



Section 106 of the National Historic Preservation Act: **BACK TO BASICS**

by Leslie E. Barras

PART 2: TECHNICAL REPORT



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CONTENTS

PART II: TECHNICAL REPORT – SUMMARY CONTENTS

Introduction	1
Section 1: Historical Background	3
Section 2: The Section 106 Process and Its Participants	17
Section 3: Federal Agencies	47
Section 4: Planning	81
Section 5: The Advisory Council on Historic Preservation	109
Section 6: Public Participation	139
Section 7: Funding	155
Section 8: Program Alternatives	167
Section 9: Technology	175
Glossary & Table of Acronyms	183

PART II: TECHNICAL REPORT — DETAILED CONTENTS

Introduction	1
Section 1: Historical Background	3
Early Preservation Policy in the United States	3
Post-World War II Years	5
The 1960s and the Genesis of the National Historic Preservation Act	6
The National Environmental Policy Act	11
Notes	14
Section 2: The Section 106 Process and Its Participants	17
Overview	18
The Advisory Council on Historic Preservation	19
Federal Agencies	22
The Courts	26
The U.S. Congress	27
Native Peoples	28
State Historic Preservation Officers	31
Certified Local Governments	33
Public Interest Groups and the Public	34
Applicants for Federal Funding, Permits, or Other Approvals	35
Consultants	37
Appendix 2-1: Rulemaking Affecting the Advisory Council's Role in Section 106 Consultation	39
Appendix 2-2: Advisory Council Section 106 Activities, FY 1968-FY 2008	40
Notes	42
Section 3: Federal Agencies	47
Key Recommendation: Federal agencies must endorse and compel compliance with Section 106	47
3-1. A presidential memorandum should be issued reinforcing federal agency responsibilities under the National Historic Preservation Act and requiring reporting on current compliance	48
3-2. The Secretary of the Interior and Advisory Council Chair should consult with federal agencies on the adequacy of historic preservation staff capacity	51
3-3. Federal agencies that oversee or delegate Section 106 compliance to nonfederal applicants for project funding or approvals should implement robust management systems to ensure procedural compliance with the law	54

3-3-1. Legal authority for federal delegation of Section 106 compliance clearly exists	57
3-3-2. Many federal agencies lack formal procedures and criteria describing responsibilities and necessary qualifications of nonfederal applicants in the Section 106 process.	59
3-3-3. Federal agencies may lack sufficient internal management controls to ensure procedural compliance with Section 106	61
3-4. Special responsive strategies should be developed to address the challenges of Section 106 compliance when nonfederal parties receive project funding or approvals as a result of massive economic or disaster recovery initiatives	66
3-5. Government performance and accountability reports should more specifically and prominently identify progress made and improvements needed in federal preservation programs	68
Appendix 3-1: Federal Employment, Six Preservation Disciplines, March 2009	75
Notes	77

Section 4: Planning	81
Key Recommendation: Federal agencies need to ensure earlier and broader integration of preservation values in their planning processes	81
4-1. In many cases, consideration of historic properties could be improved through better coordination or integration with National Environmental Policy Act compliance	82
4-2. The Advisory Council should be more active in fulfilling its commenting responsibilities under the National Environmental Policy Act	89
4-3. Environmental management systems should be expanded to encompass cultural resources, including Section 106 implementation	91
4-4. Sanctions should be imposed on federal agencies that misuse environmental reviews and prevent meaningful Section 106 compliance	93
4-5. Interstate projects provide an opportunity to plan for strategic and consistent ways to identify and evaluate archaeological sites	95
4-6. Earlier consideration of preservation values should be promoted through increasing preservation advocates' participation in agency advisory committees.	99
4-7. Outreach to groups not traditionally familiar with Section 106 should be further expanded, including development interests and the media.	101
Appendix 4-1: U.S. EPA Rating Criteria, Environmental Impact Statements	103
Notes	105

Section 5: The Advisory Council on Historic Preservation	109
Key Recommendation: The Advisory Council should vigorously assert Section 106 as its core mission	109
5-1. Advisory Council members should increase their direct involvement in strategic Section 106 cases	110
5-2. The agency’s role in “Preserve America” should be redefined	112
5-3. The Advisory Council should consider reopening a western office	117
5-4. Checks and balances are needed to reduce conflict-of-interest concerns when the Advisory Council’s “liaison” staff participate in Section 106 reviews for their funding agencies’ projects	119
5-5. There is a compelling need for timely and concrete Section 106 advice from the Advisory Council; opinion letters are one possible solution	122
5-6. Facilitated negotiations should be conducted more often in controversial Section 106 cases, and training in conflict resolution skills should be provided to the Advisory Council’s staff	124
5-7. Expansion of basic and advanced Section 106 training should be facilitated by the Advisory Council	128
Appendix 5-1: Select Examples of Project Outcomes Following the Council Membership’s Involvement in Cases	131
Appendix 5-2: Advisory Council Budget and Staffing, FY 1971-FY 2010	133
Appendix 5-3: Section 106 Guidance Issued by the Advisory Council on Historic Preservation	135
Notes	136
 Section 6: Public Participation	 139
Key Recommendation: Improvements are needed to increase consulting party access and public involvement in the Section 106 process	139
6-1. Federal agencies should honor the requirement to directly “invite” consulting parties to participate	141
6-2. Consulting parties should be provided a tentative plan of action or roadmap for consultation	142
6-3. The Section 106 advocacy capacity of the National Trust’s statewide and local preservation partners requires strengthening	144
6-4. The use of public participation models of inclusiveness has languished and needs to be resurrected	146
6-5. Federal agencies and applicants for federal funding or approvals should be more responsible to the public for project changes and commitments made in Section 106 reviews	148
6-6. Consulting party and public feedback on their experience in Section 106 reviews needs to be actively solicited	151
Notes	153

Section 7: Funding	155
Key Recommendation: State and tribal Section 106 programs should be supported by fees and full appropriation of proceeds in the national Historic Preservation Fund account	155
7-1. The authority of states and tribes to assess fees to support their Section 106 review responsibilities should be seriously explored	156
7-2. Congress should fully appropriate the proceeds in the national Historic Preservation Fund account	162
Notes	164
 Section 8: Program Alternatives	 167
Key Recommendation: Prior to further federal agency use of alternative approaches to comply with Section 106, the Advisory Council should establish standards to promote accountability in implementing these “program alternatives”	167
Appendix 8-1: 36 C.F.R. Part 800, Subpart C, Approved Program Alternatives	173
Notes	174
 Section 9: Technology	 175
Key Recommendation: Section 106 stakeholders should pursue new ways of using technology, while improving and expanding existing uses	175
9-1. “Web 2.0” technology should be harnessed to enhance implementation of the National Historic Preservation Act.	176
9-2. Project management software needs to include Section 106 compliance milestones to help early and coordinated consideration of historic properties in construction projects	178
9-3. The Advisory Council should establish deeper content on its website for Section 106 practitioners, consider establishing a compliance-oriented website name for inexperienced Section 106 stakeholders, and offer a targeted Section 106 link for the public on its homepage	179
9-4. Metropolitan and regional transportation planning organizations need access to digitized cultural resource information	181
Notes	182
 Glossary & Table of Acronyms	 183

INTRODUCTION

This Part II of *Section 106 of the National Historic Preservation Act: Back to Basics* provides a more in-depth evaluation and analysis leading to the detailed findings and recommendations summarized in Part I regarding implementation of Section 106 of the National Historic Preservation Act. The information reflects research into the statutory and regulatory history of Section 106; work reports, budget plans, and records of the Advisory Council on Historic Preservation (Advisory Council) since 1969; other federal agency documents relating to their preservation programs; and recent studies of the overall national historic preservation program. Existing requirements, imposed as a result of executive orders and laws on financial statement reporting, that attempt to make the business of running the federal government more like private sector businesses were also evaluated. As a result of this particular analysis, several recommendations are made regarding setting specific federal preservation program goals, including those related to Section 106, and disclosing to the public progress on meeting these goals in a more open and consistent way. Environmental protection laws and regulations were also analyzed for possible avenues to improve consideration of historic properties during the federal review process for projects, as were initiatives by state and local pollution control agencies to substantially fund their federally delegated environmental programs through fees from federal agencies, private businesses, and local governments.

The acknowledgement section of Part I of this report identifies the individuals who participated in the research for this report. Interviews (most of them one-on-one) were held with 55 individuals from June 2009 through February 2010. A conference call with tribal historic preservation officers was conducted in late September 2009. Input was also submitted via e-mail from four cultural resource consultants. To a person, everyone was generous with their time. Heads of the National Association of Tribal Historic Preservation Officers, the National Conference of State Historic Preservation Officers, and the Advisory Council staff greatly facilitated the interview process, as did the National Trust.

Following this Introduction, Section 1 of this part of the report provides background on both the National Historic Preservation Act and National Environmental Policy Act. A brief description of the Section 106 process and its unique concept of consultation are provided in Section 2, and the identity and roles of stakeholders that often participate in consultations regarding project impacts on historic properties are discussed. The remainder of this Part II addresses findings and recommendations regarding federal agencies' Section 106 responsibilities (Section 3); planning for consideration of historic properties in projects (Section 4); the Advisory Council (Section 5); the public's role (Section 6); funding of state and tribal historic preservation programs that contribute to Section 106 reviews (Section 7); regulatory alternatives to implementing Section 106 in standard fashion (Section 8); and the use of technology in Section 106 applications (Section 9). Endnotes, which provide source information and/or explanatory text, directly follow each individual section, except when data tables or supplementary information are provided. In these cases, one or more appendices follow the text of that section, and the appended material is placed before the notes.

SECTION 1: HISTORICAL BACKGROUND

This section concerns the history leading to enactment of the National Historic Preservation Act of 1966 and the independent, yet complementary, National Environmental Policy Act (NEPA) enacted in 1969, in order to set the framework for many of the findings and recommendations in this report.¹

Money served as the initial impetus in the early 1960s for starting a dialogue on a new federal law supporting historic preservation. Among other things, a grants-in-aid program for the National Trust for Historic Preservation, congressionally chartered in 1949, was envisioned to provide support for the nonprofit's work. An inevitable broadening of the legislative agenda occurred as the political process expanded around this initiative. What we know as "Section 106" was simply and conceptually identified in this dialogue as a need for a protective mechanism against heedless federal action that destroyed buildings and harmed landscapes. As enacted, Section 106 was lauded as the "machinery for . . . protection from governmental depredation, at least at the federal level."²

Five individuals were pivotal actors in the events leading up to the NHPA of 1966, including a president, the chair of the board and executive director of the National Trust, the head of the National Park Service, and a retired congressman. Preservation efforts until this time were not entirely lacking, but were primarily conducted by individuals and groups who had the resources to lead private preservation initiatives. Action from the nation's capital was episodic until enactment of the framework for a national preservation program through adoption of the NHPA.

Early Preservation Policy in the United States

Nineteenth and early 20th century preservation initiatives focused "on the homes of the great and the places where political and military history were made."³ The value of these early preservation efforts was often couched in inspirational terms in order to instill national civic pride and patriotism. One of the earliest acquisitions of a historic building occurred in 1816 when the city of Philadelphia purchased the deteriorating Independence Hall from the Commonwealth of Pennsylvania. In 1850, New York State acquired George Washington's headquarters (including the Hasbrouck farmhouse) in Newburgh, on a site featuring commanding views of the Hudson River.

Associations initially burgeoned under female leadership and membership to protect Revolutionary War places or properties. The Mount Vernon Ladies Association, organized by Ann Pamela Cunningham in 1858, acquired George Washington's Virginia plantation. Beginning in 1890, the Daughters of the American Revolution expanded its reach in protecting Revolutionary War ideals, heroes, and historic places through a network of state and local affiliates. Financial assistance from the National Association of Colored Women was instrumental in protecting Cedar Hill, Frederick Douglass' home in Washington, DC.

Occasionally, Congress and the federal court system were involved in establishing early protections for historic places. An 1893 Sundry Civil Appropriations Act authorized the Secretary of War to spend not more than \$25,000 for monuments and tablets identifying troop positions and movements at Gettysburg. When railroad construction threatened to divide this historic battlefield, Congress later authorized the War Secretary to acquire land to

permanently protect this landscape. The railroad judicially challenged the use of eminent domain for the acquisition. However, in *U.S. v. Gettysburg Electric R. Co.*, the U.S. Supreme Court declared protection of the lands of “one of the great battles of the world” a valid public purpose and, thus, upheld this use of the government’s condemnation power.⁴ Detailed rules regulating the placement of monuments and markers, and establishing codes of conduct for visitors at Gettysburg and four other prominent Civil War battlefields, were promulgated by the Secretary of War in 1914.⁵

In addition to battlefield sites, archaeological sites were a matter of scientific interest as early as the 18th century. However, it would be a mistake to assume that western lands were the only focus of this attention. An ongoing debate throughout the 19th century centered on the identity of the mound builders in the Ohio and Mississippi River valleys. Subsequently, more formal approaches to funding, surveying, and evaluating archaeological sites were expanded through newly created institutions. For example, Congress chartered the Smithsonian Institution in 1846 “for the increase and diffusion of knowledge among men.”⁶ In 1879, the Archaeological Institute of America was founded.⁷

Threats to western landscapes which contained remnants of ancient cultures were clearly identified by the late 19th to early 20th centuries. Congress authorized the first prehistoric reserve in the United States in 1889 when it set aside 480 acres in Arizona associated with the Hohokam culture, and featuring *Hottai Ki* (*Casa Grande*), recorded by European missionaries as early as 1694. Theodore Roosevelt designated *Mato Tipila* (Bear Lodge), a sacred site to over 20 tribes of the Plains Indians, as the first national monument (Devil’s Tower, Wyoming) in 1916. This action occurred within a decade of authorizing legislation, the 1906 Antiquities Act. The force of this law was later limited by a court decision based on the lack of clear definitions of key terms in the law. Nevertheless, the enactment is noteworthy for establishing penalties (\$500 at the time, \$12,300 in 2009 dollars) for destroying, appropriating, or excavating any historic or prehistoric ruin or monument, or any object of antiquity on lands owned or controlled by the federal government.⁸

These early American preservation efforts used the spoken and written word to reach decision makers and the public. However, the most significant boost to promoting preservation in America arguably occurred on October 14, 1884 when George Eastman filed patent claim #306,594 for photographic film. By designing a process and materials that relied on coated paper and rollers, instead of heavy glass plates, he freed photographers to expand their range and scope. As a result, film images immeasurably heightened the public’s imagination and interest in historic landscapes and buildings. Frances Benjamin Johnston, for example, chronicled dramatically diverse historic places across the country in the early 20th century. Her work documented architecturally designed commercial and residential buildings, designed gardens in major metropolitan areas of the eastern and mid-western states, African American and Indian schools, southern plantations, sharecropper huts, and natural areas, such as Mammoth Cave. Ansel Adams’ black-and-white photography revealed the complexity of arid western landscapes, leading to a personal invitation from the Secretary of the Interior Harold Ickes to create a mural project in 1941 and 1942 for the agency’s new headquarters.

The federal government’s structure for managing federally owned historic properties was scattered until an effort was made early in the Franklin D. Roosevelt administration to better organize the bureaucracy. This reorganiza-

tion portends the placement—some three decades later—of the historic preservation programs of the NHPA (including, initially, the Advisory Council) in the Department of the Interior. Perhaps as a counterweight to expanding federal programs in the New Deal, Roosevelt became convinced of the savings (estimated at \$25 million per year at the time) of wresting certain park, building, and site programs from the Departments of War and Agriculture. A presidential executive order provided the details of the Reorganization Act of 1933 by abolishing eight or so federal commissions on infrastructure, parks, and commemorative events, and consolidating their responsibilities into a newly created Office of National Parks, Buildings, and Reservations within the Department of the Interior.⁹

Preservation also became a career choice by the early 20th century, supported by the establishment of academic programs in several of the nation's universities to educate archaeologists, historians, and architects. In the throes of the Great Depression in 1935, President Roosevelt's signature ushered in a series of laws providing a government-sponsored safety net for individuals (e.g., the Social Security Act) and spurring job creation and employment (e.g., the rural electrification program). One job creation program was enacted on August 21, 1935 when Roosevelt signed the Historic Sites, Buildings, and Antiquities Act, the first federal legislation in this country to declare a national policy on historic preservation.

This preservation act, in part, satisfied an economic need to gainfully use the skills of unemployed architects, historians, archaeologists, and other preservation professionals. To that end, the National Park Service (NPS) was directed to gather material documentation of historic sites; to conduct a survey of such sites to determine which possessed exceptional value in reflecting national history; and to preserve such sites. The agency was further authorized to contract with states, local governments, private organizations, and individuals to preserve nationally significant sites. Finally, the 1935 legislation also established an Advisory Board on National Parks, Historic Sites, Buildings, and Monuments comprised of individuals to work with the NPS in this new mission.

Primarily through the efforts of Washington insider, David Finley, Jr., the National Council for Historic Sites and Buildings (which was not the same group as the 1935 Historic Sites Act Advisory Board) successfully advocated for creation of the National Trust for Historic Preservation. Finley subsequently became the first chair of the Trust's board. Congress chartered the nonprofit organization for charitable and education purposes, and to facilitate public participation to preserve significant sites or places of interest, which became law under President Truman's signature in 1949.¹⁰

Post-World War II Years

The wave of building in this country after World War II is well chronicled. Federal government capital expenditures for highways, aviation, mass transit, water supply facilities, and wastewater treatment plants quadrupled in real terms from the mid-1950s to 1965.¹¹ Most of these expenditures were associated with the interstate and national highway systems. Notably, mid-20th century public and private housing, roads, bridges, transit stations, military installations, airports, and telecommunication facilities have now reached the age of 50 years, entitling their consideration for inclusion in the National Register of Historic Places.

Aesthetic considerations prevailed in some aspects of this building boom. The Administrator of the Federal Aviation Administration (FAA) remarked in 1965 that only a brave government official would take beauty into account in his decisions.¹² However, he saw no tension between the agency's safety mission and the need for high-quality design work as a way to build for the future. Given the choice of an engineer to build "the cheapest air towers possible," the FAA instead opted to hire I.M. Pei to design "the most perfect tower functionally" at some 50 airports across the country.¹³

The National Trust acquired an impressive portfolio of geographically dispersed historic properties during these years, which imposed substantial financial commitments to maintain these sites. These acquisitions included two plantations in Virginia (Woodlawn, near Mount Vernon, and Belle Grove in Middletown), two homes in Washington, DC (the Decatur house and Woodrow Wilson's house), Shadows-on-the-Teche plantation house and grounds in New Iberia, Louisiana, and *Casa Amesti*, a circa-1855 adobe house, in Monterey, California. The organization experienced a range of management and financial challenges, as is often the case with any new nonprofit. Robert Garvey, Executive Director of Old Salem, Inc., in Winston-Salem, North Carolina, drew the organization's attention based on his management skills and fundraising ability, and was tapped as the Trust's Executive Director in 1960. (Garvey later became the first executive director of the Advisory Council on Historic Preservation.)

The 1960s and the Genesis of the National Historic Preservation Act

In early 1965, President Lyndon Johnson delivered a message to Congress on natural beauty.¹⁴ Declaring an important national purpose in saving landmarks of beauty and history, he summoned a national effort to produce a solid framework of federal conservation laws. The president urged full funding of the Land and Water Conservation Fund as a compelling need. With respect to the built environment, President Johnson lauded the work of the National Trust which "we will encourage and support." He further commended the National Registry of National Historic Landmarks (created through the Historic Sites Act of 1935) as a "fine federal program." Apparent in the chief executive's remarks is his keen awareness of the Registry's parsimonious federal operating budget. He noted that it required virtually no federal assistance, but evoked a new wave of interest in historic preservation.

At the time of this speech, the administration was already planning a formal gathering of individuals and organizations at the White House to deliberate on natural beauty. When viewed from a current perspective, an executive branch effort to address national policy on the beauty of the natural environment seems almost naïve, or even politically risky given the weight and range of issues facing the nation at that time (the war in Vietnam, for example). However, the intent of the gathering was anything but genteel. Conference planners emphasized to the chairs of the 15 panels of the Task Force on Natural Beauty that "this was to be a hard conference" and they were expected "not to tarry on philosophical speculations or reaffirmation of the importance of beauty."¹⁵ Strict orders were given to the panel chairs to boil down their opening statements to five minutes or less, and planners asked that comments be submitted in advance in writing, but not to exceed two pages. After preconference submittals proved "woefully short on action and long on philosophy," a focused process was imposed in order to develop concrete and specific proposals for the scope of each panel's work.

The Presidential Task Force on Natural Beauty formally convened May 24-25, 1965 in Washington, DC. Over 800 individuals and organizations from throughout the United States participated. First Lady Mrs. Johnson addressed the group in an opening session and stayed throughout the two days, and the president presided over the closing session in the East Room of the White House. The historic preservation component of the Task Force's work primarily occurred within the "Townscape" panel which included Gordon Gray, chair of the National Trust board.¹⁶

Some of the panelists, particularly those participating in the sessions on highway design, waterfront development, and overhead power lines, openly delivered stinging recriminations to the federal agencies that were present regarding their despoliation of the natural and built environments. Senator Edward Muskie (D-ME), for example, identified the following challenge in preserving beauty: "one of the toughest concepts to put over to a highway engineer is to convince him that a road is something more than a straight line between two points."¹⁷ A waterfront planner skewered the "rip-rap efficiency boys" of the Army Corps of Engineers.¹⁸

Gordon Gray, the National Trust's chief representative at the conference, had extensive important connections based on his varied work experiences—as a lawyer; owner of print and radio media businesses; a former state senator; briefly, the Secretary of the U.S. Army; and college president of the University of North Carolina at Chapel Hill. Many of his thoughts on the direction of historic preservation were contained in the Townscape panel's final recommendations, including:

- Inventorying major landmarks, "taking into account a wide range of historic, architectural, and unique community values";
- Adopting legal protections for such landmarks;
- Creating historic districts, including "the whole of some towns";
- Establishing an annual grant-in-aid funding program (\$2 million each year) for the National Trust's work; and
- Offering financial incentives to stimulate private preservation efforts, including federal mortgage insurance and favorable tax policies.¹⁹

In closing remarks, President Johnson committed to including as many of the Task Force's recommendations "as are feasible" in his next State of the Union speech and legislative program to the Congress (which he described as more ambitious than the one that had led to his signing 30 conservation bills in the previous year).²⁰ He finally vowed to put every proposal for a new public building under a "natural beauty microscope."²¹

Under the direction of George Hartzog, Jr., an attorney from North Carolina who headed the NPS at the time, the agency's legislative office staff subsequently drafted a bill to legislate several of the Task Force's recommendations. By September 1965, a consensus on the essential elements of the draft legislation was reached between the National Trust and the federal Bureau of the Budget (now, the Office of Management and Budget).

A related historic preservation initiative was underway contemporaneously, bolstered by the planned retirement of a southern congressman. U.S. Rep. Albert Rains (D-AL) served as chair of the Subcommittee on Housing of the

Committee on Banking and Commerce, a position which afforded a prime vantage-point to grasp the magnitude of destruction of urban housing by the Urban Renewal Administration, a part of the Housing and Home Finance Agency (which became HUD in 1965). In 1964, when Rains decided not to seek another term, an opportunity arose to explore his interest in urban affairs. With seed money from the Taconic Foundation in New York City (whose founders were instrumental funders of civil rights organizing in the south), a group of preservationists engaged an influential Washington lobbyist to convince Rains and Senator Ed Muskie to lead a special committee on comparative historic preservation. On-the-ground research would be conducted through the committee's travel to Europe, and their recommendations would then be formed in a report outlining a significant federal preservation legislation initiative.

Budget demands for international travel, professional expertise, and a report required additional financial support. The group submitted a substantial grant request to the Ford Foundation, who balked at the makeup of the committee structure. Robert Garvey, the National Trust's Executive Director at the time, was contacted by the foundation about its concerns. His astute solution was to include high-level representatives of the Interior, Housing, and Highways agencies, and the General Services Administration (GSA). In a later account, Garvey noted "the success of a protective mechanism (if that's what we get out of a study) will depend on how well you can make the federal system adjust to taking a hard look at our urban scene, making sure that our roads don't run over everything, and that the GSA quits tearing down great monumental government buildings" ²² The foundation accepted the revised makeup of the group, and awarded \$125,000 for the study proposal.

The U.S. Conference of Mayors also assisted in financing and planning the overseas trip, to such an extent that participants were identified as the Special Committee on Historic Preservation of the U.S. Conference of Mayors (Special Committee). Although the committee's report provides an impressive and tangible record making the case for historic preservation in America, the *gravitas* of the committee cemented the resolve to produce a federal historic preservation law. Robert Garvey correctly assessed that key political decision makers should be integrally included in the committee's work.

Draft findings and recommendations were sent to Chairman Rains in mid-November 1965. The committee's final report, *With Heritage So Rich*, was published in early 1966 as a series of essays with abundant black-and-white images of the diverse historic record of this country. Not all of the photo-chronicles were pretty. The essay "Our Lost Inheritance" detailed in straightforward yet lamenting fashion the "large-scale demolition by neglect" of buildings in every city, as well as the intentional demolition of iconic and humble structures.

Because the committee solely focused on historic preservation, its work was inherently more detailed and specific than—though not inconsistent with—that of the Task Force on Natural Beauty.²³ A key finding of the panel's report concluded that while there has been "some notable" federal accomplishments in historic preservation:

. . . the present disposition of federal properties, the official designation of historic buildings and sites, the development of urban renewal programs, the planning of details of the federally-aided highway system and the development of national defense facilities and other federal operations, responsibilities and programs involve a series of complex activities Jurisdictional disputes in the field of historic conserva-

tion have been inevitable. Such disputes will occur again and again and provisions for their early resolution must be an important part of national programs for historic preservation.²⁴

In order to address these problems at the national level, the committee recommended “establish[ing] . . . an Advisory Council on Historic Preservation which will adequately represent paramount interests at all levels of government and the private sector . . . which could reduce conflicts and improve historic preservation liaison and coordination.”²⁵ This new body would need “adequate staffing” and representation on its membership panel of the major federal agencies, state and local governments, and public and private organizations. Specific functions recommended by the committee included advising the president and Congress; developing policies, guidelines, and studies to facilitate historic preservation in carrying out federal programs; providing support to state and local governments in drafting legislation and ordinances; studying the effects of tax policies on historic preservation; encouraging public involvement; and supporting the National Register of Historic Places “as an instrument of national historic preservation policy.”²⁶

The genesis of Section 106 and its key terms appears in a committee recommendation to:

Make mandatory a preliminary review of the location and status of historic sites and buildings in relevant areas prior to the *undertaking* of federal or federally-aided programs or projects affecting plans for physical development [emphasis added].²⁷

Surveying the project area for historic properties, in the absence of prior surveys, was recommended and, further, that:

Plans prepared for such development projects must take all such historic surveys *into consideration*, and must show evidence thereof [emphasis added].²⁸

The recommendation did not, however, specifically address the role of the proposed Advisory Council in this review process.

As a result of the work of the Task Force on Natural Beauty and the Special Committee, three bills were introduced concurrently in the House and Senate in March 1966: S 3035, S 3097, and S 3098. The president’s bill was designated in the Senate as S 3035 and in the House as HR 13491.²⁹ S 3035 primarily proposed a financial assistance program for the National Trust and the states, but was silent regarding the creation of an Advisory Council or protections during planning for federal projects.

S 3097 and its House corollary, HR 13790, were introduced on March 17, 1966.³⁰ Both bills proposed to substantially revise existing federal housing legislation, and also to establish the Advisory Council. Including historic preservation in housing legislation did not curry favor with the president, who also reportedly objected to creating a new federal body, the Advisory Council.³¹

The Special Committee’s preferred historic preservation bill was also introduced on March 17, 1966 as S 3098 and HR 13792.³² Section 202 of the Senate bill evolved into Section 106 in the final National Historic Preservation Act. As initially drafted, Section 202 required the “consideration” of historic properties of national, state, or local significance that were listed in the National Register or in state or local listings prior to implementation of federal

projects. Neither S 3035 (the president's bill) nor S 3097 (housing legislation amendments) initially contained this protective review.

As the legislative committee process and political negotiations meshed the three bills, ultimately the president's bill, S 3035, emerged as the NHPA of 1966. Compression of the exacting political work into what was essentially the summer of 1966 seems galactic by today's standards. Still, there were bumps along the way. In early July 1966, the Senate Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs reported a substitute bill for S 3035 and S 3098, which created a 12-member Advisory Council and required that heads of federal agencies "take into account" the effects of federal or federally assisted projects on National Register-listed historic properties. The substitute bill further required federal officials to submit a report to the Advisory Council if their projects were predicted to harm historic properties, and that no funds could be spent for at least 60 days after submittal of the reports (during the Council's review).

The Bureau of the Budget's report on this substitute bill did not object to an Advisory Council—as long as it remained advisory—but balked at the 60-day wait period as interfering with the "execution of important Federal programs."³³ As an alternative to a prescribed time period in the process, the budget agency proposed the following language:

The head of any such Federal agency shall afford the Council a reasonable opportunity to comment with regard to such project.³⁴

The wait period was removed in the amended version of S 3035, which favorably passed out of the Senate Committee on Interior and Insular Affairs with the budget agency's revised wording on July 7 and the full Senate on July 11, 1966.

Four days after the Senate's passage of the bill, the House Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs began hearings on S 3035, as amended. During the hearings, the committee's attorney questioned the use of the term "project" in the version before the subcommittee and also inquired as to whether Section 106 was intended to apply to federal licensing activities, citing the Federal Power Commission's licensing of hydroelectric dams.³⁵ The House's amendments to S 3035, when the body passed the bill out favorably on August 4, 1966, re-established the term "undertaking" as the trigger for Section 106 review and added federally licensed and assisted actions within the law's umbrella. Membership on the panel of the proposed Advisory Council was also increased from 12 to 17.

S 3035, as amended, failed to pass a full House vote on September 19, 1966. Rep. H.R. Gross (R-IA), renowned as a legislative champion for limiting the role of government and for a prickly, irascible style, spoke against the federal government's role in historic preservation.³⁶ The bill subsequently fizzled by a margin of 10 votes.

Two actions resurrected the NHPA. Gordon Gray, the National Trust's board chairman, personally appealed to the head of the House Ways and Means Committee, and a legislative maneuver on rules was passed providing for a one-hour debate on S 3035, as amended. Rep. Wayne Aspinall (D-CO), the House sponsor, then appointed retiring Rep. Leo O'Brien (D-NY) as floor leader during the limited consideration of the bill on October 10, 1966.

Rep. John McCormack (D-MA) extolled enactment of the bill as a retirement gift to Rep. O'Brien, and the bill passed with no objections.³⁷ The Senate concurred in the House amendments the following day.

President Johnson signed the NHPA into law on October 15, 1966, along with six other conservation bills.

The National Environmental Policy Act

The National Environmental Policy Act (NEPA) was signed into law by President Richard Nixon on January 1, 1970, a little over three years following enactment of the NHPA. There is no overt indication in the formal legislative history of either statute that one was considered in the adoption of the other. Nevertheless, the goals and implementation of both programs have been intertwined from their beginnings.

Unlike the years before the NHPA was adopted, the federal government's role in preserving air, water, land, and forests was highly evolved before NEPA. The National Park Service was an aged bureaucracy by 1970. As early as 1899, civil and criminal sanctions could be imposed under the first River and Harbors Act for discharging refuse into navigable waters and starting construction work affecting such waters without a prior permit issued by the Army Corps of Engineers. Waterways visibly laden with domestic sewage and industrial wastewater drew the public's attention and led to enactment of the Federal Water Pollution Control Act of 1948. Shortly thereafter, in the 1950s, the U.S. Public Health Service (PHS) began to actively investigate air quality in cities. At this early time of pollution consciousness, the PHS monitored the emission of air toxics from smokestacks of the synthetic rubber industry that burgeoned in the country during World War II. Other surveys evaluated the need for federal regulation of the combustion of coal for residential, industrial, and institutional heating, which blackened cities with sooty fallout.

Further, because "the environment" encompasses a vast array of resources that appeal in different ways to a broad and diverse set of stakeholders, the number of national public interest organizations established in the late 19th and early 20th centuries outpaced those devoted to historic preservation. The longevity of the Sierra Club, Izaak Walton League, Nature Conservancy, National Parks Conservation Association, and the Audubon Society exceeds the National Trust's by some three to six decades. Observant chroniclers of nature (such as Rachel Carson and Aldo Leopold) captured the public's attention and support for protecting the land, air, water, as well as vertebrate and invertebrate animals.³⁸ Television later boosted public interest in the natural world, particularly through the oceanographic adventures of media-savvy Jacques Cousteau aboard the *Calypso*.

Although the 1965 Task Force on Natural Beauty addressed the state of the nation's cultural resources (mostly through the conclusions of the Townscape panel), its primary emphasis was on the environment. A sentiment that pre-dated the Task Force, but gathered strength after, supported a strong expression of national environmental policy through new federal legislation. In December 1968, the Advisory Council on Historic Preservation, then in its infancy, hailed the rumblings of a legislative initiative to create a national environmental policy and oversight agency during a day-long forum on the visual environment.³⁹ The agency welcomed a counterpart agency for environmental oversight, and forecast that an environmental policy law calling for interagency coor-

dination and cooperation would ensure that the Advisory Council “will have a key role in assisting the environmental council as it considers the historic heritage—the cultural values of the environment.”⁴⁰

NEPA was introduced, negotiated, and adopted by the Senate and House in slightly more time (about three months) than it took to enact the NHPA.⁴¹ The law requires federal agencies to fully consider and publicly disclose the environmental consequences of agency action before proceeding with that action.⁴² A key term—the “environment”—is not defined in the law, however. This omission, and the broad possible connotation of the word, caused the Bureau of the Budget “major difficulties” based on its comments on the draft legislation.⁴³ Cultural resources, for example, are expressly included within the law’s rubric regarding values that must be considered in NEPA’s environmental review process. As a threshold, Section 4331(b) of the law provides, in part, that:

In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

...

(2) assure for all Americans safe, healthful, productive, and *esthetically and culturally pleasing surroundings*;

... [and]

(4) *preserve important historic, cultural, and natural aspects of our national heritage*,...[emphases added].

These subsections were included because “an important aspect of national environmental policy is the maintenance of physical surroundings which provide present and future generations of American people with the widest possible opportunities for diversity and variety of experience and choice in cultural pursuits . . . in esthetics and in living styles.”⁴⁴

Congress also established in 1969 a Council on Environmental Quality (CEQ) within the Office of the White House as an independent federal agency with advisory oversight regarding NEPA.⁴⁵ The CEQ consists of three members appointed by the president with the advice and consent of the Senate, although because of funding constraints only a Chair is appointed in practice.⁴⁶ In outlining the qualifications of members, Congress directed that “Each member . . . be conscious of and responsive to the . . . *esthetic and cultural needs and interests* of the Nation [emphasis added].”⁴⁷ The individuals envisioned as fulfilling this role, based on the legislative history of NEPA, were not those with “depth of training or expertise” in science or any one discipline; instead, they were to be chosen based on their ability to “grasp broad national issues, to render public service in the national interest, and to appreciate the significance of choosing among present alternatives in shaping the country’s future environment.”⁴⁸

Preparing an environmental impact statement (EIS) for all “major federal actions significantly affecting the quality of the human environment” (including cultural and aesthetic qualities) has become the hallmark of the law, though this “action-forcing” statement was not in the original Senate and House bills.⁴⁹ An EIS must provide a “full and fair discussion of significant environmental impacts and . . . inform the decision makers and the public of reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human

environment.”⁵⁰ Federal agencies must further consider alternatives to the proposed action, identified as the “heart” of the planning process.⁵¹

A year or two after the Advisory Council on Historic Preservation welcomed a new federal environmental oversight agency, the two councils collaborated on a document that remains one of the most important presidential directives to federal agencies on their preservation responsibilities. In May 1971, President Nixon issued the sweeping Executive Order (E.O.) 11,593 (*Protection and enhancement of the cultural environment*), a joint work product of the CEQ and Advisory Council, intended to spur dilatory federal agencies to fully assume their preservation program responsibilities.⁵² For the first time, E.O. 11,593 provided some level of protection to properties determined “likely to meet” National Register criteria, at least for federally owned properties.

The CEQ issued initial guidelines to implement NEPA shortly after the law was enacted, which were amended a year later, in April 1971.⁵³ Final NEPA regulations were adopted at 40 Code of Federal Regulations (C.F.R.) Parts 1500-1508 in 1978; these rules, which are binding on all federal agencies, establish criteria for preparing EISs, environmental assessments, and categorical exclusions.⁵⁴ Historic properties that are subject to Section 106 are clearly required by the CEQ regulations to be considered in NEPA reviews, regardless of the level of document prepared, as are resources embodying aesthetic and cultural values.⁵⁵

By the time the Advisory Council converted its Section 106 guidelines into administrative regulations in early 1974, the environmental law’s print was indelible. Section 800.2 of the new Section 106 regulations instructed federal agencies to coordinate NEPA, NHPA, and E.O.11,593 by documenting compliance with each in an EIS (when prepared) and submitting all draft EISs to the Department of the Interior and Advisory Council. The rules explicitly noted, however, that Section 106 compliance is independent of NEPA, and applies to all federal actions regardless of the level of environmental review documentation used when federal agencies carry out or assist projects.⁵⁶

Further, the new Section 106 rules identified, for the first time, a geographic area within which federal agencies were required to identify historic properties: the “area of potential environmental impact.”⁵⁷ This nomenclature was later replaced with the term currently used in the Section 106 rules—the “area of potential effects.” Nevertheless, this is but one example of how NEPA and the NHPA have shared common goals and concepts from their political and policy inception.

Notes to Section 1

Explanation of Citations in Part II: Section 202(b) of the National Historic Preservation Act (NHPA) requires the Advisory Council to “submit annually a comprehensive report of its activities and the results of its studies to the President and the Congress. . . .” The following abbreviated citation is used for the annual *Report to the President and the Congress of the United States* by the Advisory Council on Historic Preservation: *A.R.* “1986 *A.R.*” refers to the annual report covering Advisory Council activities during federal fiscal year (FY) 1986. Publication of these annual reports stopped in FY 1999. The annual *Budget Justification Report* to the Office of Management and Budget is now considered by the Advisory Council as the statutorily required report to the executive and legislative branches. The abbreviated citation “*B.J.R.*” is used to reference this document.

References to relevant provisions of the NHPA are made to sections as they were enumerated in the original act and amendments, followed by the current sections designated in the United States Code (U.S. Code). For example, a reference to Section 106 of the NHPA is cited as “NHPA, Section 106; 16 U.S. Code §470f.” Other federal laws that are referenced are identified by U.S. Code citations only.

Internet content was retrieved from Uniform Resource Locators which were active as of May 1, 2010.

1. Amos Loveday, President, Atchley Hardin Lane LLC, Columbus, Ohio, provided insights and materials relating to this section.
2. Oscar S. Gray, “The Response of Federal Legislation to Historic Preservation,” *Law and Contemporary Problems* 36, no. 3 (1971): 315.
3. *Beauty for America, Proceedings of the White House Conference on Natural Beauty, May 24-25, 1965* (Washington, DC: Government Printing Office, 1965), remarks of Gordon Gray, National Trust for Historic Preservation, 78.
4. 160 U.S. 668 (1896).
5. U.S. Department of War, *Regulations for the National Military Parks And the Statutes under which they were Organized and are Administered* (1914). The other four parks were Chickamauga, Chattanooga, Shiloh, and Vicksburg, <<http://ia350607.us.archive.org/0/items/regulationsforna00unitrich/regulationsforna00unitrich.pdf>>.
6. 20 U.S. Code §41 et seq.
7. <www.archaeological.org>.
8. *U.S. v. Diaz*, 499 F.2d 113 (9th Cir. 1974).
9. This reorganization was codified in Section 16 of Public Law 428, the Reorganization Act of 1933. Executive Order 6,166, which directed the specifics of the executive branch reorganization, was issued June 10, 1933. Executive Order 6,228 (July 28, 1933) clarified that the Office of National Parks, Buildings, and Reservations would also be responsible for the national military parks.
10. 16 U.S. Code §468 et seq.
11. Alan A. Altshuler, Jose A. Gomez-Ibanez, and Arnold M. Howett, *Regulation for Revenue: the political economy of land use extraction* (Washington, DC: The Brookings Institution and The Lincoln Institute of Land Policy, 1993), 29.
12. *Conference on Natural Beauty*, remarks of N.E. Halaby, Administrator, FAA, 96-97.
13. *Ibid.*
14. “Special Message to the Congress on Conservation and Restoration of Natural Beauty,” Feb. 8, 1965, <www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650208.asp>.
15. *Conference on Natural Beauty*, 689.
16. The Task Force panels of the Conference on Natural Beauty consisted of the Federal-State-Local Partnership; Townscape; Parks and Open Spaces; Water and Waterfronts; Design of the Highway; Scenic Roads and Parkways; Roadside Control; Farm Landscape; Reclamation of the Landscape; Underground Installation of Utilities; Automobile Junkyards; New Suburbia; Landscape Action Program; Education; and Citizen Action.

17. *Conference on Natural Beauty*, 63.
18. *Ibid.*, 167.
19. *Ibid.*, 636.
20. The “brutal and bitter conflict in Vietnam” instead dominated President Johnson’s January 1966 State of the Union address following the Task Force on Natural Beauty, <www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/660112.asp>.
21. *Conference on Natural Beauty*, 680.
22. Robert E. Garvey, Jr., interview by Charles B. Hosmer, Jr., Aug. 1981, University of Maryland at College Park, 31.
23. Both reports recommended grant-in-aid funding for the National Trust. *Conference on Natural Beauty*, 636; U.S. Conference of Mayors, Special Committee on Historic Preservation, *With Heritage So Rich* (1966; repr., Washington, DC: The Preservation Press, 1983), 187.
24. U.S. Conference of Mayors, *With Heritage So Rich*, 192.
25. *Ibid.*
26. *Ibid.*, 195.
27. *Ibid.*
28. *Ibid.*
29. Senator Henry Jackson (D-WA), chair of the Senate Committee on Interior and Insular Affairs, introduced the Senate bill on March 7, 1966. Rep. Wayne Aspinall (D-CO), chair of the House Committee on Interior and Insular Affairs, filed the House version the same day.
30. These bills were introduced by Senator Ed Muskie (D-ME) and Rep. William Widnall (D-NJ), respectively; both served on the Mayors’ Conference Special Committee.
31. U.S. Department of the Interior, National Park Service, *Legislative History of Historic Preservation Act of 1966* (1967), by James M. Lambe, 83, <www.nps.gov/history/history/online_books/nps/nthp_legislation.pdf>.
32. These bills were also introduced by Senator Muskie and Rep. Widnall in the Senate and House, respectively.
33. Senate Committee on Interior and Insular Affairs, *Preservation of Historic Properties*, 89th Cong., 2d sess., 1966, S. Rep. 89-1363, 18.
34. *Ibid.*
35. Lambe, *Legislative History*, remarks of T. Richard Witmer, 98 and 100.
36. Rep. H.R. Gross reportedly exclaimed on the floor of the House during deliberations on the NHPA that his notion of historic preservation was to “let Podunk take care of its own General Cornpone.” Robert Garvey interview, 35.
37. *Ibid.*, 36.
38. Even Dr. Seuss delivered an environmental message. As most environmentalists know from their childhood days, *The Lorax* educated children (and adults) about the dire consequences to animals, the land, air, and water after the rapacious Once-lers clearcut all of the Truffala trees to weave into mass-produced garments, called Thneeds.
39. 1969-70 *A.R.*, 11. The forum was sparked by the Advisory Council’s first Section 106 review involving a project that did not propose to demolish any historic properties, but would instead cause harmful “indirect effects”—Niagara Mohawk Power Company’s application to the Atomic Energy Commission for a license to build a nuclear power plant on the Hudson River in Easton, NY, opposite the Saratoga Historical Park. The visual intrusion of a major industrial plant into the bucolic area and historic battleground raised a case of first impression regarding the law’s directive to consider historic properties in federal agency activities.
40. *Ibid.*
41. S 1075 was introduced by Senator Henry Jackson on February 18, 1969 and shepherded through his Committee on Interior and Insular Affairs, which favorably reported out an amended bill on July 8, 1969. HR 6750 was filed by Rep. John

Dingell (D-MI) on February 17, 1969 and assigned to the Merchant Marine and Fisheries Committee, which favorably reported out an amended bill on July 11, 1969. After a conferencing process in which Senator Ed Muskie added the “action forcing” environmental impact statement and alternatives analysis language to the conference bill, each chamber passed the legislation during Christmas week 1969.

42. 42 U.S. Code §4332(2)(C).
43. Senate Committee on Interior and Insular Affairs, *National Environmental Policy Act of 1969*, 91st Cong., 1st sess., 1969, S. Rep. 91-296, 40.
44. *Ibid.*, 18.
45. 42 U.S. Code §4342 et seq. Sec. 3(h) of E.O. 11,514 (*Protection and enhancement of environmental quality*) (Mar. 5, 1970) spelled out further expectations of agency, including issuing regulations that apply to all federal agencies to implement the procedural aspects of NEPA.
46. 42 U.S. Code §4342. Funds are only appropriated for one member who serves in a full-time capacity as chair of the CEQ.
47. *Ibid.*
48. Senate Committee, *National Environmental Policy Act*, 23.
49. 42 U.S. Code §4332(2)(C); 40 C.F.R. §1501.4.
50. *Ibid*; see also §1502.1.
51. 42 U.S. Code §§4332(2)(C)(iii), 4332(2)(E); 40 C.F.R. §1502.14.
52. Robert Garvey interview, 47-48.
53. 35 Federal Register 7390 (Apr. 30, 1970); 36 Federal Register 7724 (Apr. 23, 1971).
54. 43 Federal Register 55990 (Nov. 28, 1978). The CEQ’s rules have been substantively amended once, on May 27, 1986, to clarify how agencies evaluate situations in which information is incomplete or unavailable (40 C.F.R. §1502.22).
55. See 40 C.F.R. §§1508.8, 1508.27.
56. 39 Federal Register 3366 (Jan. 25, 1974).
57. *Ibid.* at 3367(§800.4(a)).

SECTION 2: THE SECTION 106 PROCESS AND ITS PARTICIPANTS

There are no shades of gray in the directive issued to federal agencies by the Congress that such agencies are required to comply with Section 106. Together, the two sentences comprising this section of the NHPA make clear that the heads of such agencies “shall take into account” the impacts of their actions on historic properties and “shall afford” the Advisory Council an opportunity to review and comment on the agencies’ accounting of those actions and the consequences. Legislative history of the statute reveals the view that early federal agency planning and compliance to positively incorporate historic properties into projects or avoid harming them would be facilitated by an easily accessed national list—the National Register of Historic Places (National Register), which was unrealistically predicted to be completed by the states in three years following enactment of the NHPA.¹

Section 106 lacks statutory prescription, however, about the depth and consequences of the Advisory Council’s role as a reviewing and commenting authority and the mechanics of the federal agencies’ compliance responsibilities. As a stand-alone section of the NHPA, it completely fails to address roles or responsibilities of other participants, such as the public, Indian tribes or Native Hawaiian organizations, state or local governments, and those seeking federal financial assistance, permits, licenses, and other types of formal approvals.

This section of the report provides an overview of the Section 106 regulatory process and background on key participants in the process and their roles.

The Section 106 Process

Congress gave almost no initial insights into the mechanics of how the federal agencies and Advisory Council were to accomplish their respective duties and roles in Section 106.

A little over two years following enactment of the NHPA, the Department of the Interior and Advisory Council published initial guidelines for the Section 106 process.² These guidelines were amended once, in 1973, and were subsequently promulgated as regulations appearing at 36 C.F.R. Part 800 (effective January 25, 1974) (the promulgation—and subsequent amendments—are referred to in this report as either the “Section 106” or “Part 800” rules or regulations).³

By and large, the concepts, definitions, and steps in this early set of guidelines and rules are still found in the current Part 800 regulations. For years, the Advisory Council’s annual reports of its work included a figure titled “Section 106 Review Diagrammed,” which outlined a linear, sequential progression of steps for identifying and considering historic properties in federal or federally assisted projects. The current regulations add complexity in terms of additional participants, alternative ways to comply with Section 106 (see Section 8 below), and avenues to administratively appeal disagreements during Section 106 reviews. Nevertheless, the basic steps in the agency’s early diagrams still exist, as outlined as follows. Key Section 106 terms are presented in *italics* (although this report tries not to systematically use regulatory language in presenting its research, findings, and recommendations), and the steps of the review process are very briefly explained for readers who may not be familiar with the process.

An Overview of the Section 106 Process

During the review process, federal agencies or their authorized representatives must:

- Identify whether there is a federal *undertaking*:

Programs or projects: (1) conducted directly by a federal agency; or (2) funded, licensed, permitted, or otherwise formally approved by a federal agency, when carried out by another unit of government or a private entity.

- *Identify/evaluate* historic properties:

Those listed or eligible for listing in the National Register of Historic Places; and

Those located within one or more geographic *area(s) of potential effects* (APE) (areas within which *direct, indirect, and cumulative effects* from the program or project may occur).

- *Assess effects* (impacts) to historic properties from the undertaking:

Includes direct impacts (e.g., demolition, introducing high levels of noise into a quiet setting of a historic farm), indirect impacts (e.g., an off-site sand and gravel pit to recover materials to be used in a project has the potential to harm archaeological sites), and cumulative impacts (e.g., the combined direct and indirect impacts from the specific project being considered, combined with past and predicted future projects).

- *Resolve adverse* (harmful) *effects* (“resolve” is to mitigate—avoid or minimize):

Develop and sign a *memorandum of agreement* (MOA) which identifies measures the federal agency and/or others will take to avoid, minimize, and mitigate harmful effects to historic properties.

In addition to the steps above, federal agencies or their authorized representatives must:

- *Consult* with *consulting parties* who have jurisdiction (states, tribes) or an interest (preservation advocates, property owners, applicants for federal funding or permits, individuals).
- Involve the public.
- Recognize that the Advisory Council may choose to formally comment and participate.

The concept of *consultation* overlays the Section 106 process and is somewhat unique in the realm of federal regulatory programs.⁴ Consultation, as envisioned by the Advisory Council, is:

... seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.⁵

During negotiations preceding the 1999 revisions to the Section 106 rules, the Advisory Council participated in several listening sessions with Indian tribes. The agency identified a major schism between Native and federal agency (and industry) perspectives on the meaning of consultation:

... the word ‘consultation’ is interpreted differently by Indians and non-Indians. In general, American Indian participants believed that the word implies a ‘give-and-take’ dialogue, not just listening or record-

ing their concerns. From the tribal perspective, consultation is more closely aligned with the process of negotiation . . . and working toward a consensus. For non-Indians, consultation has another meaning: if the tribe had been contacted, attended the meetings, and had the opportunity to discuss its views with the agency, then the tribes had been consulted regardless of the outcome. For the majority of American Indian participants this kind of exchange did not represent adequate or effective consultation.⁶

However, the conflict is more pervasive. Based on the interviews for this report, state historic preservation officers (SHPOs) and their staff, public interest groups, and individual preservation advocates generally share the same understanding of the regulatory definition of “consultation” as that expressed by tribal representatives during these listening sessions. Further, the guidelines established for federal agency preservation programs under Section 110 of the NHPA (which include Section 106) specifically reject the mere recording of views as constituting consultation:

Consultation must include, at least as its theoretical purpose, the willingness to explore the possibilities for agreement—or at least for a narrowing of agreement—among the consulting parties. Even if that exploration quickly shows or confirms that further discussion would be fruitless, the attempt is fundamental to the concept of consultation as envisioned by these standards and guidelines.

. . .

Consultation is built upon the exchange of ideas, not simply providing information....the agency should: (1) Make its interests and constraints clear at the beginning; (2) Make clear any rules, processes, or schedules applicable to the consultation; (3) *Acknowledge others’ interests and seek to understand them*; (4) Develop and consider a full range of options; and (5) *Try to identify solutions that will leave all parties satisfied* [emphases added].⁷

Many frustrations occur during individual Section 106 reviews when federal agencies or their representatives impose a one-way comment process (e.g., “send us your thoughts in writing and we will consider them”), rather than follow the consensus-oriented give-and-take process required by the Part 800 rules and described in the Interior Department’s guidance.

The Advisory Council on Historic Preservation

The Advisory Council is one of 65 independent agencies within the executive branch of the federal government. Its substantial jurisdiction is somewhat masked by its small size (in terms of the number of professional and administrative staff, currently at 36 full-time equivalent positions)—comparable to the size of the Inter-American Foundation (which provides grants to groups in Latin America and the Caribbean) and the Office of Navajo and Hopi Indian Relocation, other independent agencies.⁸ Dictated by legislative amendments to the NHPA, the formal “membership” of the Council (a panel that operates similar to a board of directors) has ranged in size and interest representation, and currently stands at 23 members.⁹ To promote involvement of high-level federal managers, the top leaders of the federal agencies that serve as Advisory Council members (e.g., Secretary of the Department of Interior)—which current stands at 10—may delegate their participation only to “. . . an Assistant Secretary or an officer having major department-wide or agency-wide responsibilities.”¹⁰

In the events and written record leading up to the original enactment of the NHPA, the Mayors' Conference Special Committee first recommended an Advisory Council on Historic Preservation with membership representation of federal agencies, state and local governments, and public and private organizations.¹¹ The committee separately recommended a federal review process for projects affecting historic properties, but did not clearly identify the Advisory Council's role in such reviews. The closest function specifically recommended for the Council was to develop "policies, guidelines and studies for the review and resolution of conflicts between different federal and federally-aided programs affecting historic preservation."¹² The Task Force on Natural Beauty urged legal protections for historic properties, but did not specifically recommend a historic preservation council or board to further this purpose.

The concept of a federal advisory body related to protection of important resources was not new at the time of the NHPA. Section 3 of the Historic Sites Act of 1935 established a National Advisory Board on National Parks, Historic Sites, Buildings, and Monuments ("National Advisory Board") to advise the Secretary of the Interior. Comprised of 11 citizens serving in a volunteer capacity and appointed by the Secretary, this board included representation from the fields of history, archeology, architecture, and human geography.

Our understanding of legislative intent regarding the initial enactment of the NHPA and the creation of the Advisory Council is primarily based on House and Senate committee reports as supplemented by oral histories of participants.^{13,14} One stated motive behind establishing an Advisory Council was expressed during deliberations in the Senate Committee on Interior and Insular Affairs. Recognizing a functional gap in federal activities, committee members concluded that the Council:

... would be of such fundamental importance in coordinating Federal programs affecting historic properties and in furthering historic preservation activities . . .¹⁵

The House report noted the need for the new Advisory Council to prepare "deliberate and considered comments" in its check-and-balance role in the review process established for federal projects.¹⁶ A National Park Service historian has written that, when viewed in the context of Congress' "positive call for preservation" in the law, the agency's enumerated duties "indicated that the Council was expected to play an advocacy role for preservation."¹⁷

The Advisory Council was intended, therefore, from the start to serve a very different role than that of the National Advisory Board, even though the Bureau of the Budget initially complained that the two entities were redundant. The National Advisory Board was an early version of a federal agency stakeholder committee that would today come under the auspices of the Federal Advisory Committee Act. The Advisory Council, on the other hand, was chartered as a governmental agency consisting of a board with 17 members (initially) and financial, administrative, and professional staff. Staff was initially housed within the Interior Department (in a newly created Office of Archeology and Historic Preservation) "for administrative simplicity."¹⁸ However, the inherent conflict of embedding the Advisory Council in the Interior Department was recognized early on when the Senate Committee on Interior and Insular Affairs warned that:

. . . to be fully effective [the Council] must act independently and not be considered the voice of any one agency of the Federal Government.¹⁹

Subsequent amendments to the NHPA in 1976 separated the Council from the Department of the Interior, establishing the entity as an independent federal agency.

Starting with the initial publication of the Section 106 guidelines in 1969, the Council began to judiciously define its membership's involvement in specific project reviews stating that "normally its comments will be reserved in only the most complex situations."²⁰ Additionally, the principal in-house professional staff dedicated to Section 106 consultation (whose positions are identified as either a "historic preservation specialist" or "program analyst"), exclusive of managers and administrative staff, has never exceeded a total of 13 individuals at one time. In recognition of the size of the agency and the number of federal or federally assisted projects each year (see the table below), the Advisory Council has adopted several significant regulatory changes to the Section 106 process over the years to structurally conserve the role of both its staff and membership. The most expansive of these changes occurred in 1986, 1999, 2000, and 2004 (see Appendix 2-1).

In particular, the 1986 amendments removed the Advisory Council's participation in many consultations by promoting federal agency consultation directly with the SHPOs. The 1999 and 2000 amendments further scaled back the Council's role (e.g., eliminating review of "no adverse effect" determinations), and added criteria for the Council's involvement in reviewing individual projects. Factors that the Council evaluates when determining whether to formally participate in Section 106 reviews include projects that may: substantially impact important historic properties; pose important questions of policy or interpretation; present compliance problems; or present issues of concern to Indian tribes or Native Hawaiian organizations.²¹ However, when projects threaten to harm National Historic Landmarks, the Advisory Council must be invited to consult in ways to avoid or minimize such impacts.²²

Appendix 2-2 tabulates the number of federal agency projects and the Advisory Council's Section 106-related actions each year from fiscal year (FY) 1968 through FY 2008. Numbers of EISs issued for "major federal actions" each year are included for comparison. The table below summarizes the professional staff's and membership's involvement during these years, annually averaged from the reported details in the appendix.

Time Period	Project Actions/year (rounded)	Cases, ACHP Staff Review/year	ACHP Membership Formal Comments Reported/year	Foreclosures Reported/year*	Annual Report Themes
Late 1960s-70s	36,000	645 (1.8%)	3	<1	Energy crisis, congressional delegation of Section 106 compliance to recipients of federal housing funds
1980s	80,500	1,920 (2.4%)	4.38	<1	Emergency Jobs Act, Private Sector Survey on Cost Control (Grace Commission), bank and farm failures, privatization of federal programs, acid rain
1990s	86,000	2,880 (3.35%)	5.8	5.8	Military base realignment and closures, suburban sprawl, traditional cultural properties, Native American participation in Section 106
2000-08	109,350	1,077 (0.98%)	4.4	2.7	Preserve America, natural disasters, American Recovery and Reinvestment Act

* Foreclosures reported in the Council's ARs and BJR's include foreclosure determinations by staff.

In general, this data shows that Section 106 reviews by the Advisory Council's professional staff reached between 3 and 4 percent of federal or federally assisted projects undertaken each year by the late 1990s and declined to approximately 1 percent from 2000 to 2008. Formal comments by members of the Advisory Council are issued in less than 0.01 percent of total projects undertaken by federal agencies or with their support. This small percentage, however, masks the fact that the membership's involvement in the relatively few high-profile, controversial, and complex cases can be extremely influential. The Council's budget justification reports for FY 2000-FY 2002 stated that the membership had decided to focus and increase its role in high-profile and policy-setting Section 106 cases after adoption of the 1999 regulatory amendments. Although the BJR's for the succeeding decade do not emphasize this goal, the Council should consider a renewed commitment to this policy.

Federal Agencies

Section 106 applies to the activities and programs of the 15 executive departments and 65 independent agencies.²³ These departments and agencies execute policies of the president, consistent with federal legislative authority. Their budgets are approved by Congress and actions are subject to review by the judicial branch of the federal government. Section 106 is triggered when agencies undertake a project themselves involving or affecting historic properties they own, acquire, or control, or when agencies award financial assistance (e.g., grants, low-interest loans) or governmental approvals (e.g., permits, licenses) to businesses or state or local governments.

The scale of potential application of Section 106 becomes clear when one considers the leviathan executive departments: Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security,

ty, Housing and Urban Development (HUD), Justice, Labor, State, Interior, Treasury, Transportation, and Veterans Affairs. These departments conduct most of the day-to-day work of the federal government in delivering services to the nation. Further, the breadth of Section 106 compliance is illuminated when one considers that each department consists of associated agencies (e.g., FAA, Federal Highway Administration [FHWA], Federal Transit Administration [FTA], Federal Railroad Administration [FRA], Surface Transportation Board, and Maritime Administration, all within the Department of Transportation), each with hundreds of regional and field offices that either directly carry out programs, projects, and activities, or that fund or license activities undertaken by nonfederal parties.

Most individuals would easily recognize the potential for large-scale harm to historic properties when major projects, such as highway or dams, are built. However, a review of the Advisory Council's annual reports over the years illustrates the range of federal government activities and programs and, thus, the challenge in administering Section 106.²⁴

- The Internal Revenue Service seized the circa-1898 Redstone Castle (Colorado), built by an early industrial magnate, for sale to recover \$6 million in back taxes from a current owner engaged in a fraudulent investment scheme. The planned sale put the architecturally significant mansion at risk of demolition due to its desirable setting and substantial acreage. As a result of Section 106 consultation from 2004 to 2005, a conservation easement was established to permanently protect the property, which was subsequently purchased by an individual for \$5 million. Complications arose during the negotiations, however, when the Securities and Exchange Commission filed suit to secure the property, claiming its suit negated the applicability of Section 106.
- In the late 1960s, Georgetown University proposed to build a cooling tower for its power plant, with funding from the Department of Health, Education, and Welfare, at a site adjacent to the school observatory (circa 1841) and the Georgetown Historic District. As a result of Section 106 consultation, the structure was redesigned and more architecturally appropriate construction materials selected.
- A developer sought an Army Corps of Engineers permit under the Clean Water Act to dredge Ualupue Fishpond in the Hokokano-Ualupe Complex, a National Register-listed area on Molokai Island still used by a Native Hawaiian organization. As a result of Section 106 consultation in the mid-1970s, the developer was required to use dredging practices that minimized disturbance to the marine environment and water quality.
- NASA planned to demolish the Apollo 11 Launch Umbilical Tower at the Kennedy Space Center, despite a 1974 MOA which provided for disassembly of the structure. After further Section 106 consultation during the early 1980s, the structure was disassembled and now sits in a lot at the Florida space center; the Space Restoration Society is currently promoting preservation of the tower.
- The government of Truk, a trust territory of the Pacific Islands, bulldozed a road and installed lights on Mount Tonaachaw, culturally important to the Trukese, for an airport expansion in 1985, destroying an archaeological site in the process.

- The Federal Communications Commission approved a plan in the late 1980s by a “mobile cellular telephone company” to erect an emerging technology—a “transmitter/receiver” tower— causing visual effects to the Landmark Farm near Rochester (New York).
- In 1990, the Holocaust Museum proposed to demolish Annex 3 of the W. Auditors’ Building complex in Washington, DC, to establish a view to the National Mall. Identified in a 1978 National Register-listing nomination form as “an unusual example of turn-of-the century Government industrial architecture,” the building was preserved through Section 106 consultation.
- The U.S. Environmental Protection Agency oversaw cleanup of a massive crude oil spill from the Exxon *Valdez* in 1989, which contaminated Alaskan beaches and lands on which are located extensive prehistoric and historic sites. An MOA was developed to protect these sites because they were threatened both by contamination from the spill and the risk of vandalism or looting from exposure through cleanup efforts. (A similar effort is underway in summer 2010 to respond to the catastrophic loss of the *Deepwater Horizon* drilling rig in the Gulf of Mexico, and the crude oil released into the environment as a result.)
- An MOA was negotiated for adverse effects to *Dzil nchaa si ‘an* (Mount Graham, Coronado National Forest), a National Register-eligible traditional cultural property of the Western Apache tribes. The consultation, which occurred in the 2006 to 2007 timeframe, was associated with the U.S. Forest Service’s issuance of a special use permit to the University of Arizona to replace a microwave communications tower at the observatory on the mountain.

Agency Stewardship and Inventory Responsibilities under Section 110 (a) of the NHPA²⁵

Section 110(a)(1) of the NHPA provides that all federal agencies are responsible for the preservation of historic properties they own or control. Section 110(a)(2)(B) of the NHPA imposes a general duty requirement on federal agencies for management and maintenance of their historic properties.

Section 110(a)(2) of the NHPA requires federal agencies to implement a preservation program that includes surveying their lands and real property assets to identify, inventory, and evaluate properties that may be eligible for the National Register.

The NHPA of 1966 established a national policy that it was “necessary and appropriate for the Federal government to accelerate its historic preservation programs and activities,” but the law provided no insight, prescription, or support relating to the organization, structure, staffing, funding, priorities, or expected outcomes of individual agency programs. As described in Section 1 of this report, three years later, NEPA established a policy and program for federal agencies to comprehensively evaluate the impacts of their actions on a broad array of resources, including human, social, economic, environmental, and cultural resources. NEPA initially suffered the same lack of direction or prescription as the NHPA regarding how agencies were to organize themselves to accomplish this work.

Because of the absence of specific instructions, early implementation of these laws lagged because many federal agencies, not unpredictably, tended to their primary mission and budget needs. Executive Order 11,593, issued by President Richard Nixon on May 13, 1971, was and remains one of the most clear and firm statements of expectations of the federal agencies concerning their compliance duties under the NHPA, NEPA, the Antiquities Act of 1906, and the Historic Sites Act of 1935. Though largely codified into law through 1980 amendments to the NHPA (see Section 110) and supplemented by subsequent laws and executive orders, many agencies have made barely perceptible progress toward the expectation that they identify their historic properties.

A primary duty and deadline in the 1971 presidential directive was associated with identifying and nominating National Register-eligible properties owned or controlled by the agencies. Federal agencies were given a little over two years (until July 1, 1973) to complete the sweeping process of surveying and evaluating their properties (in concert with the states) and nominating eligible properties. The breadth of federal real property assets reveals the level of effort: some 3.3 billion square feet of space and 655 million acres of land.²⁶

A second equally clear expectation of E.O. 11,593 prescribed that by January 1, 1972, and annually thereafter, federal agencies were to develop, initiate, and submit procedures to the Secretary of the Interior and Advisory Council providing for:

. . . the maintenance, through preservation, rehabilitation, or restoration, of federally owned and registered sites at professional standards prescribed by the Secretary of the Interior.

After enactment of the NHPA in 1966, federal agencies were further directed by Congress and various presidents to adopt or review specific aspects of cultural resource protections and related procedures for public involvement in such programs.²⁷

The following two relatively recent executive orders impose specific federal agency management responsibilities with respect to cultural resources. Sec. 3(e) of E.O. 13,287 (*Preserve America*) required the heads of federal agencies to designate a senior policy level official to have oversight responsibility for the agency's preservation program and to notify the Advisory Council and the Secretary of the Interior of the person holding the position by no later than June 30, 2003. Further, this Senior Policy Official (SPO) is required to either serve as the Federal Preservation Officer (FPO) for that agency or serve as the direct supervisor to the FPO. The SPO must further ensure that a direct report FPO has "access to adequate expertise and support to carry out the duties of the position."

Sec. 3(a) of E.O. 13,327 (*Federal real property asset management*), issued on February 4, 2004, required the heads of federal agencies to designate a Senior Real Property Officer (SRPO) from among their senior management officials, although no deadline is imposed. Part of each SRPO's responsibility is to ensure that their agency conducts appropriate planning and management regarding the retention of historic properties they own or control. The relationship between SRPOs and SPOs in federal agencies that hold, manage, or control real properties that are historic is not addressed in either order.

The Courts

Federal judges are called on to formally resolve Section 106 conflicts in several ways: (1) to evaluate whether the Advisory Council has exceeded the powers Congress provided in Title II of the NHPA; (2) to determine whether a specific activity constitutes an “undertaking,” thereby triggering Section 106 review; and (3) to review public, tribal, or industry claims that Section 106 was not applied or was improperly applied to a specific project or program. On one occasion, the Advisory Council has directly participated in litigation on its own initiative when a matter of significant policy was at stake.²⁸

The Council’s powers. In the 1980 annual report to the president and Congress, the Advisory Council identified an important case in which its commenting role under Section 106 was upheld as a result of a public interest group’s challenge to construction of a hotel and convention center within the Charleston (South Carolina) Historic District.²⁹ The Charleston Center was a city-led project funded in part by a grant from HUD and the Economic Development Administration (EDA) of the Department of Commerce. The Advisory Council was one of several signatories to an MOA intended to resolve adverse effects to the district, allowing the project to begin. The federal court upheld the Council’s authority to do so, recognizing substantial discretion in the agency’s determination under the NHPA as to the method by which the Council defines its opportunity to comment, and to promulgate regulations implementing Section 106.

This rulemaking authority has, however, been successfully challenged in recent litigation. In 2003, a national trade association for the mining industry succeeded in invalidating the application of Section 106 to certain types of federal permits that are delegated to state agencies to issue. The Council’s 1999 revisions to the Section 106 rules incorporated verbatim a provision from the 1992 amendments to the NHPA that included in the definition of an “undertaking”—thereby triggering Section 106 review—federal regulatory activities carried out by the states and local governments under formal delegation by a federal agency. These types of programs include surface mining permits issued under the federal Surface Mining Control and Reclamation Act; permits to discharge pollutants into surface waters under the federal Clean Water Act; and permits to emit pollutants to the ambient air under federal air pollution control acts. Despite explicit congressional intent to accomplish precisely such a result in the 1992 amendments, this reach of the Advisory Council’s regulatory revisions was invalidated on the grounds that delegation by a federal agency to a state or local authority under these “cooperative federalism” programs does not constitute a funding or licensing activity within the scope of Section 106.³⁰

Public interest enforcement. Litigation is a costly, inefficient, and difficult means for tribes, individual preservation advocates, or public interest groups to resolve conflict in historic preservation or environmental controversies. The first hurdle is whether prospective plaintiffs have a right to be in federal court under the NHPA or NEPA, called the “right of action.” This is a different concept than (and comes before) the issue of “standing”—whether the plaintiffs can show particular interests in or harms from a project to justify their participation in a lawsuit.

Because of different court interpretations of the NHPA in different jurisdictions, vagaries of geography may dictate whether preservation advocates have a private right of action to sue the federal government directly under

Section 106 of the NHPA, or whether plaintiffs must rely on the federal Administrative Procedure Act (APA) as a more general framework for judicial review of challenged actions. This question regarding the public's right to sue directly under the NHPA has been determined through decisions of the 11 federal Courts of Appeals (the layer of judges between federal district courts at the bottom and the U.S. Supreme Court at the top).

Initially, Congress did not expressly include language in the NHPA that individuals or organizations can sue to enforce the law, as it has done with some laws that protect natural resources.³¹ However, the NHPA was amended in 1980 to add Section 305, which authorizes federal judges to award attorneys and expert witness fees and other costs to anyone who “substantially prevails” in a suit to enforce the statute.³²

Public interest plaintiffs who want to challenge Section 106 compliance for projects in seven western states and Alaska and Hawaii, for example, are barred from a private right of action under Section 106 because courts in these jurisdictions have held there is no direct right of action under the NHPA; instead, the APA must be used as the basis for enforcing Section 106.³³ Other federal courts, however, observing that Congress provided for the possible recovery of costs to successful plaintiffs in NHPA enforcement, have determined that such a right of action is implied in the law.³⁴

Private “attorney general” lawsuits are, of course, brought all over the country challenging Section 106 compliance. Judges who have not recognized a direct right of action under the NHPA require that public interest litigants look to the federal APA to establish their ability to ask a court for review, which authorizes a right of review for anyone harmed by federal government action (or inaction) under any other federal law.³⁵ When suits are successfully brought under either law, plaintiffs are awarded declaratory or injunctive relief (the court prohibits an agency from taking a certain action or directs it to take a certain action).

The differences in enforcing Section 106 pursuant to the NHPA as opposed to the APA are not just for the realm of litigators—these differences impose very real problems for public interest watchdogs. Under the procedural stairsteps of the APA, the public must wait for “final agency action” before filing a challenge.³⁶ However, it can be difficult, even in a digital era, to determine when this happens, especially for preservation volunteers. On the other hand, bringing an action directly under the NHPA facilitates the public's ability to seek judicial review before an agency's final action.³⁷ Further, in a lawsuit brought under the NHPA, the courts generally exercise a standard of review of federal agency action that is less deferential to the defendant agency's own interpretation of the law, and, for that reason, may be more attractive to public interest plaintiffs.³⁸

The U.S. Congress

Congress' role in Section 106 is directive and financial. Legislative enactments, such as the NHPA and its revisions, are formal expressions of national preservation policy. Congress also holds the purse strings of federal agencies, including the Advisory Council, through the annual appropriations process.

Annual appropriations and reauthorizations have occasionally invoked congressional requests for the Advisory Council to examine and report back on Section 106 implementation issues.³⁹ Congress has also asked the Council to monitor federal agency historic preservation program compliance.⁴⁰

Individual elected officials occasionally serve as high-level consulting parties, both directly and indirectly (e.g., through legislation action regarding specific projects). In the early 1980s, for example, the General Services Administration designed an addition to the National Register-listed U.S. Courthouse in Charleston that would have adversely impacted the courthouse itself, the Charleston National Historic Landmark, and St. Michael's Church. Despite a storm of public outcry, the agency gave all indication that it would nonetheless proceed with its plans. After the local congressional representative introduced legislation that eliminated authorization for the project, the agency and city negotiated a revised design similar to that initially proposed by the Advisory Council.⁴¹

Recurring controversies over individual projects that harm certain types of historic properties have yielded strategic congressional response. One example is the Pennsylvania Battlefields Protection Act of 1999, which responded to years of individual projects that cumulatively threatened Revolutionary War battlegrounds.⁴²

On the other hand, an Advisory Council Chair once lamented that “we are not ‘loved’ on Capital (sic) Hill as much as we deserve to be” because of developers’ complaints.⁴³ Congressional end runs around the Advisory Council and Section 106 have at times been contingent on the promise of future compliance (e.g., requiring that the National Park Service approve a cell tower application in Rock Creek Park in Washington, DC, but providing that all future projects comply with federal and local laws). From 2005 to 2006, the Army Corps of Engineers considered a permit application for construction of a bridge along the controversial Paseo del Norte extension outside Albuquerque. The project, and land development associated with the extension, would impact the Petroglyph National Monument and Los Imagines Archaeological District containing over 17,000 archaeological sites. One of the state’s U.S. senators noted his exasperation at the Corps’ slow pace of issuing the permit in a press release that also identified his important position as chair of the subcommittee over the agency’s annual appropriations.⁴⁴

Native Peoples

Not until the 1992 amendments to the NHPA was federal policy declared to include partnerships with Indian tribes and assistance to such tribes and Native Hawaiian organizations to “expand and accelerate” their preservation programs and activities. Federally recognized Indian tribes may designate tribal historic preservation officers (THPOs) as the lead Section 106 review authority on reservation lands and consultation on ancestral lands.⁴⁵

According to the National Association of Tribal Historic Preservation Officers (NATHPO), there are 76 THPOs recognized by the National Park Service, representing a land base exceeding 34 million acres.⁴⁶ For the 564 federally recognized tribes that have not formally designated a historic preservation officer, federal agencies must consult with a tribal representative and the SHPO during Section 106 reviews.

The geography within which projects may affect tribal resources is vast, including not only reservation lands but ancestral, aboriginal, and ceded lands as well. The latter point is significant for tribes whose original lands were east of the Mississippi River but who were forcibly removed to lands west of the river as a result of the Indian Removal Act of 1830. Tribes such as the Caddo Nation, for example, govern reservation lands in Oklahoma but have ancestral ties to Texas, Louisiana, and Arkansas. Ancestral lands of the Alabama-Coushatta Tribe, headquartered in the pine forests of east Texas, span Oklahoma, Florida, Alabama, and Mississippi. Federal agencies are obligated to consult with Indian tribes and Native Hawaiian organizations during Section 106 reviews regarding the potential for traditional cultural properties on all such lands.⁴⁷

Sovereign status. The legal organizing structure of Indian tribes is not quasi-governmental, state-like, or foreign. Each federally designated tribe has jurisdictional status as a **domestic nation** and sovereign government with its own right of self-determination, including selecting the form of its governing structure. Further, an independent principle of federal Indian law, first pronounced in an 1831 U.S. Supreme Court case, is that the U.S. government exercises **Indian trust responsibility** as a legal and fiduciary obligation to “protect tribal treaty rights, lands, assets, and resources, as well as a duty to carry out the mandates of federal law with respect to American Indian and Alaska Native tribes and villages.”⁴⁹ These legal principles give rise to the government-to-government relationship between the United States and each Indian tribe, reflected in the Advisory Council’s Section 106 rules as a direct responsibility of federal agency officials, which cannot be delegated to others to carry out (e.g., states, consultants).⁵⁰

Consideration of resources culturally important to Native people prior to the 1992 NHPA amendments. The special inquiry commissions leading to the NHPA of 1966—the Mayors’ Conference Special Committee, with its urban and colonial focus, and the Task Force on Natural Beauty—omitted any consideration of the role of native people in protecting cultural resources, as did the initial enactment of the law itself.

It would be a mistake, however, to conclude from the 1992 NHPA amendments that the tribes and other indigenous people arrived “late” to preservation advocacy, because there are over three centuries of British and colonial government and, later, U.S. executive, judicial, and legislative branch pronouncements determining the ownership and fate of Indian and other native lands, including archaeological sites and free-standing historic properties.

With respect to the Section 106 process specifically, tribes and Native Hawaiian organizations participated in consultations before 1992, particularly when archaeological sites and traditional cultural properties were threatened, as a result of several factors. For example, the Advisory Council first observed an increase in Section 106 cases involving archaeological resources in the western states after E.O. 11,593 was issued in 1971. In 1972, the tribal council of the Navajo Nation adopted the first tribal resolution on the preservation of antiquities and established its own cultural resource management program in 1977.

One of the first high-profile Section 106 cases on the importance of preserving the traditional relationship between the natural and cultural environment occurred in 1974 in response to the FHWA's proposal to build a 6-lane interstate highway (the H-3) through Moanalua Valley on the island of Oahu. The valley encompasses Native Hawaiian lands of importance, and features one of three freestanding petroglyph rocks in the entire state. The *Pohaku ka Luahine* is an imposing stone mass depicting human figures and bird men scribed by prehistoric peoples. Although the highway project was initially stopped by litigation under Section 4(f) of the Department of Transportation Act, years later Congress exempted the project from further reviews under Section 4(f) and it was built. Another relatively early case in which the Council formally participated in a Section 106 review affecting cultural resources important to Native Hawaiians resulted in water quality protections being negotiated during a developer's dredging of the ancient Ualapue Fishpond on the island of Molokai.⁵¹

By the mid-1980s, tribal issues in Section 106 cases permeated the Advisory Council's yearly reports to the president and Congress. Revisions to the Section 106 rules drafted between 1982 and 1985 encouraged, for the first time, Native American involvement in the consultation process and authorized tribes to establish their own Section 106 implementation procedures.⁵² The Advisory Council crafted a working paper for addressing traditional cultural values and properties (Native and non-Native) in the Section 106 process, observing that federal agencies disliked the 1985 draft for interjecting intangible cultural values into Section 106.⁵³ Problems were projected to be-

Examples of Traditional Cultural Properties Considered in the Section 106 Process⁴⁸

Medicine Wheel/Medicine Mountain, Bighorn National Forest, Wyoming (Local efforts to convert a plateau featuring a "wheel," comprised of emplaced rocks at the center and in 28 radiating spokes, into a tourist attraction posed significant risks to archaeological sites and traditional cultural properties important to the Plains Indian tribes. A Historic Preservation Plan (HPP) was developed in 1996 and subsequently incorporated into the Forest Plan; a logging company's judicial challenge of the HPP [1999-2004] was unsuccessful.)

Zuni Salt Lake, New Mexico (Mid-1990s coal mining threatened indirect impacts to the lake where salt is extracted for domestic and ritual use by the Zuni pueblo, and those of the Hopi, Acoma, and Laguna; these natural areas are also important to the Apache and Navajo. The Bureau of Land Management now prohibits coal mining in the lake area.)

Indian Pass-Running Man Area, California (An open-pit gold mine proposal threatened this area of traditional cultural concern to the Quechan tribe; the Council's membership recommended that the Department of the Interior deny the mining permit. That 2001 denial was subsequently reversed by a new Interior Department secretary. California, in response, adopted stringent rules on backfilling open-pit mines. The mining company then sued under NAFTA, claiming that its mining rights were violated through regulatory action; however, those claims were rejected in May 2009 by an arbitral tribunal.)

Second Seminole War battleground, Lake Okeechobee, Florida (A developer proposed to build a residential subdivision on the grounds of this National Historic Landmark, the site of a battle between General Zachary Taylor and the Seminoles and Miccosukees. After a controversial Army Corps of Engineers' permitting and Section 106 process, the developer sold the site to Florida in 2006; a state park is now planned.)

come “increasingly significant in the coming years” because of the federal agencies’ position.⁵⁴

Native American organizations increasingly asserted their interests in the Section 106 process, particularly when human remains were expected to be encountered during construction. The Advisory Council’s report on its 1985 activities described a recent declaration by the Department of the Interior’s consulting archeologist that human remains were scientific specimens that should be reburied only if they posed no or little scientific value, a position that generated strong opposition from Native American communities.⁵⁵

In an assessment of the 20th anniversary of the NHPA in 1986, the Advisory Council endorsed the tribes’ perspective that they should be allowed to participate in lieu of SHPOs during consultations relating to federal or federally assisted projects on reservations, and that Native American representative should be added to the Council’s membership.⁵⁶ During a subsequent listening session with Northwest Pacific tribes, the Advisory Council heard solid support for the tribes’ management of historic properties on their own lands.⁵⁷ The following year (1988), the Advisory Council issued its first policy on the treatment of human remains and grave goods, two years before Congressional enactment of the Native American Graves Protection and Repatriation Act.

By the 1992 amendments to the NHPA, 20 high-profile Section 106 cases involving impacts to Native American traditional cultural properties were pending, mostly in the west.⁵⁸ The Council’s membership panel adopted the *Mesa Verde Policy Statement on Traditional Cultural Properties* in 1992 which affirmed that such properties can be National Register-eligible and, therefore, subject to Section 106 review.⁵⁹ *National Register Bulletin 38* thereafter established guidelines for evaluating and documenting traditional cultural properties.⁶⁰

State Historic Preservation Officers

State historic preservation officers are tasked in the NHPA to “advise and assist” federal agencies in complying with their Section 106 responsibilities and to cooperate with such agencies, local governments, organizations, and individuals to ensure that historic properties are considered during “all levels of planning and development.”⁶¹

There were no SHPOs at the time Section 106 became law, however. As originally enacted, the NHPA simply provided a grants program for states to fund bricks-and-mortar preservation projects and conduct statewide surveys to identify properties for National Register consideration. In order to identify the principal contacts for the funding program, Secretary of the Interior Stewart Udall issued a letter to the governors in January 1967, as well as the chief executives of the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and American Samoa, requesting that each jurisdiction identify a “state liaison officer” (SLO).

Each governor or chief executive exercised complete discretion regarding the individual selected to serve as the SLO and the state agency responsible for coordinating the initial funding and survey activities provided for in the NHPA. Their initial choices were varied. State historical commissions and societies not surprisingly employed the majority of the first SLOs (22), particularly in the eastern and southern states. Parks and recreation agencies were next (9), mostly in western states. Natural resource/environmental/conservation agencies (6) and archives and museum agencies (6) followed. The rest of the SLOs were distributed throughout different functional offices:

economic development (4), planning (3), and culture (1). Oregon's SLO was the State Highway Engineer. Kentucky established its SLO in the Office of the Governor, while the District of Columbia housed its officer in the office of Deputy Mayor.⁶²

One commentator has argued that of all these functional offices, the historical commissions, societies, archives, and museums were perhaps the least equipped in some respects to take on the mandate. Planning, natural resource, and economic development agencies (and even the state highway engineer), on the other hand, were relatively familiar with conducting long-range planning, integrating multiple resources when considering the impacts of projects, and involving the public in proposals.⁶³

The initial 1969 Section 106 guidelines instructed federal agencies to consult with the SLOs if projects would harm National Register-listed properties within their state or territory. When these guidelines were adopted as formal regulations in 1974, a new title—the “State Historic Preservation Officer”—appeared. The new rules integrated the SHPO role in every step of the review and consultation process (identifying properties, determining project impacts, and negotiating ways to mitigate harmful impacts). When amendments to the NHPA were adopted in 1980, Congress codified the position of SHPO, as well as requirements for state preservation programs, as a matter of federal law.⁶⁴

As a key stakeholder in implementing the NHPA, the National Conference of State Historic Preservation Officers (NCSHPO, the professional organization for state historic preservation officers) advises the Department of the Interior on requirements for state historic preservation programs.⁶⁵ Under the NHPA, the president of the organization, elected by member states, also serves on the membership panel of the Advisory Council.⁶⁶ Many of the existing nationwide Section 106 programmatic agreements (see Section 8) have been developed in consultation with, and are signed by, the NCSHPO.

A fundamental shift in the SHPO consultative role occurred as a result of revisions to the Section 106 rules in 1986 which reduced the Advisory Council's participation in many individual project reviews. The role of the federal government was under intensive scrutiny and review during this time, initiated after President Ronald Reagan took office in 1981. A Private Sector Survey on Cost Control (known as the “Grace Commission” after its chairman's name) recommended abolishing the Section 106 program entirely, claiming an annual savings of up to \$40 million based on Army Corps of Engineers and FHWA estimates. These figures were not substantiated upon later review.⁶⁷

Congress never acted on the Grace Commission's final report, but the resolve in Washington to scrutinize regulatory programs solidified. An Advisory Council Task Force on Regulatory Review was initiated early in the Reagan administration whose efforts led to significant revisions in the Section 106 rules, issued in March 1982. However, objections from the Office of Management and Budget and the Justice Department, who questioned the Council's statutory authority to adopt some of the changes, resulted in a partial suspension of the amendments later in 1982. The impasse was not resolved until four years later, when Congress confirmed the Council's authority in this rulemaking. Significant changes to the procedural reviews of Section 106 were finalized in October 1986 by establishing a new emphasis on “two-party” consultation between the federal agencies and SHPOs

(without the participation of the Council) and new 30-day review periods for the states to respond to federal agency “findings and determinations” during project reviews.⁶⁸

Today, state historic preservation offices serve as the front-line check and balance regarding federal agencies’ compliance with Section 106 because they review all of the federal government’s documentation on projects that have the potential to impact historic properties. Further, if there are harmful impacts, SHPO staff often draft the memorandum of agreement (MOA), and SHPOs play an instrumental role in identifying and negotiating mitigation measures to avoid or reduce these impacts.

Data submitted annually to the NPS by SHPOs generally quantifies, but does not provide a complete picture of, the states’ Section 106 workload. These numbers are staggering and, to a large extent, belie any generalizations from those regulated by Section 106 that the law impedes the work of government and business. From 2004 through 2008, for example, the states reviewed an average of 114,000 Section 106 actions on an annual basis.⁶⁹ Approximately 85 percent of this caseload resulted in “no historic properties affected” determinations, 13 percent in “no adverse effects” determinations, and 2 percent in an MOA because harmful effects were identified.

The number of project reviews in any individual state does not necessarily correlate with its size. For example, a geographically small state may have as many review actions as a large state if a multibillion dollar project is proposed within its boundaries. Additionally, natural disasters (e.g., hurricanes, flooding) that qualify for federal financial assistance for recovery efforts can episodically overwhelm a review office even in a large state with relatively more staff than a small state.

Certified Local Governments

By the late 1970s, an interest surfaced in Washington which favored increasing the participation of nonfederal stakeholders in national preservation policy. Robert Garvey, the first Executive Director and Secretary of the Advisory Council, recalled a sentiment at this time to scale back the federal government’s role in preservation, and to instead increase reliance on the private sector, states, and local governments to promote and carry out preservation activities.⁷⁰ The 1980 amendments to the NHPA reduced the Advisory Council membership panel—mostly the federal agency positions—from 29 to 18, but within this new makeup added two positions representing local and state governments (one each).

The 1980 statutory amendments also created a new program whereby SHPOs and the Secretary of the Interior “certify” local governments “to carry out the purposes of the Act” if the local government adopts and enforces ordinances to protect historic properties; establishes a local historic preservation review commission; maintains a system to survey and inventory historic properties; and provides for public involvement in the local preservation program.⁷¹ Though not required, certified local governments (CLGs) often designate a staff member to serve as their historic preservation officer.

Federal agencies are required to invite local governments to serve as consulting parties in Section 106 reviews, although it is in the discretion of the local government to elect whether to participate.⁷² At times, CLGs are also

applicants for federal funding, permits, licenses, or other formal approvals (see “Applicants” below), which can create conflicts between their economic development objectives and preservation programs.

Public Interest Groups and the Public

Preservation advocates include nonprofit organizations, neighborhood groups, and individuals. There are four primary ways that advocates can be directly involved in historic preservation (and environmental) reviews under current federal law:

- Serve as a formal consulting party in individual project reviews; or
- Provide public comments in the Section 106 process for individual projects; or
- Provide public comments on Section 106 program alternatives (see Section 8).
- Provide public comments during the NEPA environmental review process (alone or in combination with the Section 106 participation options above).

The National Trust for Historic Preservation. The National Trust is a private nonprofit corporation chartered by Congress in 1949 to protect and defend America’s historic resources, to further the historic preservation policy of the country, and to facilitate public participation in the preservation of the nation’s heritage.⁷³ The concept of an American National Trust (inspired by the National Trust of Great Britain) has been attributed to Ronald F. Lee, chief of the historic sites branch of the National Park Service during the 1940s, who envisioned creation of a national organization to lead the private preservation movement in the U.S.⁷⁴

Membership in the Trust has increased from approximately 30,000 to 160,000 members in the 1970s to almost 270,000 members today. Approximately 100 statewide and local preservation nonprofits formally partner with the organization for administrative and capacity building support and access to the Trust’s advocacy resources.⁷⁵

Headquartered in Washington, DC, the National Trust has eight regional and field offices across the country, as well as 29 historic sites open to the public. Most of the organization’s direct Section 106 case involvement is handled by the Law Department in headquarters and by regional office staff. By statute, the Chair of the board of the National Trust is a member of the Advisory Council.⁷⁶ The statutory powers of the National Trust include the power to bring suit in its corporate name.⁷⁷

Other national groups. Although the National Trust is the premiere preservation advocacy group with a nationwide mission, other national public interest groups often participate in Section 106 as consulting parties. Examples are groups that advocate to protect specific types of historic structures or places, such as the Historic Bridge Foundation, Civil War Preservation Trust, National Parks Conservation Association, or DOCOMOMO (“**D**ocumentation and **C**onservation of buildings, sites, and neighborhoods of the **M**odern **M**ovement”). Others have different resource-protection missions that overlap or intersect with historic preservation, such as environmental groups. The Sierra Club, for example, often participates in Section 106 consultations when historic landscapes and family-owned farms are threatened from public or private development or mining.

State, regional, and local groups. The range of entities that advocate for historic preservation at state, regional, and local levels includes nonprofits with statewide jurisdiction (e.g., Indiana Landmarks) to regional and local organizations. Local advocacy is undertaken by large land use and preservation organizations (e.g., Los Angeles Conservancy) and neighborhood groups. Natural resource groups with statewide or regional perspectives (e.g., land and water conservancy organizations) often advocate for protection of archaeological resources and cultural landscapes associated with these natural features.

The public. “The public” is a sweeping term that includes individuals who care about historic places, but who are not typically affiliated with an organized preservation advocacy group. These individuals are also not likely to be familiar with federal, state, or local regulations which provide for public involvement. By the mid-1990s, the Advisory Council received approximately 300 to 400 inquiries from the public each year relating to Section 106 generally or case-specific inquiries; from FY 2004 through FY 2006, the agency reviewed 60 to 85 Section 106 cases per year in response to requests from the public; and agency staff responds to 10 to 20 online requests from the public on a monthly basis.⁷⁸

Applicants for Federal Funding, Permits, or Other Approvals

“Applicants” are the most numerous and diverse stakeholders in the Section 106 process. HUD alone estimates that some 8,000 to 10,000 applicants have received its financial assistance.⁷⁹ In general, the term “applicant” refers to any nonfederal unit of government (e.g., state, city, county), private business, or individual who seeks the following types of benefits or actions from the U.S. government: (1) **money**, as a grant, congressional earmark, formula allocation, loan or loan guarantee, or other form of financial assistance; (2) **formal approval** of a project, program, or activity, through federal agency issuance of a permit or license pursuant to a federal regulatory program; or (3) **real property** (land and/or buildings), leased or acquired through a sale or other form of disposition, which was originally owned or seized by the federal government.

“Applicants” include, but are not limited to:

- Indian tribes, states, cities, public housing agencies, nonprofit organizations, Native Hawaiian organizations, or private, for-profit developers who use HUD funds to build, reconstruct, or demolish housing or to assist in home ownership or rentals in urban and rural areas.
- Local units of government (e.g., a city, county, port authority, or economic development agency) or private developers who acquire real property from the Department of Defense when federal installations are sold as a result of military base realignment and closure laws.
- Corporations or units of government (e.g., emergency management agencies) that need a license from the Federal Communications Commission to use federal broadband for cell towers, antennae, or radio frequencies.
- Local or regional quasi-governmental water or sewer districts that receive funding from the U.S. EPA for infrastructure to support private land development.

- Corporations, developers, individuals, farmers, universities, utility districts, Indian tribes, states, federal agencies, cities, or counties who propose to fill wetlands to develop land and need an individual or nationwide Clean Water Act permit from the Army Corps of Engineers, or who propose to place a structure over navigable waters and need a Coast Guard permit.
- State departments of transportation that receive formula (entitlement) or discretionary federal funds for road or highway development and local or regional agencies that receive FTA funds for public transit systems.
- Purchasers of real property seized in criminal enforcement or tax lien cases and sold at auction.
- Companies leasing Bureau of Land Management (BLM), Bureau of Reclamation, U.S. Forest Service, or national wildlife refuges for oil, gas, coal, or other mineral extraction, logging, or grazing.
- School districts that receive Departments of Energy or Education grants or financial assistance to demolish, repair, construct, or upgrade schools or administration buildings.
- States, cities, counties, parishes, regional planning organizations, airport or port authorities, railroads, state departments of emergency management or transportation, utility companies and other businesses, and individuals receiving disaster assistance from Federal Emergency Management Agency (FEMA), HUD, the Department of Transportation, FRA, Small Business Administration, or EDA (Department of Commerce).
- Anyone who needs FAA approval to construct or erect an object affecting navigable airspace (e.g., a high-rise building in a flight path) or to fund, construct, or modify a general aviation or commercial services airport.

Congress clearly intended from the inception of the NHPA that the Section 106 process encompass the universe of “applicant” projects, by providing that “The head of any Federal agency having direct or *indirect jurisdiction* over a proposed Federal or federally assisted undertaking . . . shall . . . take into account the effect of the undertaking . . .” and “shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.” The clause encompassing matters of “indirect jurisdiction” was intended “to cover any instance where Federal action advances a project that will affect a National Register property.”⁸⁰ Whether the proposal was carried out by a state or local government or private applicant was “immaterial” if there is some federal involvement contributing to the project.⁸¹

Federal agencies are required to invite applicants to serve as consulting parties in Section 106 reviews for their projects, though it is in the discretion of the applicant to elect whether to participate.⁸² Interviewees for this report observed that locally elected officials associated with cities, counties, and other local units of government often decide not to participate visibly in controversial Section 106 processes when they are the project applicants. Instead, they often rely on consultants to serve in that public role.

Applicant projects have at times posed a particularly troublesome problem in Section 106: anticipatory demolition. Anticipatory demolition occurs when an applicant intentionally destroys (through demolition or other activities that substantially harm) a historic property in order to avoid Section 106 review. The Advisory Council’s

first reference to anticipatory demolition as a “growing problem” in housing and transportation projects surfaced in the late 1980s, and the agency faced a particularly blatant example of this phenomenon at that time when 20 buildings within 30 acres of a 19th century historic district were demolished in downtown Omaha for an agribusiness’ corporate headquarters.⁸³ As a result of these intentional activities to avoid Section 106 review, the Council’s membership panel adopted a policy in an attempt to minimize anticipatory demolition in June 1987 which was codified in Section 110(k) of the 1992 amendments to the NHPA. The 1999 and 2000 revisions to the Section 106 rules added §800.9(c) (*Intentional adverse effects by applicants*) which mirrors the statute by prohibiting a federal agency from approving or funding a project if an applicant willfully harms a historic property to escape the required review. The Secretary of the Interior’s guidelines on federal agency preservation programs call for agencies to establish procedures to identify and respond to anticipatory demolition.⁸⁴

Consultants

The financial and personnel capacity of consultants may range vastly—from Fortune 500 companies with an international practice to national or regional cultural resource firms to local engineering shops or sole proprietors. Law firms and lawyers may serve as consultants as well. A number of professional associations, which include cultural resource consultant members, provide continuing education and quasi-monitoring of professional practices (e.g., Registered Professional Archaeologists, Society of Historical Archaeologists, American Anthropological Association, American Cultural Resources Association, and the American Historical Association).

Clients that hire consultants include federal agencies; public or private grantees and applicants for federal licenses, permits, or approvals; Indian tribes; states; or, less commonly, public interest groups. Consultants bring a special expertise that a client may not have, or simply may extend the expertise and staff capabilities of their client. Unless they have an ongoing relationship with a client, they typically are retained through a competitive process of responding to a request for proposal or qualifications. In all cases, the consultant’s contractual responsibility is to the client and the consultant’s scope of work is established by the client. A consultant’s ability to engage in free-ranging inquiries or work activities is, therefore, circumscribed by what the client requires the consultant to do by formal agreement between the two parties.

Under federal rules, consultants hired to prepare environmental impact statements generally must execute a statement that they have no financial or other interest in the outcome of the project.⁸⁵ (However, this conflict-of-interest disclosure was removed for highway projects in the 1998 amendments to the federal surface transportation act. A consultant may *prepare* NEPA documentation recommending a “build” alternative to its client, the FHWA or state department of transportation. Those agencies can then hire the firm, or extend its contract, to do the engineering and design work for the preferred “build” alternative recommended by the consultant in the EIS.⁸⁶) There are no corresponding conflict-of-interest disclosure requirements in the Advisory Council’s Section 106 rules. In other words, a consultant hired by a federal agency or applicant to prepare NHPA Section 106 (and NEPA) documentation, including “purpose and need” for a project (e.g., reservoir, energy facility, pipeline, bridge), the alternatives analysis, the APE, historic property identification, and impact analysis can recommend a “preferred alternative” in that documentation and then be hired by the same client to design and build the se-

lected project alternative. This outcome is particularly troubling to members of the public when the same firm that was involved in negotiations on mitigation measures contained in a final Section 106 memorandum of agreement becomes the general engineering consultant for the project. In this latter role overseeing project construction, the firm may then be in a position to restrict or delay implementation of mitigation measures if appropriations for the project fall behind schedule.

Appendix 2-1: Rulemakings Affecting the Advisory Council's Role in Section 106 Consultation

Year	Effect on Advisory Council Involvement
1974	Deleted the requirement that federal agencies prepare a “no effects” memorandum for Advisory Council review when their projects posed no potential to harm historic properties.
1982	Deleted the 60-day Council review period for all projects; also provided that the Council could exit the review process before federal agencies determined whether potentially affected properties were National Register-eligible.
1986	Made the Council’s involvement optional in many cases. Eliminated formal determinations of eligibility of potentially affected properties in favor of a “consensus” determination between the federal agencies and the SHPOs. The Council still received MOAs, but mitigation measures were mostly developed in negotiations between the federal agencies and the states.
1999 and 2000	Eliminated the Council’s automatic review of projects where federal agencies and SHPOs agreed on “no adverse effects” determinations. In contested “no adverse effect” cases, the Council could be invited to participate in informally working out the conflict rather than formally terminating consultation and issuing formal comments. The regulatory changes also combined the “no historic properties” and “no effects” step into a “no historic properties affected” step.
2004	<p>Eliminated the ability of the Council (and states and tribes) to reverse a federal agency’s determination of “no historic properties affected” or “no adverse effect.” Formerly, a contested determination for either of these stages required the federal agency to proceed to the next step and attempt to negotiate a solution. The amendment established an option by which certain determinations that are not agreed upon between the federal agency and consulting parties can be appealed to the Council for consideration and comment. In such cases, the Council must keep a record of its formal comments to the federal agency and how the federal agency official responded.</p> <p>Also eliminated from the definition of “undertaking” state, tribal, or local government issuance of environmental and mining permits under federal delegation—thereby completely removing such actions from Section 106, including the Council’s opportunity to “comment”—notwithstanding that delegated permits were identified in the statutory definition of “undertaking” specifically adopted by Congress in 1992.</p> <p>See note 30 below regarding the federal court decisions in the <i>National Mining Association</i> litigation that led to these regulatory changes.</p>

Appendix 2-2: Advisory Council Section 106 Activities, FY 1968-FY 2008

FY	EISs	Undertakings	Advisory Council Caseload and Membership Actions as Reported in ARs and BJRs							President
			New	Total	NAE	MOAs	PAs	Foreclosures	Comments**	
1968				5		195			3	Johnson
1969		35,941		22					5	Nixon
1970		35,941		57					7	Nixon
1971	5834	35,941		81					7	Nixon
1972		35,941		152					3	Nixon
1973		35,941	249	311				1	2	Nixon
1974	1965	35,941	480	689	186	145			2	Nixon
1975	1881	35,941	746	1104		60			1	Ford
1976	1802	35,941							1	Ford
1977	1568	35,941							2	Carter
1978	1355	35,941	1759	1759	800	103			1	Carter
1979	688	35,941	2267	2267	850	250	11			Carter
1980	526	35,941								Carter
1981	597	63,100		1623	307	219-223		2		Reagan
1982	449	87,700				207	4		5	Reagan
1983	368	65,500	2251	2251		207		1	1	Reagan
1984	309	78,500	2250	2250		225-242			5	Reagan
1985	317	80,000	1094	1094		318		3	1	Reagan
1986	305	101,200	1400	1400	750	260	74		2	Reagan
1987	278	96,100			715-825	310-325	75		3	Reagan
1988	252	105,100			1250		170		10	Reagan
1989	203	92,000	2903	2903	1301	602	275	1	8	GHW Bush
1990	250	69,200	1713	2943	1151	387	100	2	6	GHW Bush
1991	242	77,300	1819	1819	1126	512	165	5	4	GHW Bush
1992	275	79,000	2862	2862	1409	580		3	8	GHW Bush
1993	227	93,482	2332-3588	2332-3588	1634	683	264	13	2	Clinton
1994	285	95,518	3220	3220	2104	798		7	2	Clinton
1995	248	94,066	3220	3220	1838	988		4	1	Clinton
1996	304	86,903	2888	3605					4	Clinton
1997	246	80,805	2566	3395	1602	175	155	5	9	Clinton
1998	247	90,476	2300	3090	1720	175	105	6	10	Clinton
1999	235	95,149	1134	1697	806	120	69	13	12	Clinton

(continued next page)

FY	EISs	Undertakings	Advisory Council Caseload and Membership Actions According to ARs and BJR's							President
			New	Total	NAE	MOAs	PAs	Foreclosures	Comments**	
2000	221	100,273	955	1288		97	*	3	5	Clinton
2001	218	108,456	1100	1447		110	*	7	6	GW Bush
2002	250	103,023	975	1315		105	*	1	2	GW Bush
2003	269	101,377	920	1210		100	*	2	5	GW Bush
2004	298	103,700	910	1036		110	*	2	5	GW Bush
2005	256	105,700	782	861		96	*	2	4	GW Bush
2006	253	133,863	750	832		98	*	2	4	GW Bush
2007	266	110,600 (est)	767	842		125	*	3	4	GW Bush
2008	309	117,700 (est)	775	862		135	*	2	5	GW Bush

* In MOA total.

** These numbers reflect comments issued by the Council in response to termination of consultation, regardless of which party initiated the termination.

EISs=Environmental Impact Statements; MOA=memorandum of agreement; NAE=no adverse effect; PAs=programmatic agreements.

NOTES: A blank cell indicates data was not reported or is not readily available.

Data column 1 (EISs) is from < http://ceq.hss.doe.gov/nepa/EISs_by_Year_1970_2007.pdf>, reported on a calendar year basis. Draft and final EISs are included in the numbers for 1970-1978; only final EISs are included from 1979-2008. 2008 EISs are from <www.epa.gov/compliance/nepa/>.

Data column 2 (Undertakings) is from the SHPO Historic Preservation Fund grant year-end reports to the NPS. Undertaking (project) actions from FY 1969-FY 1980 were reported as 431,300 total and were averaged across each fiscal year for inclusion in this table. Data columns 3-9 (ACHP Caseload & Membership Actions) are from the following sources: (1) FY 1967-FY 1977 Council membership actions: Advisory Council on Historic Preservation, *Report, Special Issue, Digest of Cases, 1967-1977*, vol. V, no. 6; (2) FY 1968-FY 1993: Advisory Council annual *Report to the President and the Congress of the United States* (FY 1994-FY 1995 new and total caseload data is apportioned from the FY 1996-FY 1997 reports); (3) FY 2000-FY 2008: Advisory Council annual *Budget Justification Report* to the OMB. The data in the table should be considered approximate because there are variations in the way information is counted and categorized in the Advisory Council reports. The Council did not respond to the author's request to confirm these numbers taken from the annual reports, and apparently is not able to readily access these records.

Notes to Section 2

1. Completion of the National Register of Historic Places, “designed . . . as a planning tool” (36 C.F.R. §60.2(a)), was unrealistically forecast. National Park Service Director George Hartzog testified during congressional deliberation on the NHPA bills that the states needed only three years of appropriations to finish the National Register survey work by 1970. U.S. Department of the Interior, National Park Service, *The National Historic Preservation Act and the National Park Service, A History* (1986), by Barry Mackintosh, 23,
< www.nps.gov/history/history/online_books/mackintosh5/index.htm>.
2. 34 Federal Register 2580 (Feb. 25, 1969).
3. 38 Federal Register 5386 (Feb. 28, 1973) and 39 Federal Register 3365 (Jan. 25, 1974), respectively.
4. Rules implementing NEPA also promote consultation between federal agencies, and integration of environmental review and consultation requirements with other federal statutes, including the NHPA. See 40 C.F.R. §1502.25, §1500.4(k), §1500.5(g), and §1501.1(b).
5. 36 C.F.R. §800.16(f).
6. 64 Federal Register 27044, 27049 (May 18, 1999).
7. U.S. Department of the Interior, *The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs*, 63 Federal Register 20498, 20504 (Apr. 24, 1998).
8. <www.opm.gov/feddata/html/2008/july/table9.asp>.
9. The original NHPA established a membership body of 17, which was increased to 29 in 1976 amendments to the act, and was then reduced to 18 in 1980 statutory amendments (though nonfederal interest representation was expanded at that time). The number of representatives increased to 19 in the 1988 amendments, and 20 in the 1992 amendments (a Native American or Native Hawaiian organization representative was added in 1992). The current composition of 23 members was established in the 2006 amendments (federal agency representation was expanded from 7 to 10 total members at that time, 9 from executive branch agencies and 1 from a legislative branch agency, the Office of the Architect of the Capitol).
10. NHPA, Section 201(b); 16 U.S. Code §470i(b). The National Trust reports that a number of agencies do not comply with this requirement.
11. U.S. Conference of Mayors, *With Heritage So Rich*, 195.
12. *Ibid.*
13. The Bureau of the Budget initially objected to the proposed National Advisory Council on Historic Preservation on the basis that it potentially duplicated work of the National Advisory Board. House Committee on Interior and Insular Affairs, *Establishing a Program for the Preservation of Additional Historic Properties Throughout the Nation*, 89th Cong., 2d sess., 1966, H. Rep. 89-1916, 14. The National Advisory Board was terminated effective December 31, 1977. A question sometimes raised within the cultural resource professional community has centered on the use of the preposition “on” instead of “for” in the name of the Advisory Council on Historic Preservation. Some interviewees for this report suggest that the omission of “for” inflects neutrality in the agency’s work. However, it is likely that the title given to the National Advisory Board *on* National Parks, Historic Sites, Buildings, and Monuments, which existed at the time of the Mayors’ Conference Special Committee, influenced the title recommended for the Advisory Council created in the NHPA.
14. An amendment to remove “National” in the Advisory Council’s title was subsequently made to minimize confusion between the proposed agency and the National Advisory Council on International Monetary and Financial Policies. *Ibid.*, 16.
15. Senate Committee, *Preservation of Historic Properties*, 8.
16. House Committee, *Establishing a Program*, 8.
17. Mackintosh, *The National Historic Preservation Act*, 81.
18. Senate Committee, *Preservation of Historic Properties*, 8.

19. Ibid.
20. 34 Federal Register 2582 (Feb. 25, 1969).
21. 36 C.F.R. Part 800, Appendix A.
22. 36 C.F.R. §§800.10(b), 800.6(a)(1)(i)(B).
23. Whether Section 106 applies to quasi-governmental or official entities created by Congress depends on a careful reading of the enabling legislation, legislative history, and the actual function and powers of the entity. See, e.g., *Mittenberger v. C. & O. Ry.*, 450 F.2d 971 (4th Cir. 1971) (Amtrak is expressly not defined as a federal agency in the corporation's enabling statute); *Committee to Save the Fox Bldg. v. Birmingham Branch of the Federal Reserve Bank*, 497 F. Supp. 504 (N.D. Ala. 1980) (Federal Reserve Bank and its regional affiliates were created to serve as fiscal operating agencies of the federal government and are subject to Section 106).
24. In order, these cases are found at <www.achp.gov/casearchive/casesspg05CO.html>; 1969-70 A.R., 1-2; 1973-74 A.R., 20; 1983 A.R., 19; 1985 A.R., 23; 1987 A.R., 49; 1990 A.R., 96-97; 1989 A.R., 96; and 2008 B.J.R., 40.
25. See also the Archaeological Resources Protection Act, 16 U.S. Code §§470mm(a) and (b) and 32 C.F.R. §§229.21(a) and (b); E.O. 11,593, Sec. 2(a) (*Protection and enhancement of the cultural environment*) (May 13, 1971); E.O. 13,287 (*Preserve America*) (Mar. 3, 2003).
26. General Services Administration, "Federal Real Property Asset Management Initiative," PowerPoint presentation to the Federal Training Work Group, Federal Preservation Institute, National Park Service, by Dennis Goldstein (June 21, 2005), 3, <www.historicpreservation.gov/web/14501/19>; U.S. Department of Commerce, Bureau of the Census, *Statistical Abstract of the U.S.* (2009), under Table 484 (2006 data), <www.census.gov/compendia/statab/>.
27. Federal agency cultural resource responsibilities were subsequently expanded in the following statutes and presidential directives: Freedom of Information Act (1966), NEPA (1969), E.O. 11,514 (1970) E.O. 11,593 (1971), Archaeological and Historic Preservation Act (1974), American Indian Religious Freedom Act (1978), Archaeological Resources Protection Act (1979), Native American Graves Protection and Repatriation Act (1990), E.O. 12,898 (environmental justice) (1994), E.O. 13,006 (locating federal facilities in historic properties in central cities) (1996), E.O. 13,007 (Indian sacred sites) (1996), E.O. 13,148 (environmental management systems) (2000), E.O. 13,175 (tribal consultation and coordination) (2000), E.O. 13,287 (*Preserve America*) (2003), E.O. 13,327 (real property asset management) (2004), E.O. 13,514 (environmental, energy, and economic performance) (2009), and the Presidential Memorandum on Tribal Consultation (74 Federal Register 57881, Nov. 5, 2009).
28. See, e.g., *United Artists Theater Circuit v. City of Philadelphia*, 635 A. 2d 612 (Pa. 1993). Though not a Section 106 case, it was the only time the Advisory Council has ever filed an *amicus* brief in a lawsuit because of the issue's importance for historic preservation programs: is the designation of a privately owned building as a local historic landmark a "taking" under the state constitution and, thus, compensable? The state Supreme Court held the designation was not a taking, reversing its ruling in response to a motion for reconsideration.
29. *National Center for Preservation Law v. Landrieu*, 496 F. Supp. 716 (D.S.C. 1980), *aff'd per curiam*, 635 F.2d 324 (4th Cir. 1980).
30. *National Mining Association v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003). It is important to note that the Advisory Council initiated this rulemaking to codify verbatim congressional language from the 1992 amendments (found at NHPA Section 301(7)(D); 16 U.S. Code §470w(7)(d)) in its Section 106 rules. The portion of the congressional amendments relating to the statutory definition of "undertaking" (including federally delegated programs) itself codified an earlier federal district court ruling in *Indiana Coal Council v. Lujan*, 774 F. Supp. 1385 (D.D.C. 1991) *vacated in part & appeal dismissed*, Nos. 91-5397, 91-5405, 91-5406, 1993 U.S. App. LEXIS 14561, 1993 WL 184022 (D.C. Cir. Apr. 26, 1993), *appeal dismissed*, No. 91-5398. More background on the lawsuits and associated rulemaking is found in the Advisory Council's preamble to the final rule resolving the litigation in 2004, 64 Federal Register 40544 and 40550-51 (July 6, 2004). But see, *Sayler Park Village Council v. U.S. Army Corps of Engineers*, 2002 WL 32191511 (S.D. Ohio, Dec. 30, 2002), 2003 WL 22423202 (S.D. Ohio, Jan. 17, 2003) (the Sayler Park court specifically rejected the court's reasoning in the National Mining Association case).

31. The Clean Water Act, Clean Air Act, Endangered Species Act, and Safe Drinking Water Act, for example, identify an express right of private action to bring suit to enforce these laws.
32. NHPA, Section 305; 16 U.S. Code §470w-4.
33. See, e.g., *San Carlos Apache Tribe v. U.S.*, 417 F.3d 1091 (9th Cir. 2005).
34. See, e.g., *Boarhead Corp. v. Erickson*, 923 F.2d 1011 (3rd Cir. 1991) (applies to projects in Pennsylvania, New Jersey, and Delaware) and *Vieux Carré Prop. Owners, Residents & Assoc., Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989) (applies to projects in Texas, Louisiana, and Mississippi).
35. 5 U.S. Code §702.
36. The San Carlos court (see note 33) characterized an implied right of action under the NHPA as sidestepping the procedural requirements of the APA, 417 F.3d at 1096.
37. See, e.g., *El Rancho La Comunidad v. United States*, No. 90-113 (D.N.M. May 21, 1991), in which Latino plaintiffs sought NHPA review before construction of a Rural Electrification Administration-funded power station which affected a traditional cultural property, the site where the community held traditional dance ceremonies.
38. See, e.g., *National Trust for Historic Preservation v. Blanck*, 938 F. Supp. 908 (D.D.C. 1996), *aff'd mem.*, 203 F.3d 53 (D.C. Cir. 1999).
39. Advisory Council on Historic Preservation, *Review of Regulations Implementing the National Historic Preservation Act* (Jan. 1990), 1990 A.R., 82; *Balancing Historic Preservation Needs with the Operation of Highly Technical or Scientific Facilities* (1991), <www.achp.gov/pubs-scitech.html>; *Report Requested by the Committees on Appropriations* (Mar. 1996), <www.achp.gov/pubs-reportapprop.html>; *Alternatives for Implementing Section 106 of the National Historic Preservation Act: An Assessment* (1998), <www.achp.gov/pubs-alternatives.html>.
40. In the late 1970s, for example, Congress asked the Advisory Council to assess federal agency compliance with Section 106 and E.O. 11,593. At that time, only 16 of 56 agencies reviewed had “adequate” procedures; 15 were rated “inadequate”; and 25 agencies had no procedures at all, 1978 A.R., 4.
41. 1984 A.R., 84.
42. 1998-99 A.R., 19.
43. 1980 A.R., 2.
44. Andrea Schoellkopf, “Domenici Weighs in on Road Debates,” *Albuquerque Journal*, Jan. 13, 2006. According to the National Trust, the Army Corps of Engineers used the new 2004 changes to the Advisory Council’s Section 106 regulations to overrule the Council’s and consulting parties’ objections to its “no adverse effect” determination regarding the project’s impacts.
45. NHPA, Section 101(d)(2); 16 U.S. Code §470a(d)(2). “Indian tribes,” for purposes of the NHPA and Section 106 implementing rules, are those that are formally designated by the Department of the Interior as eligible for federal government services. An acknowledgement process is conducted by the Bureau of Indian Affairs, Office of Federal Acknowledgement, pursuant to rules at 25 C.F.R. Part 83. As of this report, there are 564 federally recognized Indian tribes representing some 1.9 million Native Americans and Alaskan Natives, <www.doi.gov/bia>. Over 220 designation petitions were pending as of 2005, <www.doi.gov/ocl/2005/FedAcknowledgement.htm>.
46. <www.nathpo.org/map>.
47. 36 C.F.R. §800.4(a).
48. These case examples are discussed in the Advisory Council’s annual reports at 1993 A.R., 30-31; *ibid.*, 46-49; 1998-99 A.R., 43-44; *ibid.*, 45-46.
49. <www.doi.gov/bia/ia_faqs.html>.
50. See, e.g., 36 C.F.R. §§800.2(c)(2)(ii)(B) and (C) and (c)(4).
51. 1973-74 A.R., 20.

52. 1993 A.R., 25. The Advisory Council cited its reading of policies in the American Indian Religious Freedom Act of 1978 in support of the proposed regulatory revisions.
53. 1985 A.R., 35.
54. Ibid.
55. Ibid., 21.
56. 1986 A.R., 69.
57. 1988 A.R., 52.
58. 1992 A.R., 87.
59. Section 101(d)(6) of the 1992 NHPA amendments (16 U.S. Code §470a(d)(6)) codified this position. Traditional cultural properties are not, however, limited to places important solely to Native Americans.
60. U.S. Department of the Interior, National Park Service, *National Register Bulletin 38, Guidelines for Evaluating and Documenting Traditional Cultural Properties* (1990, rev.1992, 1998), by Patricia L. Parker, Cultural Anthropologist and Archeologist, American Indian Liaison Office, National Park Service, and Thomas F. King, Senior Archeologist and Director of the Office of Program Review, Advisory Council on Historic Preservation (formerly), Consultant, Archeology and Historic Preservation (currently), <www.nps.gov/history/NR/publications/bulletins/nrb38/>.
61. 36 C.F.R. §800.2(c)(1).
62. 34 Federal Register 2580 (Feb. 25, 1969).
63. Mackintosh, *The National Historic Preservation Act*, 29.
64. NHPA, Section 101(b); 16 U.S. Code §470a(b).
65. <www.ncshpo.org>; NHPA, Section 101(b)(1); 16 U.S. Code §470a(b)(1).
66. NHPA, Section 201(a)(7); 16 U.S. Code §470i(a)(7).
67. 1984 A.R., 75. These were hard years for cultural (and natural) resources—the administration repeatedly proposed to eliminate the budget for the national Historic Preservation Fund and support for funding the National Trust, but Congress repeatedly restored these appropriations.
68. The Advisory Council reported that the 30-day review deadlines imposed on the states were difficult to meet (1987 A.R., 35). Further, the Council’s role as judge or critic of the adequacy of memoranda of agreement (typically drafted at that time by SHPO staffs) strained its relationship with the states, 1990 A.R., 86. Currently, the 30-day review periods are imposed for SHPO (and THPO) response to federal agency determinations as to whether potentially impacted properties are National Register-eligible (36 C.F.R. §800.4(c)(2)); findings that no historic properties are present or will be affected by the project (§800.4(d)(1)); and findings that no adverse effects to historic properties will result (§800.5(c)(1)). Thirty-day review periods are not imposed on the SHPOs (and THPOs) for other aspects of project consultations, including establishing the APE, identifying other consulting parties entitled to participate, and resolving adverse effects through an MOA.
69. John W. Renaud, U.S. Department of the Interior, National Park Service, e-mail message to author, June 28, 2009. The counting principles that apply to annual reporting result in one federal or federally assisted project (a Section 106 “undertaking”) generating multiple undertaking review “actions” of the SHPO and THPO offices. For example, a federally funded road project is one undertaking, but if the identification process results in five properties being declared as not eligible for the National Register of Historic Places and five properties being declared as National Register-eligible, then 10 undertaking actions are reflected in identification columns of the report’s database. This data reporting approach is a reasonable and appropriate way to reflect the level of required scrutiny of a professional staff reviewer in a tribal or state review office. These numbers in the annual reports of the states and tribes also highlight the enormous amount of cultural resource literature and work that is invested in reviewing projects that should be captured through hard copy or digital repositories for future Section 106 users.
70. Robert Garvey interview, 46.

71. The certified local government regulations at 36 C.F.R. §§61.6 and 61.7 were adopted May 14, 1984. Certified local governments can also receive a portion of national Historic Preservation Fund allocations to the SHPOs pursuant to NHPA, Section 101(c), 16 U.S. Code §470a(c).
72. 36 C.F.R. §800.3(f)(1).
73. See 16 U.S. Code §468.
74. Mackintosh, *The National Historic Preservation Act*, 1.
75. < www.preservationnation.org/about-us/partners/statewide-localpartners>.
76. NHPA, Section 201(a)(8); 16 U.S. Code §470i(a)(8).
77. 16 U.S. Code §468c.(b).
78. 1994-95 *A.R.*, 21; 2006 *B.J.R.*, 43 (for 2004 data), 2007 *B.J.R.*, 54 (for 2005 data), 2008 *B.J.R.*, 52 (for 2006 data); 2010 *B.J.R.*, 47.
79. Department of Housing and Urban Development, “HUD’s Historic Preservation Program,” PowerPoint presentation to the Federal Training Work Group, Federal Preservation Institute, National Park Service, by David Blick (undated, meta-data indicates the file was created on May 10, 2004), <www.historicpreservation.gov/web/14501/19>.
80. Senate Committee on Interior and Insular Affairs, *Report by the Advisory Council on Historic Preservation on the National Historic Preservation Program Today*, 94th Cong., 2d sess., 1976, 66.
81. *Ibid.*, 67.
82. 36 C.F.R. §800.3(f)(1).
83. 1987 *A.R.*, 41; 1988 *A.R.*, 68.
84. U.S. Department of the Interior, *Standards and Guidelines for Federal Agency Historic Preservation Programs*, Standard 4, Guideline (g), 20503.
85. 40 C.F.R. §1506.5(c).
86. 23 U.S. Code §112(f).

SECTION 3: FEDERAL AGENCIES

Key Recommendation: Federal Agencies Must Endorse and Compel Compliance With Section 106

Almost five decades have passed since federal agencies were directed by Congress to support a national policy of historic preservation. That policy directive requires intentional planning to use federally owned historic properties in ways that maintain and promote their use, as well as considering ways to avoid harming historic properties when federal programs and projects are implemented. Other legislative or presidential directives have expanded or supplemented the core set of federal preservation responsibilities since 1966, but have not changed much of the basics of Section 106.

Preservation stakeholders, including the states and tribes, are eager to recognize federal agencies that have transformed their approach to Section 106 in meaningful ways. One example of a turnaround in approach has been the General Services Administration (GSA). For a number of years, GSA dominated the Advisory Council's *Reports to the President and Congress of the United States* in terms of willful noncompliance or, at best, dilatory compliance. Indeed, the very first formal determination that a federal agency's actions had intentionally foreclosed the Advisory Council's opportunity to comment during Section 106 consultation was issued by the Council's membership panel in response to GSA's weekend demolition of part of the Winder complex in Washington, DC, in 1973. Today, however, GSA is widely recognized (and was cited by many SHPO staff interviewees for this report) as exemplary in its planning to protect and maintain historic properties. A recent report on the national historic preservation program identified GSA as setting "the gold standard" in its "sophistication and commitment" to preservation through staffing and planning.¹ Outstanding practices by other federal agencies in project planning and implementation are also deservedly commended through heritage awards.

Still, many federal agencies have not comprehensively internalized their historic preservation responsibilities, particularly Section 106 implementation. A few major agencies continue to dominate the field with systematic problems since inception of the 1966 legislation. Based on the interviews for this report, and the annual reports of the Advisory Council, programs of HUD, the Army Corps of Engineers, and the Department of Transportation fall into this category.

In terms of implementing the law, interviews for this report suggest that there are problems on two ends of the scale. On the one hand are the more sophisticated agencies that, at least as a matter of process, manage their paperwork well. A consensus emerged among those interviewed that these agencies need to become less "rote," and should exercise more critical thinking at the project planning stage about ways to use historic properties in a positive way and avoid harming historic landscapes and buildings. On the other hand are the agencies for which

Section 106 implementation or oversight needs to become *more* rote. These agencies include those whose mission does not routinely trigger Section 106. They also include agencies that provide financial assistance, permits, or other formal approvals to tens if not hundreds of thousands of business applicants and local governments each year. In these cases, both the applicants and the local or regional staff of the federal agencies often do not understand, or give only perfunctory attention to, their compliance responsibilities

The following recommendations are intended to focus the need for federal government leadership to endorse Section 106 as a responsibility and compel compliance at all levels within their agencies—reinforcing agency responsibilities at the highest level, increasing oversight and enforcement over their representatives and delegates who carry out Section 106 on their behalf, and requiring greater public disclosure about all of these activities.

Purposes of the Section 106 process, as stated in Subpart A of the Advisory Council’s regulations

“Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings. The procedures in this part define how Federal agencies meet these statutory responsibilities. 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. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties . . . The agency official shall ensure that the section 106 process is initiated early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.”

—36 C.F.R. Subpart A [excerpt] (“Purposes.”)

3-1. A presidential memorandum should be issued reinforcing federal agency responsibilities under the National Historic Preservation Act and requiring reporting on current compliance.

In weighing recommendations for federal leadership action for purposes of this report, it became evident that there are many federal laws, and several important executive orders, that clearly and comprehensively describe federal agency responsibilities regarding historic properties. More laws are unnecessary, a point upon which almost all interviewees agreed. Nonetheless, executive orders, such as E.O. 11,593 [*Protection and enhancement of the cultural environment*] and E.O. 13,287 [*Preserve America*], have provided important policy guidance and expanded scope to the NHPA in key points during its history. Accordingly, a new presidential directive in the form of a memorandum targeted to the heads of federal agencies may help to address agency compliance responsibilities on a more detailed level. Therefore, this report recommends that policy emphasis on existing compliance responsibilities and a reporting directive should be issued through a presidential memorandum to the 15 executive departments and 65 independent agencies. Such a memorandum (which, like executive orders, is an example of a formal policy directive issued by presidents) would reinforce the roles and responsibilities of federal agencies

under Sections 106 and 110 of the NHPA and Subpart A of the Advisory Council’s Section 106 regulations [see sidebar previous page].

The first element of such a memorandum should be a strong policy statement identifying the existing laws, orders, and rules that commit the federal government to preserving the diverse tangible and intangible heritage of this country and that impose specific compliance responsibilities on federal agencies. A component of this statement should be a reiteration of the administration’s strong support for historic preservation values as a matter of national policy and commitment to full executive branch compliance.

Another focus of the recommended memorandum should be on internal review, reporting, and accountability, because public reports of individual federal agency evaluations of historic preservation compliance are limited. Most of the reviews have been external to the operating agencies, such as the Preserve America expert panel convened by the Advisory Council, or by nongovernmental organizations such as the National Academy of Public Administration and the National Trust. Given the federal government’s trend toward promoting a more business-like and accountable approach, it would be appropriate for the “chief executive officer” to ask for performance data on how fully preservation programs are being implemented.

Therefore, the following elements of a reporting directive are offered for consideration in a presidential memorandum on our national heritage. Within a set period of time following issuance of the memorandum, each federal agency’s Senior Policy Official (as defined in Sec. 3(e) of the Preserve America executive order) should be asked to report to the president and the chair of the Advisory Council the following information:

Historic property identification. Reporting should include the status of compliance with Section 110(a)(2) of the NHPA, which requires federal agencies to identify and evaluate historic properties under their jurisdiction or control and nominate them to the National Register. Elements reported should expand current reporting under the Preserve America executive order by including both a complete numerical inventory of properties under the agency’s jurisdiction or control, as well as an estimate of the status of mandatory identification, evaluation, and nomination activities as a percentage of the total real property acreage and building inventory of each agency.

Historic preservation staff capacity. Reporting should include the status of compliance with NHPA Section 112(a)(1)(A) and (B), which requires federal agencies to ensure that the actions and qualifications of employees meet professional standards established by the Secretary of the Interior, in consultation with the Advisory Council and the Office of Personnel Management (OPM).

A review of federal employment data conducted for this study suggests that more formal evaluation is warranted of the deployment and adequacy of existing historic preservation staff levels (see Section 5-2 below). Recent personnel data submitted by some federal agencies to the chair of the CEQ calls into question whether environmental staff may be tasked in some agencies (particularly the independent agencies) with fulfilling historic preservation compliance duties, as suggested by some of the interviewees for this report. A current and public inventory of agency cultural resource staffing capacity would serve to develop a baseline and highlight the importance of employing staff in recognized professional disciplines for effective historic preservation compliance programs (in-

cluding Section 106). To ensure an accurate comparison of staffing levels across agencies and consistent reporting of the professional disciplines employed within agencies, more detailed ideas for this reporting are provided in note 2 to this section.

Outsourcing practices. Reporting should include the status of outsourced cultural resource compliance staffing (i.e., contracted outside the agency) and the procedures for ensuring compliance with the NHPA Section 112(a)(1)(A) and (B) which requires that federal agencies ensure that the actions and qualifications of contractors responsible for historic preservation work must meet professional standards established by the Secretary of the Interior and the OPM. Identification of specific procedures to ensure the appropriate professional credentials in procuring these services should also be included in the directive. Recommended reporting on the use of consultants should include the number of full-time equivalent positions actually contracted during the preceding three years and the scope of their work activities.

Independent compliance procedures. Reporting should include the specific procedures in place to ensure that federal agencies make independent findings and determinations during the Section 106 process and initiate government-to-government consultation with Indian tribes when nonfederal parties have been formally authorized to initiate consultation pursuant to 36 C.F.R. §800.2(c)(4). Additionally, agencies should be asked to provide an updated list of the applicants, groups of applicants, or program areas that have been authorized to initiate consultation pursuant to formal notice to the SHPOs and THPOs pursuant to §800.2(c)(4).

Compliance oversight programs. For Section 106 compliance responsibilities that have been fully delegated through other federal laws to nonfederal parties (e.g., HUD), the reporting should include specific methods and procedures by which the federal agency conducts compliance oversight and the findings of such oversight within the last three years. Reporting on methods and procedures should also include the frequency of actual field audits of HUD recipients. Reporting should also include the specific recipients and associated HUD funding programs in which field monitoring has identified Section 106 compliance deficiencies, and the specific corrective measures implemented as a result.

Internal agency compliance reviews. Federal agencies should be asked to identify existing programs and procedures for internal reviews, evaluations, and auditing of compliance with Sections 110 and 106 of the NHPA, including compliance with specific Section 106 agreements. Reporting should address the frequency of reviews, staffing, internal monitoring, deficiencies encountered, and corrective measures implemented or underway.

Employee performance reviews. The suggested presidential memorandum should also consider requiring that preservation criteria be included in performance evaluations of individual employees whose responsibilities generally include NHPA compliance, but who are not historic preservation professionals. A similar approach has been emphasized in E.O. 13,148 (*Greening the government through leadership in environmental management*):

To recognize and reinforce the responsibilities of facility and senior headquarters program managers, regional environmental coordinators and officers, their superiors, and, to the extent practicable and appropriate, others vital to the implementation of this order, *each agency shall include* successful implementation

of pollution prevention, community awareness, and environmental management into its position descriptions *and performance evaluations* for those positions [emphasis added].³

Federal agencies are already instructed to evaluate historic preservation staff on how well they perform their duties.⁴ This recommendation proposes to systematically extend such reviews to other positions filled by employees who are responsible for federal real property or for issuing funds, permits, or licenses to nonfederal parties. Preservation compliance is already a part of the specific job description of some federal position classification standards and, as a result, should be included in performance evaluations. For example, the standards for federal “Building Managers” include the following expectations:

Historic Preservation— Some . . . assignments include Federally owned structures of unique historic and architectural value. Building managers are required to preserve the original character of such structures. This requires compromise and innovation in evaluating the need for and directing repairs, replacements, *and* alterations. They must also adjust plans and alterations for needed modifications made by owners to leased buildings that are protected by historic preservation requirements [emphasis added].⁵

Similarly, the OPM position classification standards for federal “Realty Specialists” apply to individuals responsible for managing general purpose and tribal trust lands, water projects, and special purpose facilities (e.g., labs, factories, general storage), and for disposing of surplus property (including property acquired through forfeiture, seizure, and default). The standards explicitly recognize that required performance includes compliance with historic preservation requirements, and that long- and short-range planning for “substantial geographic areas” may include “extensive or unusual historic preservation . . . issues. . . .”⁶

Anticipatory demolition. Finally, the suggested reporting directive should request specific federal agency procedures to identify and minimize or prevent occurrences of anticipatory demolition of historic properties by applicants for federal funding or approvals.⁷ (See Section 2 above, “Applicants,” for an explanation of anticipatory demolition.)

3-2. The Secretary of the Interior and Advisory Council Chair should consult with federal agencies on the adequacy of historic preservation staff capacity.

During the research for this report, a uniform classification system that readily identifies the historic preservation staffing levels of federal agencies was sought. None was found. However, as explained in more detail below, a review of federal employment data for 6 of the 7 historic preservation disciplines identified in Section 112 of the NHPA raises substantial questions regarding the sufficiency of staffing for historic preservation program implementation, including Section 106. At the very least, the numbers warrant additional detailed review. This recommendation, therefore, urges the Secretary of the Interior and the Chair of the Advisory Council to initiate consultation with federal agencies to review the sufficiency of existing cultural resource staff.

The only requirement of the NHPA that directs federal agencies to establish a particular historic preservation position is found in Section 110(c), which requires designation of a “qualified official to be known as the agency’s ‘preservation officer’ who shall be responsible for coordinating that agency’s activities . . . [under the NHPA, including Section 106].” The Secretary of the Interior’s implementing guidance provides that Federal Preservation

Officers should have substantial historic preservation program administration experience and/or supervise qualified staff.⁸

The NHPA, other cultural resource laws, and presidential executive orders impose additional obligations on federal agencies, including the responsibility that their preservation programs meet professional standards in their implementation. First, agency officials must ensure that employees or contractors “responsible for historic preservation” are qualified to perform certain tasks.⁹ Second, officials must ensure that their documentation meets certain professional standards (including documents produced for Section 106 compliance by nonfederal parties, such as consultants and applicants for federally assisted projects).¹⁰ Third, federal agency officials must make independent findings and determinations during the Section 106 process relating to identification of historic properties, impacts of their projects, and mitigation measures for harmful impacts, even if the agencies employ contractors to prepare the relevant reports and studies.¹¹

The first responsibility identified above directly addresses the qualifications of individuals involved in NHPA compliance, including Section 106, while the other two responsibilities apply only indirectly to personnel qualifications. Presumably, in order to ensure adequate oversight of delegated actions and documentation prepared during Section 106 reviews, some level of subject matter competency is needed among federal supervising officials. Indeed, guidance on federal agency Section 110 programs provides that agency heads should designate qualified preservation officials in regional and field offices and federal facilities and installations when significant preservation responsibilities are delegated from headquarters or a central office.¹²

Position classification standards for agency personnel “responsible for historic preservation” have been established by the federal OPM for the seven disciplines identified in the NHPA (archaeology, architecture, conservation, curation, history, landscape architecture, and planning).¹³ Five of those disciplines have been more specifically identified as “required to perform identification, evaluation, registration, and treatment”: historian, archaeologist (which includes anthropologist), architectural historian, architect, and historical architect.¹⁴ As a related note to the findings on staffing levels, the credentials established by OPM, the Interior Department, and other federal stakeholders for historic preservation work do not reflect changes and expansions in relevant academic programs and technical skills. The first wave of retirement of cultural resource professionals, whose careers have spanned the national preservation program since 1966, is looming. Updating the professional qualification standards—which the Interior Department initiated in a June 1997 proposal, but did not complete because the effort became contentious—should be finished in the near term in order to plan for the next generation of preservation professionals in federal employment, to establish a baseline or profile of agency staffing, and to track staffing capacity in the future (also a suggested preservation performance measure in Section 3-5 below).

Appendix 3-1 provides data on federal employment in the U.S. for the 15 executive departments, some of their associated agencies, and some of the independent federal agencies. The employment information is from the OPM’s publicly available database and the most current dataset (March 2009). Staffing levels for the disciplines identified in the NHPA and federal guidance are presented in tabular form, with a total count of 4,421 historic preservation employees serving as in-house (not contract) professionals for the 15 large executive departments (this number does not include the independent federal agencies, some of whose staff levels are also presented in

the appendix). The data is presented in the table by total employees; white collar professionals and administrative staff; and employment numbers for 6 of the 7 historic preservation disciplines identified in Section 112 of the NHPA (museum curation professionals were omitted in this analysis).¹⁵ Also included in the table for comparison are recently reported federal agency NEPA staffing levels for in-house (not contract) employees.¹⁶ Similar to the historic preservation employee data, the NEPA staff count bears more scrutiny and was incompletely reported, or not reported at all, for some agencies.

Several cautions preclude use of the OPM database numbers to draw firm conclusions. The overall number of reported preservation professionals in Appendix 3-1 is likely to be low because employee counts may not reflect more recent academic disciplines that are not yet identified in the NHPA or the Secretary of the Interior's guidance, but nonetheless provide appropriate credentials for preservation work. Additionally, responsibility for cultural resource compliance may be assigned to individual employees in managerial positions who may have the appropriate academic backgrounds and/or experience, but are not readily identified in the federal employment database.

However, the number is likely to be too high in other respects, particularly for the "Architect" category, because many agencies undoubtedly employ architects who have no cultural resource compliance responsibilities or experience. Ironically, the agencies with persistent Section 106 compliance issues (based on annual reports of the Advisory Council and interviewees for this study) tend to be staffed with more architects than the other preservation disciplines, perhaps reflecting their high level of building activity (e.g., VA, Bureau of Prisons).

This total number of 4,421 in-house preservation professionals employed within the executive departments was further evaluated to analyze staffing among individual agencies that make up these larger departments (e.g., FBI and Bureau of Prisons [in the Justice Department], or FEMA, the Transportation Security Administration, and Border Patrol [in the Department of Homeland Security]). The more specific numbers identified in this inquiry shore up perceptions of interviewees, and are consistent with the Advisory Council's yearly reports of activities from 1969 to the present, regarding agencies that appear to be staffed sufficiently to carry out their responsibilities, on the one hand, as well as those associated with chronic Section 106 implementation problems.

Observations from this more refined analysis include the following:

- The Department of Defense services (i.e., Army, Navy, Air Force) have the largest number of cultural resource staff positions identified in the professional qualification standards relative to any other agency, particularly in the education, training, and combat commands, installation management, and facilities engineering.
- Agencies identified in the Advisory Council's yearly reports of activities from 1969 to the present, and the interviews conducted for this report, as presenting chronic or significant Section 106 implementation problems do not appear to be adequately staffed for the function. These include HUD, the Office of Surface Mining and Reclamation Enforcement (OSM) and Minerals Management Service (Department of the Interior), FEMA (Department of Homeland Security), Rural Utilities Service (Department of Agriculture),

EDA (Department of Commerce), Federal Bureau of Prisons, Department of Education, Federal Deposit Insurance Corporation, FTA, and the FRA.

- Ironically, data for a federal agency often commended for its project paperwork—FHWA—shows no positions in the disciplines of historian, anthropologist, archaeologist, or architecture and only one landscape architect. This likely reflects heavy reliance on state transportation departments to prepare and conduct all work required for Section 106 compliance.

Other agencies appear to be staffed to some extent, but not at levels that appear sufficient based on the scope of their mission or real property portfolio, including EPA, the VA, and the Department of Energy.

Some of these agencies are likely to contract out substantial aspects of their Section 106 compliance responsibilities (e.g., FEMA, Department of Energy), or rely on nonfederal parties who are authorized to carry out Section 106, in whole or part, as a matter of formal delegation (e.g., HUD, EPA). With respect to the outsourced work, however, there is no clear tracking system to ensure that the contractors are using qualified cultural resource personnel. It is very possible that work is passed along to industry-oriented engineering companies that may try to accomplish the work in house without qualified staff. In sum, it is difficult to determine how some federal agencies ensure qualified oversight of their contractors' cultural resource work, and the independence of Section 106 findings and determinations, when their delegated representatives appear to carry out the substantive responsibilities in the review process.

3-3. Federal agencies that oversee or delegate Section 106 compliance to nonfederal applicants for project funding or approvals should implement robust management systems to ensure procedural compliance with the law.

Section 106 applies when a federal agency carries out projects and activities directly, but also applies to federal agencies that exercise *indirect* jurisdiction over programs or projects that have the potential to affect historic properties. This type of activity occurs in two ways: (1) when federal agencies oversee nonfederal parties that are legally authorized to carry out Section 106 fully themselves (e.g., HUD, OSM, EPA); and (2) when agencies provide funding or issue permits and other types of approvals to nonfederal parties (e.g., businesses, local governments). Neither the NHPA nor the Advisory Council's Section 106 rules authorize a waiver of the requirements when a federal agency exercises indirect, as opposed to direct, jurisdiction over a project. The law and rules apply in both circumstances.

Identifying the problem. Every nonfederal preservation stakeholder interviewed for this study emphatically commented that most federal agencies are largely absent from, or have abdicated responsibility for, the Section 106 process in cases involving federal assistance or permits. By far, the majority of examples given involved: (1) agency programs that either fund housing, infrastructure, or economic development projects; or (2) federal agencies that directly issue environmental permits (particularly permits to dredge and fill wetlands and other Clean Water Act permits issued by the Army Corps of Engineers).

The applicants for these federal benefits are the immediate focus of much of the frustration expressed in the interview process because in most cases Section 106 implementation has been formally or—more commonly—informally delegated to them by the federal agencies. Section 2 of this report (“Applicants”) provides an overview of the diversity and magnitude of nonfederal parties that seek federal support for their projects, thus triggering Section 106 compliance: state and local governments; Indian tribes; territories of the United States; for-profit and nonprofit organizations and institutions; specialized groups (e.g., trade associations); partnerships; corporations; and individuals. As a basis for generally estimating the number of federal funding actions each year for all federal agency programs, the most recent Census data identifies 446,484 records of domestic federal financial assistance provided in 2008, although not all such assistance triggers Section 106.¹⁷

Many applicants use their own consultants for federally mandated project reviews, which introduces further complexity (or confusion) among the parties involved in Section 106 studies, reviews, and consultation.

With respect to the agency programs most frequently cited by interviewees as having compliance deficiencies (HUD), SHPO office staff described repeated foreclosure of Section 106 consultation by funding recipients through failure to contact the SHPO until after a project was essentially completed or demolition had occurred. Specific friction points include: (1) lack of knowledge by funding recipients to properly assess what is a historic property, thereby shifting the substantive evaluation of historic properties to the SHPOs; (2) the rote mentality that the gist of Section 106 is “SHPO clearance” rather than a broader consultation process that includes other consulting parties and the public; (3) disagreements about effect determinations regarding treatment of architectural elements in the rehabilitation of historic properties; and (4) failure to understand Section 106 compliance as a legal duty independent from NEPA.

Agencies that provide financial support or that issue permits for development or other infrastructure were cited as the second most frequent source of Section 106 compliance problems. Included within this umbrella were the EPA, EDA, Army Corps of Engineers, the Rural Housing Service and Rural Utilities Service, and the Department of Transportation (including all of its associated agencies). State and tribal review offices experience overload as a result of conducting Section 106 work for unauthorized, unqualified, dilatory, indifferent, or hostile applicants.

Indian tribes further experience delays in, or inappropriate nonfederal contacts in lieu of, required government-to-government consultation. Preservation advocates expressed great frustration with the absence of alternatives analysis and consideration of indirect and cumulative effects; failure to implement mitigation commitments; and changes to projects after Section 106 has been completed, but without consideration of newly discovered impacts to historic properties.

Based on a review of the Advisory Council’s annual reports since 1969, ensuring procedural compliance with Section 106 in cases involving federally assisted projects clearly has been a challenge for the Council. First, in the case of housing and community development programs, states, local governments, and other HUD funding recipients are directly and legally responsible for Section 106 compliance—instead of HUD—under “delegated” authority of federal housing laws. HUD, however, bears responsibility for ensuring that these parties comply with the procedures of Section 106.

Second, changes to the Advisory Council's Section 106 rules in 1999 and 2000 allow federal agencies to notify SHPOs and THPOs that the agencies authorize certain nonfederal parties seeking funding or permits to *initiate* Section 106 consultation. The common experience among SHPO staff interviewees is that rather than simply allowing applicants to initiate consultation, federal agencies now expect these nonfederal parties to assume lead responsibility for carrying out the evaluation, review, and consultation work under Section 106. This practice of informally delegating Section 106 responsibility to applicants greatly concerns consulting parties, SHPOs, and other stakeholders, but especially tribal representatives because of the clear mandate for direct federal government-to-government relations and consultation under the NHPA.

Many of the same agencies mentioned in the interviews for this report with respect to compliance problems coincide with the Advisory Council's annual report themes over the years that identify faulty or inadequate Section 106 implementation. For example, the Advisory Council's workload has been dominated by HUD's funding programs for decades. Federal housing, community, and neighborhood revitalization programs fulfill an important and crucial need in this country. Implementation of these programs, however, has posed severe challenges for Section 106 compliance ever since the enactment of the NHPA.¹⁸

Some housing officials and developers have long viewed the preservation of old housing stock as inconsistent with national housing policy, especially under the former Urban Development Action Grant and current HOPE VI programs. The energy crisis of the 1970s steered many housing proponents to favor new and presumed "energy-efficient" construction materials instead of restoring original materials in existing buildings (a recurring theme). The Advisory Council's early *Reports to the President and Congress* are replete with fact-based policy education efforts on the sound economics of rehabilitating existing historic real property as a way to counter these misperceptions.

A significant policy change—still not universally understood at the local level—occurred when HUD's community development block grant rules were issued in 1988, specifically authorizing the expenditure of funds to rehabilitate, preserve, or restore historic properties.¹⁹ Federal investment tax credits, expanded through laws such as the Economic Recovery Tax Act of 1981, have substantially promoted incentive-based preservation approaches in housing rehabilitation as well.

The devastating consequences to our nation's heritage of incomplete, inadequate, or failed compliance with Section 106 for these federally assisted projects may never be fully and adequately quantified.

Section 106 by Crisis Management

HUD-funded demolition cases often come to the Advisory Council in "11th-hour" crisis mode. The Council has wisely used its authority to buy time to allow for stakeholders to evaluate other options. However, this tactic is not always successful. Two early examples were unfortunately typical:

Demolition of the Sterling Opera House (Derby, Connecticut) occurred in the late 1960s after the Advisory Council secured a 120-day moratorium on action.

Demolition of 24 out of 27 19th century buildings in the Market Square Historic District (St. Joseph, Missouri) occurred in the mid-1970s. The district marked the starting point for Pony Express service to Sacramento.

Root causes. Although the interviews defined a common problem, interviewees did not address or agree on the root causes of problems in Section 106 implementation when a nonfederal applicant is either directly authorized to carry out Section 106, or has unwillingly had Section 106 responsibilities foisted upon it by a federal agency. In order to address possible root causes, it may be helpful, first, to define what could be considered the necessary elements of effective Section 106 programs for reviewing these nonfederal projects, and, second, to identify the ways in which selected agencies' programs appear to depart from these elements.

The Interior Department's guidance for federal historic preservation programs concludes that strong management systems are essential to ensure effective procedural compliance with federal preservation requirements. At the same time, effective management systems for Section 106 compliance responsibilities in nonfederal projects should require certain minimum elements, including clear legal authority for federal agency delegation of responsibility, formal procedures and criteria, and internal management controls. Upon reviewing these elements, it appears that:

- Legal authority for federal delegation of Section 106 compliance clearly exists;
- Many federal agencies lack formal procedures and criteria describing responsibilities and necessary qualifications of applicants in the Section 106 process; and
- Federal agencies may lack sufficient internal management controls to ensure procedural compliance with Section 106 when delegation has been made in whole or in part to recipients of federal assistance.

Section 106 compliance responsibility is clearly defined by law and regulation. Using selected agencies as examples suggests that the disintegration arises in the absence or incompleteness of federal agency procedures and controls when compliance is fully or partially delegated to applicants.

3-3-1. Legal authority for federal delegation of Section 106 compliance clearly exists.

This subsection describes the two mechanisms that address the extent to which nonfederal parties may be delegated responsibilities under Section 106.

Complete delegation. First, a law other than the NHPA may independently allow a federal agency to fully delegate responsibility for Section 106 compliance for programs or categories of projects. This scenario is addressed in Subpart A of the Advisory Council's rules (Purposes and Participants). Section 800.2(a) provides that an "agency official" with Section 106 duties may be "a State, local, or tribal government official who has been delegated legal responsibility for compliance with section 106 in accordance with Federal law." Such nonfederal officials have legal and financial responsibility for regulatory compliance.²⁰ However, the federal agency maintains responsibility to ensure that its applicants follow the procedural requirements of the NHPA and the Section 106 rules.²¹

Through multiple federal legislative enactments, most HUD financial assistance programs shift Section 106 compliance obligations to nonfederal applicants.²² Of the approximately 14 routine HUD funding programs, Section 106 reviews have been delegated to applicants in at least 11 programs. Of these, the ones most likely to be famil-

iar to readers are community development block grants (entitlement formula distributions in large cities and urban counties and discretionary distributions in small cities and rural areas). Also included are neighborhood stabilization grants to address abandoned and foreclosed homes pursuant to Title III of the Housing and Economic Recovery Act of 2008); HOME investment partnerships; lead-based paint and lead dust hazard abatement; public and Indian housing; HOPE VI (demolition/revitalization of severely distressed public housing); and Section 8 assistance.²³

Delegation to initiate consultation. A second mechanism that delegates Section 106 compliance responsibilities was provided in the 1999 and 2000 revisions to the Advisory Council’s rules; however, this option is substantially more circumscribed than complete delegation to carry out the review. Federal agencies may authorize applicants for funding, permits, licenses, or other types of approvals to *initiate* consultation with the SHPO/THPO and others.²⁴ Additionally, an agency may authorize an individual applicant, a group of applicants, or all applicants in a specific program to *initiate* consultation upon notice to the SHPOs/THPOs.²⁵ A federal agency may also authorize a nonfederal party (including applicants) to prepare Section 106 documents and studies.²⁶

The federal agency remains legally responsible, however, for government-to-government relationships with Indian tribes; implementing a program for public involvement; ensuring that the content of all documents and studies meet applicable standards and guidelines; and for all findings and determinations made under Section 106.

During an assessment of the Section 106 process in the early 1990s, the Advisory Council solicited survey input from 1,200 stakeholders. Four-hundred twenty responses were submitted within one month.²⁷ The agency reported that the only question upon which there was “overwhelming disagreement” was whether federal agencies should be able to delegate more of their responsibilities under Section 106 to nonfederal parties.²⁸ Nevertheless, in the regulations implementing the 1992 NHPA amendments, more flexibility was provided to do so through the addition of §800.2(c)(4).²⁹

The Advisory Council’s intent regarding delegation of the ability to initiate consultation is expressed in the preamble to the 1999 regulatory revisions:

. . . Federal agencies have the legal responsibility to comply with section 106 of the NHPA. In fulfilling their responsibilities, Federal agencies sometimes chose to rely on applicants for permits, approvals or assistance to *begin* the section 106 process. The intent was to allow applicants to *contact* SHPOs and other consulting parties, but agencies must be mindful of their government-to-government consultation responsibilities when dealing with Indian tribes . . . [T]he Federal agency remains legally responsible for the determinations (in Section 106) [emphasis added].³⁰

SHPO offices interviewed for this report identified substantial problems in implementation of §800.2(c)(4). In their view (and those of the nonprofit groups and individual preservation advocates as well), the practice has degenerated into informal and sweeping delegation by federal agencies of much of their Section 106 compliance responsibilities to nonfederal applicants and their consultants. The common experience among SHPO staff interviewees is that rather than simply allowing applicants to *initiate* consultation, federal agencies expect these nonfederal parties to take over the vast majority of their responsibilities under Section 106, even chairing Section 106 consultation meetings.

One interviewee estimated that the number of “unauthorized applicants” is so high that if the SHPO office asked these parties to submit documentation formally authorizing their initiation of consultation under §800.2(c)(4), and authorizing their submission of findings and determinations on behalf of the federal agency, half of the office’s review workload would evaporate. Further, the reviewer estimated that 75 percent of incoming Section 106 documents submitted by nonfederal parties that either have legal delegation (HUD recipients), or that have been tasked by the federal agency to handle Section 106, fail to identify the project adequately or do not even identify the federal agency with Section 106 responsibility. When a broader cross-section of interviewees was asked whether SHPO offices resist these noncompliant practices, few do. The same state-level reviewer that estimated the high noncompliance rate of incoming documentation said that the SHPO office’s cost-benefit calculation concluded that the level of effort that would be required to secure federal agency authorization letters is outweighed by the practical need to just get on with the work and meet the 30-day review timelines in the Section 106 rules.

3-3-2. Many federal agencies lack formal procedures and criteria describing responsibilities and necessary qualifications of nonfederal parties in the Section 106 process.

Regardless of whether a nonfederal applicant is legitimately authorized to carry out Section 106 in whole or part, the responsible federal agency should have clear procedures and criteria for what is expected of these parties, for the benefit of the public.

Some of the good examples of written expectations and requirements in this regard are found in the surface transportation programmatic agreements (PAs), in which the FHWA has delegated Section 106 compliance in part or whole to state departments of transportation. Standard terms in “minor road project” PAs, for example, include requirements for state transportation agencies to employ preservation professionals on their staffs, confirm that FHWA retains clear responsibility for tribal consultation, and identify with reasonable specificity the types of road repair, rehabilitation, or other construction activities that pose minimum effects to historic properties and, therefore, do not require SHPO or FHWA review.³¹ The California Department of Transportation PA contains similar requirements, but is more extensive since it governs all federally funded highway projects in the state. Included, for instance, is a conceptual methodology for delineation of one or more APEs for direct and indirect (but not cumulative) effects.³²

A review of other federal financial assistance and permitting programs suggests that formal procedures and criteria for Section 106 compliance are often absent or insufficient.

The first problem occurs when federal agency information to applicants obscures Section 106 by treating the law as subsumed by the broader environmental review under NEPA, rather than as an independent legal requirement. A key example of this problem is the HUD programs, which fund tens of thousands of state and local projects run by offices with insufficient cultural resource staff that often experience high turnover as well. In its oversight role to ensure procedural compliance with NEPA, the NHPA, and other applicable federal laws, HUD has understandably tried to standardize, summarize, and distill information to facilitate the compliance programs of thousands of different funding recipients.

HUD's regulations that inform applicants about the federal review processes they must directly carry out are found at 24 C.F.R. Part 58 (*Environmental review procedures for entities assuming HUD environmental responsibilities*). As suggested in the title, however, these rules do not clearly target Section 106 compliance as an independent responsibility, but instead primarily focus on NEPA compliance and natural resource protection laws. The NHPA, including a reference to Section 106, is identified at §58.5 as a "related Federal law" that applies to recipients. However, the NHPA is but one in a laundry list of ten "applicable laws" that are referenced by legal citations only. The rest of the referenced laws, while independent environmental requirements (e.g., endangered species, sole-source aquifers, air quality, wild and scenic rivers, farmland protection), are in no way similar to the unique identification, consultation, and review process of Section 106. Further, as a practical matter, most urban housing programs do not involve impacts to endangered species, farmland, or wild and scenic rivers; by contrast, historic properties are usually the *primary* protected resource affected by HUD funding. Yet, HUD's regulatory direction to funding recipients is practically nonexistent.

Further, HUD's important *Request for Release of Funds and Certification* form (the paperwork by which funds are actually disbursed to local parties) emphasizes only NEPA reviews. Thus the very form that increases local officials' understanding that they can be held accountable for not complying with the law—by requiring the officials to sign a legal certification—is limited to a half page of NEPA compliance language, and represents a missed opportunity to encourage HUD applicants to take Section 106 more seriously.³³ Compliance with the NHPA is instead buried in this all-important form's obscure references to subsections of HUD regulations.

Unless and until HUD explicitly delineates and impresses upon its applicants the requirements for compliance with Section 106, as the agency does regarding NEPA, preservation issues will not be adequately addressed by HUD funding recipients. To hold out even a remote possibility that this outcome can be achieved, Section 106 must be independently addressed in federal agency regulations and other information and reporting systems.

The second problem in full or partial delegation of Section 106 responsibilities to nonfederal applicants occurs where federal agencies either have no formal structure in place whatsoever to explain Section 106 responsibilities, or the information they provide to applicants is inconsistent with the Advisory Council's rules. Funding programs of the Department of Commerce and two of its associated agencies, the National Oceanic and Atmospheric Administration (NOAA) and Economic Development Administration (EDA), provide examples of both these problems. Overall, the Commerce Department administers NEPA through an administrative order, but the agency has not issued any formal administrative procedures to implement the NHPA, and the agency's overall regulations for grants and cooperative agreements fail to address both the NHPA and NEPA.³⁴ NOAA's environmental review checklist at least asks applicants for information about project impacts on National Register-listed or –eligible properties. However, the agency's NEPA administrative order encourages the scoping process to consider:

... sites nominated or designated by the Advisory Council on Historic Preservation, as required by 36 CFR 800; ...
[emphasis added]³⁵

Clearly, improvements can be made in federal agencies' understanding of Section 106 and the role of the Advisory Council, who does not "nominate" or "designate" historic properties.

The EDA administers seven programs within the Commerce Department that fund or otherwise financially assist infrastructure and other construction projects in distressed urban and rural communities. Implementing rules for application requirements address NEPA reviews but are completely silent on Section 106 compliance.³⁶ Website guidance on application requirements for various economic development funding programs includes an "environmental narrative" that does address historic properties. However, the narrative and website guidance highlight another recurring Section 106 compliance problem. Applicants are only asked to identify any *known* historic properties and to submit photos and a description of any such properties to the SHPO. No definitions or guidance are provided, nor are applicants required to use qualified professionals in this effort. Applicants are also required to identify "indirect and cumulative effects," with no description or explanation of what this analysis entails.

Further, applicants are instructed that EDA requires:

Documented *approval* from the appropriate State Historic Preservation Officer (SHPO). Please visit the Advisory Council on Historic Preservation's . . . website for more information on this requirement. Applicants should begin working with the SHPO *as soon as EDA indicates that the project has been selected for further consideration*, as this process can be lengthy . . . [second emphasis in original].³⁷

These instructions do not accurately depict the consultation process, especially regarding the role of the SHPOs who do not "approve" projects, although they do carry out a mandatory role to review and consult on Section 106 documentation. The guidance also lends credence to SHPOs' and THPOs' reported experiences that their staffs receive nominal, inadequate information on the APE, historic property identification within the APE, and evaluation of properties for National Register-eligibility. Equally problematic is the absence of any requirement to use qualified preservation professionals or to invite consulting parties and involve the public in the process.

In short, these funding and permitting agencies need to significantly overhaul and expand their compliance and oversight responsibilities to ensure that applicants provide accurate and timely input on historic properties to the federal agencies (or, in some cases, meet their own delegated legal responsibilities to comply with Section 106).

3-3-3. Federal agencies may lack sufficient internal management controls to ensure procedural compliance with Section 106.

"Internal controls" is a term used in financial auditing to assess whether a process is in place such that managers and directors have a reasonable assurance that operations and activities of the organization conform to applicable laws. The framework for such a system encompasses the expectations created by management regarding legal compliance duties; assessing risks of noncompliance; developing explicit policies and procedures; implementing information management systems; and monitoring activities.³⁸

In the case of legitimately delegated Section 106 compliance (either in whole or to initiate the consultation process), a review of readily available public sources of information, and the interviews for this report, suggests that the following internal control weaknesses may be endemic among many federal agencies:

- Explicit procedures have not been developed by federal agencies to ensure the professionalism of delegated Section 106 compliance implementation, or to make independent findings and determinations during the consultation process or pursuant to programmatic agreements.
- Systematic internal monitoring, auditing, and enforcement of Section 106 responsibilities and commitments in applicant-initiated projects are simply are not carried out.

The NHPA and the Section 106 rules of the Advisory Council specifically require that federal agencies ensure the professional qualifications of those who carry out Section 106 responsibilities directly for the agency (e.g., consultants) or indirectly (through delegation to nonfederal parties seeking federal help), and also require that federal agencies review and endorse the documentation and determinations prepared on their behalf. When an agency uses consultants or allows nonfederal parties to lead Section 106 consultation, the agency remains responsible for independently making its own findings and determinations on the APE, identification of historic properties, assessment of direct, indirect, and cumulative effects, and resolution of effects. Yet the review of HUD and Department of Commerce regulations and guidance addressed above did not identify any standards, guidance, or regulations regarding how these agencies ensure that applicants use staff or consultants that meet the Secretary of the Interior’s professional qualification standards, particularly at the crucial stage of identifying properties and evaluating whether they are listed or eligible for the National Register.

Nor did this study identify specifically how federal agencies ensure the “independent review” of findings and determinations in Section 106. (HUD is not included in this specific observation since its funding programs are completely delegated to applicants.) Written communication to a THPO or SHPO on the letterhead of a federal agency—or sent from a “.gov” e-mail address—does not necessarily represent an independent and substantive review of the content of the communication. Indeed, the fact that many agencies seem to lack adequate internal preservation professional staff (see federal agency employment data in Section 3-2) suggests a weakness in this compliance responsibility.

Moreover, there seems to be almost no system to address changes in projects after Section 106 reviews are complete or to ensure implementation of mitigation commitments, especially for federally assisted projects. The preservation advocates interviewed for this report emphasize this flaw as one of the most troubling, especially with respect to infrastructure funding and Army Corps of Engineers permits (see also Section 6-5 below).

Federal agency monitoring, auditing, and enforcement of Section 106 responsibilities in cases involving nonfederal projects offers one of the most promising avenues for improvements in the law’s requirements to “consider” historic properties in these “indirect jurisdiction” cases—if such systems are fully developed and implemented. This report recommends in particular that the Advisory Council notify OMB of the need to add Section 106 compliance to the list of instructions that federal agencies use when they conduct federally required audits of applicants that spend \$500,000 or more of awarded federal funds in a single year. For now, there does not appear to

be any systematic program for evaluating applicant compliance with Section 106, at least among the federal agencies reviewed. The following summary describes the findings of this study based on Internet research into the selected agencies' government performance and accountability reports, regulations, program guidance, Office of the Inspector General reports, and OMB audit guidelines and directives.

HUD. This agency has ample legal authority to review and monitor the performance of its recipients for compliance with federal mandates; insist upon corrective action to remedy deficiencies; and impose sanctions for noncompliance.³⁹ Further, Section 1010 of the federal Fraud and False Statements Act authorizes civil fines and criminal fines and/or imprisonment with respect to HUD employees, states, cities, and other HUD-funded recipients for fraudulent or false statements relating to the agency's programs.⁴⁰

HUD's monitoring of its funding recipients occurs through an intricate review process that prioritizes audits based on risk factors suggesting the potential for fraud, waste, and mismanagement in the use of federal funds. "An important and fundamental principle of the monitoring process is that HUD is *required to make findings* when there is evidence that a statute, regulation or requirement has been violated but it retains *discretion in identifying appropriate corrective action(s)* to resolve deficiencies [emphasis in original]."⁴¹

The agency's regulations aspire to conduct in-depth monitoring and "quality control" regarding recipients' compliance with environmental and historic preservation programs at least every three years.⁴² According to this regulation, the primary way HUD achieves this goal is through training and consultation rather than an actual on-site review of records and interviews with local personnel, although the agency states that it may conduct limited on-site monitoring. The agency's regional and field office monitoring forms do include a review of recipients' programs for consideration of historic properties and archaeology in carrying out HUD-funded projects.⁴³ However, the OMB's monitoring directives for the community development block grant program (CDBG) only emphasize reviewing whether the grantee complies with the environmental certification for NEPA compliance before requesting funds. Any reference to NHPA compliance assessment is completely absent in the directives (see more on this issue below in *Other agencies*).

If HUD becomes aware of Section 106 deficiencies, *by any means* (such as complaints from the public or others), a cascade of actions may be instituted. These actions range from additional monitoring or training to termination or suspension of delegation and HUD's re-assumption of review responsibilities.⁴⁴ If the agency has approved the release of funds but subsequently learns that a recipient failed to comply with a "clearly applicable environmental authority" (including Section 106), the agency "shall impose appropriate remedies and sanctions in accord with the law and regulations for the program under which the violation was found."⁴⁵ Individual programs, such as CDBG grants, provide HUD with broad powers to terminate assistance or require reimbursement of funds, and also allow the agency to make referrals to the U.S. Department of Justice to prosecute violations of the agency's requirements.⁴⁶

Interviewees for this report expressed skepticism and doubt concerning the inclination of HUD's regional and field offices to take a strong monitoring and enforcement role. None of the SHPOs or nonprofit preservation advocates interviewed for this report was familiar with any HUD monitoring or enforcement activities regarding

Section 106 compliance performance by recipients. However, it is not clear that stakeholders would necessarily be aware of such monitoring or sanctions, other than through informal channels. HUD's procedures do not require that review officers contact external stakeholders other than those directly involved in housing programs (but see the discussion of the Office of the Inspector General audits of Section 106 compliance below).

A review of HUD monitoring actions, findings, and follow up was beyond the scope of this report. However, based on the interviews for this report and the Advisory Council's extended documentation of chronic Section 106 compliance difficulties in housing programs, the inadequacy of such oversight should be evaluated and corrective actions should be implemented.

There is some indication that a strong HUD position enforcing Section 106 compliance would cause positive changes in behavior by its recipients. In one of the few cases reported in the Advisory Council's yearly reports, in which HUD exerted strong opposition to an applicant's use of funds based on Section 106 noncompliance, the recipient altered its proposal. The agency denied the city of Lebanon, Pennsylvania CDBG funds in the mid-1980s to renovate commercial property in a National Register-eligible historic district based on the city's failure to carry out Section 106 review. Municipal leaders were then persuaded to follow the Secretary of the Interior's treatment standards for the rehabilitation and to consult with the SHPO.⁴⁷

The HUD Office of the Inspector General (OIG) has been called upon by the public and preservation advocates to step in and review Section 106 compliance when agency staff has not done so or when HUD monitoring has revealed concerns. The mission of the OIG is "independent and objective reporting to the Secretary (of HUD) and the Congress for the purpose of bringing about positive change in the integrity, efficiency, and effectiveness of HUD operations."⁴⁸ Much of the office's work is conducted through independent auditors who perform intense on-site records reviews and interviews and formally document their findings. Unlike the agency's regional or field review officers, the OIG independent auditors interview representatives from all interested stakeholders. In the context of Section 106 reviews, these interviews have included concerned citizens, preservation groups, elected officials objecting to proposed demolition of historic properties, and the Advisory Council.

For example, a recent OIG evaluation of Section 106 compliance confirmed anticipatory demolition of the *Casa Parroquial* ("House of Redeemer Fathers") by a Puerto Rican city.⁴⁹ Despite significant public and SHPO opposition and the initiation of National Register listing, the city demolished the historic structure for waterfront development. The final audit report, issued in 2000, recommended that the city be required to reimburse HUD for \$2.78 million. Similarly, in the summer of 2009, an audit of the management of HOME funds in Kansas City (KS) identified a "significant weakness" in internal controls. The deficiencies included failing to complete and monitor environmental reviews, a "key area" of which was historic preservation. Staff and manager training was recommended as an initial corrective action.⁵⁰

Sometimes, HUD's OIG review process has uncovered preservation-related problems through its financial scrutiny. For example, in reviewing a contract for \$160,000 in questionable fees paid by the city to an architect for "historical consultation" services during repairs to Section 8 rental property in Providence (RI), an auditor discovered that the contract deleted the design and construction phase for the services. The final report observed that it was

“unusual” for a historic preservation project to omit design documents as part of the consultant’s work products.⁵¹

In the only instance identified through this research where the HUD OIG audited a Section 106 case in which actual consultation had taken place, the recipient’s compliance activities were upheld. A citizen reported Section 106 noncompliance for a HOPE VI project in Pittsburgh on the basis that the controversial public housing property proposed for demolition was historic. However, upon scrutiny, the audit office determined that the city had taken the correct procedural steps to evaluate the property for historic significance and integrity. The city had further obtained the SHPO’s concurrence that material changes had destroyed the integrity of the residential dwellings. Documentation also provided to the OIG by the regional historic society confirmed the SHPO staff’s assessment that the housing complex had lost architectural integrity.⁵²

Other agencies. OMB Circular A-133 implements federal law requiring federal agency program audits of local and state units of government, Indian tribes, and nonprofit organizations that spend \$500,000 or more in federal funds in a single year.⁵³ The *Compliance Supplement* to this circular “provides an invaluable tool to both federal agencies and auditors in setting forth the important provisions of federal assistance programs. This tool allows federal agencies to effectively communicate items that they believe are important to the successful management of the program and legislative intent.”⁵⁴ Federal agencies are responsible under Circular A-133 for annually informing OMB of any updates needed to the *Compliance Supplement*. For the reasons explained below, the Advisory Council should inform OMB of the need to add Section 106 compliance as an element of the “special test” reviews for every federal agency’s funding programs (particularly, though not necessarily limited to, those that involve construction, demolition, and land-disturbance projects) as a necessary update to the supplement, and as an independent audit evaluation factor, separate from NEPA.

The *Compliance Supplement* was reviewed during research for this report for all 15 executive departments (and their associated agencies) to identify whether Section 106 compliance is evaluated in their monitoring programs. It is instructive to keep in mind that not all of the funding programs covered by the audit requirement involve projects that may constitute an “undertaking” in Section 106 terms. Additionally, these audits are designed to review overall program implementation, for example, by EPA grantees for water or sewer improvement funding or FAA airport grants-in-aid funding. However, the methodology for compliance audits under Circular A-133 involves sampling specific projects as a way of understanding the presence or absence of internal controls in an overall program.

The primary focus of the OMB audit circular is financial and is designed to evaluate noncompliance that may have a direct and material effect on a federal funding program. The review conducted for this report revealed that, currently, Section 106 compliance is completely absent as a “special test” in every federal agency’s auditing directive that includes financial assistance to applicants. Nevertheless, environmental reviews under NEPA have been included as “special tests” for audit review in several programs, e.g., EPA’s water and sewer financial assistance, and FTA capital investment grants.⁵⁵ As recommended above, the Advisory Council should work with the OMB to correct the omission of Section 106 compliance review in the audit directives.

3-4. Special responsive strategies should be developed to address the challenges of Section 106 compliance when nonfederal parties receive project funding or approvals as a result of massive economic or disaster recovery initiatives.

A recurring theme in the Advisory Council's yearly reports to the president and Congress since 1969 is the challenge in balancing a quick federal response to economic downturns and natural disasters with consideration of historic properties, as mandated by Section 106. Over the years, the Council has implemented models of rapid response solutions, including training, program alternatives, and, in the late 1980s, an innovative historic property identification and acquisition partnering arrangement with states and nonprofit organizations, in order to facilitate Section 106 compliance during implementation of these episodic programs. These responsive solutions should continue be explored in concert with federal agencies and other preservation stakeholders.

As the most recent example of the types of federal initiatives that pose challenges in Section 106, comparing the levels of stimulus funding between the last most significant federal job creation bill—the Emergency Jobs Act of 1983—and the American Recovery and Reinvestment Act (ARRA) gives credence to the level of anxiety among interviewees regarding Section 106 compliance. The 1983 jobs creation legislation had a \$9 billion price tag distributed over 77 federal programs and activities—which corresponds to \$19.5 billion in 2009 dollars. Upon its enactment, the Advisory Council and SHPOs faced a wave of grantee and financial assistance project reviews. In response, the Council acted swiftly to develop expedited review programs for the VA and EDA.⁵⁶ Infrastructure projects required quick planning and compliance preparation since they were required to begin within nine months of President Reagan's signature on the bill.

By contrast, the ARRA, signed into law on February 17, 2009, has a \$787 billion price tag. Of this total, \$275 billion (over 14 times the size 1983 stimulus program) was designated to be directly distributed to applicants, including \$60 billion for general infrastructure (including technology), \$85 billion for competitive grant awards of all types, \$75 billion for education (including buildings), \$8 billion for housing, and \$37 billion for highway and transit projects.⁵⁷ By June 25, 2010, about 43 percent of this \$275 billion had been received by states, local governments, and businesses, based on the federal government's ARRA website (<www.recovery.gov>). Federal agencies must commit by Sept. 30, 2010 to disburse the remaining \$156 billion of project funds under Title XVI of the law. However, because actual project funding can be spent after this general obligation date, there is still a massive workload of Section 106 reviews for stimulus projects.

The importance of Section 106 compliance for the use of ARRA funds (and other comparable federal initiatives) was emphasized during the interviews for this study. SHPO offices reported that, even during routine federal government spending periods, the lack of competency for Section 106 implementation among HUD funding recipients, other applicants for federal funding and permits, and congressional earmark recipients is high. As a result, SHPO staffs often have to perform basic tasks of historic property identification and evaluation that should be completed by federal agencies or their applicants.

The challenge is made even greater because some applicants view Section 106 and environmental reviews as a hindrance. Consideration of indirect and cumulative impacts in many cases is entirely missing. Most applicants

“start from a narrow landscape,” in the words of one interviewee, and avoid addressing such impacts. As noted above, tribal historic preservation officers are especially concerned about omitting the crucial government-to-government consultation that is a mandated federal agency responsibility.

Specific training on Section 106 compliance for ARRA projects has been initiated by the Advisory Council and the agency has participated in several recovery legislation PAs.⁵⁸ While these measures are welcome, the overwhelming response among interviewees is that the massive volume of Section 106 reviews for ARRA—predicted to last for several more years—will effectively require the participation of any and all qualified preservation professionals and partners (under the supervision of qualified personnel) to help address the challenge.

Being a small federal agency has provided certain advantages for the Advisory Council in the past, in that it can be nimble and quick when needed. There are several past guides to filling immediate identification and evaluation needs in the Section 106 process that could now be instructive.

For example, the Resolution Trust Corporation (RTC) was a federally owned asset management entity created by Congress in 1989 to acquire and sell real estate (e.g., houses, financial offices) of savings and loan associations that became insolvent during the financial crisis of the 1980s. The corporation claimed that its acquisition and disposition of real properties were not subject to Section 106. Nevertheless, RTC entered into an agreement with the Advisory Council in October 1992 to fund the review of its real property inventory to identify and evaluate historic properties and attempt to find preservation buyers. The Council, in turn, solicited the help of SHPOs and statewide preservation groups as subcontractors to conduct the survey work.⁵⁹

In its initial year, the RTC advertised 35,000 properties with a net book value of \$10 billion.⁶⁰ Twenty SHPO offices signed up to assist with the inventory from fall 1992 through year-end 1993 and were reimbursed on a per property basis by the Advisory Council. The Council in turn received \$430,000 from the RTC to fund the effort for one year.⁶¹ At the conclusion of the cooperative agreement, approximately 10,000 properties were inventoried, of which over 1,100 were determined to be National Register-eligible. Through this program, for example, the statewide nonprofit group, Indiana Landmarks, found a local preservation purchaser for a circa-1890 house in Bunker Hill, while the Texas Historical Commission identified properties in San Antonio featuring concrete sculptures of Mexican-born artist Dionicio Rodriguez in *el trabajo rustica* style.⁶²

In another example, recognizing that the resources of the Gulf Coast states were “depleted” after Hurricane Katrina, the Advisory Council successfully championed securing an additional \$3 million on top of \$40 million in supplemental federal appropriations, to be used directly by the SHPOs of Louisiana, Alabama, and Mississippi for Section 106 reviews during reconstruction and recovery activities.⁶³ In a state-led example of a rapid response effort reported by the National Trust, after a significant earthquake struck the Los Angeles area in early 1994, the California SHPO appointed an experienced cultural resource consultant as the SHPO representative to oversee the review and repair of several thousand affected buildings and structures.

3-5. Government performance and accountability reports should more specifically and prominently identify progress made and improvements needed in federal preservation programs.

This recommendation supports the use of government performance and accountability reports (PARs) to expand federal agency reporting on implementation of Sections 106 and 110 of the NHPA. One element of this expanded reporting should combine a recent federal initiative on financial reporting of heritage assets and stewardship lands with information from a recently established federal real property database. Additionally, OMB, the Federal Financial Accounting Standards Advisory Board, and preservation stakeholders should develop a technical release or guide on federal agency disclosure of preservation compliance in the prominent “management’s discussion and analysis” section in each PAR report. Lastly, specific performance goals and measurements relating to preservation programs are suggested for tracking in PARs.

Federal agencies issue PARs each year, which combine program and financial analysis mandates from the Government Performance and Results Act of 1993, Chief Financial Officers Act of 1990, and related laws.⁶⁴ In an attempt to empower taxpayers to more readily understand the specific activities of each agency and how successful they were in meeting their program goals, PARs include information and data intended to improve accountability for federal agency performance. Each agency, therefore, has to collect millions of pieces of information from their headquarters in Washington, DC, as well as regional and field offices and operating sites (e.g., laboratories, military installations).

These reports also include auditable financial statements which adhere to many of the same accounting standards that apply to private businesses. The purpose of these statements is to “fully reveal” agencies’ financial positions, facilitate a better understanding of operations of the federal government, and assist in managing people, projects, and budgets.

Consolidating federal historic property reporting. A recent amendment to the *Statement of Federal Financial Accounting Standards* 29 (SFFAS 29) is a welcome direction in PARs. The SFFAS 29 was issued in July 2005 and became fully effective starting with FY 2009 reporting. In a way, the change did not pose a new information collection duty with respect to federal agency heritage assets and stewardship lands. Rather, it recategorized such information as a basic part of balance sheet reporting rather than as “supplementary” information. Few comments were received on the draft standard issued in 2003; however, of these submittals, most opposed the reclassification on the grounds that the information is now subject to independent auditing—an important point, because the data was not auditable before.⁶⁵

As of FY 2009, federal agencies must identify the number of “heritage assets and stewardship lands” under their jurisdiction or control in an associated note to their balance sheets. Balance sheet reporting includes a category of assets labeled “property, plant, and equipment” (PP&E) which is assigned a monetary value and depreciated over time. Heritage assets and stewardship lands are now reported as a type of PP&E but are not assigned a monetary valuation or depreciated. As one agency observes, the “most relevant information about (such assets) is their existence.”⁶⁶

At the same time, practical use of *SFFAS* 29 information by preservation advocates is hindered by lack of clarity in how such assets are defined and “counted,” the absence of any easy way to compare the number of reported heritage assets and stewardship lands to an agency’s overall progress in inventorying historic properties and landscapes, and the location of the data in an obscure financial footnote. “Heritage assets,” for example, include buildings and structures that are listed in or eligible for the National Register, but also include parks, monuments, and museum collections. If an asset is used in the day-to-day operations of an agency, it is considered a “multi-use heritage asset” and can be identified and valued in the PP&E portion of the balance sheet, but not in the *SFFAS* 29 note.

Discretion is left to each agency on the specific methodology used to count these assets. The FY 2009 report of the Department of Agriculture, for example, identifies 155 national forests and 20 national grasslands that are heritage assets (and stewardship lands).⁶⁷ This approach to listing, however, does not shed any light on how many historic buildings, structures, objects, or sites have been identified within these forests and grasslands.

In a related, and also welcome direction, a federal real property database was established pursuant to E.O. 13,327 (*Federal real property asset management*), issued in 2004. By incorporating planning and management requirements of E.O. 13,287 (*Preserve America*, March 3, 2003), historic property status attributes (e.g., National Register-listed, -eligible, evaluated, not evaluated) are required to be included. However, the detailed database, <www.realpropertyprofile.gov>, is not accessible to the public. Summary reports issued by the GSA provide a top-level overview and exclude any reference to historic status or attributes. The usefulness of information from the database is further hindered by the following considerations: (1) the order applies to only 9 of the 65 independent agencies (EPA, GSA, NASA, AID, NSF, NRC, OPM, SBA, SSA), while other significant property-holding agencies, such as the U.S. Postal Service, Tennessee Valley Authority, Presidio Trust, and the Federal Reserve, are exempted; and (2) lands that are used, withdrawn, reserved, or dedicated for military purposes; national forests, national parks, or national wildlife refuges; Indian or Indian tribal trust lands; or lands that agency heads withhold for reasons of national security, foreign policy, or public safety are also exempted. Improvements to excluded national forests, national parks, and national wildlife refuge lands are within the scope of the order, but the operative effect of the exclusion precludes database reporting of tens if not hundreds of thousands of archaeological sites and other historic properties.

Consolidating both the *SFFAS* 29 data and information from the real property database in the PARs would provide important contextual information that would further the public’s ability to ask informed questions about the status of federal agencies’ preservation program, and pace of their survey efforts. Using the Department of Agriculture example above, a list of 155 national forests and 20 national grasslands does not inform the public about the extent of historic buildings and sites within those areas. If one separately reviews the Agriculture Department’s inventory in the federal real property database summary, the total count of buildings and structures is 57,523. When considered together, there is no way to determine how many of the Agriculture Department’s total of 57,523 real property assets are historic, how they are distributed within the 155 national forests and 20 national grasslands, and how much of the forests and grasslands remain to be surveyed to identify historic properties.⁶⁸

As another example, the FY 2009 Department of Defense *SFFAS* 29 report identifies 43,023 buildings and structures and 12,096 archaeological sites that are National Register-listed or -eligible and almost 17 million acres of stewardship lands (including multi-use assets).⁶⁹ Compared to other agencies' first-year reporting under *SFFAS* 29, the defense agency's identification is admirable. However, the count alone does not inform the public of either: (1) the percentage of the agency's *total* buildings and structures that are historic (or whose historic significance has been evaluated); or (2) the percentage of the 17 million acres of stewardship lands that have been surveyed for historic resources. The Department of Defense reports 507,755 total buildings and structures in the federal real property database summary for FY 2008.⁷⁰ Reading the two together suggests that 8.5 percent of the agency's structures have been determined to be historic. Consolidating these types of information in one place for review would greatly facilitate establishing preservation goals and public monitoring of agency progress on compliance with Section 110 of the NHPA.

As a final example, the FY 2009 balance sheet note for NASA (an independent federal agency with a \$17.78 billion budget and over 18,000 employees) identifies 12 heritage buildings and structures.⁷¹ Eighty-nine additional buildings and structures are identified in the note as multi-use heritage assets. However, the most current federal real property database summary identifies 4,719 total buildings and structures within the space agency's holdings.⁷² Comparing these independent reports suggests that slightly over 2 percent of all of NASA's buildings are historic (101 out of 4,719), and raises questions regarding the extent to which surveys have been completed for all of the agency's buildings, how this relatively young agency proposes to evaluate buildings approaching 50 years of age (and thus possibly newly eligible for the National Register), and similar questions. (In addition, there are 19 NASA National Historic Landmarks, identified as a result of a congressionally mandated theme study in 1984. It is not clear where these structures are identified in the PAR's list of heritage assets.)

In summary, the information from financial statement and real property database initiatives together provides an important opportunity to increase accountability for agency historic preservation responsibilities, particularly in terms of stewardship and inventory obligations

Compliance analysis and disclosure. Publicly traded companies are required by laws and regulations to include a nonfinancial narrative disclosure and discussion of *known and contingent material liabilities* as part of their financial statements. This analysis appears in the prominent section on management's discussion and analysis of the statement, not in the balance sheet itself or appended as an oblique footnote. The purpose of such disclosures is to provide investors, potential investors, and the public access to relevant information about the nature, quality, and effectiveness of corporate compliance programs. For example, Securities and Exchange Commission (SEC) guidance relating to environmental liability disclosures has resulted in more corporate accountability for lapses in programs, increased shareholder activism, and facilitated the establishment of performance goals and measurements for environmental stewardship among most Fortune 500 companies.

Disclosure of known and contingent material liabilities is decided by top managers, their attorneys, and auditors. The U.S. Supreme Court has framed this inquiry as whether a "reasonable investor" would view the issue as significantly altering the total mix of information about the company that is available to that person.⁷³ Therefore, the inquiry is not based on the organization's perspective about what is important information or even a financial

lens. However, the SEC defines the required disclosure, in part, based on whether: (1) a lawsuit exposes greater than 10 percent of the assets of an organization and its subsidiaries; or (2) a company is subject to government enforcement with the potential for more than \$100,000 in fines.⁷⁴

Management's discussion of preservation compliance in the PARs could provide a more complete and publicly accessible disclosure. Some resource agencies have already used the PAR management discussion and analysis section as a way to disclose cultural resource-related "material weaknesses" in mission-critical programs. The FY 2002 statement of the Department of the Interior, for example, identified the lack of accountability and control over the protection of museum objects held by all of its associated agencies (e.g., BLM, National Park Service) as posing the "risk of significant loss of or damage to irreplaceable artwork and artifacts. . . ."⁷⁵ A commitment was made in the disclosure to budget and program funds to prioritize inventorying collections, starting with sensitive artifacts (e.g., Native American cultural items).

Executive Order 11,593 (*Protection and enhancement of the cultural environment*, May 6, 1971) (codified in the NHPA in 1980) required all federal agencies to hire or engage qualified staff and identify, evaluate, and nominate to the National Register historic properties within their jurisdiction or control. Over 40 years later, no agency can claim to have completely done so. The BLM, for example, has practically the same terrestrial land portfolio as existed in 1966, but has surveyed less than 10 percent of its holdings.⁷⁶ The review of federal employment data (Section 3-2 above) highlights the potential paucity of competent staffing in many federal agencies for conducting statutorily required identification, evaluation, and nomination of historic properties. These deficiencies would appear to be a known and material weakness in compliance programs.

There is some evidence that cultural resource litigation under all federal laws has been steadily increasing since the early 1970s and particularly in the past 10 years.⁷⁷ The longstanding tribal trust accounting case *Cobell v. Salazar* is not a cultural resource compliance lawsuit. Nevertheless, the case, and outcome (including a multi-billion dollar settlement), is instructive regarding the operating and financial risks associated with sleepy federal compliance programs that are brought into accountability by persistent public interest plaintiffs in the formal setting of a federal courthouse.⁷⁸

Performance tracking goals. Interviewees for this report generally agreed that setting goals for preservation programs that could be measured and tracked (also referred to as "metrics") would be useful. At the same time, the logistics of doing so seemed "impossible" or "impractical" to many interviewees, and were viewed by some as an invitation to manipulate the numbers; the prospect of greater reporting requirements also evoked concern about unfunded mandates if state review offices were required to develop the data. The National Academy of Public Administration (NAPA) expressed similar concerns about preservation metrics in its January 2009 report, *Towards More Meaningful Performance Measures for Historic Preservation*.

However, data from thousands of field and regional offices is annually compiled for the purpose of preparing PARs so the exercise, in and of itself, is not impossible or impractical. As one example, HUD tracks the use of community development block grants to demolish "blighted" properties across the country (FY 2008 goal=5,000 individual properties eliminated; actual=9,180 individual properties demolished). The Maritime Administration

monitors the number of contracts awarded to dismantle and scrap aging merchant vessels (FY 2008 goal=10; actual=21).⁷⁹ Reporting the goal and what was accomplished was not designed by either agency to assess their federal preservation program; both measurements, nevertheless, reflect agency practices that permanently destroyed properties and structures, some of which were undoubtedly historic.

The Advisory Council and the National Park Service have struggled to identify metrics that can accurately reflect “quality” as well as “quantity” when it comes to Section 106 review. The metrics listed below could provide some useful ideas for that ongoing effort. This study suggests that preservation goals for reporting yearly performance in federal agency PARs should include the following:

- For major federal actions requiring an EIS and for actions addressed through an EA, identify the number of historic properties affected by each alternative considered, and the net gain or loss in adverse effects resulting from the selected alternative. This information is or should already be contained in every EIS and EA. Some direction on “counting principles” would be required, especially for historic districts (which feature multiple contributing resources and span multiple acres).

Additional effort may be required to collect the information identified above in NEPA documents that are processed as EAs, but knowing in advance that the data will be collected will provide an incentive to include an appropriate level of detail in EAs regarding historic properties. This data collection exercise for both EISs and EAs should also be a clear requirement in the application materials for every request for federal assistance, either funding, permits, or other types of approvals. As a result, applicants will clearly know that the evaluation is a requisite part of their receipt of a public benefit.

The goal identified in this section is comparable to recommendation 4 in the 2009 NAPA report. However, rather than place the data collection burden on THPOs and SHPOs, this recommendation proposes a different reporting mechanism and scope (i.e., on the federal agency through its PAR, though it may choose to require applicants for federally assisted projects to collect the data to transmit to the agency).

- For federally assisted projects processed as an EA, identify the number of historic properties affected by the applicant’s preferred alternative that were avoided through alternatives or modifications to the site or project.
- Quantify the professional resources of agency programs through routine reporting of the numbers of employees and contractors with credentials that meet the Secretary of the Interior’s historic preservation professional qualification standards.
- Identify the percentage of completeness in surveying and evaluating federal agencies’ real property assets and the percentage of historic properties in each agency’s asset portfolio entered into a geographic information system or other digital database (with due consideration for confidentiality for archaeological sites and other sites considered sacred or culturally significant by Indian tribes and Native Hawaiian organizations). This performance goal is similar to NAPA’s recommendations 1 and 12. Instead of absolute numbers, however, this metric focuses on the percentage of holdings evaluated to provide a context for tracking progress (see more discussion above under *Compliance analysis and disclosure*).

- Gauge public access to Section 106 information through the percentage of Section 106 agreement documents (i.e. MOAs, programmatic agreements) posted to the federal agencies' websites.
- Identify the numbers and percentages of contested "no historic properties affected" or "no adverse effect" appeals to the Advisory Council. This performance tracking measure is similar to NAPA's recommendations 6 and 7, except it only would apply to appeals to the Advisory Council (which suggest a breakdown in the consultation process). These appeal mechanisms were intended by the Advisory Council as a counterweight to its lack of direct involvement in most projects. This measurement could help assess a number of issues: whether agency staff properly apply the criteria of adverse effect, whether agencies are involving consulting parties early in the stage of effect determinations, how well the avenues of appeal to the Council are understood and used by stakeholders, and, conversely, how many Section 106 reviews result in a consensus about effects.
- Identify whether each agency has filled the position of Federal Preservation Officer, as required by the NHPA, and the position/grade level of his/her supervisor (reflecting the seniority level of the supervisor and, thus, the degree to which historic preservation issues are recognized at the highest levels of each agency).

Some in the preservation community may question these metrics as being susceptible to manipulation, like accounting data, based on the feedback of interviewees. On the other hand, historic preservation could be promoted by requiring that federal agency staff at all levels to spend more time thinking about what they are actually doing to build their preservation program, even if the data quality is imperfect at times. Some interviewees responded that tracking some types of numerical metrics would compare to counting the "snail darters" of Tellico Dam litigation fame.⁸⁰ This tiny invertebrate, however, had the important effect of inculcating federal agency compliance with the Endangered Species Act.

Appendix 3-1: Federal Employment, Six Preservation Disciplines, March 2009

Departments	2009 Employees		2009 Employees Section 112 NHPA Disciplines*							2009 NEPA Staff
	Total	Prof. & Admin.	Anthrop.	Archaeo.	Architec.	Com. Pl.	Historian	L. Archit	Total	
Agriculture	93,618	48,559	0	402	51	12	7	137	609	3849
USFS	31,211	14,548	0	360	18	5	6	132	521	3549
RUS	327	262	0	1	29	0	0	0	30	53
NRCS	11,368	8186	0	41	0	6	1	5	53	5
Commerce	45,400	31,063	1	1	14	5	7	0	28	24.5
NOAA	12,656	9870	1	1	11	0	4	0	17	18.9
EDA	167	153	0	0	0	5	0	0	5	4.5
Defense	663,533	354,870	36	194	814	362	433	73	1912	NR
Air Force	150,791	73,826	4	19	128	87	199	8	445	
Army	249,540	129,999	14	146	379	94	163	59	855	
Navy	177,374	97,191	18	29	300	181	51	6	585	
Education	4167	3810	0	0	0	0	0	0	0	NR
Energy	15,636	12,737	0	11	11	0	3	1	26	95
HHS	77,085	59,580	70	0	65	4	3	1	143	NR
DHS	178,006	97,985	0	1	60	14	7	0	82	60
FEMA	16,269	15,273	0	0	3	12	0	0	15	20
HUD	9532	8335	0	0	28	3	0	0	31	NR
Interior	68,758	39,822	35	476	160	66	193	190	1120	467
BIA	8933	3972	1	25	11	3	0	0	40	38
BLM	10,260	6624	1	202	4	2	3	6	218	124
BOR	5419	2887	0	29	1	4	7	6	47	60
NPS	20,557	9546	25	200	131	54	177	169	756	103
OSM	518	448	0	1	0	0	0	0	1	6
MMS	1649	1373	0	3	0	0	0	0	3	27
Justice	109,227	70,635	0	0	44	0	9	0	53	NR
Prisons	35,977	10,985	0	0	22	0	0	0	22	
Labor	15,165	12,953	0	0	1	0	0	0	1	NR
State	11,282	9989	0	0	46	0	32	1	79	NR
Treasury	118,244	57,904	0	0	9	0	1	0	10	NR
Transportation	55,639	50,416	0	0	17	242	3	1	263	NR
FAA	46,702	42,767	0	0	17	34	1	0	52	
FHWA	2817	2354	0	0	0	119	0	1	120	
FRA	818	773	0	0	0	0	0	0	0	
FTA	506	464	0	0	0	68	0	0	68	
Maritime	774	482	0	0	0	0	1	0	1	
VA	285,289	155,625	0	1	51	0	4	8	64	NR
Estimated Total Executive Department Preservation Staff in the U.S.:									4,421	
Independent Agencies (selected):										
EPA	18,009	16,752	1	0	5	2	1	0	9	124
FCC	1844	1,630	0	0	0	0	0	0	0	13.75
FDIC	5392	4,817	0	0	0	0	1	0	1	NR
FERC	NR	NR	NR	NR	NR	NR	NR	NR	NR	148
GSA	11,941	10,295	0	0	184	0	0	0	184	NR
NASA	18,371	16,575	0	0	11	0	3	0	14	12
NRC	4133	3,646	0	0	1	0	1	0	2	83.1

Source: FedScope, <www.fedscope.opm.gov/employment.asp> (most recent data reported are from Mar. 2009), see note 15 below on methodology. NR=not reported or not completely reported; see Table of Acronyms at the end of this report for an identification of agency acronyms.

*There is a disparity in some of the agency totals, because the database's individual numbers do not always add up to the totals. Additionally, employment numbers for all of the associated agencies within executive departments (e.g., Marine Corps in the Department of Defense) are not reported in this table, although they are counted in the department-wide totals.

Notes to Section 3

1. National Academy of Public Administration, *Back to the Future: A Review of the National Historic Preservation Program* (Dec. 2007), 22.
2. The staffing inventory should include: (1) a list of names, titles, grade, and contact information for the highest-ranking employees in agency headquarters and subordinate offices with compliance responsibility for Sections 106 and 110 of the NHPA; and (2) specific numbers and the geographic locations of in-house employee positions (expressed in terms of full-time equivalents) assigned with duties to help carry out Sections 106 and 110. The inventory should also include the OPM four-digit job classification series for each position in order to assess consistency with the Secretary of the Interior's professional qualification standards and to provide information to assist in updating these standards.
3. 65 Federal Register 24593 (Apr. 26, 2000).
4. U.S. Department of the Interior, *Standards and Guidelines for Federal Agency Historic Preservation Programs*, Standard 1, Guideline (o), 20501.
5. Office of Personnel Management, "Federal Classification and Job Grading Systems, Building Management Series, GS-1176, TS-118" (Sept. 1992), 4, <www.opm.gov/fedclass/>.
6. Office of Personnel Management, "Realty Series, GS-1170, TS-125" (Aug. 1993), 11 and 13.
7. NHPA, Section 110(2)(k); 16 U.S. Code §470h-2(k); 36 C.F.R. §800.9(c); see also U.S. Department of the Interior, *Standards and Guidelines for Federal Agency Historic Preservation Programs*, Standard 4, Guideline (g), 20503.
8. U.S. Department of the Interior, *Standards and Guidelines for Federal Agency Historic Preservation Programs*, Standard 1, Guideline (l), 20501.
9. NHPA Section 112(a)(1)(B); 16 U.S. Code §470h-4(a)(1)(B); 36 C.F.R. §800.2(a)(1).
10. NHPA, Section 112(a)(1)(A); 16 U.S. Code §470h-4(a)(1)(A); 36 C.F.R. §§800.2(a)(3), 800.2(c)(3) (representatives of local governments).
11. 36 C.F.R. §800.2(a)(3).
12. U.S. Department of the Interior, *Standards and Guidelines for Federal Agency Historic Preservation Programs*, Standard 1, Guideline (n), 20501.
13. The OPM position classification standards for most of the disciplines identified in Section 112(a)(1)(B) of the NHPA and the Secretary of the Interior *Standards and Guidelines* are located within the umbrella group of "Social Services, Psychology, and Welfare." Standards for the History Series (GS-0170) were last updated in February 1962. Standards for the Archeology Series (GS-0193) were last updated in July 1983. Standards for the Community Planning Series (GS-0020), included in the "Miscellaneous Occupations Group," were last updated in June 1973. Standards for architects and landscape architects have been recently updated, most likely because they are included as part of the Engineering Group (updated in Nov. 2008).
14. U.S. Department of the Interior, *The Secretary of the Interior's Standards and Guidelines for Archeology and Historic Preservation, Historic Preservation Professional Qualification Standards*, 48 Federal Register 44716 (Sept. 29, 1983), <www.nps.gov/history/local-law/arch_stnds_9.htm>.
15. The search was conducted in OPM's online database, FedScope, <www.fedscope.opm.gov/employment.asp> (most recent data reported is from Mar. 2009). The search function for "Occupation" was entered as "White Collar Group" and for "Occupational Category" as "Professional and Administrative." Each four-digit classification standard (see note 13 above, e.g., "0193" for archaeologists) was then searched for the 15 executive departments and their associated agencies, as well as some of the independent agencies. The numbers were also roughly compared to federal agency staffing levels in 1998, and do not vary significantly. The conservation and curation positions were omitted in the analysis based on the assumption that employees meeting these qualification standards are more likely to perform exclusively federal repository and museum duties.

16. Elizabeth Moss, Freedom of Information Act Coordinator, Council on Environmental Quality, e-mail message to author, Oct. 21, 2009. Numbers are reported as full-time equivalent positions.
17. <www.census.gov/govs/faads/084sumus.html>.
18. 1991 A.R., 82. The Advisory Council's first policy statement on affordable housing and historic preservation was issued in 1995, superseded by a Nov. 2006 revised statement. The revised statement clearly articulates basic principles for meshing the two public policies and conducting Section 106 reviews during implementation of housing programs administered by HUD and Rural Development of the Department of Agriculture, 72 Federal Register 7387 (Feb. 15, 2007).
19. 24 C.F.R. §570.202(d).
20. 36 C.F.R. §800.2(a).
21. National Center for Preservation Law v. Landrieu, 496 F. Supp. at 731.
22. See, e.g., 42 U.S. Code §3545; 24 C.F.R. Part 58.
23. 24 C.F.R. §58.1(b) identifies these programs and each associated law that delegates review responsibilities to recipients.
24. 36 C.F.R. §800.2(c)(4).
25. Ibid.
26. 36 C.F.R. §800.2(a)(3).
27. 1993 A.R., 33.
28. Ibid., 35.
29. Numbered as §800.2(c)(5) at that time.
30. 64 Federal Register 27062 (May 18, 1999).
31. See, e.g., *First Amended Programmatic Agreement Among the Federal Highway Administration, the Massachusetts Highway Department, the Massachusetts State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Implementation of Minor Highway Projects* (2004), <www.mhd.state.ma.us/downloads/enviro/cultural/-programmaticAgreement.pdf>.
32. California Department of Transportation, *Environmental Handbook*, Vol. 2, *Cultural*, Ch. 1, Exhibit 1.1, <www.dot.ca.gov/ser/vol2/PA_04-EH.pdf>. Section 6005(a) of the 2005 federal surface transportation act reauthorization, SAFETEA-LU, authorized a pilot program for complete legal delegation of Section 106 (and NEPA) compliance to a state department of transportation. California is the only state that has accepted the full delegation to date.
33. Department of Housing and Urban Development Form 7015-15, "Request for Release of Funds and Certification" (OMB No. 2506-0087), <www.hud.gov/offices/adm/hudclips/forms/files/7015-15.pdf>.
34. Department of Commerce, "Administrative Order 216-6, Implementing the National Environmental Policy Act" (issued Mar. 10, 1983), <www.osec.doc.gov/omo/dmp/daos/dao216-6.html>, and 15 C.F.R. Part 24.
35. National Oceanic and Atmospheric Administration, "Environmental Compliance Questionnaire," <www.nepa.noaa.gov/questionnaire.pdf>, "Administrative Order 216-6" (issued June 3, 1999, effective May 20, 1999), <www.nepa.noaa.gov>.
36. 13 C.F.R. Part 301 and §302.1, although §302.8 provides that applicants must comply with federal "historic preservation" requirements—along with a laundry list of other laws—but with no other explanation, and not even a reference to the statutory citation or the Advisory Council's rules.
37. See, e.g., <www.eda.gov/PDF/single_app_narrative_111008.pdf> and <www.eda.gov/InvestmentsGrants/PublicWorks.xml>.
38. This discussion is adapted from <www.aicpa.org/audcommctr/toolkitsnpo/internal_control.htm>.
39. 42 U.S. Code §3545; 24 C.F.R. §58.77(d).
40. Department of Housing and Urban Development, *Community Planning and Development Monitoring* (6509.2), Chapter 2, "Management of Monitoring Activities," 6509.2 REV-5 (Mar. 2008), 2-7, <www.hud.gov/offices/adm/hudclips/-handbooks/cpdh/6509.2/index.cfm>.

41. 18 U.S. Code §1010.
42. 24 C.F.R. §58.77(d).
43. Department of Housing and Urban Development, *Community Planning and Development Monitoring* (6509.2), Chapter 21, “Environmental Monitoring,” Exhibit 21-3, 6509.2 REV-5, <www.hud.gov/offices/adm/hudclips/handbooks/cpdh/6509.2/index.cfm>. The content of the audit form for historic preservation and archaeology monitoring is sufficient, but requires substantive knowledge on the part of the regional or field review officer performing the audit (as well as the “responsible entity” being audited) to ensure a meaningful evaluation of compliance.
44. 24 C.F.R. §58.77(d)(i)-(v).
45. 24 C.F.R. §58.72(c).
46. 24 C.F.R. §570.913.
47. 1985 A.R., 17-18.
48. <www.hud.gov/offices/oig/>.
49. Department of Housing and Urban Development, Office of Inspector General, “Audit-Related Memorandum No. 01-AT-241-1801,” Dec. 12, 2000. These reports were located through a search for “Section 106” in <www.hud.gov/offices/oig/reports/oigsearch.cfm>.
50. Department of Housing and Urban Development, Office of Inspector General, “Audit Report No. 2009-KC-1006,” June 29, 2009.
51. Department of Housing and Urban Development, Office of Inspector General, “Audit-Related Memorandum No. 97-BO-111-0805,” June 25, 1997.
52. Department of Housing and Urban Development, Office of Inspector General, “Audit Memorandum No. 2001-PH-0802,” Mar. 31, 2001.
53. <www.whitehouse.gov/omb/circulars_a133_compliance_09toc/>.
54. Ibid., “Part 1—Background, Purpose, and Applicability,” 1-1.
55. Ibid., “Part 4—Environmental Protection Agency,” 4-66.458-5 and 4-66.468-5 – 4.66.468-6; “Part 4—Department of Transportation,” 4-20.500.4 – 4.20.500.5.
56. 1983 A.R., 45.
57. <www.recovery.gov>. Separate from concerns about how historic preservation and environmental reviews will continue to be accomplished during the remainder of ARRA funding, the administrative capacity of some applicants to even administer this infusion of funds was questioned by one federal agency’s independent auditor. HUD’s OIG determined that some public housing authorities (e.g., Travis County, Texas and Fort Worth, Texas) may lack capacity or management strength to administer stimulus funds, <www.hud.gov/offices/oig/reports/tx.cfm>.
58. See, e.g., the programmatic agreement regarding supplemental CDBG funding for economic recovery and stimulus projects in Iowa, <www.iowalifechanging.com/community/downloads/nsp-pa.pdf>.
59. 1992 A.R., 58.
60. Bert Ely, “The Resolution Trust Corporation in Historical Perspective,” *Housing Policy Debate* 1:1 (1990): 57, <www.knowledgeplex.org/programs/hpd/pdf/hpd_0101_ely.pdf>.
61. 1994-95 A.R., 11-13.
62. Ibid., 13.
63. 2008 B.J.R., 6.
64. See 31 U.S. Code §901 et seq. (chief financial officers) and 31 U.S. Code §1112 et seq. (performance and accountability).
65. Federal Accounting Standards Advisory Board, *Statement of Federal Financial Accounting Standards 29, Heritage Assets and Stewardship Land* (July 7, 2005) 17, <www.fasab.gov/pdf/FILES/sSFFAS_29.pdf>.

66. NASA, *FY 2009 Performance and Accountability Report, Financials*, F-20, <www.nasa.gov/pdf/403614main_NASA_FY09_PAR-Financials.pdf>.
67. U.S. Department of Agriculture, *2009 Performance and Accountability Report*, 144, <www.ocfo.usda.gov/usdarpt/pdf/FINAL2k9_USDA_Combined_PAR_11.25.09vF8.pdf>.
68. General Services Administration, *The Federal Real Property Council's FY 2008 Federal Real Property Report, An Overview of the U.S. Federal Government's Real Property Assets* (Aug. 2009), 8, <www.gsa.gov/graphics/ogp/-FY_2008_Real_Property_Report.pdf>.
69. U.S. Department of Defense, *Agency Financial Report for Fiscal Year 2009*, 45-46, <http://comptroller.defense.gov/afr/-fy2009/Addendum_A_Financial_Statements.pdf>.
70. General Services Administration, *FY 2008 Federal Real Property Report*, 8.
71. NASA, *FY 2009 Performance and Accountability Report, Financials*, F-20.
72. General Services Administration, *FY 2008 Federal Real Property Report*, 8.
73. *TSC Indus. Inc. v. Northway Inc.*, 426 U.S. 438 (1976).
74. 17 C.F.R. §229.103.
75. U.S. Department of the Interior, *FY 2002 Annual Report on Performance and Accountability*, Part 1. "Management's Discussion and Analysis," 77, <www.doi.gov/pfm/par/par2002/par2002_part1.pdf> The agency also stated that its bureaus are expected to catalogue 5 percent of their museum holdings each year until at least 80 percent of objects are catalogued.
76. T. Destry Jarvis, *Cultural Resources on the Bureau of Land Management Public Lands: An Assessment and Needs Analysis* (Washington, DC: National Trust for Historic Preservation, May 2006), <<http://preservationnation.org>>.
77. Robert Z. Selden, Jr. and C. Britt Bousman, *2010 Temporal and Regional Dynamics of Cultural Resource Case Law*, manuscript on file, Department of Anthropology, Texas State University at San Marcos and Selden, *2008 A Frequency and Distribution Study of Case Law within Archaeology.*, unpublished B.A. thesis, Department of Anthropology, Texas State University, San Marcos. See also, Selden and Bousman, *2010 U.S. CRM Case Law Database 1906-2009*, at <<http://www.thc.state.tx.us/-archeology/aaresource.shtml>>.
78. *Cobell v. Salazar*, Case No. 1:96CV01285 (D.D.C.), a class action lawsuit filed by Blackfeet (Montana) tribal member and lead plaintiff Elouise Pepion Cobell against the Department of the Interior regarding mismanagement of the agency's accounting methods for estimating the proper balances of tribal and individual accounts in the Indian Trust Fund. After 13 years of litigation, the parties announced a settlement on December 7, 2009 in the amount of \$3.46 billion, <www.justice.gov/civil/cases/cobell/index.htm>.
79. Department of Housing and Urban Development, *FY 2008 Performance and Accountability Report*, Section 2, "Performance Information," 101, <www.hud.gov/offices/cfo/reports/section2.pdf>; Department of Transportation, *FY 2008 Performance & Accountability Report*, "Management's Discussion and Analysis," 147, <www.dot.gov/par/2008/pdf/-DOT_PAR_2008_PR.pdf>.
80. *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978). The U.S. Supreme Court upheld the appellate court's directive enjoining the power agency from completing the impoundment after the snail darter was listed as endangered under the new federal law, and the Little Tennessee River was consequently declared as critical habitat for the fish. Although the majority opinion noted that "Congress has spoken in the plainest words, making it clear that endangered species are to be accorded the highest priorities" (*Ibid.* at 155), Congress later exempted the construction project from the law, allowing the dam to be built. Nevertheless, the Endangered Species Act became an indelible part of federal agency risk management planning as a result of the extensive litigation.

SECTION 4: PLANNING

Key Recommendation: Federal Agencies Need to Ensure Earlier and Broader Integration of Preservation Values in Their Planning Processes

By all measures, there is no dearth of planning by the federal government. Agencies adopt management plans, resource plans, strategic plans, long-range plans, short-range plans, and even plans to make plans. Over four decades ago, Congress enacted the National Historic Preservation Act (NHPA), followed by the National Environmental Policy Act (NEPA), which together require federal agencies to identify and consider environmental and cultural resources (including historic properties) in a broad, interdisciplinary, and integrated fashion when planning for and conducting their own projects and reviewing plans for nonfederal projects they fund or approve. These two laws and their corresponding regulations feature common early planning requirements and expectations:

- The point of NEPA, as expressed in the Council on Environmental Quality's regulations, is "not to generate paperwork—even excellent paperwork—but to foster excellent action."¹ Before project plans are finalized, "better decisions" can be made to protect, enhance, and restore the environment through a careful prior analysis that focuses on reasonable alternative locations for a project or its design and predicts how these alternatives may harm or help environmental resources.
- Federal agencies "shall integrate the NEPA process with other planning at the earliest possible time" to ensure that their planning and decisions "reflect environmental values, avoid delays late in the process, and head off potential conflicts."²
- Likewise, Section 106 is intended to commence "at the early stages of project planning."³ Subpart A of the Advisory Council's regulations mandates that "Federal agencies *shall* ensure that section 106 is initiated early in the undertaking's planning so that a broad range of alternatives may be considering during the planning process [emphasis added]."⁴

Despite the proliferation of federal plans and planning requirements, practically every person interviewed for this study reported on the lack of critical thinking *during the planning process* about early strategies to identify historic properties and to develop alternatives, once project evaluation is underway, that incorporate historic properties in a positive way or that avoid and minimize harm to these properties. Instead, consideration of historic properties is too often conducted well down the path of project refinement, not the early planning stage, when key decisions have already been made. Today, the overwhelming experience of the National Trust, tribal officials, state historic preservation agency staff, cultural resource consultants, and the public is that all too often Section 106 has become "back-end loaded," focusing solely on mitigating harmful impacts from predetermined project site locations, design layouts, or infrastructure corridors.

This recommendation promotes the integration or coordination of Section 106 compliance in environmental reviews and environmental management systems for certain federal agencies; encourages the Advisory Council to be more active in commenting on NEPA documentation; suggests disincentive measures for agencies that are dilatory in addressing Section 106 compliance; urges preservation advocates to participate in agency planning and advisory committees; and highlights the need to expand awareness of Section 106 by the media and among other stakeholders that do not traditionally participate in Section 106 reviews. This section also addresses concepts to improve planning methodology for archaeological investigations during Section 106 reviews for interstate projects; the goal is to achieve a broader benefit to the public by encouraging federal agencies to then undertake Section 110 surveys more proactively in the future, bolstered by the strategic lessons learned from more effective field testing and data management models developed through these Section 106 experimentation cases.

4-1. In many cases, consideration of historic properties could be improved through better coordination or integration with National Environmental Policy Act compliance.

This planning recommendation supports two different—yet related—concepts to improve meaningful consideration of historic properties in federal planning processes: (1) the specific *coordination* milestones in environmental and historic property reviews identified below from a Preserve America expert panel report issued in 2009 under the auspices of the Advisory Council; and (2) increased use of the authorized (but seldom employed) formal “substitution” process adopted by the Advisory Council in 1999 and 2000 for full *integration* of Section 106 compliance in NEPA documents and processes. Related aspects of this recommendation are contained in another planning subsection below that calls for imposition of specific types of sanctions on federal agencies that systematically misuse environmental reviews, as well as a technology recommendation later in this report that identifies a critical need to upgrade the major commercially available software used to manage construction projects by adding Section 106 coordination and integration milestones to existing NEPA milestones in these software products.

Proposals for federal projects or federally assisted projects are subject to both the environmental and historic property review processes under NEPA and the NHPA. There are three types of environmental review documents: (1) the EIS, which is required for each “major” project “significantly affecting the human environment,” and is finalized in a formal Record of Decision (ROD); (2) the environmental assessment (EA) for each less-impacting project, which is finalized in a formal finding of no significant impact (FONSI); or (3) the categorical exclusion, for each project proposal that is predicted to have minor or no impacts to natural or cultural resources. Between 200 and 300 EISs are issued each year based on EPA data.⁵ The total number of EAs has been estimated by the CEQ to approximate 50,000 per year.⁶ Data on categorical exclusions is not readily available, but the number of these NEPA reviews is also likely to reach in the tens of thousands issued each year.

Section 106, which independently applies to proposals, has no comparable tiers of review documentation. A federal agency either concludes that a proposal is not an “undertaking,” in Section 106 terminology, because it has *no* potential to harm historic properties that might be present (thus, ending the review at that point), or that there is a potential for such effects, and the review and consultation process of the Advisory Council’s Section 106 rules is

then initiated. (Section 106 also differs from NEPA in an important procedural way that has substantive benefits: it provides a clear process in which the SHPOs and/or Advisory Council have the bargaining leverage to bring significant pressure on the federal agencies to avoid, minimize, or mitigate the impact of projects under Section 106 itself [under pain of termination and involvement by the heads of federal agencies], and federal agencies are mandated under Section 110(l) of the NHPA to comply with the mitigation commitments that are developed through this negotiation process. NEPA itself offers no comparable process, but simply provides for “full disclosure” of the harmful impacts of projects in environmental review documents.) Currently, the historic preservation offices of the states and Indian tribes review and consult in over 100,000 Section 106 actions each year. On the NEPA side, a project (a Section 106 “undertaking”) is reviewed either as an EIS/ROD, EA/FONSI, or, most commonly, a categorical exclusion.

Coordination of the two review processes. Section 1 of this Part II report explains more specifically how NEPA and the NHPA and their backgrounds, policies and regulations together promote coordinated and substantive consideration of historic properties (including their natural features, such as landscapes) in project analyses and public involvement processes.

Interviewees for this report were asked a number of questions about NEPA and NHPA coordination during reviews of federal and federally assisted projects, which sparked the most varied and lively discussion among any set of questions asked. These questions were intended to gauge specific insights among experienced preservation and environmental practitioners regarding the following finding of the Preserve America expert panel’s February 2009 report *Recommendations to Improve the Structure of the Federal Historic Preservation Program*:

Coordination between Section 106 and other federal review statutes, especially the NEPA, is often lacking or inadequate, which leads to uninformed decisions, foreclosure of alternatives, and inefficient reviews.⁷

There was a general consensus among interviewees for this study that NEPA compliance (though itself often perfunctory) is more ingrained in federal agency programs than is Section 106 of the NHPA. Part of the reason for this phenomenon may be based on the fact that NEPA requires production of a document (the EIS) for major federal projects. One reviewer of agency compliance with NEPA found that teams of people were hired by federal agencies to write environmental review documents—particularly the massive EISs—an early practice that substantially increased internal federal agency environmental staffing at that time.⁸ Further, federal agencies were instructed to identify and develop their own measures to implement NEPA.⁹ Unlike the NHPA, these directives led federal agencies to adopt their own NEPA-implementing regulations in addition to those adopted by the CEQ rules.

The other reason NEPA compliance may be more ingrained in agency programs is that the statute’s entrée into the federal bureaucracy was greeted with prodigious litigation, particularly with respect to federal licensing of hydroelectric dams and nuclear power plants (colloquially, at that time, the “dam and doom” projects).¹⁰ Because federal agencies increased their hiring to employ staff to write EISs, and weighty public interest enforcement accompanied the early stages of implementation of NEPA, it would not be surprising, therefore, that the bureaucratic processes better adapted early on to NEPA than to Section 106, if somewhat as a defensive mechanism.

Section 3-2 of this report questions whether federal agencies are adequately staffed with preservation professionals. The data in Appendix 3-1 suggests that some agencies—particularly the independent federal agencies—may use their NEPA staff to carry out functions that should be conducted by preservation professionals under the Interior Department’s guidance. This possibility could contribute to the Section 106 problems noted by the Preserve America expert panel report, in that NEPA sometimes gets ahead of Section 106 process in project reviews, thereby foreclosing meaningful consideration of alternatives that do not harm historic properties and minimizing the opportunity for consultation with consulting parties.

Input from interviewees (experienced practitioners, representatives of public interest groups and the public) regarding the lack of coordination between NEPA and Section 106 can be distilled as follows:

The conceptual and practical orientations of the two review processes are different. NEPA is oriented to extensive documentation of resources; paper-based, back-and-forth comments and communication between government agencies; and “stand-up at the podium and scream” public meetings. By contrast, Section 106 “sets up a conversation” and is oriented to creative solutions, negotiations, and settling differences through consultation. Anyone can sit down next to a decision maker at a consultation meeting.

Professional compartmentalization is a barrier. Experts who are involved with NEPA (typically professionals who focus on the natural environment) are different from experts who are involved with NHPA (typically professionals who focus on the built environment or on archaeological resources). Consulting firms tend to feature one set of staffing capabilities, often to the exclusion of the other. Within federal agencies that are staffed with both sets of professionals, these specialists are at times assigned to different offices rather than work in an integrated fashion.

The two laws impose separate and independent compliance duties, which are not well understood; the procedural steps are not a one-to-one match. A threshold understanding of the independent compliance requirements of Section 106 and NEPA is absent among some federal agencies and consultants (e.g., firms with a traditional civil engineering emphasis, local firms). As a result, coordination (much less integration, as promoted by the Advisory Council through the substitution process of its Section 106 rules) is simply not included in project management from the start of a proposal. Many agencies use categorical exclusion and EA/FONSI documents as their cultural resource compliance documentation without even following the Advisory Council rules. Additionally, a project may meet environmental criteria for a NEPA categorical exclusion (which requires minimal documentation) and yet pose harmful direct—or more commonly—indirect and cumulative impacts to historic properties, requiring a negotiated mitigation process and separate documentation through a formal Section 106 memorandum of agreement.

Not coordinating the two review processes can be used as a purposeful tactic to avoid meaningful public interest consultation. Several environmental and preservation advocates knowledgeable about both NEPA and Section 106 consider the lack of coordination a purposeful tactic in a few controversial projects.

This report concludes that there are no significant structural barriers in the laws and regulations themselves that impede better coordination of the two review processes. Nor is coordination hindered by a lack of simple guid-

ance. To improve Section 106 and NEPA reviews working together, for example, the Preserve America expert panel recommended a simple set of clear coordination milestones for Section 106 activities in relation to NEPA documentation:

- (1) *Before* a draft EA or EIS is finished or issued, the following three stages of Section 106 review should occur: consultation should be initiated, geographic areas where project impacts could occur (“areas of potential effects” [APE] in Section 106 terms) should be identified, as well as historic properties within the APE; and impacts to these historic properties should be identified in consultation with Section 106 stakeholders; and
- (2) Commitments to minimize predicted harmful impacts to historic properties should be negotiated and documented *before* the final NEPA decision document is issued (i.e., before the issuance of a categorical exclusion document, EA/FONSI, or EIS/ROD).

This study recognizes that a key—if not *the* most—practical impediment to achieving the goals set by Congress to mesh consideration of natural and cultural resources appears to be founded primarily on past institutional practices and mind-set differences between career environmental and cultural resource professionals alike. In particular, some professionals may tend to compartmentalize their work and embrace the regulatory process and resources with which they are most familiar, thereby diminishing a more holistic evaluation of projects, alternatives, and impacts. To the extent this outcome occurs, it is wholly unfounded and unintended in NEPA in particular, which includes historic properties in its “systematic, interdisciplinary approach” to improve federal projects. The public, on the other hand, does not make narrow or legalistic distinctions when considering the historic properties and landscapes—and associated environmental features—they value and want to protect.

The NEPA substitution option for full integration of Section 106 in project planning. To some extent, the Advisory Council’s creation almost a decade ago of a NEPA substitution path to achieve Section 106 compliance in federal agency planning should have facilitated not only coordination, but full and interdisciplinary *integration*, of the two review processes. This outcome has not been realized, however. A total of only 28 NEPA substitution notices have been submitted to the Council from FY 1999 through FY 2007 based on its yearly reports to the president and Congress.

In 1999 and 2000, the agency adopted a new procedure in §800.8(c) of its Section 106 rules (“*Use of the NEPA process for section 106 purposes*”). (The unfortunate “in lieu” nickname of this rule—which may suggest a loophole or end run around Section 106 compliance—is not in the title of the rule but in the introductory clause. This report refers to 36 C.F.R. §800.8(c) as the “NEPA substitution” rule or process, which is more consistent with the intent of the agency as stated in its explanations of the rulemaking.)

This rule authorizes a federal agency on its own initiative, and with prior notice to the SHPO/THPO and Advisory Council, to use the EA/FONSI or EIS/ROD process and documentation to comply with the Section 106 procedures at §800.3 (initiation of the Section 106 process, including consultation), §800.4 (identification of the APE and historic properties), §800.5 (assessment of effects), and §800.6 (resolution of adverse effects). “Substantive

compliance” with each of these Section 106 stages must be achieved through the environmental review process and documentation.

Consulting parties and the Advisory Council must be provided the EA before the federal agency finalizes the document or draft or final EIS before or at the time the documents are issued for public comment.¹¹ There is an avenue for consulting party appeals and automatic referrals to the Advisory Council of any objections to the adequacy of the NEPA documentation (including EAs) in addressing National Register-listed or -eligible historic properties or the resolution of adverse effects (proposed mitigation measures).¹² Binding mitigation commitments for the resolution of adverse effects may be included in either an MOA or a ROD (if the action was processed as an EIS).¹³

The Advisory Council initially estimated that more than 100 Section 106 undertakings each year might be addressed through the formal NEPA substitution process; however, actual numbers are dramatically smaller. Seven substitution notices were received in FY 2001; 3 in FY 2002; 5 each in FY 2003 and FY 2004; 1 each in FY 2005 and FY 2006; and 6 in FY 2007.¹⁴ State review offices and private preservation advocates interviewed for this report were asked why this is the case. Most everyone responded that federal agencies, their representatives, and businesses and local governments seeking federal funding or permits may *think* they are complying with §800.8(c), but they are not—they do not give the required formal notice to the states, tribes, or Advisory Council (thus, the low reported numbers) and they may be confusing the concept of *coordinating* NEPA and NHPA (which was already required and strongly encouraged by the Advisory Council before the 1999 and 2000 rule amendments) with actual *integration* of Section 106 steps (e.g., inviting consulting parties, seeking the views of Indian tribes, identifying historic properties, and determining how they will be impacted by the project) under §800.8(c) in NEPA planning, public notices and meetings, and decision documents. To be clear, though, the perceptions of these interviewees is that the same problems permeate *both* coordination and formal “integration” of the NHPA and NEPA: many agencies, consultants, and businesses or local governments who prepare NEPA documents do not tend to think about historic properties until well into the NEPA process (at the mitigation stage), often foreclosing early, required consideration of ways to avoid harming historic properties.

Although formally using the §800.8(c) NEPA substitution rule is currently rare, it should be encouraged for federal agencies that tend to exhibit relatively better or more sophisticated ownership of their NEPA compliance planning processes (e.g., GSA). The

State Strategies for Integrated Resource Review

During interviews, several SHPO offices identified initiatives to bring together multiple state agencies in an attempt to collaboratively integrate consideration of natural and cultural resources in planning for federally funded projects (often, road projects). Staff reported they never miss these team meetings because they serve as the forum for negotiating “birds and bees vs. structures” during the critical stage of identifying and selecting project alternatives.

One SHPO also reported on an upcoming initiative to work with a counterpart natural resource agency to develop strategic plans that better integrate consideration of the natural and built environments.

goal should be to deliberately develop models of cultural and natural resource integration in agency planning and alternatives analysis that can also be used by other federal agencies. For example, many of the preservation performance goals and reporting recommendations identified in Section 5-5 of this report are more efficiently compiled through NEPA documentation for individual projects.

While more complete guidance to integrate and coordinate Section 106 and NEPA would be helpful (and is being jointly developed by the Advisory Council and the CEQ), potential users among those interviewed for this report indicated that abstract guidance, or guidance that simply restates the regulations, would not be helpful in their evaluation of whether to use the NEPA substitution rule.¹⁵ Several SHPO websites now feature helpful diagrams which depict how NEPA and Section 106 should work together in practice, and which complement the Preserve America milestones.¹⁶ However, there is no substitute for working through the process of applying a diagram to a specific project to illustrate the benefits and limitations of the NEPA substitution option—including following the Preserve America coordination milestone guidance—as a matter of actual practice. Therefore, in addition to the ACHP-CEQ guidance underway, representative projects from various federal real property agencies should be cooperatively selected with the input of the Advisory Council and CEQ; the mechanics of implementing the NEPA substitution option for both an EA and EIS should be mapped out in project management plans and consciously tracked and checked along the way; and an after-the-fact review of lessons learned should be developed to guide other similar projects. However, no project should be chosen for the formal NEPA substitution path that involves programs identified through the Advisory Council’s experience as presenting systematic Section 106 weaknesses, particularly housing. If an agency or its authorized representatives have not ensured the basic understanding of NEPA and NHPA as separate (yet related) compliance requirements, formal substitution under §800.8(c) may best be left to those who have the qualified staff and planning practices instead.

Tribal review offices are often one-shop technical experts for both NHPA and NEPA (as well as other resource laws) and, for this reason, may be more familiar with the environmental review process and how to navigate the particular formats and bulk of EISs, EAs/FONSIs, categorical exclusions, as well as important ancillary reports and appendices. While some SHPO offices also have NEPA experience, based on the interviews for this study, if more federal agencies formally and correctly use the NEPA substitution process, some training may need to be provided to SHPO (and Advisory Council) staff that may be unfamiliar with the mechanics of NEPA and associated documentation.

Concerns were expressed during the interviews for this study about cultural resource professionals’ unfamiliarity with NEPA or the fear that Section 106 would be “whittled down” in the formal substitution process. However, given the limited substantive consideration of preservation values currently afforded in the NEPA process even by some proficient federal agencies, applicants, and consultants, Section 106 is often “whittled down” and belated in any event under the status quo. On the other hand, if substitution is correctly implemented based on compliance with the requirements in the Council’s rules, specific models of implementation, and following the coordination milestones of the Preserve America expert panel report, consideration of historic properties *could* be improved, and could be more influential in shaping early decisions about alternatives.

As a small, but important, first step, in the practical use of NEPA integration documents in individual projects, submittals to SHPOs and THPOs should provide Section 106-relevant information in a format that facilitates their staffs' review (e.g., identifies or flags the sections relating to historic properties). One concern raised in the interviews is that the 30-day review deadlines under §800.3(c)(4) to respond to federal agency findings and determinations can quickly slip away if SHPO and THPO staffs are required to hunt for Section 106 information in massive NEPA documents or related appendices. SHPOs and THPOs should therefore be encouraged to consider such submittals incomplete under the Section 106 rules until the relevant information is clearly identified in NEPA submittals to their offices. Additionally, cultural resource information contained in NEPA documentation should be provided in a format that supports SHPO and THPO data entry requirements for their automated databases, used as essential tools for year-end reporting to the National Park Service on Section 106 activities.

In addition, gray areas of the NEPA substitution process should be identified and addressed through opinion letters from the Advisory Council. The issues addressed by this guidance should include, but not be limited to, the following questions:

- If NEPA ROD conditions are used instead of a Section 106 MOA to legally document historic property mitigation commitments—as is authorized in the Advisory Council's rules—what is the statute of limitations and right of action for consulting party or other third-party enforcement? Litigation that challenges NEPA compliance is subject to the general 6-year statute of limitations under the federal Administrative Procedure Act (and the limitations period for challenging highway or transit projects may be shortened to 180 days under the 2005 surface transportation act, SAFETEA-LU). Historic property mitigation timelines may exceed six years—the duration of one multibillion dollar highway project MOA is 20 years. Furthermore, some courts look to whether a plaintiff has signed an MOA as a concurring party in assessing whether the party has standing to enforce compliance with the MOA; formal “concurrence” is not an option for a ROD under the CEQ's rules. Does the APA extinguish third-party enforcement of historic preservation mitigation commitments when they are made in a ROD as opposed to an MOA?
- Could the Advisory Council create a mechanism for consulting parties (e.g., SHPO/THPO, public interest groups) to sign historic property terms and conditions of a ROD as “concurring parties” under the Advisory Council's Section 106 rules? (The Council currently encourages federal agencies to create special privileges for concurring parties, such as special access to design review or to administrative dispute resolution mechanisms that non-concurring parties cannot use.) The creation of such a hierarchy would be more difficult under a ROD with no “concurrence.” On the other hand, the benefit to a federal agency in using a ROD as a Section 106 decision document when it processes a major federal action as an EIS is that, under NEPA, a ROD is *not* a joint signatory document, and there are often significant time efficiencies in not having to secure multiple written concurrences from other agencies' high-level officers or managers.
- How should post-ROD reviews be conducted when the NEPA substitution path is used? According to the Advisory Council's §800.8(c)(5), project modifications that change the project or its effects on historic properties are, at the discretion of the federal agency, either processed as NEPA supplemental documents (e.g., supplemental EIS) or evaluated by reopening the Section 106 process. However, the portions of the

CEQ rules relating to supplemental reviews only apply to EISs (not EAs), and are not precisely clear on when to reopen EISs for new or different information.¹⁷

- Does the Section 106 substitution process apply to project proposals reviewed under NEPA as categorical exclusions? If so, what documentation should be used? Categorical exclusion actions may minimally impact land, air, water, or animals, yet may significantly harm historic properties or landscapes. Section 800.8(c) only addresses NEPA substitution compliance through using EAs or EIS/ROD documentation, suggesting that the process cannot be used for categorical exclusions. Section 1508.4 of the CEQ rules allows federal agencies to adopt procedures to analyze project impacts in a categorical exclusion document in rare circumstances when a “normally excluded action may have a significant environmental impact” — could the substitution process under §800.8(c) provide an alternative review mechanism for categorical exclusions which meet agency criteria in these limited cases?

4-2. The Advisory Council should be more active in fulfilling its commenting responsibilities under the National Environmental Policy Act.

Part of the interagency coordination and cooperation mandate of NEPA requires that the federal agency responsible for preparing an EIS for a “major federal action” (which is, by definition, a Section 106 “undertaking”):

. . . shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.¹⁸

The implementing regulations of the CEQ include a counterpart directive addressed to the federal resource agencies that have such expertise:

Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved . . . *shall comment* on statements within their jurisdiction, expertise, or authority . . . [emphasis added].¹⁹

Apart from this requirement in the NEPA implementing rules, the Advisory Council has independent power under the NHPA to review federal agency activities and information for consistency with the NHPA — authority that is broad enough to including commenting on *any* type of NEPA document, including EAs and categorical exclusions (the latter is intended to be used in NEPA reviews for projects with minor or no impacts).

Yet, the Advisory Council rarely submits comments as a federal expert agency during the NEPA scoping process for EISs (where important issues are identified early in the study) or in response to draft or final NEPA documents. This omission represents a significant missed opportunity for positive preservation outcomes. Specific proposals for the Advisory Council’s involvement in NEPA cases that present substantial impacts or policy issues are identified below in this recommendation.

The early Section 106 rules encouraged federal agencies to send EISs to the Advisory Council and the Department of the Interior for review if National Register-listed or potentially eligible historic properties were affected by the undertaking.²⁰ By 1975, the Advisory Council reported that it received approximately 80 EISs per month which

provided an “early warning system” for the agency’s review of impacts to historic properties from federal programs and projects.²¹ The focus of the agency’s NEPA review and comment was “to ensure that Federal agencies fully consider the impact (upon) . . . and avoid damaging sites, structures, and areas if possible.”²²

However, NEPA is rarely mentioned in the majority of Advisory Council work activity reports from 1969 to the present. Former Section 106 caseworkers interviewed for this report indicated that they did review NEPA documentation as background in the high-profile or controversial cases in which the Council elected to participate. However, specific information on the Advisory Council’s NEPA scoping responses and comments on other NEPA documents was requested for this study, but no records were provided. Current senior staff stated that the Council typically does not review or comment on NEPA documents, including scoping requests from federal agencies.

Many federal agencies have a more ingrained history of planning for projects and analyzing their impacts through NEPA than through Section 106. As a result, it may be more effective to address the agencies through the regulatory framework with which they are most familiar or comfortable. Until that time, it does not appear that the Advisory Council is taking full advantage of the opportunity to influence agency actions earlier through its role as a commenting agency for major federal actions under NEPA.

Approximately 17 to 25 EISs are issued per month by all federal agencies combined.²³ This recommendation does not suggest that the Advisory Council immerse itself in every such statement, or the 50,000 EAs issued annually (based on estimates from the CEQ). Rather, this report suggests that the Advisory Council and U.S. EPA jointly work on opportunities for select Council input into NEPA cases that pose significant historic property impacts or preservation policy implications. Since EPA has substantial staff capacity for reviewing NEPA documents, that capacity could perhaps be leveraged more efficiently to better address historic preservation concerns, for example.

The Preserve America expert panel recommended better integration of NEPA and cultural resource programs (including Section 106) through (among other things) assigning cultural resources to a new CEQ managerial position.²⁴ In addition, this study recommends establishing a formal or informal partnering arrangement between EPA and the Advisory Council to support cultural resource reviews of individual EISs (and certain EAs over time). The environmental agency’s regional offices throughout the country conduct the primary EIS and EA reviews, provide comments, and assign initial ratings of impacts and adequacy of EISs.²⁵ This report did not specifically evaluate whether EPA’s NEPA reviewers in regional offices comment on historic properties subject to Section 106 review or communicate with THPOs or SHPOs. Anecdotally, some EPA regional offices have commented on historic property concerns in reviewing NEPA documents. However, none of the SHPO offices interviewed reported interactions on projects initiated by the regional EPA offices.

There are a number of ways in which the Council’s role could be facilitated in NEPA reviews through a cooperative partnership with the EPA: (1) assigning a point of contact at the Council to answer questions from the EPA’s regional NEPA review staff; (2) seeking early and informal referral to the Advisory Council from regional EPA office NEPA staff of cases that defer or do not adequately consider impacts on historic properties; and (3) tempo-

rarily assigning an Advisory Council Section 106 caseworker to the NEPA Compliance Division in EPA headquarters to review draft NEPA documents on a short-term, periodic basis.

Additionally, based on a review of the EPA NEPA database, planning and management documents by the three major federal land management agencies (BLM, National Park Service, and the U.S. Forest Service) appear to constitute a substantial percentage of the EISs issued each year. In the past, the Advisory Council has expressed frustration with the vagueness of federal land planning documents especially with respect to plans to identify and manage historic properties.²⁶ However, that approach begs the question as to *why* those documents are too vague in some instances.²⁷ Participating more actively in EIS scoping opportunities and commenting on NEPA documents would present a forum for the Advisory Council to raise agency consciousness and prod agencies to plan for fully inventorying federal lands, as required by Section 110(a)(2) of the NHPA.²⁸ Further, the EPA should consider such comments in its NEPA document rating role described in Section 4-4 below.

Finally, expanded involvement of the National Trust's preservation partners in the federal advisory committee process (see Section 4-6 below) could also provide the Advisory Council early alerts with respect to NEPA cases that may warrant the expert agency's scrutiny.

4-3. Environmental management systems should be expanded to encompass cultural resources, including Section 106 implementation.

Within the past 15 years, the principles of quality management traditionally applied to manufacturing processes have been extended to business and government environmental programs required to protect air, water, and land. Standard 14001 of the International Organization for Standardization (ISO 14001), adopted in 1996, established a voluntary framework for these "environmental management systems" (EMSs). Through a process of third-party auditing, a company's or organization's EMS may be certified as meeting ISO standards. EMSs are designed to increase internal standardization, consistency, and completeness of environmental programs for businesses (and even government agencies) that operate plants or facilities under federally enforceable air, wastewater, or waste permits. Incentives to establish an EMS include the following considerations: (1) environmental laws and permits impose significant civil and criminal penalties for noncompliance, and these laws are actively enforced; (2) pollution includes valuable byproducts that are lost when emitted from a smokestack or discharge pipe, and thus costs money; and (3) "green" and "sustainability" are now marketing mantras, not maledictions.

This study recommends that federal agencies expand their required EMS programs to evaluate and improve cultural resource compliance in an earlier and more systematic fashion with the involvement of key federal managers.

The EMS model is an elaboration of the "plan-do-act-check" quality management cycle, with an emphasis on improving regulatory compliance through routine internal reviews and manager-level commitments to remedy any problems found through these reviews. Executive Order 13,148 (*Greening the government through leadership in environmental management* [Apr. 21, 2000]) directed federal agencies to establish environmental leadership and im-

prove regulatory compliance by developing their own EMSs. Adding a cultural resource component to federal agency EMSs should logically follow from implementation of federal preservation programs under Section 110 of the NHPA. The 1998 revisions to the Secretary of the Interior’s guidance to executive branch departments and agencies also reinforced that historic preservation is “a fundamental part of the mission of any Federal agency” and “*should interact with the agency’s management systems* to ensure that historic preservation issues are considered in decision-making [emphasis added].”²⁹ Further, from a risk management perspective, although federal laws do not generally impose criminal sanctions for noncompliance with cultural resource laws, including Section 106, incomplete or faulty compliance with the procedural aspects of Section 106 can subject a federal agency to third-party enforcement through litigation.

Environmental management systems are sometimes criticized for focusing on paperwork; they do not guarantee or assure compliance. At their best, however, such systems increase management understanding of legal requirements and create a recurring process for internal self-examination and corrective action. It would be very useful for federal agencies to adapt EMS commitments for internal audits or compliance evaluations to include Section 106. Experienced cultural resource consultants interviewed for this report could not identify *any* example of an EMS being used to evaluate Section 106 compliance, even though they are used at times to review NEPA compliance. As an environmental professional with over 20 years of experience working for federal agencies, the author of this report can identify only *one* federal facility that has addressed cultural resource reviews in its EMS internal assessment program. Strengthening consulting party relationships as a result of the review significantly facilitated a subsequent Section 106 consultation for a major, time-sensitive project. In only one instance formally reported by the Advisory Council involving internal evaluation of Section 106, the agency noted that an internal U.S. Forest Service historic preservation audit—required as a result of a “costly lawsuit” against the agency—increased the number of Section 106 reviews, most likely a result of the audit increasing awareness of the compliance responsibility.³⁰

National Park Service audits of state review programs included SHPO compliance with their Section 106 responsibilities, but these reviews generally stopped in the early- to mid-1990s (with the exception of Hawaii’s program, mentioned in Section 7-1 below). State- or tribal-level compliance reviews are an inapt surrogate in any event, since federal agencies bear the primary responsibility for Section 106 compliance.

Implementation of Section 106 will continue to be relegated to a collateral or extraneous function for some agencies in the absence of a systematic internal assessment that reaches key federal managers. Such managers include the Senior Policy Officials who are designated as the “responsible official” for purposes of their federal agency’s preservation responsibilities under the 2003 Preserve America presidential executive order, as well as Federal Preservation Officers which each agency is required to appoint pursuant to the NHPA.

The Advisory Council or other qualified stakeholders could help instruct federal agencies on the mechanics of an internal compliance system, including audit checklists, to ensure that EMSs (or comparable management systems) include Section 106 compliance. In reviewing one federal agency’s management-system manual for this study, the section on historic preservation procedures did not address Section 106 whatsoever, but primarily focused on the Preserve America executive order instead.³¹

4-4. Sanctions should be imposed on federal agencies that misuse environmental reviews and prevent meaningful Section 106 compliance.

As explained above in Section 4-1, a Preserve America expert panel recently identified discrete Section 106 compliance milestones that must be achieved before certain steps in the NEPA review process for individual projects, in order to ensure timely consideration of historic properties and a meaningful opportunity for the Advisory Council to comment. This report recommends that federal agencies or their representatives that systemically produce NEPA documents that do not follow the expert panel's coordination milestones should be penalized by lowering the EPA's NEPA project rating in the process described below and/or suspending Section 106 program alternatives previously approved by the Advisory Council.

The EPA fulfills two roles in reviewing NEPA documents. First, it serves as an expert agency when critiquing EISs (and, at times, EAs) for consideration of impacts to air, water, wetlands, and other natural resources. Secondly, the agency exercises a less well-recognized but, nonetheless, mandatory duty by which it "rates" or "grades" the severity of impacts from a project and the adequacy of NEPA documents and analyses. This unique role was assigned to the agency by Congress under Section 309 of the Clean Air Act, which mandates that the EPA review and comment in writing on all "Federal projects for construction" or "major Federal actions" subject to the national environmental policy set out in NEPA.³² The agency's review jurisdiction is not limited to environmental impacts or air quality in particular. Instead, its review and ratings encompasses all resources affecting the quality of the human environment (including historic properties) through Section 309's reference to NEPA's national policy.

In practice, the EPA grades only project impacts studied in an EIS, although it is not exclusively limited to rating this level of NEPA documentation by the Clean Air Act. Two sets of criteria have been developed for rating major federal actions (which are also Section 106 "undertakings") under NEPA: one set relates to the severity of environmental impacts and the other to the adequacy of the draft EIS (see Appendix 4-1).³³ These lists identify the factors EPA considers when assessing the degree of harm that will result from a project and recommending improvements in project documentation, elements, or impacts to the lead federal agency that proposes to carry out or assist the activity.

Any impacts that are deemed "unsatisfactory to the public health or welfare [emphasis added]" trigger an automatic referral of the project or matter to the CEQ.³⁴ The CEQ's process for considering these controversial projects is somewhat comparable to the Advisory Council membership's formal—though also rare—direct involvement in high-profile Section 106 cases, in terms of focusing high-level attention on cases where conflicts were not resolved at the staff level. In addition, the CEQ regulations on handling referrals do follow formal administrative law procedures, including the opportunity for public meetings or hearings. From 1974 through the end of 2001, 27 cases were referred to the CEQ by EPA or other federal agencies.³⁵ The Army Corps of Engineers leads with 10 referrals, followed by the FHWA (6), BLM (4), FAA (2), and one each for the Atomic Energy Commission (now the Nuclear Regulatory Commission), HUD, the Marine Corps, Bureau of Reclamation, and FERC.³⁶

This EPA and CEQ review authority provides a possible way for the Advisory Council, EPA, and CEQ to collaborate on strengthening consideration of historic properties and coordination of NEPA and Section 106. Specific ways this collaboration could be documented include amending the formal Memorandum of Agreement between EPA and CEQ (which addresses respective roles and responsibilities in NEPA reviews) or jointly issuing revised guidance on application of the rating categories and criteria for cases involving significant historic properties, impacts to such properties, and procedural problems in considering historic properties.

Projects that do not adhere to the Preserve America expert panel's recommended NEPA-Section 106 coordination milestones should be downgraded by EPA in the NEPA document and impact rating process. Several THPOs and SHPOs interviewed for this study described repeated experiences of being asked to consult on the federal agency's NEPA "preferred alternative" *before* the agency had even made its findings on impacts to historic properties. Further, the rating process—and the possible sanctions that follow below—does not have to be, and should not be, limited to EISs. According to the experiences of both preservation and environmental professionals interviewed for this report, there is an increasing trend for federal agencies or applicants for federal funding or approvals to use EAs in lieu of EISs for environmental reviews. Reasons for this uniformly observed trend may be that the less-documented EAs do not require the lead agency to conduct early "scoping" (identifying issues or concerns) with other agencies, do not require issuance of a draft document for agency and public review, and entail much less opportunity for public involvement overall.

Options for EPA to lower a formal project rating in response to NEPA reviews that hinder or prevent meaningful compliance with Section 106 include: (1) assigning a lower "grade" to the NEPA document in response to Section 106 compliance concerns; (2) designating an EIS or EA as "inadequate" and unsuitable for public review and comment until revised; or (3) designating an EIS or EA as "environmentally unsatisfactory" for potential historic property impacts not adequately addressed or foreclosed from consideration due to dilatory Section 106 compliance, thus triggering project referral to the CEQ for formal consideration and comment. The downside to the project sponsor from a lowered NEPA rating can take the form of project delays—with associated costs—and negative publicity.

These ideas for action are not meant to suggest that the Advisory Council directly take on the type of rating responsibility exercised by the EPA under Section 309 of the Clean Air Act. The EPA is a regulatory agency that has significant enforcement power under federal laws and, for that reason, is more experienced with directly and routinely confronting regulated industries. It may be more advantageous for the Council to provide content for the EPA to deliver, or criteria to apply (such as the milestones recommended in the Preserve America expert panel report). NEPA and the Clean Air Act authorize EPA to do so. A partnership or staffing arrangement may be the most efficient way for EPA and the Council to collaborate in this regard.

In addition to using EPA's rating system for NEPA documentation, the Advisory Council should consider a set of sanctions over which it has direct control—employing its underutilized authority in §800.9(a) and (b) of its rules to directly criticize agencies that have improperly failed to coordinate Section 106 and NEPA reviews by deferring consideration of historic properties until after decisions about project alternatives are already complete. The other sanction that should be considered for significant misuse of NEPA in a way that forecloses meaningful consid-

eration of historic properties is the Advisory Council's termination of project-related program alternatives, particularly programmatic agreements, or withdrawal of approved program comments (see Section 8). Significant NEPA-Section 106 coordination problems strongly suggest that programmatic agreements are not properly designed in any event and need to be revised.

Ultimately, assigning a lower rating or termination of a program alternative should depend on factors such as the recurring nature of federal agency Section 106 compliance problems, the significance of the resources, and scope/severity of impacts. A progressive system of invoking these sanctions could also be instituted by the EPA and Advisory Council.

4-5. Interstate projects provide an opportunity to plan for strategic and consistent ways to identify and evaluate archaeological sites.

A theme emerged during several interviews of archaeologists for this study, which was generally expressed as a concern that there are few opportunities or incentives for consultants (who perform the bulk of archaeological investigations during Section 106 reviews) to recommend or implement possible improvements in the methodology for planning and carrying out archaeological surveys and for evaluating and reporting on the results. This barrier appears to be based both on limitations in scopes of work issued by project sponsors (which authorize and bind consultants to a specific task during a project), as well as possibly outdated or "cookbook" professional standards issued by the states for such investigations (and these vary from state to state, as explained below). High levels of frustration were reported in response to these issues.

This report therefore recommends experimentation with federal-level planning for archaeological survey, identification, and evaluation work for illustrative types of interstate projects (e.g., pipelines, highways, electricity transmission facilities) to improve ways to identify and evaluate archaeological sites. To a large extent, there should already be ongoing opportunities to improve investigation strategies and methods and interpretation of results through federal agencies' implementation of the duty under Section 110(a) of the NHPA to inventory historic properties they own or control; however, few examples of comprehensive Section 110 surveys are being conducted. The proposal in this section could benefit business sponsors of the selected interstate projects through planning for more consistent and possibly less resource-intensive archaeological investigations over the long term. However, a key objective of the recommendation is to achieve a broader benefit to the public by encouraging federal agencies to then undertake Section 110 surveys more proactively in the future, bolstered by the strategic lessons learned from more effective field testing and data management models developed through these Section 106 experimentation cases.

What lies below the Earth's surface in this country may reveal physical evidence of human activity in prehistoric times (the period of indigenous American societies before contact with Europeans, which varies from region to region, starting as early as 1492 and as late as the early 1800s), historic times (the "post-contact" period), or both in the same site.³⁷ Evidence may be in the form of physical artifacts—from Native American stone tools to colonial flintlocks—or physical remains of human habitation—from fire pits to stone foundations. The subsurface may also reveal the sacred, including ancient human remains and objects buried with the deceased.

Archaeologists work to reveal the subsurface through successive phases of terrestrial or aquatic field work, with increasing levels of intensity and corresponding costs. Basic implements to locate, delineate, and document the boundaries of land-based archaeological sites are a shovel, map, soil identification meter, global positioning system device, notebook, forms, camera, and fine-mesh screen to separate excavated materials. More sophisticated techniques rely on computer modeling performed prior to field work to predict the likely presence of sites based on land forms and topography, water patterns, and historic infrastructure. Nonintrusive instrumentation, such as ground-penetrating radar (“digital shovels”); portable analytical chemistry instrumentation; and digital notebooks that rapidly record and convey field findings to a project planner or engineer are also common capabilities of 21st century archaeology.³⁸

Archaeology is also a scientific endeavor with significant legal consequences in the Section 106 review process. Section 800.4(b)(1) of the Advisory Council’s Section 106 rules requires that federal agencies (or their authorized representatives or applicants) undertake a “reasonable and good faith” effort to identify historic properties, including archaeological sites, during project reviews. Pursuant to Advisory Council guidance, a survey of 100 percent of the APE is not required during Section 106 reviews, but the agency recognizes that the APE includes areas of indirect and cumulative effects as well as direct impacts, which may broaden the area of representative survey coverage.³⁹ The guidance also recognizes a “vertical APE,” relevant to archaeological resources.⁴⁰

Federal agencies are mandated to consider the effects of their projects on *all* National Register-eligible or -listed properties once they are identified, including prehistoric and historic archaeological sites; to involve stakeholders regarding these properties; and to identify and mitigate harmful impacts (usually through data recovery for archaeological sites that are historically significant because of their potential to yield important information about past people or events). Decisions regarding how a “reasonable and good faith effort” to identify sites is accomplished when designing field testing strategies in three dimensions, and how the findings are evaluated for the purpose of assigning National-Register eligibility determinations, therefore serve as the crux of many conflicts in Section 106 project reviews. Indeed, one of the experienced archaeologists interviewed for this study labeled archaeological site identification as an “Achilles heel” of the Section 106 review process, because of different interpretations of “how much is enough” in survey work for projects, as well as the associated costs. A fundamental dilemma, however, that counterbalances such concerns is that more than 90 percent of the archaeological investigations conducted in this country are carried out to comply with Section 106 reviews for particular projects, as opposed to a systematic identification of sites through the federal agency preservation programs required by Section 110 of the NHPA, or through state or local government surveys.⁴¹ Section 106 is driven by project budgets, deadlines, and intractable positions at times, all of which are not necessarily conducive to designing and implementing strategic scientific research priorities.

The methodology for project investigations during Section 106 reviews is primarily established by each state since there is no national standard for archaeological survey work. However, specifications for archaeological survey work vary from state to state, sometimes quite substantially according to interviewees for this report. The most common technique used by archaeologists to sample a physical area for evidence of subsurface features that may suggest buried archaeological deposits is to excavate small holes with a shovel. Shovel testing is conducted along

a defined path or strip of land (a transect) within a grid encompassing the area to be evaluated. However, depending on the project location and even within the same type of environment (e.g., rural, open field, disturbed), state standards for the frequency of placing test holes can range from testing every 50 feet within a transect to every 100 feet, based on reports of interviewees for this study. Similarly, when archaeologists visually evaluate the ground surface for visible artifacts, or as a clue to assist the design of intrusive testing (“fieldwalking”), investigators may face significantly different requirements even within the same type of field conditions (e.g., brushy area, plowed fields)—interviewees reported that state standards for spacing these walking paths can vary from 15- to 50- to 100-foot intervals, for example.⁴²

Further, there are different interpretations from state to state regarding the definition of a “site” (thus requiring boundary delineation and possible Section 106 review) versus an “isolated find” (which generally removes the locale from Section 106 review). Depending on the state in which a project is located, the presence of more than 2, 3, 5, or 10 artifacts associated with a particular cultural sequence may each constitute a “site.” These details are not simply a matter of fine-tuning but can pose significant cost implications when considering projects that may involve tens or hundreds of thousands of acres of land and/or that cross the boundaries of several states. Further, the collection and disposition of materials generated from shovel testing or more extensive excavation impose management issues because state standards for treatment of such excavated materials also vary. Such recovered materials, if returned to a federal agency, are subject to exacting curatorial standards for federally owned and administered archaeological collections and, therefore, pose an additional layer of cost and resource management.⁴³

Representation of preservation interests on federal advisory committees (see Section 4-6 below) and use of federal agency performance and accountability reports (see Section 3-5 above) could promote some level of disentanglement of archaeological surveys from projects, at least for the federal land-managing agencies. Nonetheless, as a practical matter, archaeological investigations are likely to continue to be motivated primarily by reactive forces rather than proactive efforts at resource identification. This situation is even more challenging with respect to federally licensed, permitted, or funded projects that are carried out by nonfederal parties. Archaeology will always suffer to a large extent in these cases because the scientific endeavor is so incompatible with commercial development interests.

The challenge of divergent state standards for archeological work is particularly acute in proposals for interstate projects. Several interviewees experienced in linear interstate projects (energy pipelines, interstate highways) cited variability in state specifications for coverage of pedestrian surveys and shovel testing of between 15 to 100 percent for comparable land surfaces within a “right-of-way” APE for direct effects. Business sponsors of interstate projects, who typically pay for this work, understandably question the state-by-state variability of archaeological survey approaches for these types of projects.

In a general way, the concepts described below for federal-level archaeological investigation planning in interstate projects are based on changes in approaches to environmental geology field work that occurred in the early-to mid-1990s. Before this time, it was not uncommon for groundwater investigations at large industrial or federal facilities, for example, to exceed \$1 million per month in labor costs alone. Regulated industries and federal agen-

cies began to question the strategy of extensive and costly investigations of soil and groundwater, and the variations in state guidelines for determining the extent and scope of contamination. As a result, industry, federal agencies, consultants, some states, and the EPA undertook deliberative and strategic planning, collaborative development of objectives for data collection and quality, and use of data to decide on the need for and extent of investigation and cleanup based on the ultimate intended use of the land, who would be exposed (e.g., residents, workers), and the acceptable level of risk to those groups based on present and future land uses. At a project level, for example, these efforts translated into installation of 10 soil borings when 100 would have been unquestionably required in the past. Instead of automatically pumping millions of gallons of groundwater to the surface to treat pollutants, the new management approach considered whether the groundwater was actually being used for drinking water and other consumptive purposes or whether it was just as protective to continue to monitor the situation and keep the groundwater from leaving the property line.

Under this report's recommended experimentation for archaeological investigations, first, a lead federal agency (such as the Federal Energy Regulatory Commission or the Department of Energy) would hire a cultural resource consultant independent from the applicant or sponsor proposing the interstate project. This lead consultant would be tasked to develop: (1) a research design and survey strategy that synthesizes and evaluates background literature (including historic contexts), available data, tribal input, and state priorities for archaeological investigation; and (2) a field testing approach that relies on predictive modeling to prioritize field work in direct impact areas within the project's right-of-way. Although the survey strategy would consider variations in state guidance and methodology, consistent standards for the linear interstate project would be established to be followed regardless of state boundary lines. At least part of the costs for the federal agency's consultant could be charged to the project sponsor under authority of the Archaeological and Historic Preservation Act of 1974 (for terrain-altering work) and, independently, by the NHPA, or might be defrayed by an industrial trade association.⁴⁴ (While private applicants might initially balk at incurring part of the federal agency's cost in this initial arrangement, over the longer term, costs for many comparable projects could be reduced in the future as a result of standardizing survey approaches instead of navigating the maze of different state requirements.)

The lead consultant would not conduct the fieldwork (instead, the consultant conducting the field work would be directly hired by the applicant proposing the interstate project); rather, the lead firm would be retained by the federal agency for peer review and "value analysis" of the field archaeology firm's implementation of the survey strategy and evaluation of results.⁴⁵ The federal agency's consultant would also have authority to make ongoing and timely recommendations to modify the plan of investigation being carried out by the field archaeologists, as site conditions warrant. Dividing the roles and responsibilities between two different consultants is a purposeful strategy in this experimentation. It is often difficult (and there are few incentives) for a consultant to recommend a different way of implementing a task to a business client. By assigning the strategic planning and guidance to a different consultant, employed by the federal agency, there is both a competitive and practical dynamic at work. Neither consultant wants to disappoint its client so there is some impetus to work together. Further, by removing the methodology decision making from the field work task, and elevating research design to a federal planning level, the field investigators are relieved of the responsibility to develop work plans that respond to each state review office along the interstate corridor, each with possibly differing standards.

To save costs in carrying out the field work, survey methods would rely on real-time digital recordation of field observations, measurements, and decisions which could lessen the need for paper notes, forms, and subsequent production of bulky reports. Where appropriate, surveys would emphasize the use of nonintrusive equipment, like ground-penetrating radar, in lieu of shovel or other intrusive testing, as warranted by the probability of findings in direct impact areas and other relevant factors supporting a less-intensive level of effort.

4-6. Earlier consideration of preservation values should be promoted through increasing preservation advocates' participation in agency advisory committees.

There are over 1,000 advisory committees that make program or project recommendations to 49 federal agencies, and whose membership includes representatives of multiple stakeholder interest groups. These committees are often referred to as "FACA committees," because they are subject to the Federal Advisory Committee Act (FACA).⁴⁶ The law recognizes the benefit of having citizen participation in government policy and planning processes and requires that each committee be "fairly balanced" in terms of the points of view represented. The specific makeup of each committee is sometimes mandated by legislation (e.g., the Black Hills National Forest Advisory Board's 16-member group must include someone with historic preservation or archaeological interests).

Federal agency officials, members of Congress, the general public, professional societies, or current and former committee members may nominate potential candidates for membership. Membership is usually on a volunteer basis with travel and per diem reimbursement.

Historic preservation interests are represented in some federal agency advisory committees. The Department of the Interior and two of its agencies—the National Park Service and BLM, for example—receive input from a substantial number of FACA committees. A review of the federal advisory committee public database identifies 32 members representing historic preservation or archaeology interests across the 107 committees of the Interior Department in FY 2009. The U.S. Forest Service (Department of Agriculture) FY committee list, on the other hand, identifies only two members (on the Black Hills and Alpine County committees) as of FY 2009.

The National Trust provides staff representation on a few of these committees, e.g., Cedar Creek and Belle Grove National Historical Park. On the other hand, despite FACA's goal to have "balanced" stakeholder participation, some committees (e.g., the National Coal Council) tend to be dominated by development or industry interests and, until recently, their professional lobbyists (the Obama administration has instituted a new prohibition on federally registered lobbyists serving on FACA committees). Many federal agencies sponsor advisory committees with no preservation interests whatsoever—including the Departments of Defense, Commerce, Energy, and Transportation, and the VA (including the policy and planning committee)—even though the committees deal with issues that are relevant to the preservation community. The Bureau of Reclamation, a component agency of the Department of the Interior, also has no current preservation interest representation on its committees, based on a review of the public database for FY 2009.

Preservation advocates should ensure that their perspective is maintained on relevant committees, especially at the local or regional level. These members can serve as the eyes and ears regarding agency land use and con-

struction project planning that affects historic properties. The other reason to promote preservation representation on these committees is the opportunity to build relationships with federal agency staff and other stakeholders. State and tribal preservation officers uniformly report that positive preservation solutions are more likely to occur when they invest time with federal agency staff or state agencies authorized to exercise delegated Section 106 responsibilities. Even better preservation outcomes are achieved when these relationships are first built apart from the Section 106 process for individual projects, when plans are already well underway and positions often already established.

Additionally, even if federal agencies become authentically proficient at the NEPA substitution process as a way to improve integration of Section 106 review for individual projects (see Section 4-1 above), by the time a project is ripe for the environmental and historic property review processes, *someone* has the “preferred alternative” in mind. An earlier, pivotal input point occurs during development of federal agency *programs* (which lead to multiple projects). Federal advisory committees, whose charters often encompass *programmatic* activities, could serve as an opportunity to emphasize the importance of considering historic properties before individual project site selection and site configuration decisions are set in stone.

Finally, there may be other committees, whose jurisdiction may affect heritage assets, that could benefit from a preservation perspective on a federal advisory committee, or at least a presentation on preservation issues (e.g., Department of Education Historically Black College committee, and University Capital Financing Board). Exploring an expanded opportunity for federal advisory committee participation in relevant ways should be pursued by preservation advocates.

In addition to federal advisory committee participation, preservation advocates should explore more opportunities to participate in local advisory committees and processes. Applicants who receive ongoing federal funding and financial assistance are required to develop and implement public involvement processes. Program areas include transportation, coastal zone management, water and sewer infrastructure, and housing. Some of these requirements include or encourage local advisory committees. Such opportunities should be pursued by preservation stakeholders at the grass-roots level to learn about proposals at the planning stage and advocate for preservation solutions before projects are developed.

For example, state and local governments are required to develop and implement citizen participation plans for some of HUD’s programs (e.g., CDBG funding).⁴⁷ This outreach, which includes opportunities for hearings and public comment on “action plans” (annual work plans), allows housing officials to gauge community needs. Therefore, the efforts are primarily directed to their clients (low- and moderate-income individuals), affordable housing advocates, builders, and other interested stakeholders. This public involvement process offers an important opportunity for preservation advocates. HUD applicants are required under the Advisory Council’s Section 106 rules to identify and invite consulting parties and to “seek and consider” the views of the public with respect to projects affecting historic properties. According to several of the SHPO staff interviewed for this report, it is not clear precisely whether and how this “invitation” occurs.

Preservation advocates can request to participate in or speak to community housing committees, and to be notified of opportunities to comment on HUD-funded programs and specific projects. They can serve as an important messenger on the sound economics of rehabilitating historic residential dwellings to meet the needs of underserved individuals in their communities.

Local decision makers have substantial discretion in how they spend federal housing funds. One town of which this report author is aware (a Preserve America community) applies its funds to support infrastructure for new housing and to demolish existing structures. In the meantime, a substantial number of historic homes occupied by elderly low-income residents or renters crumble for lack of maintenance. City officials view HUD funding as an opportunity to obliterate eyesores, rather than an opportunity to enhance these existing investments and to provide sustainable, safe, and decent places to live. There is a strong need for preservation advocates to work at this grassroots level, and an existing formal framework in which to do so.

4-7. Outreach to groups not traditionally familiar with Section 106 should be further expanded, including development interests and the media.

Development, construction, and consultant interests. Both the Advisory Council and key nonfederal Section 106 stakeholders—the National Trust, National Conference of State Historic Preservation Officers (NCSHPO), National Association of Tribal Historic Preservation Officers (NATHPO)—should continue to expand opportunities for education and relationship building among organizations affiliated with development. Candidate organizations include the National Association of Development Organizations, Air and Waste Management Association, American Public Works Association, and engineering students (e.g., National Association of Student Engineering Councils). Each of these organizations features at least an annual meeting (with side tours of unique local flavor, typically historic properties or places); several often host regional meetings as well.

The goal is not to “convert” these organizations. Rather, the benefit of receiving such outreach, from these groups’ perspective, is to: (1) educate and train their members in ways that will increase their effectiveness in planning and implementing projects; and (2) minimize schedule, budget, and legal risks associated with poor planning and project development that fails to consider historic properties.

Environmental journalists. Media interests should also be better cultivated. Reporting on Section 106, if it occurs at all, is typically staffed in large urban market areas by an environmental or land use reporter. They know NEPA but are generally not familiar with Section 106. For example, opportunities should be sought by preservation professionals to present information about Section 106 consultation as a way to save landscapes and foster sustainable buildings at the annual conference of the Society for Environmental Journalists.⁴⁸ Journalist members report on the environment, energy, natural resources, and climate change—all of which impact historic properties and landscapes and often relate to Section 106 implementation.

Federal judiciary. One litigator who was interviewed for this study suggested Section 106 education programs for federal judges. The interviewee’s perception is that judges are more familiar with NEPA than Section 106 and would therefore benefit from additional education, outside the context of a specific case. Undoub-

tedly, historic preservation law training such as that occasionally provided through the American Law Institute/American Bar Association (ALI/ABA), of which the National Trust is a co-sponsor and presenter, reaches some of the judiciary. Advisory Council staff has also participated in these ALI/ABA courses.

Training programs specifically geared for judges, however, should be explored. Environmental law programs specifically fashioned for judicial education seminars are provided via national organizations.⁴⁹ The Federal Judicial Center also provides the federal judiciary educational programs and materials.⁵⁰ In collaboration, the National Trust and the Advisory Council should pursue opportunities to include Section 106 training and education for the federal judiciary.

Appendix 4-1: U.S. EPA Rating Criteria, Environmental Impact Statements

RATING THE ENVIRONMENTAL IMPACT OF THE ACTION
<p>LO (Lack of Objections) The review has not identified any potential environmental impacts requiring substantive changes to the preferred alternative. The review may have disclosed opportunities for application of mitigation measures that could be accomplished with no more than minor changes to the proposed action.</p>
<p>EC (Environmental Concerns) The review has identified environmental impacts that should be avoided in order to fully protect the environment. Corrective measures may require changes to the preferred alternative or application of mitigation measures that can reduce the environmental impact.</p>
<p>EO (Environmental Objections) The review has identified significant environmental impacts that should be avoided in order to adequately protect the environment. Corrective measures may require substantial changes to the preferred alternative or consideration of some other project alternative (including the no action alternative or a new alternative). The basis for environmental objections can include situations:</p> <ul style="list-style-type: none"> • Where an action might violate or be inconsistent with achievement or maintenance of a national environmental standard; • Where the Federal agency violates its own substantive environmental requirements that relate to EPA's areas of jurisdiction or expertise; • Where there is a violation of an EPA policy declaration; • Where there are no applicable standards or where applicable standards will not be violated but there is potential for significant environmental degradation that could be corrected by project modification or other feasible alternatives; or • Where proceeding with the proposed action would set a precedent for future actions that collectively could result in significant environmental impacts.
<p>EU (Environmentally Unsatisfactory) The review has identified adverse environmental impacts that are of sufficient magnitude that EPA believes the proposed action must not proceed as proposed. The basis for an environmentally unsatisfactory determination consists of identification of environmentally objectionable impacts as defined above and one or more of the following conditions:</p> <ul style="list-style-type: none"> • The potential violation of or inconsistency with a national environmental standard is substantive and/or will occur on a long-term basis; • There are no applicable standards but the severity, duration, or geographical scope of the impacts associated with the proposed action warrant special attention; or • The potential environmental impacts resulting from the proposed action are of national importance because of the threat to national environmental resources or to environmental policies.
RATING THE ADEQUACY OF THE DRAFT ENVIRONMENTAL IMPACT STATEMENT (EIS)
<p>(Adequate) The draft EIS adequately sets forth the environmental impact(s) of the preferred alternative and those of the alternatives reasonably available to the project or action. No further analysis or data collection is necessary, but the reviewer may suggest the addition of clarifying language or information.</p>
<p>(Insufficient Information) The draft EIS does not contain sufficient information to fully assess environmental impacts that should be avoided in order to fully protect the environment, or the reviewer has identified new reasonably available alternatives that are within the spectrum of alternatives analyzed in the draft EIS, which could reduce the environmental impacts of the proposal. The identified additional information, data, analyses, or discussion should be included in the final EIS.</p>

(Inadequate) The draft EIS does not adequately assess the potentially significant environmental impacts of the proposal, or the reviewer has identified new, reasonably available, alternatives, that are outside of the spectrum of alternatives analyzed in the draft EIS, which should be analyzed in order to reduce the potentially significant environmental impacts. The identified additional information, data, analyses, or discussions are of such a magnitude that they should have full public review at a draft stage. This rating indicates EPA's belief that the draft EIS does not meet the purposes of NEPA and/or the Section 309 review, and thus should be formally revised and made available for public comment in a supplemental or revised draft EIS.

Source: <www.epa.gov/compliance/nepa/comments/ratings.html>.

Notes to Section 4

1. 40 C.F.R. §1500.1(c).
2. 40 C.F.R. §1500.2.
3. 36 C.F.R. §800.1(a).
4. 36 C.F.R. §800.1(c).
5. <www.epa.gov/Compliance/nepa/eisdata.html>; draft and final EISs issued for the same project or program were not counted twice.
6. <<http://ceq.eh.doe.gov/nepa/nepa25fn>>.
7. Advisory Council on Historic Preservation, *Recommendations to Improve the Structure of the Federal Historic Preservation Program* (the Preserve America “expert panel” report) (Feb. 20, 2009), 11.
8. J. Serge Taylor, *Making Bureaucracies Think: The Environmental Impact Statement Strategy of Administrative Reform* (Stanford, CA: Stanford University Press, 1984), 351-52, quoted by Peter Alfano, “NEPA at 40, Procedure or Substance,” <www.eli.org/pdf/seminars/NEPA/Alfano.NEPA.pdf>.
9. 42 U.S. Code §§4332(B) and 4333; E.O. 11,514; 40 C.F.R. §1500.6.
10. Robert M. Lynch, “Complying with NEPA: The Torturous Path to an Adequate Environmental Impact Statement,” 14 *Arizona Law Review* (1972): 717-745.
11. 36 C.F.R. §800.8(c)(2)(i).
12. 36 C.F.R. §800.8(c)(2)(ii).
13. 36 C.F.R. §800.8(c)(4).
14. 2003 *B.J.R.*, ACHP-25 (for FY 2001 data); 2004 *B.J.R.*, 25 (for FY 2002-03 data); 2005 *B.J.R.*, 32 (for FY 2004 data); 2007 *B.J.R.*, 54 (for FY 2005 data); 2008 *B.J.R.*, 52 (for FY 2006 data); 2009 *B.J.R.*, 57 (for FY 2007 data).
15. The Preserve America expert panel report, *Recommendations*, at 11, also advocated that the Council provide additional guidance for coordinating NHPA and NEPA compliance and noted that “The ACHP has been working with CEQ for several years to develop guidance for integrating Section 106 and NEPA, but progress has been slow,” 12.
16. See, e.g., <www.coloradohistory-oahp.org/programareas/intergov/NEPA106.pdf>.
17. See 40 C.F.R. §§1501.7(c), 1502.9(c).
18. 42 U.S. Code §4332(2)(C).
19. 40 C.F.R. §1503.2.
20. 36 C.F.R. §800.2 (Jan. 25, 1974).
21. 1973-74 *A.R.*, 22.
22. 1980 *A.R.*, 36.
23. See note 5.
24. Preserve America expert panel report, *Recommendations*, 7.
25. These offices have various names depending on their region (e.g., Office of Federal Activities, Region 4, Atlanta; Office of Ecosystems, Tribal and Public Affairs, NEPA Review Unit, Region 10, Seattle). The regional NEPA review offices all report to the Office of Federal Activities of the NEPA Compliance Division in the Office of Enforcement and Compliance Assurance in Washington, DC.
26. 1988 *A.R.*, 49.
27. For recent analyses of the status of NHPA compliance by two federal multiple-use land management agencies that may shed some light on this issue, see Jarvis, *Cultural Resources on the Bureau of Land Management Public Lands: An Assessment*

and Needs Analysis (see Section 3, note 79) and *The National Forest System: Cultural Resources at Risk, An Assessment and Needs Analysis* (Washington, DC: National Trust for Historic Preservation, May 2008), <<http://preservationnation.org>>.

28. The nationwide Section 106 programmatic agreements with the land management agencies do not substantively address the integration of NEPA and the NHPA, nor the planning stages of programs or projects, see, e.g., BLM's PA (1997, 2009 addendum), <www.achp.gov/pa1.pdf>; U.S. Forest Service PAs (1995), <www.achp.gov/pa11.pdf> and <www.achp.gov/pa12.pdf>. The nationwide memorandum of understanding between the Advisory Council and the Forest Service regarding unit, resource, and project plans is so vague and outdated (1977, found at <www.achp.gov/pa13.pdf>), that it may no longer be a valid document.
29. U.S. Department of the Interior, *Standards and Guidelines for Federal Agency Historic Preservation Programs*, 20499.
30. 1987 A.R., 48.
31. U.S. Cabinet for Health and Human Services, *Facilities Program Manual*, Vol. 2, Ch. 3, Section 3-4, "Historic Preservation," 3-11 – 3-14, <www.hhs.gov/hhsmanuals/>.
32. 42 U.S. Code §7609(a) and (b).
33. Although clearly authorized by Section 309 of the Clean Air Act, the Environmental Protection Agency has not tackled this review and comment role for the tens of thousands of EAs and categorical exclusions issued each year.
34. The CEQ's rules for handling environmental referrals are found at 40 C.F.R. Part 1504.
35. The Advisory Council's referral authority has been exercised twice. The first instance occurred in June 1984 in relation to the Presidential Parkway, a new highway from Atlanta to the Ponce de Leon Avenue in Druid Hills Historic District, which also provided access to the Carter presidential library complex (1984 A.R., 84-85). The CEQ refused to act on the referral on the grounds that the project and its impacts were not nationally significant. Ultimately, the project was not built as originally planned. Ibid. The second case was referred in January 1993. The Route 710 Freeway Extension in southern California would have demolished almost 1,000 homes and 6,000 trees along a 6-mile corridor, displacing 2,400 people. The proposed route would have bisected the core of four National Register historic districts and skirted the boundaries of two others. In 1989, the National Trust included South Pasadena, Pasadena, and the nearby Los Angeles community of El Sereno, in its annual listing of America's 11 Most Endangered Places. As a result of the referral, CEQ remanded the project back to the FHWA for further consideration of a "Low Build" alternative that would avoid destruction by using surface streets to connect the freeway gap. In 1998, the FHWA rejected this avoidance alternative and approved the destructive alternative, which was then enjoined by a federal district court—an injunction that remains in place. *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106 (C.D. Cal. 1999). Today, the surface highway is acknowledged as defunct for all practical purposes, but initial planning has begun to consider the possibility of a full-bore tunnel underneath the historic communities.
36. Council on Environmental Quality, "Referral of inter-agency disagreements to CEQ under the National Environmental Policy Act," Mar. 2009, <http://ceq.hss.doe.gov/nepa/eis/Referrals_to_CEQ_Mar09.pdf>.
37. U.S. Department of the Interior, National Park Service, *National Register Bulletin 36, Guidelines for Evaluating and Registering Archeological Properties* (2000), by Barbara Little et al., <www.nps.gov/history/nr/publications/bulletins/arch/>. Archaeologists are among the first to acknowledge that the boon and bane of their profession is the rendering of the initially inscrutable to the scrutable.
38. The use of computer models to guide and define the limits of probability-based field testing is not a universal capability of federal agencies or consultants, nor universally accepted by SHPO offices, as reported by interviewees.
39. Advisory Council on Historic Preservation, *Section 106 Archaeology Guidance* (Jan. 1, 2009), 16-17, <www.achp.gov/docs/ACHP_ARCHAEOLOGY_GUIDANCE.pdf>.
40. Ibid, 20. In one consultation in which the author of this report was involved, a federal agency declined to delineate a vertical APE in a controversial project affecting nationally significant karst and cave terrain in which prehistoric human remains had been found. The public interest consulting parties sought a vertical APE because of the potential for contami-

nated runoff from a highway project—and associated land development activities—to pollute subsurface cultural (and natural) resources through a hydraulically connected system of underground streams.

41. Advisory Council on Historic Preservation, *Archaeology Guidance*, 2.
42. The dimensional spacing of archaeological survey coverage is specified in metric units. In deference to the non-metric audience, English standards units (rounded to the closest foot) are used in this report.
43. 36 C.F.R. Part 79.
44. Also known as the Reservoir Salvage Act or Moss-Bennett Act, the Archaeological and Historic Preservation Act requires that archaeological resources in the path of reservoirs be evaluated, as well as projects in which “any alteration of the terrain [is] caused as a result of any Federal construction project or federally licensed activity or program,” 16 U.S. Code §§469, 469c-2(2). Section 110(g) of the NHPA (16 U.S. Code §470h-2(g)) separately authorizes federal agencies to charge reasonable costs of carrying out the NHPA to applicants as a condition of their federal permit or license.
45. The peer review and state survey recommendations are also based on a still-insightful and relevant General Accounting (now Accountability) Office report, *Are Agencies Doing Enough or Too Much for Archeological Preservation? Guidance Needed*, CED-81-61 (Apr. 22, 1981), 52 and 26-28, respectively, <<http://archive.gao.gov/f0102/115803.pdf>>. “Value analysis,” synonymous with “value engineering,” refers to techniques and collaborations designed to analyze the function of a tangible item or process to determine its “‘best value’ or the best relationship between its worth and cost,” <www.whitehouse.gov/omb/rewrite/circulars/a131/a131.html>.
46. 5 U.S. Code Appendix, §1 et seq.; for the list of committees, see <<http://fido.gov/facadatabase/public.asp>>.
47. 24 C.F.R. §§91.105, 91.115.
48. <www.sej.org>.
49. See, e.g., the Environmental Law Institute programs at <www.eli.org>.
50. <www.fjc.org>.

SECTION 5: THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

Key Recommendation: The Advisory Council Should Vigorously Assert Section 106 as its Core Mission

Congress created the Advisory Council on Historic Preservation in 1966 as an expert watchdog over other federal agencies' implementation of their Section 106 responsibilities, and to provide expertise to these agencies, the president, Congress, state and local governments, and the public. Section 106 regulations adopted by the Council at 36 C.F.R. Part 800 establish mandatory requirements for how historic properties are identified and reviewed in federal or federally assisted actions, who is involved in the process, and the circumstances in which the Council itself will become directly involved in individual cases. As an independent federal agency, the Advisory Council has a "membership" body of 23 individuals, whose role is similar to a board of directors, and a professional and administrative staff. Based on the agency's budget justification report for fiscal year (FY) 2010, the agency's staffing level in Washington, DC is equivalent to 36 full-time positions. Of this total employment, eight professional staff members and three managers primarily focus on Section 106 reviews. In addition to these regular employees, eight temporary employees, called "liaison" staff members, provide some level of Section 106 compliance services for certain federal agencies that fund their positions within the Advisory Council.

Recommendations that follow in this section are based, in part, on a key conclusion of this report that the Advisory Council should focus more of its attention on Section 106 implementation, rather than other preservation activities. These other activities—discussed below—are laudable in their own right, but do not constitute what is widely recognized to be the agency's most important statutory mission.¹

Based on the interviews conducted for this report, there are realistic expectations of the Advisory Council among the state and tribal historic preservation officers, nonprofit groups, members of the public, and cultural resource consultants. The prevailing view among interviewees is that the Advisory Council's core mission is Section 106, and within that mission its role is to balance multiple interests in the planning and consultation process; to guard over federal agency compliance with Section 106 in general; and to interpret the rules it has developed that guide the process, all conducted with a thumb on the preservation side of the scale.

Interviewees respect the Council's past work and current capabilities. The majority of those interviewed, however, raised significant concerns regarding whether the Council is effectively asserting its core role in Section 106. Some of the specific issues cited by interviewees included the Council's closure of its western office in FY 2006, the limited ability of staff to travel for on-site assistance desired by stakeholders, a general perception that the Council focuses too much on helping agencies streamline their procedural obligations, and a common perception that the Council's attention in recent years to the Preserve America initiative has detracted from the agency's

“check and balance” role in Section 106 cases. Preservation professionals, SHPOs and their staff, and members of the public interviewed for this study called for the Council to more vigorously assert Section 106 as its core mission, and thereby demonstrate the strong leadership role envisioned by Congress. In the view of interviewees, this leadership role should reflect a renewed emphasis on advocating and promoting preservation outcomes in consultations on projects.

5-1. Advisory Council members should increase their direct involvement in strategic Section 106 cases.

The ability of the Advisory Council’s membership to influence federal agencies through its power of moral persuasion has been tangibly demonstrated over the decades. In the past—indeed from the inception of the Section 106 process—the serious possibility that a specific matter may be elevated to the full Council established by the NHPA (which currently includes high-level officials from 10 federal agencies) can motivate low- to mid-level federal agency managers to resolve conflicts without the need to involve the highest officials of their agencies. Further, the Council’s formal statements regarding the sufficiency of the process for considering impacts to historic properties, as well as commenting on the substantive impacts of particular projects, are viewed with authority by federal courts who are sometimes asked by plaintiffs to review specific projects. While the membership’s power has always been selectively applied to cases that present strategic policy or implementation issues because of the sheer volume of federal projects each year, the role of the members themselves in Section 106 matters has varied over the years. For example, the frequency of members’ formal commenting actions averaged 3 per year during the late 1960s through the 1970s, 4.38 per year during the 1980s, 5.8 per year during the 1990s, and 4.4 per year from 2000 to 2008 (see Appendix 2-2 above). The Council’s budget reports for FY 2000-FY 2002 state that the membership had decided to focus and increase its role in high-profile and policy-setting Section 106 cases after adoption of the 1999 regulatory amendments. Although the BJR for the succeeding decade do not emphasize this goal, the Council should consider a renewed commitment to this policy. Therefore, this report recommends that the membership’s formal involvement in cases that present strategic policy or implementation issues should be increased as part of the Advisory Council’s assertion of Section 106 as its core mission.

Affording the Advisory Council a “reasonable opportunity to comment” on federal or federally assisted projects through 1966 enactment of the NHPA opened an array of implementation questions not the least of which was: *who* exercises the Council’s commenting authority? The initial Section 106 guidelines developed in the late 1960s through the mid-1970s established a fluid “commenting” role apportioned between the Advisory Council’s *professional staff* and the board’s *statutory membership* that remains largely in place today.² The 1969 guidelines essentially required federal agencies to work with Advisory Council staff in an attempt to negotiate a mutually agreeable solution to avoid, minimize, and mitigate the harmful effects of their actions on National Register-listed historic properties. In the event that negotiations between the staffs of federal agencies and the Advisory Council bogged down, the Executive Director of the Advisory Council could refer the matter to the Chair of the Council’s membership, who could either schedule the matter for consideration at the next regular quarterly meeting of the membership or decline to comment.³

From the beginning, therefore, the responsibility for internal referral of Section 106 cases to the Council's membership resided in the Executive Director in communication with the Council Chair. The impetus was (and today remains) for the professional staff to achieve resolution of the cases in which agency management decides to participate, which makes sense from the sheer annual workload of 1,000 to 3,000 cases. Robert Garvey, the Advisory Council's first executive director, described working "awfully hard to cajole, persuade . . . and avoid a confrontation" in the vast majority of cases.⁴ The membership's participation was, therefore, reserved for those special instances in which projects posed "doubtful or unresolved situations of adverse effect" that were not concluded at the staff level.⁵

Three primary ways in which the Council's membership may exercise its commenting role on specific projects are as follows:

General commenting authority. The Advisory Council may provide its views to a federal agency official during any stage of Section 106 implementation (determination of no historic properties affected, delineation of the area of potential effects, findings of effects, or during negotiations to resolve, or mitigate, harmful impacts of projects) or on the agency's overall compliance with the Section 106 rules.⁶ This commenting authority may be exercised on the Council's own initiative, or upon request of a federal agency, or any individual or organization. The Council may also provide comments to a federal agency regarding a project for which a memorandum of agreement will be executed when there is disagreement on measures to mitigate adverse effects.⁷

Foreclosure determinations. The Council may determine that its opportunity to comment has been *foreclosed* by an agency.⁸ This situation occurs when a federal agency "has gone forward with an undertaking to such an extent that the Council can not provide meaningful comments."⁹ In 1973, the Council's membership issued its first foreclosure determination in response to the intentional demolition of part of the Winder complex in Washington, DC, by the General Services Administration during consultation. A formal foreclosure determination is significant because it represents the Council's finding that the agency's failure to follow the procedural aspects of Section 106 may represent a violation of the NHPA. Such a determination is afforded substantial judicial deference when individuals or organizations sue to enforce Section 106 in particular cases.¹⁰

Termination comments. The Council may *terminate* consultation during negotiations on ways to mitigate harmful impacts of a project, if the members determine that further dialogue will not be productive.¹¹ Termination is followed by formal comments from the Council regardless of whether the termination is initiated by the federal agency, the SHPO, or the Advisory Council itself.

Instances of the Council membership's formal comments are rare when considering the overall number of federal actions each year (currently exceeding 110,000 reviews). However, the formal involvement of the members is *very* important in the relatively few high-profile, controversial, or complex cases that arise.

Based on the agency's annual reports of activities, Council membership exercised formal commenting authority in at least 167 cases from FY 1968 through FY 2008 (see Appendix 2-2 above). In addition, the reports identify 90 determinations that noncompliance by a federal agency or applicant had foreclosed the Council's ability to mea-

ningfully comment on a project. (According to Council staff, many if not most of these are staff determinations, rather than formal findings by the Council membership.).

When viewed over the decades, a handful of federal agencies have presented recurring challenges to Section 106 implementation and, therefore, have been the focus of the Council membership, based on the recorded data. Comprising almost 25 percent of all Council membership actions to date, these agencies are HUD, U.S. Forest Service, FHWA, GSA, National Park Service, and the Army Corps of Engineers.

Though uncommon, the membership's formal involvement in specific projects has nonetheless functioned at its best by demanding the attention of federal agency heads to consider alternatives, providing a direct opportunity for public comment, and focusing media attention. Other important outcomes have involved cases in which federal agencies were motivated to modify some aspect of their projects to reduce harm to historic properties as a result of the Council membership's involvement, even in the absence of formal termination and comment. In other examples, federal agencies committed to mitigation that achieved a larger preservation goal in the impacted community. Appendix 5-1 identifies examples of these positive outcomes in representative Section 106 cases involving formal consultation with the Council's membership, as well as cases in which federal agencies pursued their predetermined alternative despite such involvement.

5-2. The agency's role in "Preserve America" should be redefined.

Unveiled in 2003, "Preserve America" has two facets (a presidential executive order and a White House initiative) that collectively promote productive use of historic properties and bestow recognition, awards, and grants. This new initiative has provided helpful publicity and discrete funding support for preservation activities, particularly at the community level. However, significant concerns were aired during interviews for this study that the Advisory Council's weighty Section 106 work has been overshadowed by the Preserve America initiative as it has developed. This shift in the Council's focus and work is reflected in the Council's own reports on budget and staff impacts.

The Advisory Council's FY 2002 budget justification report to the Office of Management and Budget previewed a major initiative underway: the drafting of a proposed executive order (E.O.) on federal stewardship of historic resources.¹² Hailed by the Advisory Council as "the first comprehensive historic preservation presidential directive since 1971," E.O. 13,287 (*Preserve America*), was signed on March 3, 2003.¹³

Key elements of the presidential order include:

- Encouraging federal agencies to seek partnerships with state and local governments, Indian tribes, and the private sector to promote local economic development through the use of historic properties.
- Requiring federal agencies to adopt a system to inventory their historic properties, evaluate their condition and management requirements for proper stewardship, plan for ways that these properties could support community economic development, including heritage tourism, and report triennially on their

progress on these activities. (See also Sections 3-1 and 3-5 regarding agency reporting on historic real property assets.)

- Designating a Senior Policy Official to be responsible overall for each federal agency's historic preservation program.

That same week, a companion White House initiative was unveiled by the First Lady. Also called "Preserve America," the initiative inaugurated a presidential award program to recognize accomplishments in the use and preservation of heritage assets and to designate "Preserve America communities" for their heritage promotion programs.¹⁴

By FY 2007, 352 locales had been designated by the White House as Preserve America communities, reaching 736 by FY 2010.¹⁵ Program support for the presidential award and community designation activities entails substantial Advisory Council staff involvement, based on its budget reports. In addition to staff support for external communications, the agency, for example, conducts an extensive call for nominations for the presidential awards each year by distributing more than 4,400 forms across the country, and had reviewed almost 300 applications in total by FY 2008.¹⁶ In another example, cited in the Council's FY 2009 budget justification report, "[o]f 676 applications received through FY 2007 for community designations, 347 required additional follow-up work with the applicants. This included 343 follow-up letters, 98 second letters, and many telephone conversations and e-mail exchanges."¹⁷

Preserve America's grant program supports worthy preservation activities undertaken by states, local governments, and Indian tribes (eligible projects include planning, surveying, training, education, and heritage tourism, but not rehabilitation or maintenance of historic buildings or landscapes). Grant funding (administered by the National Park Service with input from the Advisory Council) equaled \$5 million each in FY 2006 and FY 2007 and \$7.5 million in FY 2008.¹⁸ The Omnibus Public Land Management Act of 2009, signed by President Obama, permanently authorizes the grant and award program of Preserve America (Section 7302) with an annual funding ceiling of \$25 million (and the Save America's Treasures grant program—which can be used for bricks-and-mortar projects on nationally significant historic properties—with an annual funding ceiling of \$50 million).

Since FY 2000, the Advisory Council's budget justification reports have accounted for the agency's work activities in lieu of the annual *Report to the President and the Congress of the United States* required under Section 202(b) of the NHPA. These reports, therefore, represent the agency's external statement and official position on policy, priorities, staffing, and future direction. A review of these reports since FY 2003 reflects the Council's increasing attention to Preserve America. Indeed, the part of the Council's mission statement that emphasized promoting the "protection" of historic properties disappeared from the budget report during the first year of implementation of the new executive order and White House initiative, while the agency's role in Section 106 became defined in the 2003 report as simply "administering" the process.¹⁹

A measure of the extent to which the new executive initiatives have re-focused the agency's mission is perhaps best conveyed through the language of the reports, followed by a review of the budget and staffing allocations and impacts. For example, in its FY 2005 budget justification report, the Advisory Council stated:

The ACHP continues its transition from its traditional focus on Section 106 review to a larger role. The ACHP has committed itself to promoting the preservation and appreciation of historic properties and educating the public about the economic benefits of heritage tourism through initiatives promoted by its leadership.

...

The first *Preserve America* Presidential awards are expected to be announced during National Preservation Week . . . and implementation of this initiative is expected to be a major component of the ACHP's work throughout the remainder of FY 2004 and in FY 2005.

...

In addition to the ACHP [web] site, the ACHP also developed and maintains the official *Preserve America* Web site for the Administration. Located at www.preserveamerica.gov, this site is built to expand as various components of the initiative are announced.

...

Some personnel and priorities can be reprogrammed to allow the ACHP to carry out its new responsibilities under the *Preserve America* Executive Order²⁰

The agency's FY 2006 report similarly focused significant attention on the Preserve America initiative. In introducing the budget request, Preserve America is featured as the agency's first "major emphasis" area, comprising over one-third of all of the seven emphasis areas, and receiving more space in the budget request than the Section 106 activities.²¹ Specific agency accomplishments identified in the report include supporting Preserve America events at least two to three times per month, involving travel to at least 15 community designation events around the country during the previous fiscal year.²²

In the Council's FY 2007 through FY 2009 budget reports, the major areas of emphasis justifying the agency's proposed budget are, in order, "Preserve America; Preserve America Presidential Awards; Preserve America Communities; Preserve America Grants; Preserve America History Teacher of the Year Award; Educational Outreach; and Executive Order 13287: 'Preserve America.'" In FY 2008 and FY 2009, the "Preserve America Summit" was added as another major activity area. Of the 13 "Trends with Budget and Staffing Consequences," the first six are, in order: "Administering the Preserve America Presidential Awards; Administering the Preserve America Communities program; Developing electronic media support for the Preserve America initiative; Upgrading all ACHP graphic and Web materials to better reflect agency involvement with the Preserve America initiative; Cooperating with the NPS to administer the Preserve America Grants program; and Assisting the First Lady's Preserve America events." In FY 2008 and FY 2009, "Implementing the findings of the Preserve America Summit" was added as the seventh trend.²³

Budget impacts related to the Council's increased involvement in the Preserve America initiative appear to be reflected in a cumulative view of the Advisory Council's budget appropriations. From an initial budget of \$105,600 in 1971, the agency's budget grew to \$1 million in the late 1970s and then took almost 20 years to reach approximately \$3 million in FY 2000. Within a 6-year period (FY 2004 through FY 2009), the budget grew by 39 percent to support the agency's request for its statutory programs and "redefined direction."²⁴ Appropriations reached \$5.498 million in FY 2009.²⁵

Personnel costs (salaries and benefits) represent the bulk of the agency's operating expenses. Such costs grew by 26 percent from FY 2004 through FY 2009 (with a net gain in full-time equivalents of 2 to 3 positions in the Native

American program area and communications staff). Travel costs grew by 138.6 percent during this same time period, at least in part to support the Preserve America “new initiatives,” based on descriptions of travel activities in the budget reports; “other services” increased by almost 34 percent (including Department of the Interior administrative service charges, Preserve America executive order reporting, charges related to office renovation, and implementation of the Preserve America summit in 2006); and “rent, communications, and miscellaneous” grew by 140.6 percent (including expenses relating to agency “branding” [image development] and planned office expansion/renovations).²⁶

An “aggressive” Advisory Council external communications plan and “branding” were initiated as part of Preserve America activities.²⁷ A separate Preserve America website, established in FY 2003, is maintained by the agency. The agency’s logo, stationery, press kit, and exhibits were also redesigned or newly created to reflect involvement with the Preserve America initiative and “new use” of the agency’s acronym.²⁸

During this same period, it appears that in-house Section 106 professional staff positions decreased. A detailed breakdown of individual staff positions was omitted in the FY 2003 budget justification report, the first year of the Preserve America initiative. The FY 2004 through FY 2009 budget reports, however, reflect Section 106 historic preservation specialist and program analyst positions at the lowest levels since the Advisory Council’s detailed reporting began in FY 1985—8 staff positions in the current budget report compared to a high of 13 first reached in the 1990s. (However, the Council’s website shows 7 staff positions.)

Appendix 5-2 provides details of this staffing analysis, including agency budget and staff data from FY 1971 through FY 2010. Only permanent, in-house positions identified as historic preservation specialists or program analysts were counted in this comparison since they serve as the core professional staff in project-level Section 106 reviews, and to ensure an equivalent comparison to non-managerial positions reported in the Council’s annual reports over the decades. “Liaisons” (see Section 5-4 below), funded by other federal agencies, were not counted since they perform other duties in addition to Section 106-related work for their funding agencies, and these positions are temporary. The three managers currently supervising the core Section 106 staff were not counted either in this particular analysis (to achieve equivalent comparisons to previously reported non-managerial positions), although they certainly perform and supervise Section 106 reviews. (Administrative personnel were not included either.) Many staff positions support the agency’s Section 106 work—in fact, one could argue that the agency’s entire staff of 36 positions support Section 106 work in some way. However, anyone who has participated in a high-profile, complex case with the Council’s involvement understands the primary role of the caseworker-level positions, who focus on the task of substantively delving into the issues and interests in such cases, and directly represent the Council’s mission in face-to-face consultation meetings.

The implications and long-term effects of these budget and staffing shifts may be a matter for debate, since they are gleaned from summaries in budget documents. Indeed, the Council’s staff leadership has emphatically stated that staffing and support for Section 106 compliance have *not* been adversely affected by the Council’s involvement in Preserve America, and that any shift in staffing resources over the past several years primarily reflects a more limited role assigned to the Council resulting from changes in the Section 106 regulations. Council staff also stated that increases in travel and logistical support during this period were not primarily attributable to the

Council's growing involvement in Preserve America activities, but largely reflected "traditional" Council activities, including a more active membership and other activities related to Section 106 administration.²⁹

Regardless of the reasons for the shift in resources reflected in the Advisory Council's budget justification documents, many of those interviewed for this report expressed concern that the Council's increased involvement in Preserve America has detracted from its programmatic focus on Section 106. This is *not* to suggest that the Advisory Council has neglected its Section 106 oversight responsibilities in recent years, and it is important to note that during this period there have been a number of initiatives and actions undertaken by the Advisory Council to strengthen Section 106 oversight. For example, significant initiatives in Indian tribal consultation and coordination have been instituted the past eight years. The Council membership has also used its formal commenting authority on a number of occasions, most recently in spring 2010 in the case of a precedent-setting wind energy project proposed offshore in Nantucket Sound.

Nonetheless, the overwhelming majority of those interviewed for this report believe that the high priority given by the Advisory Council to its role in Preserve America has hurt the attentiveness of the Council to its role in Section 106. There is a common view that Preserve America has—at least to some degree—adversely affected the Council's core preservation professional staffing for Section 106, and has diminished the Council's ability to bring strong national attention to Section 106 implementation. Most interviewees believe that staffing and support for Section 106 compliance work by the Council should be strengthened, even if that would mean a diminished involvement in the Preserve America initiative.

Suggestions for redefining the Council's Preserve America involvement include seeking cooperative agreements or understandings with other federal agencies or nonprofit organizations to share or delegate responsibilities for:

- Maintaining the Preserve America website (possibly incorporating pertinent content into the primary website, <www.achp.gov>).
- Soliciting, reviewing, and processing Preserve America community applications for designation.
- Reviewing and making grant decisions (e.g., encouraging the National Park Service to directly solicit input from the tribal and state historic preservation officers in the consultation process outlined in Sections 7302(c)(1) and (4) of the law that authorizes Preserve America grants).

It is important to emphasize that the benefits of the Preserve America program are not at issue here: as one interviewee observed, historic preservation succeeds through putting tools in the hands of communities, whether through Preserve America or other mechanisms. This report evaluated whether the Advisory Council's ability to perform its critical Section 106 mission has been diminished by this initiative. In the view of practically all of the interviewees, the conclusion is "yes."

5-3. The Advisory Council should consider reopening a western office.

In the past, the Advisory Council's western office has played an essential role in the Council's complex Section 106 work, and has helped the agency maintain an effective national presence. For more than 30 years, a profes-

sional staff of 4 to 5 individuals in the Advisory Council’s Denver office delivered Section 106 expertise and assistance to the western states, Alaska, and Hawaii. The Denver office was closed in the first quarter of FY 2006; the Council abolished four senior positions in that office and replaced them with six junior positions in the Washington D.C. office.³⁰

Advisory Council reporting of detailed staff levels and locations first appears in the FY 1985 *Report to the President and Congress of the United States*. As of that year, there were 11 Section 106 caseworkers—seven in the eastern division in Washington, DC, and four in Denver.³¹

The western staff tackled some of the most complex projects in the Council’s history, as well as federal agency programs and programmatic agreements that span vast geographies of land and water. In the 1980s, for example, Tahquitz Canyon (California), culturally important for the Agua Caliente Cahuilla Indians, was saved from an Army Corps of Engineers dam and purchased for a park as a result of Section 106 involvement by the Council’s western office staff. Prior to construction of another Corps project, the Sonoma Reservoir, sedge fields important to the Pomo Indians for basket making were relocated.

In another example involving a traditional cultural property, the western office facilitated resolution of an almost decade-long conflict caused by the federally assisted construction of an electrical substation on pueblo land near El Rancho, New Mexico. The industrial site visually intruded on National Register-eligible lands where Hispanic *matachines* dances were performed. A 1999 MOA, negotiated with the assistance of the western office, contained a clear statement of objection to the location of the substation, required the construction of screening or berms to mitigate the visual intrusion, and provided for funding for the community to relocate the dances or support other efforts to preserve the dance tradition.

When the U.S. Navy proposed to demolish the wings of Hermann Hall at its training school along Monterey Bay, Council staff stepped in to urge consideration of alternatives. The complex was built in the late 1880s as part of the Hotel Del Monte coastal resort. Originally reflecting an unusual Alpine Gothic-style architecture, the hotel and wings were rebuilt after a fire in the early 1920s in a Spanish Mediterranean Revival style. The Advisory Council entered Section 106 consultation regarding the controversial partial demolition plans in 2003, led by staff from the Denver office. Consultation led to an agreement to renovate the structures and, in 2005, the Navy received the Advisory Council’s Chairman’s Award for the renovation and reuse project.

Denver office staff was also responsible for Section 106 compliance assistance relating to millions of acres of western public lands being considered for leasing by the BLM and U.S. Forest Service. The extraction and development of flowing (oil, gas) or solid (coal, uranium, gold) minerals can affect tens of thousands of archaeological resources, Indian sacred sites, and traditional cultural properties, such as the Indian Pass-Running Man Area of Traditional Cultural Concern, an area important to the Quechan Tribe of the Imperial Valley. In 1999, the Council’s comments led to a decision by the Secretary of the Interior to deny permission for a gold mine affecting this sacred land of the Quechan Tribe.

After the 1992 amendments to the NHPA formally recognized the rights of Indian tribes and Native Hawaiian organizations in the Section 106 process, the western office was officially designated as the Advisory Council's lead office for Native American and Native Hawaiian issues.³² However, the office's staff relationships with these stakeholders had been well established for at least a decade by that time, through consulting on issues such as how human remains encountered during construction should be treated and how properties of traditional religious and cultural importance should be considered during project planning and implementation.

In addition to direct involvement in Section 106 cases on specific projects, the western office staff also led the valued Section 106 training for federal agencies, state agencies, Indian tribes, and consultants, in the western part of the country; conducted other outreach, including trade association education (e.g., the hydropower industry); and provided overall technical assistance to the western THPOs, Indian tribes, and SHPOs.

The Advisory Council's FY 2003 budget justification report (which also marked the initiation of Preserve America) expressly recognized the agency's entire Section 106 professional staff as a "principal asset." In an astute measure of the complexity of controversial Section 106 cases, and the ability of Council staff to influence the outcome, the report acknowledged that "Much of the Council's work requires a high level of professional competence, experience, and mature judgment. Many situations call for well-honed public presentation and writing skills, diplomacy in consultation, negotiation, and dispute resolution, and independent action by Council employees."³³

However, the report also recognized the budgetary challenge of "maintaining that [staff] asset."³⁴ As a result, even while proposing additional budgetary resources,³⁵ the closure of the Council's western office was justified by the agency on the grounds of administrative efficiency:

This move was taken to reflect the changing nature of the ACHP's Section 106 casework under the current regulations, to enhance our ability to develop guidance and other services for Section 106 users, to better position the agency to promote Preserve America initiatives, and to better use existing resources.³⁶

...

Reprogramming of the resources for the four higher-graded Denver positions that were abolished will allow the ACHP to bring on six staff members, augmenting [Office of Federal Agency Programs] capabilities at a consolidated headquarters location.³⁷

Shortly before the western office was closed, the Advisory Council began to enhance organizational capacity by installing "videoconferencing to improve communications between headquarter and the Denver office and improve the ability of ACHP staff to participate in meetings without incurring travel costs."³⁸ (From FY 2004 through FY 2008, however, the agency's travel budget increased from \$70,000 to \$167,000, an increase of 138.6 percent. This travel increase appears to largely correlate to increased travel for Preserve America events;³⁹ however, as noted previously, Council staff has stated that increased travel primarily related to other activities, including additional membership meetings and Section 106 activities.)

Accessibility is a relative concept in the west and the far-flung 49th and 50th states. However, there is no question that western and mid-western stakeholders feel they are underserved since the western office closed, and

that their access to the Advisory Council's expertise would be improved if the agency's staff was located within the same or proximate time zones or a half- to one-day flight or drive from these dispersed constituents. A broad range of interviewees for this report (SHPOs, THPOs, the public, nonprofit advocates, cultural resource consultants) keenly feel the absence of a western office, although they appreciate the efforts of the agency's caseworkers and managers to provide compliance assistance from the nation's capitol.

A western office may not necessarily need to be located in Denver again. Any evaluation of a western site should consider expanded reaches of commercial air service and proximity to major metropolitan areas in the west and mid-America; tribal and state Section 106 staffing capacity; and regional office locations of the major federal land management agencies. Section 205(f) of the 2006 amendments to the NHPA expand the opportunities for the Advisory Council to seek financial and administrative support from agencies other than the Interior Department, which may facilitate new ways of accessing office space and administrative services.

5-4. Checks and balances are needed to reduce conflict-of-interest concerns when the Advisory Council's "liaison" staff participate in Section 106 reviews for their funding agencies' projects.

Since the Advisory Council's beginning, professional staff positions primarily responsible for Section 106 compliance oversight and case management for individual project reviews have been designated as either historic preservation specialists or program analysts. In 1997, a "liaison" position first appeared in the Advisory Council's staff list in its annual report on work activities. Liaison positions are filled by temporary employees funded by individual federal agencies through interagency contracts with the Advisory Council. According to the Council, these arrangements "... have made it possible for the Council to keep experienced staff and engage in mutually desirable projects with partners."⁴⁰ Liaison positions have increased from approximately 1 or 2 in the late 1990s to 7 or 8 since 2005, and the number currently stands at 9 (see Appendix 5-2).

In 1996, Congress asked the Advisory Council to address the advisability of seeking reimbursements from other federal agencies for its assistance and advice, including funding staff positions. The Advisory Council concluded, in response, that:

... while some reimbursable or cost-sharing arrangements are both possible and appropriate, as evidenced by past and present successes, there are currently substantial obstacles and constraints in both the desirability of the Council seeking such reimbursement on a widespread basis and its practical ability to do so.⁴¹

The report acknowledged that outside funding related to its nondiscretionary (i.e., required by law) core activities under Section 106 had supported staff travel. While "rarely done in the past," federal agency financial support for discretionary duties, such as specialized training or helping tailor special procedures to meet Section 106 compliance needs, could be considered, in the Council's view. However, the Advisory Council strongly cautioned that:

As an independent agency with regulatory and program oversight responsibilities, the Council believes that any fee system or regular agency retainer for providing advice and assistance would be ill-advised and raise questions of conflict of interest The Council's budget request should be judged in relation to its particular statutory mission, the merits of its activities, and other program priorities.⁴²

One practical and policy concern evident in 1996—and still present today—was that such funding or reimbursement agreements would strip the Advisory Council of certainty in its own budget and program planning, and in setting its own priorities. The opportunities outlined in the report for congressional review consisted of reimbursements through cost-sharing or payments to cover: (1) direct costs for interagency personnel details and/or travel costs for Section 106 technical assistance and training and similar activities more broadly associated with federal preservation programs under Section 110 of the NHPA; (2) compliance assistance with alternative ways to comply with Section 106, as authorized in the Section 106 rules; and (3) broader policy and program review to improve the effectiveness, coordination, and consistency of federal agency preservation activities under Section 202(a)(6) of the NHPA.

Objectionable interagency arrangements were clearly identified by the Advisory Council:

Excluded would be individual (Section 106) case reviews and related consultation assistance provided, those process-driven agreements that deal with specific complex or lengthy projects, or other Council actions that comprise the Council's 'comment' on a given situation to meet Section 106 requirements. The excluded work on both the Council's part and that of the agency is a direct result of our mutual statutory and regulatory responsibilities. A clear distinction must be maintained between fulfillment of our legal obligations, and what might be potential reimbursement opportunities.⁴³

Notwithstanding this concern, by FY 2004, the agency's budget justification report noted that "partnership agreements" had been reached to fund liaison positions by the Department of Agriculture, GSA, FHWA, and HUD *"to improve the delivery of services to the partner agency by ensuring timely review of projects under Section 106 and the development of improved capability within the agency to address historic preservation responsibilities [emphasis added]."*⁴⁴ Subsequent agreements for liaison positions were reached with the VA and FEMA and, more recently, with the Department of Energy and BLM. (HUD and the Department of Agriculture no longer fund liaison positions.)

The seven-fold increase in Section 106 liaison staff positions funded by other agencies occurred during a period of overall budget increases for the Council, increases that appear to be consistent with expanded Preserve America activities. The liaison position expansion also occurred as the western office was closed, with the loss of highly experienced historic preservation specialists and program analysts.

While the Council's earlier concerns about such staffing arrangements have apparently receded, preservation advocates interviewed for this report expressed significant concerns relating to the appearance of bias and potential loss of impartiality in the Council's balancing role in Section 106. Some interviewees knew of such arrangements and had directly participated in controversial Section 106 projects in which they believe the Council's position was compromised by the particular arrangement. Others were not aware until the interview of such arrange-

ments, but they questioned whether the Council's level and tenor of involvement after entering a contested case reflected in any way the liaison's need to "close the case" for their funding agency. One state agency interviewee stated that there was always a lurking question as to whether liaisons were able to provide all of the relevant compliance information regarding their funding agency's Section 106 activities during project reviews.

Positions that are funded by state agencies (mostly departments of transportation, but some housing and community affairs departments) support at least half of the SHPOs' Section 106 case review staff.⁴⁵ These arrangements also raised conflict-of-interest concerns among members of the public interviewed for this study. Section 7-1 of this report proposes imposing Section 106 user or service fees as a way for the states to secure more consistent and impartial funding sources for review staff and other Section 106 responsibilities. When asked about their liaison positions during interviews, SHPOs all cautioned that a system of internal checks and balances must be instituted to reduce the potential and actual risk of compromising independence. Practices implemented by the states to minimize these concerns include:

- Requiring all funds to be transferred at once into the agency's general account, rather than through a periodic invoicing arrangement (which leaves open the possibility that the funding agency could revoke, or threaten to revoke, the financial support at any time, as was done by HUD in 2007 in the midst of a complex consultation on the demolition of 4,500 units of historic public housing in New Orleans).⁴⁶
- Ensuring that hiring decisions, performance evaluations, and specific work assignments are made within the SHPO office, not by or shared with the funding agency.
- Conducting routine peer review of liaison staff performance during Section 106 consultation steps for projects (e.g., identification, effects determinations).
- Elevating conflicts between SHPO liaison staff and funding agency staff to a supervisor-to-supervisor level for resolution.

During preparation of this report, interagency funding agreements and liaison work plans were requested from the Advisory Council for review. The Council provided copies of interagency agreements with the Agriculture Department, GSA, the VA, and FEMA, but not those for the FHWA or HUD. No work plans were provided. The agreements that were provided are not limited exclusively to Section 106 case management, but also include other duties identified earlier by the Council as appropriate for cost sharing or reimbursement, such as training, preservation planning, and assisting in tribal communications.

Based on the documents provided, there appears to be little consistency in the basic administrative terms of the agreements or in checks and balances to ensure the Council's independence in individual Section 106 cases. Agreements for two agencies (the VA and GSA) include a relatively positive measure that, in significant disputes relating to those agencies, the Section 106 case will be handled by another program analyst on the Council staff, with support allowed by the applicable liaison staff.⁴⁷ Clauses that are very troubling, however (also found in both the VA and GSA agreements), include:

- Allowing the funding agency to participate in hiring and selection of the liaison if the position is vacated and to directly evaluate the performance of the person filling the position.
- Allowing the funding agency to “Coordinate with the Council management and the Liaison to keep them informed of [agency] priorities and *potential Section 106 . . . challenges and positions to assist [the agency] in averting adverse effects and negative publicity that may result in [agency] project delays* [emphases added].”
- Funding through a periodic invoicing basis as opposed to full funding for the term of the assignment. Pay-as-you go suggests the funding agency could withhold payment or terminate the arrangement if it is unhappy about Section 106 reviews by the individual whose position is being funded.⁴⁸

As a policy matter, it is debatable whether regulated federal agencies should fund Section 106 direct-review services within the Council. Members of the public and nonprofit organizations interviewed for this study strongly perceive that the Advisory Council’s primary statutory mission to watch over Section 106 compliance is compromised by these agreements. Nonetheless, if the practical realities are such that liaison positions are tasked to directly participate in their funding agencies’ Section 106 cases, then interagency contracts need to include consistent terms and conditions that impose administrative and supervisory checks and balances. In order to better protect the public’s interest in these contracts, contract conditions should require that liaison hiring decisions and performance evaluations be made solely by the Advisory Council, not by or with the funding agency. Further, clauses in existing agreements that *require* the liaison positions to support their funding agencies’ public relations programs and project timetables raise legitimate concerns about maintaining impartiality in Section 106 reviews and, for that reason, should be prohibited in all interagency contracts to fund liaison staff.

5-5. There is a compelling need for timely and concrete Section 106 advice from the Advisory Council; opinion letters are one possible solution.

From the start, Congress expected the Advisory Council to serve as an expert resource for the president, the legislature itself, federal agencies, and the public, and to adopt and explain regulations to guide every federal agency in complying with Section 106. The absence of substantive preservation requirements in the Advisory Council’s rules implementing Section 106 at 36 C.F.R. Part 800 is either a great advantage or disadvantage, depending on the project at hand, the experience of the reader, or the desire to use the law as a sword or shield. As one interviewee stated, the rules are “a wonderment in their conception and development” and that the flexibility or ambiguity of the language used is both “a strength and weakness, leading many to yearn for clarification.” The agency has issued at least 35 policy or guidance documents since the early 1980s relating to implementation of the Section 106 rules (see Appendix 5-3).⁴⁹

Issuing guidance is not as simple as putting the federal agency pen to paper, however. A series of restrictions and protocols has been developed over the years by the Office of Management and Budget (OMB) relating to how information is collected and guidance issued by federal agencies, including the Advisory Council. These requirements are based on principles of openness, transparency, and inclusion—all good goals—but the procedural requirements can make it difficult as a practical matter for a federal agency to provide timely guidance on newly emerging issues or project proposals.⁵⁰ Further, other executive branch directives may apply when guidance is

issued. For example, E.O. 13,175 requires government-to-government engagement between federal agencies and Indian tribes prior to adoption of policy statements or actions that have substantial direct effects on one or more tribes; the relationship between the federal government and tribes; or on the distribution of roles and responsibilities between these parties.

Interviewees for this report gave mixed feedback on the Council's Section 106 guidance. Among more experienced practitioners, there was a clear sense that the Advisory Council's national perspective and direct and detailed responsiveness were more apparent in earlier guidance than the documents issued in the last decade or so. Other interviewees noted that, in general, there seemed to be increasing staff reliance on oral guidance, which some found helpful and others found equivocating and not problem solving. In this regard, one interviewee characterized more recent guidance as "indirect," exclaiming that "the trenches need help now!" There was also a common conclusion among interviewees that strong comments issued by the Council and the imposition of sanctions—not guidance—may be a more appropriate way to address recurring problems in Section 106 noncompliance (HUD applicants and the agency's weak oversight of Section 106 implementation were cited several times in this regard). Finally, a couple of interviewees worried that guidance could nationally standardize implementation practices that cut corners, with the stated concern that the effort would reduce Section 106 implementation to "the lowest common denominator."

When interviewees cited specific needs for guidance from the Advisory Council, the following topics were identified (in order of the frequency of comments):

- Drafting, monitoring, and enforcement of agreement documents (several SHPOs noted that they do not have staff attorneys).
- Interpreting Subpart A of the Section 106 rules (roles, responsibilities, early planning emphasis).
- Updating the *Manual on Mitigation*, especially for indirect and cumulative impacts.
- Identifying ways to meaningfully involve the public.
- Addressing Section 106 reviews for emerging technology, e.g., Section 106's applicability to energy infrastructure projects (wind or solar energy fields and associated energy storage and transmission devices).
- Evaluating traditional cultural properties in NEPA and Section 106 project reviews.
- Coordinating NEPA and Section 106.
- Determining when earlier decisions of ineligibility or eligibility for the National Register should be considered "stale" and, thus, needing an updated evaluation by an applicant or federal agency.

In addition, one SHPO representative identified the need for guidance regarding the applicability of state and local land use and historic preservation laws to federal or federally assisted projects under the doctrine of federal preemption.⁵¹

Another way for the Council to serve as a resource without issuing formal guidance was suggested by one cultural resource consultant interviewed for this study, who suggested that the Council's website be expanded to high-

light examples of using technology innovations in Section 106 reviews, as well as links to Internet resources to track or identify development of historic contexts for emerging National Register-eligible property types (e.g., mid-20th century modernist dwellings and institutional buildings).

One approach to providing insightful and responsive guidance in advance of specific problems has been developed by other federal agencies through the use of advisory opinions or interpretive letters in response to written requests. Issuance of investigatory letters or opinions in response to questions involving fact-specific determinations about a matter or case is generally not included within the scope of OMB instructions requiring formal notice and prior review procedures for federal agency information collection and issuance of guidance. The OMB's instructions also exclude from formal notice and review procedures documents that relate to the use, operation, or control of a government facility or internal documents solely directed to another federal agency.⁵² It is likely that Section 106 opinion letters would not be subject to notice and comment procedures based on the existing exemptions.

In addition to issuing guidance in the form of opinion letters, posting the letters on the Council's website is key—just starting with the entire body of Council comments and other written statements already issued in individual Section 106 case reviews would be helpful, and should not necessarily require increased staffing resources. The Advisory Council's 2002 letter responding to the Vermont SHPO on the applicability of Section 106 to off-site construction borrow and fill sites appears to be the only example of a type of interpretative letter which is posted on the agency's website.⁵³ Such letters can be very insightful and practical to Section 106 users of all kinds, and for this reason, the agency should consider much more extensive use of such letters to disseminate concrete advice to federal agencies, applicants, THPOs, SHPOs, and the public.⁵⁴

However, filling the Advisory Council's general counsel position may be required to ensure timely responses if opinion letters curry favor among Section 106 stakeholders. For years, the chief counsel slot (previously held by the agency's current Executive Director) has remained unfilled due to budget constraints. A deputy counsel currently provides the only dedicated in-house legal support to the agency.

5-6. Facilitated negotiations should be conducted more often in controversial Section 106 cases, and training in conflict resolution skills should be provided to the Advisory Council's staff.

By its very definition, Section 106 "consultation" engages interested parties in a dialogue. One does not need a higher degree in social psychology to identify group dysfunctionality and adversity in controversial Section 106 cases. Consulting parties and the project proponent are often locked into positions, do not speak the same language, are mistrustful, or impatient—and often all of these conditions are apparent in the first meeting. In other cases, a project may not necessarily be controversial, but may feature complex issues or impacts that make it challenging to achieve structured consideration in consultation meetings.

At its broadest, conflict or dispute resolution is a collaborative process assisted by a third party during which two or more people seek solutions, resolution, or closure. The third party may be a *facilitator*—someone who may or

may not be a party to the proceeding—who assists with the procedural-oriented aspects of the dialogue (e.g., helps to identify issues, ensures that all voices are heard). Alternatively, the third party may be a *mediator*—an impartial actor who assists with both procedure and substantive resolution of issues. Based on its annual reports to the president and Congress, the Advisory Council views its role in Section 106 as helping to balance multiple needs, desires, and interests with a view toward resolving conflict. One title in an annual report called the Section 106 process “the Peacemaker . . . the process that . . . stresses negotiation and compromise,” while the Council’s *Citizen’s Guide to Section 106 Review* offers the agency’s assistance to the public “ . . . to help with dispute resolution.”⁵⁵

Congress has imposed multiple functions on the Council—as a consulting party with subject-matter expertise in both the Section 106 process and substance of preservation conflicts, a watchdog over consultation implementation, and a promoter of historic property protection during other federal agencies’ decision-making processes which balance project needs with consideration of preservation values. During the controversial, complex, or policy-setting Section 106 cases in which it participates, the Advisory Council staff does not formally facilitate or mediate disputes, nor does this study suggest that they do so. One practical reason for this fact is constraints on staff time and budget limitations. Further, serving in a formal conflict resolution role does not completely fit with the Council’s role as regulatory watchdog over other federal agencies during Section 106 consultations. As an aside, during interviews for this report, several interviewees indicated that the Council’s own view of its role is not always clearly expressed in individual project review meetings. Members of the public who serve as consulting parties would benefit, in particular, from a clear statement of the Council’s perspective on its role when it participates in consultation on projects.

As a key stakeholder, the Council does encourage and assist participants in Section 106 reviews to try to reach consensus solutions, a function that is appropriate especially because of the agency’s extensive knowledge base of past practices that effectively identified project alternatives and measures that positively adapted historic properties to meet federal needs or that minimized or avoided harming such properties. In order to facilitate the Council’s work in this regard, this recommendation suggests that the Section 106 caseworker and managerial staff be provided an opportunity for training in conflict resolution skills. Helping to resolve disputes is not necessarily an innate skill. Strengthening an understanding of different styles of learning and communication; diversity of all types; effective questioning and discernment practices; and recognizing issues and promoting common interests are types of conflict resolution skills that could be enhanced through formal, structured training. This suggestion is not meant to propel the Advisory Council staff into formal facilitation or mediation roles, nor does it imply any particular areas of improvement for staff and management. Instead, the proposal is intended to provide the staff more tools to effectively participate in the high-profile cases in which the Council elects to become involved.

Overall, the main thrust of this recommendation is to encourage federal agencies, in collaboration with the Advisory Council, to explore more frequently the opportunity to seek assistance from outside parties to facilitate or mediate projects which are controversial at the earliest stages of consultation. The Advisory Council’s membership has commented before on the need to use alternative dispute resolution to benefit Section 106 consultation; in a Nov. 3, 2008 letter from the Advisory Council’s Chair to the Secretary of the Department of the Interior, the

Chair noted that the BLM had failed to connect its ADR process with Section 106 consultation during a controversy involving a firearms shooting range proposal that would impact a traditional cultural property. During the research for this report, only one case was identified from the Advisory Council's yearly reports in which the Council highlighted a formal external mediation process that was conducted as part of Section 106 consultation: the Stillwater Bridge, a vertical-lift bridge from 1931 which spans the St. Croix River. Other cases are likely to exist, however, such as construction of the Paris Pike highway project in central Kentucky and the Charles River bridge constructed during the "Big Dig" tunnel project in Boston, both of which were identified by the National Trust as having involved some type of formal mediation.

The Stillwater Bridge project began as an unfortunate clash between consideration of natural and cultural resources in a transportation project. During the 1950s, the states of Minnesota and Wisconsin planned to add a new river crossing in the vicinity of Houlton (Wisconsin) and Stillwater (Minnesota). As lead agency, FHWA conducted the initial NEPA review and Section 106 consultation which resulted in an MOA signed by the Advisory Council in 1994. This agreement document allowed construction of a new bridge across the lower St. Croix National Scenic River (under the jurisdiction of the National Park Service [NPS]), while keeping the historic bridge open.

An environmental organization then sued the FHWA challenging the necessity of the project and analysis of environmental issues during preparation of the initial EIS (primarily impacts to wetlands, water quality, and endangered species). The regional office of the NPS subsequently determined that its "no bridge proliferation" policy relating to national wild and scenic rivers would require the removal of the historic Stillwater Bridge if a new crossing were built. In the alternative, the parks agency insisted that extensive mitigation would be required. Appeals were made to the regional Park Service office to preserve the historic bridge as a cultural resource important to the overall setting of the scenic river, but NPS officials would not budge in their position.

By 1996, all sides were at a stalemate, including the federal agencies. The more contentious issues related to the NPS position that the historic bridge must be removed in whole or part as a *quid pro quo* for constructing a new bridge, and the size and funding mechanism for a conservation fund as mitigation for natural resource impacts from the new bridge. As a result of direct appeals by the Advisory Council's Chair to the Secretary of the Interior and the FHWA, discussion on the two bridges was reopened around 2001.

In what appears to be an uncommon initiative, the FHWA, state departments of transportation, and the governor of Wisconsin requested assistance from the U.S. Institute of Environmental Conflict Resolution (Institute) in Tucson.⁵⁶ As a result of an initial assessment by a mediation team hired by the Institute, two significant measures helped restart the consultation process. One step was to expand the stakeholder/consulting party participant group to include representatives from local environmental groups, including the group that had sued FHWA in the 1990s. A second—and important—step was to decouple the dialogue about the two bridges during the negotiation process, rather than treat the fate of one structure as contingent upon the fate of the other.

The overall mediation effort lasted five years, with three years of intensive and frequent consultation meetings among some 30 consulting parties.⁵⁷ An updated NEPA review was embedded in the consultation process

through using the forum for updated scoping (identification of important issues), alternatives consideration, and preparation of a supplemental EIS. An independent professional peer review of the travel demand model (which forecast future vehicle travel across the river) was conducted based on concerns of the public interest consulting parties who questioned the traffic numbers. (This peer review apparently caused the state departments of transportation to exhibit some flexibility in the process.) The final MOA (and NEPA ROD), issued in summer 2006, called for a new bridge, conversion of the Stillwater Bridge to a pedestrian and bicycle crossing as part of the scenic river trails system, interpretative signage along the trail system, an endowment fund for ongoing maintenance of the historic bridge, restoration of bluff lands, mitigation for harm to wetlands, water quality, and endangered species habitat, and broader mitigation measures to address impacts from land development associated with opening up a new road across the river (watershed planning, local land use planning support).

With the exception of one of the two environmental groups involved, these final solutions were endorsed at varying levels of enthusiasm by the consulting parties.⁵⁸ Three factors were essential to the compromises: (1) shared group decision making (which caused the federal agencies to stretch a bit); (2) a full commitment of time and energy over many years by all involved; and (3) redefining success (which caused some of the public interest participants to stretch a bit). Formal mediation did not come without a financial, as well as time, investment. The FHWA primarily bore the Institute's costs (around \$500,000) with some contribution by the Minnesota Department of Transportation. However, this amount represents less than 1 percent of the projected costs of the entire project.

According to NPS data from 2004 through 2008, 98 percent of all Section 106 reviews during that time involved project proposals that did not threaten to harm historic properties. For the relatively small universe of projects that become controversial because of their impacts, federal agencies should be encouraged to weigh the time and financial investment in formal, independent conflict resolution assistance against the overall cost of the project and the benefits to possibly reaching end results that will not leave lasting community mistrust or hostility against the agency. In a journal article which cited the Priest Rapids Dam Columbia River project, a committee of the American Bar Association noted that parties had preliminarily reported savings of more than \$150,000 per case in using the Federal Energy Regulatory Commission's (FERC) dispute resolution process.⁵⁹

A comparison of two controversial FERC hydroelectric dam relicensing projects—one project (1998 to 2009) that ended in litigation at a high cost to the federal government, and another that was effectively facilitated from 2002 to 2004 to a consensus outcome during an early stage of Section 106 consultation—is presented in the following table.

Two case studies: FERC relicensing of hydropower dams and stations in Washington	
Tacoma Power Cushman Dam, Skokomish River ⁶⁰	Grant County Public Utility District, Priest Rapids Dam, Columbia River ⁶¹
<p>FERC's 1998 relicensing brought to a head decades of contention between the municipally owned power operator and FERC and the Skokomish Tribal Nation. The project encompassed two National Register-listed districts, a large prehistoric archaeological site, and several traditional cultural properties and districts important to the tribe. Issues of tribal subsistence and economy included the adequacy of river flows, water quality, and hindrance of the ability of anadromous fish (e.g., salmon, steelhead) to pass through the power system.</p> <p>FERC terminated Section 106 consultation and reissued the license contrary to the Advisory Council's comments and mitigation proposals. The Skokomish Tribal Nation filed a lawsuit (joined by parties on both sides of the issue) contesting the license and asserting \$5.8 billion in trespass and economic damages against FERC and the power operator which was finally settled in early 2009. The 240-page settlement agreement provides substantial financial mitigation for cultural, natural, and economic impacts to the tribe and the power company's return of cultural items to the tribe.</p>	<p>In spring 2002, FERC's Federal Preservation Officer (a dispute resolution specialist) was contacted by the Confederated Tribes of the Colville Reservation who expressed concerns about government-to-government consultation in the context of the relicensing, as well as procedures for the treatment of human remains and inadvertent discoveries.</p> <p>As a result of the contact, a cultural resource working group was established consisting of representatives from the Colville tribe, other tribes, FERC, the power district, federal land management agencies, the state archaeologist, other resource agencies, and public interest groups.</p> <p>The power district hired a third-party neutral facilitator of tribal descent but with no affiliation with the affected lands. After an intensive consultation process, consensus was reached on written procedures for addressing any human remains that might be encountered during the project expansion, as well as natural resource concerns. A Section 106 programmatic agreement subsequently incorporated these measures.</p>

5-7. Expansion of basic and advanced Section 106 training should be facilitated by the Advisory Council.

Interviewees support the Advisory Council's basic ("the Essentials") and advanced Section 106 training by seasoned staff. At the same time, accessibility to the training locations is perceived as troublesome by some state review offices since the closure of the western office. There was also a sense of loss of informal opportunities for interactions with staff trainers since they sometimes coupled project or review office visits with training sessions. Additionally, the dire budget plight of the states has terminated most travel opportunities, and made it difficult to fund registration fees. The Advisory Council's FY 2010 training calendar does expand to a number of cities, which should provide more training opportunities for underserved states and regions. At the same time, more initiative in delivering on-demand, web-based training could conserve the agency's professional staff for the critical face-to-face consultations needed in high-profile cases.

Several SHPOs reported that they now provide basic Section 106 training to other state agencies that receive federal funding, and to their consultants. From the SHPOs' perspective, the time spent is a sound investment because training improves the quality of incoming documentation and helps to promote project managers' understanding of the need to consider historic properties in their agency's actions. There is a substantial education and relationship building benefit in such SHPO-directed training programs. However, there are concerns from the public's standpoint about potentially "cozy" relationships between the state review offices and "regulated" state agencies, particularly the state departments of transportation. While this concern would exist regardless of whether staffs of these agencies are trained together, state managers should consider whether such sessions should also be open to the public, as is the case with the Advisory Council's training sessions.

Based on the experience of SHPOs interviewed for this study, federal agencies that commit to assigning qualified staff to Section 106 compliance, and then providing them ongoing opportunities to enhance their knowledge of best practices, are more successful in Section 106 implementation than those that do not. However, very few of the nationwide programmatic agreements require federal agency staff training, as one example of a needed measure.⁶² Given the significant practical benefits of training, the Advisory Council should promote that federal agencies provide expanded learning opportunities (from a variety of sources) for qualified staff as a standard condition of every Section 106 agreement document and particularly for program alternatives to Section 106 implementation. These standard requirements should also promote general Section 106 awareness training for federal agency employees, as well as nonfederal applicants, who are not directly responsible for compliance, but who supervise or otherwise oversee staff that manages projects subject to Section 106 reviews.⁶³

At the same time, the Advisory Council's current approach to training depends heavily on a traditional model in which Section 106 staff takes time away from their casework in order to conduct the training live at intensive one- or two-day sessions in about a dozen cities around the country during the course of a year. The cost of travel often makes such training prohibitive for key stakeholders such as tribal, state, and local governments. The Council should explore leveraging its staff's expertise more broadly through the expanded use of web-based training, which can be accessed at any time without the need to travel. More initiative in delivering on-demand training this way would also conserve professional staff time and travel budgets for the critical face-to-face consultations when the Council participates directly in high-profile or complex cases. Although a web-based training format prevents the live question-and-answer dialogue that is often useful, this potential downside could be somewhat mitigated if preservation stakeholders use the option of requesting opinion letters from the agency, as recommended in Section 5-5 above.

Appendix 5-1: Select Examples of Project Outcomes Following the Council Membership's Involvement in Cases (as reported by the Advisory Council)

Preservation Successes:

A cooling tower, funded by the Department of Health, Education, and Welfare, was redesigned at Georgetown University (Washington, DC) to avoid adverse visual effects. (1969-70 A.R.)

FHWA rejected a highway proposed through a National Natural Landmark and open area used for sweat lodges and a medicine wheel at Haskell Indian Nation University (Kansas). (1998-99 A.R.)

GSA ultimately saved the Old Post Office Building (St. Louis), a leading national example of French Second Empire architecture, from probable demolition after it first proposed to dispose of the property to the city. (1969-70 A.R.)

FTA preserved the Vesey Street Staircase, used as an escape route by survivors of the September 11, 2001 attack on the World Trade Center, and is planning to install the stairway in a memorial and museum which were redesigned to reduce the impact on the remains of the Center. (<www.achp.gov/news.html>, 2009)

FHWA oversaw the re-routing of U.S. 27 around the Chickamauga-Chattanooga National Military Park (Georgia). (1990 A.R.)

HUD prevented the demolition of the Lauderdale Courts building in Memphis, a public housing complex where Elvis lived as a teenager. Elvis first picked up a guitar and performed there as part of the Lauderdale Court Golden Boys All-Guitar Band. (1998-99 A.R.)

GSA facilitated the adaptive reuse of the 1835 General Post Office/U.S. Tariff Commission building (all marble, Classical Revival-style architecture) in Washington, DC for a boutique hotel. (Prominent Section 106 Cases: June 2000)

In 1999, then-Interior Secretary Babbitt declined to authorize the Glamis gold mine on BLM land in southeastern California, in response to the Council's formal comments opposing the mine because it would have harmed a traditional cultural property of significance to the Quechan Tribe. (Prominent Section 106 Cases: Winter 2001)

Other Important Preservation Outcomes:

The Athens Generating Company modified its power plant to eliminate wet cooling towers, thereby reducing visual impacts to the National Historic Landmark site of Frederic Church's home "Olana" and other Hudson River Valley historic properties, and established a substantial mitigation fund. (Prominent Section 106 Cases: Summer 2001)

FWHA oversaw the replacement of the Amelia Earhart Bridge (Atchinson, Kansas) as a result of an MOA authorizing removal of the historic, steel through-truss bridge and a construction of a new four-lane bridge. Mitigation includes FHWA funding for oral histories and \$500,000 in grants for local preservation activities, and sponsoring a preservation speaker at the annual statewide transportation conference. (Case Digest: Section 106 in Action, Fall 2007)

The National Park Service rehabilitated the defensive walls of San Juan National Historic Site and La Fortaleza Fortress (Puerto Rico), a World Heritage Site complex containing the oldest remaining Spanish fortifications of the New World, and utilized a conservation approach to materials, repair, and maintenance of the structure. (1998-99 A.R.)

GSA and the Smithsonian Institution redesigned plans to extensively modify the interior of the Old U.S. Custom House (New York City), a National Historic Landmark of Beaux-Arts style, for the National Museum of the American Indian, Heye Center. New plans concealed, but did not remove, original historic materials; installed separate utilities within the renovated space; and provided for interior environmental monitoring of impacts to the original materials. (1991 A.R.)

Preservation Losses:

The Army demolished Maluhia Hall (the "Haven of Rest"), a World War II-era troop entertainment center of tropical style, at Fort DeRussey (Hawaii). (1998-99 A.R.)

The Navy demolished 40 of 43 buildings slated for demolition within the Pensacola Naval Air Station (Florida), including 75 percent of the structures in the National Historic Landmark district, after being damaged by Hurricanes Ivan and Dennis. Although reports demonstrated that repairing and mothballing 13 of the 16 most significant of these structures would be more cost-effective than demolition, only three additional structures were saved in response to Council members' involvement. (Case Digest: Section 106 in Action, Spring 2005)

BLM approved a firearms shooting range on public lands near Boundary Cone Butte, a National Register-eligible traditional cultural property in Arizona important to the Fort Mojave Indian Tribe and Hualapai Indian Tribe, despite Council objections. (Nov. 3, 2008 letter from the Chair, Advisory Council, to the Secretary of the Department of Interior)

The Bureau of Indian Affairs granted a gaming permit for a bingo hall, community center, and museum complex located on terrain of the Hickory Ground site (*Oehe-au-po-fau*) near Wetumpka (Alabama), land that historically featured the last government center of the Upper Creek Nation before its removal to Oklahoma. (1992 A.R.)

HUD funded the demolition of a total of 4,500 units of historic public housing in four major complexes in New Orleans. The buildings suffered relatively minor damage from Hurricane Katrina, but the Housing Authority of New Orleans wanted to raze them and build new homes rather than rehabilitate them. Council member involvement in 2007 led to Section 106 agreements that only required the retention of two or three buildings in each complex.

Appendix 5-2: Advisory Council Budget and Staffing, FY 1971 – FY 2010

FY	Appropriation	Budget Authority	Transfers In	Total Funding	Employee FTE*	Section 106 staff**		
						East	West	Liaisons
1971				.105,6				
1972				.206,6				
1973				.479	20			
1974				.543	20			
1975				.543				
1976								
1977								
1978	1,135		.236	1,371				
1979	1,204	1,204	.150	1,354				
1980	1,375	1,375	.150	1,525				
1981		1,530	.028	1,558				
1982	1,565	1,565		1,565	26			
1983	1,522	1,457	0	1,472	36			
1984	1,561	1,557	.046	1,603	36			
1985	1,546	1,546	.049	1,595	33	7	4	
1986	1,507	1,507	.061	1,568				
1987	1,533	1,518	.068	1,586	31	6	3	
1988	1,719	1,689	.150	1,839	34	8	4	
1989	1,778	1,757	.179	1,936	32	8	4	
1990	1,890	1,890	.040	1,930	34	6	5	
1991	2,220	2,220	.094	2,314	36	8	5	
1992	2,623	2,591	.142	2,733	37	7	5	
1993	2,757		.576	3,333	41	8	5	
1994	2,959				38			
1995	2,942				37	8	5	
1996	2,497	2,497		2,497				
1997	2,500	2,500		2,500	33	9	4	1
1998	2,745	2,745	.200	2,945				
1999	2,800	2,800	.200	3,000	32	9	4	2
2000	3,000	2,988	.200	3,189	32			
2001	3,189	3,182	.200	3,382	34	13		1
2002	3,400	3,398	.200	3,598	34	5	5	1
2003	3,667	3,667			34			
2004	4,000	3,951			34	5=106 reviewers; 2=SHPO services; 2=Native Am. services; 2=admin/training		5
2005	4,600	4,536			35	2=106 reviewers; 2=SHPO services; 2=Native Am. services; 2=admin/training		7
2006	4,860	4,788			35	8		8
2007	4,788	4,828			35	8	NA	7
2008	5,348	5,265			36	8	NA	7 + 1 detailee
2009	5,498	5,498			36	8	NA	7
2010	5,908	5,908			36	8	NA	9

Sources: Advisory Council on Historic Preservation, *Reports to the President and Congress of the United States*, FY 1969 – FY 1999; *Budget Justification Reports*, FY 2000 - FY 2011. A blank cell indicates data was not reported.

Note: Funds in data columns 1-4 are expressed in millions (e.g., 1,000=\$1 million; .10=\$100,000).

*“Employee FTE” includes full-time equivalent positions for the entire agency.

**Employees whose positions are identified as “historic preservation specialists” and “program analysts” were counted in the eastern and western office Section 106 staff columns; managers who supervise this staff were not counted in this analysis to ensure an equivalent staffing-level comparison over the years of reporting.

Appendix 5-3: Section 106 Guidance Issued by the Advisory Council on Historic Preservation

~1982

Treatment of Archaeological Properties Handbook
Manual of Mitigation Measures

1987

Anticipatory Demolition Policy (June 22, 1987)
Certified Local Government Guidance (draft Aug. 31, 1987)

1988

Rights/Duties of Invited Consulting Parties
Public Participation Guidelines for Federal Agencies
Private Applicant Guidelines
Preparing Agreement Documents (Apr. 1988)
Identification of Historic Properties (Aug. 22, 1988)
Treatment of Human Remains and Grave Goods (Sept. 27, 1988)

1992

Mesa Verde Policy Statement on Traditional Cultural Properties

1993

Foreclosure guidance (draft)

1994

NHPA Section 110 Guidelines (joint effort with the NPS)

1995

Policy Statement on Affordable Housing and Historic Preservation

1999

Consultation on Recovery of Significant Information from Archaeological Sites (May 7, 1999)

2000

Policy Statement Regarding the ACHP's Relationship with Indian Tribes (Nov. 17, 2000)

2001

Fees in the Section 106 Review Process (July 6, 2001)
Extension of Emergency Provisions Under 36 C.F.R. Part 800.12 (implemented after the Sept. 11, 2001 terrorist attacks and relating to all federal actions undertaken in response to the emergency; nullified as of Mar. 29, 2004—federal agencies must now comply with §800.12 during each individual emergency or disaster)

2002

Protecting Historic Properties: A Citizen's Guide to Section 106 Review
Using Section 106 to Protect Historic Properties
Section 106 Consultation Involving National Historic Landmarks
Federal Alternate Procedures
Letter Regarding the Applicability of the Section 106 Process to Off-Site Borrow and Disposal Areas (Jan. 25, 2002)

2003

Native Hawaiian Organizations and the Section 106 Review Process (Apr. 4, 2003)

2005

The Relationship Between Executive Order 13007 Regarding Indian Sacred Sites and Section 106 (Aug. 22, 2005)

2006

Web-based Preparing Agreement Documents (draft)

2007

Policy Statement on Affordable Housing and Historic Preservation (Feb. 15, 2007, superseding the 1995 policy)
Policy Statement Regarding the Treatment of Burial Sites, Human Remains and Funerary Objects (Feb. 23, 2007, superseding the 1988 policy)

2008

Assistance Agency Tribal Consultation Q&As (Aug. 27, 2008)
Consultation with Indian Tribes in the Section 106 Review Process: A Handbook (Nov. 2008)
Requesting and Coordinating Section 213 Reports (Oct. 6, 2008)
ACHP's Policy Statement on the ACHP's Interaction with Native Hawaiian Organizations (May 13, 2008)

2009

Section 106 Archaeology Guidance (Jan. 1, 2009)
Guidance on Program Comments as a Program Alternative
Standard Treatments as Program Alternatives

Notes to Section 5

1. See generally the discussion at pages 9-10 *supra*. As recently as the 2006 amendments to the NHPA, the legislative history reflects the view of Congress that “[o]ne of the Council’s most visible duties is to oversee implementation of Section 106.” S. Rep. No. 109-235, at 2 (April 20, 2006). This view of the Council’s core mission is fully consistent with the 2009 Preserve America report, which states:

The expert panel members strongly reaffirm that oversight of Section 106 . . . is the most important function of the ACHP. ACHP involvement in individual Section 106 cases has a substantial and beneficial influence on the outcome of the consultation process and should be encouraged and expanded. Therefore, additional resources should be provided to support the ACHP’s crucial role in Section 106 involvement, oversight, and training. See Preserve America expert panel report, *Recommendations to Improve the Structure of the Federal Historic Preservation Program*, 11.
2. Until the 1999 and 2000 amendments to the Section 106 rules, the Advisory Council was a required signatory to every MOA; the agency no longer signs “consensus” MOAs between federal agencies and tribes or the states.
3. 36 C.F.R. §800.5(h), effective Jan. 25, 1974.
4. Robert Garvey interview, 60.
5. 34 Federal Register 2581-82 (Feb. 25, 1969).
6. 36 C.F.R. §800.9(a). See also ACHP Operating Procedures at App. B., p.21.
7. 36 C.F.R. §800.7(b). See also ACHP Operating Procedures at App. B., p.20.
8. 36 C.F.R. §800.9(b).
9. 64 Federal Register 27067 (May 18, 1999).
10. The membership’s foreclosure determination regarding the GSA’s demolition of part of the Winder Annex in D.C. was upheld in *Don’t Tear it Down, Inc. v. General Services Administration*, 401 F. Supp. 1194 (D.D.C. 1975).
11. 36 C.F.R. §800.7(a).
12. 2002 *B.J.R.*, 21.
13. 2005 *B.J.R.*, 4 (Advisory Council quote); 68 Federal Register 10635 (Mar. 5, 2003) (issuance of executive order).
14. 2005 *B.J.R.*, 4-5. Preserve America communities are not the same as CLGs. As explained in Section 2, CLG designation is made by SHPOs and the Department of the Interior based on criteria established by regulation. Preserve America community designation is not based on regulatory criteria and is not necessarily made in consultation with the SHPOs.
15. 2007 and 2010 *B.J.R.*, 22 and 25, respectively.
16. 2009 *B.J.R.*, 64.
17. *Ibid.*
18. 2009 *B.J.R.*, 14.
19. Compare 2002 *B.J.R.*, 7, 2003 *B.J.R.*, back page of the cover and 8, and 2004 *B.J.R.*, back page of the cover and 6.
20. 2005 *B.J.R.*, 3, 5, 6, 21, respectively.
21. The Preserve America discussion received 26.5 column-inches of text, while the Section 106 discussion received 25.5 column-inches of text.
22. 2006 *B.J.R.*, 7.
23. The quotations and information in this overall paragraph can be found at 2007 *B.J.R.*, 10-13 and 21-22; 2008 *B.J.R.*, 11-15 and 20-21; 2009 *B.J.R.*, 13-18 and 23-25.
24. 2005 *B.J.R.*, 2-3; 2007 *B.J.R.*, 50.
25. 2010 *B.J.R.*, 63.
26. 2005 *B.J.R.*, 27 (FY 2003 data); 2006 *B.J.R.*, 39 (FY 2004 data); 2007 *B.J.R.*, 50 (FY 2005 data); 2008 *B.J.R.*, 47 (FY 2006 data); 2009 *B.J.R.*, 52 (FY 2007 data); *ibid.* (FY 2008 data).

27. 2004 *B.J.R.*, 4.
28. 2004 *B.J.R.*, 16; 2005 *B.J.R.*, 9; 2006 *B.J.R.*, 11.
29. John Fowler, Executive Director, ACHP, e-mail message to Paul Edmondson, General Counsel, National Trust for Historic Preservation, July 16, 2010, shared with the author. Mr. Fowler also stated that an interagency steering committee contributed “the bulk of operational funding” for the Preserve America initiative through a pooled fund, and that the Council limited its contribution to this pooled fund to \$25,000 annually. *Ibid.* Presumably this did not include Council staff time.
30. 2007 *B.J.R.*, 28, 49.
31. 1985 *A.R.*, 8.
32. 1993 *A.R.*, 38.
33. 2003 *B.J.R.*, 11.
34. *Ibid.*, 5 and 11.
35. Between FY 2004 and FY 2009, the Council’s overall budget increased by 39 percent, from \$3,951,000 to \$5,498,000. The two largest components of the increase included a 138.6 percent increase in travel and a 140.6 percent increase in “rent, communications, and miscellaneous.” 2005 *B.J.R.*, 27 (FY 2003 data); 2010 *B.J.R.*, 63 (FY 2009 data). At the same time, as shown in Appendix 5-2, the agency’s Section 106 historic preservation specialist and program analyst positions (i.e., those not funded directly by other agencies) have been staffed at the lowest numbers in the reported history of the agency.
36. 2007 *B.J.R.*, 28.
37. *Ibid.*, 49.
38. 2004 *B.J.R.*, 18. According to the National Trust, ACHP staff informed the Trust that the videoconferencing equipment was disconnected during extensive renovations to the DC office and the equipment is no longer used by the Council.
39. 2006 *B.J.R.*, 39 (FY 2004 data); 2009 *B.J.R.*, 52 (FY 2008 data).
40. 2003 *B.J.R.*, 12.
41. Advisory Council on Historic Preservation, *Report Requested by the Committees on Appropriations*, <www.achp.gov/pubs-reportapprop.html>.
42. *Ibid.*
43. *Ibid.*
44. 2005 *B.J.R.*, 5. The Army’s liaison positions are prohibited from direct Section 106 case reviews, although they may perform Section 106-related work (e.g., PAs). The Advisory Council’s FY 2011 budget report states that the FHWA liaison position no longer performs direct case reviews for highway and bridge projects, 2011 *B.J.R.*, 15; however, this description appears inconsistent with the actual workload of the FHWA liaison. A copy of the FHWA liaison agreement was not provided by the Council despite the author’s requests.
45. NCSHPO estimate, 2009.
46. Council staff has stated that the sudden termination of the HUD liaison position was unrelated to the public housing consultation. Regardless of the reasons, the unfortunate timing of HUD’s action, in the middle of an intensive and complex 106 consultation, left the Council scrambling to staff the review adequately, and certainly created concern among the consulting parties that HUD’s decision had a chilling effect on the consultation.
47. *Interagency Agreement Between Department of Veterans Affairs and Advisory Council on Historic Preservation* (May 2008) and *Amendment #1* (Jan. 2009), Sec. IV. “Term of Agreement,” par. 3; *Reimbursable Support Agreement Between General Services Administration, Center for Historic Buildings, and the Advisory Council on Historic Preservation* (Mar. 2008), Art. III. “Term of Agreement,” par. 3.
48. *Interagency Agreement Between Department of Veterans Affairs and Advisory Council on Historic Preservation* (May 2008), Sec. V. “Scope of Work,” 1., par. 2 and 3 (filling vacancies and avoiding negative publicity); *Amendment #1* (Jan. 2009), Sec. IV. “Term of Agreement,” par. 2 (evaluation of Liaison); Sec. X. “Payment,” par. 2 (reimbursement upon invoicing). *GSA Reimbursable Support Agreement* (Mar. 2008), Art. III. “Term of Agreement,” par. 2 (evaluation of Liaison); Art. IV. “State-

ment of Work,” 2. and 3. (filling vacancies and avoiding negative publicity); Art. VII. “Payment,” par. 2 (reimbursement upon invoicing).

49. At one time, the agency tracked public interest in its publications. In one year, 7,125 requests for Section 106 guidance were received; 796 separate requests made for the annual *Report to the President and Congress of the United States*; and 688 separate requests made for information about the Council, 1992 A.R., 107.
50. These restrictions began with the Paperwork Reduction Act of 1980 (44 U.S. Code §3501 et seq.). More recently, the OMB finalized a bulletin of “Agency Good Guidance Practices,” which supports public involvement procedures (notice, opportunity to comment) prior to issuance of agency documents with “broad and substantial impact on regulated entities, the public or other Federal agencies,” 72 Federal Register 3432 (Jan. 25, 2007).
51. On May 20, 2009 a presidential memorandum was issued regarding general federal preemption of state laws, urging federal agencies to interpret and apply the preemption doctrine as narrowly as possible in issuing regulations, 74 Federal Register 24693.
52. 72 Federal Register 3434.
53. <www.achp.gov/off-site_borrow_and_disposal.pdf>.
54. The U.S. Supreme Court has, however, declined to afford complete judicial deference to federal agency interpretations of law relating to its specialized expertise which are revealed through opinion rulings or letters (as opposed to formal guidance issued through the APA process or formal adjudication), see *U.S. v. Mead Corp.*, 533 U.S. 218 (2001).
55. Chapter heading and introduction in the Council’s 1983 A.R., 4, and <www.achp.gov/citizensguide.pdf>, 19, respectively.
56. The Institute (<www.ecr.gov>) was created by Congress in 1998 as part of the Morris K. Udall Foundation to assist in resolving federal environmental, natural resources, and public lands disputes. The organization is funded by congressional appropriations and user fees. A network within the Institute focuses on Native American dispute resolution.
57. Institute for Environmental Conflict Resolution, *St. Croix River Crossing Controversy: Case Report* (Sept. 2006), 2-3, <www.ecr.gov/pdf/StCroixRPT.pdf>. Initial reactions from stakeholders to the Stillwater Bridge mediation proposal ranged from: “I found my frustration level once again hitting a peak;” the issues “have been studied *ad nauseum*,” it will be “less fun than a root canal.”
58. Advisory Council on Historic Preservation, *Case Digest*, “Minnesota-Wisconsin Closed Case: St. Croix River Crossing Project” (Summer 2006), 9-10; however, during 2009, the environmental group again challenged the new river crossing.
59. “Report of the Alternative Dispute Resolution Committee, American Bar Association,” *Energy Law Journal* 25 (2004): 451.
60. 1998-99 A.R., 47-48; *Settlement Agreement for the Cushman Project* (FERC Project No. 460) (Jan. 12, 2009), <www.mytpu.org/files/library/cushman-dam-settlement.pdf>.
61. Federal Energy Regulatory Commission, “Alternative Dispute Resolution,” PowerPoint presentation to the Federal Training Work Group, Federal Preservation Institute, National Park Service, by Deborah M. Osborne (Apr. 13, 2006), <www.historicpreservation.gov/web/14501/19>; Federal Energy Regulatory Commission, *fercADRnews*, 5:3 (Fall 2003), <www.ferc.gov/legal/adr/news/fa-2003.pdf>.
62. See, e.g., the nationwide PAs executed on behalf of the U.S. Department of Agriculture, Natural Resources Conservation Service (2002), and National Park Service (2008), <www.achp.gov/palist.html>.
63. In 2006, a utility’s proposal to construct a major sewer project affecting a historically African American neighborhood in Louisville (KY) included cutting over 300 trees. Many of the trees were part of a landscape designed by an African American developer prior to World War II; another row of trees was planted historically to serve as a racial demarcation between a white-owned farm and a Rosenwald school. When the neighborhood solicited the help of a regional land trust, the nonprofit discovered that the utility had not identified the neighborhood as National Register-eligible despite previous SHPO determinations and two historical markers at the main entrances to the subdivision. In response, the Army Corps of Engineers rescinded the project’s Clean Water Act nationwide permits and initiated a Section 106 consultation process. Part of the negotiated MOA mitigation was mandatory Section 106 “general awareness” training of all of the utility’s project managers.

SECTION 6: PUBLIC PARTICIPATION

Key Recommendation: Improvements are Needed to Increase Consulting Party Access and Public Involvement in the Section 106 Process

The vitality and effectiveness of Section 106 depends on active and engaged preservation advocates and members of the public, a point recognized from the start of political discussions that led to enactment of the NHPA in 1966. Grassroots preservation advocacy is also of critical importance to the National Trust because of the organization's congressional charter and its mission to "facilitate public participation" in historic preservation. During the Section 106 review process for a project, interested groups and individuals can ask the lead federal agency for the opportunity to participate as a "consulting party," entitled to be included in discussions with the agency about alternatives and mitigation, or they can provide their views on the project through opportunities to speak at a public forum or submit written comments. The concept of "consultation" that has developed through the Advisory Council's Section 106 rules—and is reinforced through the Interior Department's guidance on federal agency historic preservation programs—provides one of *the* most empowering avenues for individuals and groups to positively influence federal agency decision making on plans and projects, *if* federal agencies fully adhere to the following meaning of consultation:

*. . . seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.*¹

Consultation must include, at least as its theoretical purpose, *the willingness to explore the possibilities for agreement*—or at least for a narrowing of disagreement—among the consulting parties. Even if that exploration quickly shows or confirms that further discussion would be fruitless, the attempt is fundamental to the concept of consultation . . .

[and]

Consultation is built upon the exchange of ideas, *not simply providing information* . . . The agency should: (1) Make its interests and constraints clear at the beginning; (2) Make clear any rules, processes, or schedules applicable to the consultation; (3) Acknowledge others' interests and seek to understand them; (4) Develop and consider a full range of options; and (5) *Try to identify solutions that will leave all parties satisfied* [emphases added].²

A key finding of this section is that many federal agencies and nonfederal stakeholders have reduced direct contacts with preservation groups and interested individuals, and thus fail to encourage and promote their participation in Section 106, either by formally serving as consulting parties or providing comments as members of the public. These efforts—required by the Advisory Council's Section 106 rules—must be reinvigorated. An impor-

tant premise of major changes to the Section 106 regulations in 1999 and 2000 was to enhance and invigorate public involvement, in part to counterbalance the Council's intention to remove itself from the vast majority of individual Section 106 reviews. Based on the interviews of preservationists for this study, the Council's policy intention to strengthen the public's involvement in Section 106 has not proven to be effective.

Section 106 is a regulatory process that can seem overwhelming to individual preservation advocates and local preservation groups, especially in high-profile, controversial cases. Experienced practitioners who lead Section 106 consultations on specific projects should always provide instructive information about the process from the very start so that individuals and groups who participate as consulting parties know what to expect in terms of consultation steps, the roles and responsibilities of stakeholders in the review process, and an overall general (but not predetermined) timeline. Additional recommendations addressed in this section include the following: (1) the National Trust's statewide and local preservation partners' knowledge of Section 106 and the importance of their involvement should be expanded and strengthened; (2) the use of public participation models of inclusive community involvement have lapsed and should be reinstituted; (3) federal agencies and applicants for federal funding or permits should be more accountable to the public for commitments made in Section 106 reviews and for project changes that occur after these reviews; and (4) consulting party and public feedback on their experience in Section 106 reviews needs to be actively solicited.

The initial Section 106 guidelines provided only a very limited opportunity for public interest consulting parties or the public to be involved in the review process for projects. When these guidelines were adopted in 1974 as regulations codified at 36 C.F.R. Part 800, federal agencies were encouraged to use a NEPA-like model to provide members of the public the opportunity to participate in an on-site visit at the project location and to receive information and express views on the project through a one-way comment process.³ At one time, notices were issued to the public of every MOA through the Advisory Council's publication of lists of executed agreements in the *Federal Register* on a monthly basis.⁴

During amendments to the Section 106 rules over the decades, the role of preservation advocates and the public in individual project reviews has sharply divided stakeholders. Federal agencies and industries have tended to argue for limitations on consulting party and public involvement. The 1999 and 2000 revisions to the rules, for example, were criticized by a number of federal agencies and industry representatives as providing too many opportunities for consulting parties and the public to become involved in individual projects or to enter the process at times that federal agencies or applicants deemed "late."⁵ Agencies also expressed concerns about the difficulty in identifying particular groups (such as traditional cultural authorities) who they are required to contact about certain projects.⁶ Industry representatives suggested that preservation advocates and interested individuals should be required to meet a threshold to establish "standing" (similar to demonstrating a justiciable interest in a court case) prior to receiving formal consulting party status in individual project reviews.⁷ Industry and federal agencies also urged restrictions or limitations on opportunities in the Section 106 regulations for consulting parties to formally appeal to the Advisory Council when there are disagreements regarding the identification of historic properties, the assessment of how those properties will be affected by projects, and how to mitigate any harms.

However, the Advisory Council specifically rejected narrow procedural thresholds when federal agencies consider requests by preservation advocates and interested individuals to serve as consulting parties in individual project reviews, primarily as a tradeoff for lessening the Council's participation in the vast majority of cases. Section 800.2(c)(5) establishes a fairly accessible standard for the public to seek consulting party status from federal agencies or their authorized representatives. An individual or group can establish a "demonstrated interest," qualifying as a formal consulting party, by claiming in writing: (1) a legal or economic relation to the project or affected properties (e.g., the owner of property directly or indirectly impacted by a project); or (2) their concerns with the project's effects on historic properties (e.g., demonstrated by identifying the mission or prior activities of a preservation or environmental advocacy group or an individual's statements identifying such concerns).

The public can participate in Section 106 without having to serve as a formal consulting party, however. Earlier versions of the Advisory Council regulations—and the 1999 and 2000 revisions—intentionally did not prescribe the *methods* of public involvement in individual project reviews. Federal agencies may use programs developed for other laws to satisfy public involvement requirements in Section 106 reviews as long as agencies comply with the general duty requirements that they "seek and consider" the public's views and "provide information" on the project and its effects on historic properties, except where confidentiality is justified (e.g., specific locations and the character of archaeological sites and certain traditional cultural properties).⁸ Unfortunately, as reported during the interviews for this study, some agencies, such as BLM, have in the past attempted to use their NEPA public involvement procedures as a rationale for excluding consulting parties altogether. This is clearly not the intent of the Section 106 regulations.

Finally, Section 106 roles for federally recognized Indian tribes, THPOs, and Native Hawaiian organizations—including serving as consulting parties in certain projects—were formally recognized in 1992 amendments to the NHPA, and subsequently codified in the Section 106 rules in 1999 and 2000. Native American groups (including state-recognized tribes) or individuals who are lineal descendants of an indigenous people may be invited and/or designated upon request to serve as formal consulting parties in the review process.⁹ These groups and individuals also have the right and opportunity, as members of the public, to any information and process otherwise established by law (e.g., the right to project or federal agency information under the federal Freedom of Information Act and to participate in the NEPA public scoping process to identify issues of concern to them).

6-1. Federal agencies should honor the requirement to directly "invite" consulting parties to participate.

Federal agencies and nonfederal parties, in consultation with THPOs and SHPOs, need to be more proactive in identifying and inviting local, regional, and statewide groups and individuals entitled to serve as consulting parties as *required* by the Part 800 rules.¹⁰

Very limited examples were identified during the interviews for this report in which federal agencies or authorized nonfederal stakeholders directly invited preservation advocacy groups and individuals to consult on individual projects. Based on interview feedback, some state departments of transportation frequently do issue such

invitations, although not on a consistent basis even within a state (i.e., different district or field office practices vary).

In many instances, formal “invitation” to participate in an individual project review is irregular and indirect, consisting of *Federal Register* publications and legal notices in newspapers. These notices do not typically reach the individuals and organizations that are likely to be interested in how a project affects historic properties. Several SHPOs now actively ask agencies to identify those they have contacted in the preservation community or the public. In some cases, submittals are not considered complete until such outreach is demonstrated.

Even among organizations with national or statewide preservation advocacy missions, a direct invitation to consult is rare. This makes it especially difficult for organizations who want to participate in Section 106 advocacy statewide (or on an ever broader scale) because they must then closely monitor multiple sources to find out about proposed projects and ensure that their opportunity for input is not foreclosed. A representative of one national bridge preservation organization described during the interview process that many state departments of transportation will not issue consulting party invitations, nor do many FHWA division offices enforce the direct invitation requirement among states. Instead, the organization often relies on “word of mouth” notice from local preservation advocates that a historic bridge is proposed to be replaced, or is faced with monitoring action on state transportation plans containing lists of thousands of projects, and hoping that important consultation opportunities will not be overlooked. The burden to ensure adequate public participation in Section 106 should not be on preservation advocates to investigate and discover opportunities for input, nor do the regulations make it their burden.

In addition to the need for federal agencies to perform their role to facilitate consulting party and public involvement, more systematic reminders of the duty to invite interested parties to participate in project reviews should be reinforced by SHPOs—who themselves have a responsibility to promote public participation as part of their federally approved state preservation programs—as well as THPOs. SHPO offices, for example, could send written reminders of the mandatory duty to invite when Section 106 reviews are initiated and require that documentation of invitations be submitted to their office for project files. Their websites could include lists of recognized preservation, land use, or environmental advocacy organizations and links to the National Trust’s directory of statewide and local preservation partners, increasing federal agencies’ and applicants’ knowledge about potential stakeholders.¹¹ A few of the SHPOs interviewed for this report indicated that their staffs do affirmatively ask for project documentation on public participation, a helpful practice that should be more widely followed.

6-2. Consulting parties should be provided a tentative plan of action or roadmap for consultation.

Some of the interviewees for this report who work for federal agencies and other project sponsors remarked that less-sophisticated consulting parties do not understand the roles in the Section 106 process. On the other hand, not all agencies and project sponsors follow a clear and consistent framework for explaining Section 106 to participants. The Interior Department’s guidance on federal preservation programs directs agencies to explain any

rules, processes, or schedules applicable to consultation.¹² Introductory Section 106 documents (including invitations to participate) and meetings should describe general expectations for consulting party involvement and requested time commitments, and a tentative plan or schedule for the consultation process. Regardless of experience level, several preservation advocates interviewed for this report noted that there is little explanation or discussion of these matters when consulting on individual projects. In their view, “the basics” include the definition of “consultation” (and its emphasis on trying to reach consensus during deliberations), the roles/responsibilities of each of the participants (including the Advisory Council’s staff, when the agency participates), information on where the process and project is headed, specific work products or documents they will be asked to review, and their options for dispute resolution.

Although the Advisory Council’s *Citizen’s Guide to Section 106 Review* is available on its website, federal agencies or nonfederal parties rarely distribute the brochure to consulting parties before or during consultation. Another helpful guide—*Rights and Obligations of Invited Consulting Parties*—issued by the agency in 1988, could also be updated, including the current (and underutilized) options for appeals to the Advisory Council under the 2004 amendments to the Section 106 regulations.

The 2004 amendments relating to appeal options are not well understood among all stakeholders. The changes modified the opportunity for appeals to the Council during consultation on individual projects as follows: (1) when there are disagreements involving federal agency determinations that there are no historic properties affected by a project, the SHPO/THPO can appeal to the Advisory Council within 30 days of the federal agency’s decision or the Council itself may review the determination (§800.4(d)(1)(ii) and (iii)); and (2) when there are disagreements involving federal agency determinations that there are no adverse effects to one or more historic properties from a project, the SHPO/THPO or any consulting party can appeal to the Advisory Council within 30 days or the Council itself may review the determination (§800.5(c)(2)(i) and (ii)). In either case, the federal agency (or HUD funding recipients, since they are fully authorized to carry out Section 106) must provide follow-up documentation to the Council for public review on how the agency responded to the appeal and the Council’s comments. The Advisory Council reports very few cases in which parties have utilized the 2004 appeal process.¹³ Based on the interviews for this report many nongovernmental consulting parties are not fully aware of these avenues to seek the Council’s comment. This is also likely exacerbated by federal agency failure to “invite” consulting parties (discussed above), because preservation advocacy groups may not find out about a project until after initial effect determinations have already been made. Even when agencies do issue invitations to consult, they often do not do so until after effect determinations are already resolved, especially for smaller, less complex projects.

Many public interest consulting parties donate their time to participate, often using their own funds to travel and, as needed, take paid or unpaid leave to participate in meetings. Consultation on large, complex projects, or projects that have political backing but no funding, can last for years. It is not unreasonable for public interest consulting parties to expect to be treated as professionals in the process or for federal agencies, nonfederal parties, consultants, and SHPOs/THPOs to ensure that respective roles and responsibilities are described from the outset of consultation.

One further area of recommended improvement concerns the role of consultants. Consultants are essential participants in Section 106 whether they work for federal agencies or on behalf of businesses or state or local governments seeking federal assistance for their projects. However, while they serve as agents for their clients, consultants generally have no power to bind or commit their clients. Several members of the public interviewed for this report expressed concerns about practices of some consultants that suggest they are fully standing in for their clients in Section 106 consultation and negotiations. In particular, this impression may occur when a client is an elected body, the members of which do not want to appear at controversial consultation meetings. Misunderstandings about the role and authority of consultants may also occur when consultants use the logo of their clients on presentations, which can understandably confuse the public about who the presenter actually works for and whether they are a decision maker. The potential for misunderstanding can also occur when terms and conditions of an agreement document are negotiated in a consultation meeting and it is not made clear that an absentee client is the decision maker on the final document.

In order to minimize these types of legitimate misunderstandings, consultants should clarify at the outset of Section 106 (and NEPA) reviews whom they work for, the name and contact information for their direct client contact, that they are acting as a technical expert for their client, and that the client is responsible for all decisions in the consultation process. While experienced professionals who are knowledgeable about public involvement and consultation will typically tend to explain their role in these ways, more widespread use of this practice would be welcomed by consulting parties and the public. Consultants who are less experienced with Section 106, or less confident in their client relationships, need this explanation enforced by federal agencies and other clients.

6-3. The Section 106 advocacy capacity of the National Trust's statewide and local preservation partners requires strengthening.

The National Trust currently produces a number of technical publications and training opportunities to boost the capability and capacity of statewide and local preservation organizations, including publications specifically targeted at helping such groups engage as policy advocates at the national and grassroots levels. This recommendation encourages the Trust, possibly in collaboration with the Advisory Council, to consider producing similar guidance specifically targeted to encouraging these preservation stakeholders to become effective advocates as consulting parties in the Section 106 process.

During the interviews for this study, several SHPOs and their review staff expressed concerns that statewide and local preservation advocacy groups are absent from many Section 106 consultations, and are not involved in helping to monitor compliance with Section 106 agreement documents, such as MOAs and programmatic agreements. SHPOs generally welcome the involvement of organized groups, even as the watchdog for their own offices.

There are several barriers to such preservation advocacy at the state or local level. First, the most significant barrier is simply the lack of staff. Larger and controversial Section 106 consultations require substantial time, and often travel, in order to participate meaningfully, including consultation meetings, reviewing documents, and providing written comments. The Stillwater Bridge project consultation, for example, which was ultimately

submitted for third-party conflict resolution (see Section 5-6 above), lasted over seven years. It is exceedingly difficult for any volunteer organization or board of directors to sustain the in-depth level of engagement that is often required for controversial or policy-setting cases.

Second, though it does not happen often, there is a real risk in some contested cases for a belligerent applicant to institute a “strategic lawsuit against public participation” (SLAPP suit) against a consulting party. The Advisory Council itself addressed concerns about SLAPP suits as early as 1990 when a Maryland developer sued citizens involved in Section 106 consultation for EPA water and sewer grants to support a subdivision in Montgomery County.¹⁴

These suits are typically filed in state courts by project proponents (most often land developers). The cause of action is stated as an alleged business tort (e.g., interference with contractual relationships or claimed loss of income), libel, or slander. Such suits are rarely successful but they are effective in one way: they tend to stifle or inhibit public involvement. Hiring an attorney to defend oneself imposes an enormous financial and emotional cost. The financial cost often cannot be recovered, even if the outcome, as it most always does, favors the preservation advocates. Incorporated public advocacy organizations cannot typically afford directors and officers’ liability insurance or their board members cannot afford personal umbrella coverage insurance. A number of states have enacted “anti-SLAPP” laws imposing attorneys’ fees and court costs on the unsuccessful plaintiff, but these laws are not always effective protection against the threat of litigation.¹⁵

One interviewee for this report described statewide preservation organizations as potentially facing a “death sentence” for effective Section 106 advocacy. The potential for adverse impacts to fundraising efforts, and for conflict among diverse boards, may tend to discourage active involvement. To the extent this may occur, it is unfortunate, because many consultations are enormously influential in helping projects become more successful and sustainable by finding ways to make their impacts less harmful to historic properties. Further, the vast majority of Section 106 reviews are not huge, nationally controversial projects—they are local in nature, such as fire station or school expansions, housing developments, or bridge replacements, for example. These kinds of cases are an ideal starting point for a local volunteer advocacy group to become familiar with Section 106, because the project is at a scale in which the people involved, issues at stake, and possible solutions are readily known and can be dealt with in a manageable timeframe. These examples show there are all shades of consultation, not just ones in which the preservation position is intended to be wielded as an absolute sword or where it ends up at the tip of the sword.

National Trust staff in its headquarters and regional offices is appreciatively viewed by interviewees as a strong advocate that is not likely to be affected by these barriers to preservation advocacy. However, the Trust’s direct involvement in Section 106 consultation is constrained by limited resources, and, therefore, tends to focus on complex, controversial cases or those involving nationally significant historic properties. While some statewide and local preservation organizations are active and effective participants in the Section 106 process, concerns raised during interviews for this report suggest that additional support would be helpful in encouraging these stakeholders to participate as consulting parties at a more frequent and more effective level.

In addition to established statewide and local preservation organizations, there are thousands of county and other local historical societies that should be invited to participate in Section 106 reviews as formal consulting parties, or at least contacted by project sponsors for their views on proposed actions. Many of these societies focus on identifying historic properties, a valuable role in the initial stages of consultation, even if these organizations may not always have the capacity or temperament for intensive advocacy work.

6-4. The use of public participation models of inclusiveness has languished and needs to be resurrected.

“The public” is a collective term encompassing an almost limitless diversity of individual interests, life experiences, education, motives, and socioeconomic status. In the words of one interviewee for this report, the spectrum spans “the cranks” to the “truly concerned.” The one constant is that everyone in the public has a right to participate in our nation’s governmental processes, including Section 106. The public meeting host, therefore, needs a thick skin and sensitive eyes, ears, and voice.

Public involvement is a key component of federal laws on the environment and our cultural heritage. Sections 800.2(d) and 800.3(e) of the Section 106 regulations, in particular, reflect the Advisory Council’s strong policy in favor of early public participation in project reviews. Further, and in a broader way, the public has a right for their government to be inclusive and nondiscriminatory and to adopt and apply requirements in a consistent way through deliberation in forums which are open and accessible to all.

However, based on the experiences of interviewees for this study, little effort is invested to encourage early public participation when planning for federal or federally assisted projects. People may not recognize the name of—or even care about—the Advisory Council, the National Trust, or federal agencies. However, they *do* know their neighborhood, borough, pueblo, city, parish, or favorite place at a level of detail gleaned only by serving as a constant participant in life. They know, for example, the consequences to the environment when a developer dams a stream or fills a sinkhole, thus affecting the movement of water, or destroys farm fields, thus displacing wildlife. They know the places of looters or where a pivot on a historic swing bridge snags, or how sound from a train or truck travels up a hollow or across an open body of water. Community wisdom exists, yet is often an untapped resource in both environmental and historic preservation reviews of projects.

A theme expressed by many of the interviewees for this report is that public interest in historic preservation is better built prior to their involvement in individual Section 106 reviews for particular projects. As one state official observed during an interview, “we need more visioning with the public and less bureaucratic processes.” Effective civic engagement may be better developed by first increasing public access to places where they can experience history (not just passively view displays) and involving the community in survey work.¹⁶ Once the interest is created, community participation in regulatory processes, like Section 106, is more likely to follow based on the feedback of interviewees.

To their credit, several SHPOs that were interviewed try to send their staff to local public meetings to better understand on-the-ground issues, although such efforts are severely constrained by state budgets.¹⁷ Some SHPOs also routinely negotiate mitigation with a public outreach component in Section 106 agreement documents, such as providing opportunities to participate in data recovery at archaeological sites, or developing school curriculum materials about historic resources (in one example, development of high school instruction materials covering the impacts of a railroad company on the landscape, socioeconomics, and technology development in a southwestern state). Offers to produce reports or documents—even high-quality, glossy coffee-table books—are static and passive, and are increasingly rejected in favor of commitments to enhance and engage community experiences of history. More widespread use of *experiential* public outreach as mitigation in Section 106 reviews is a commendable practice as long as there is some feedback mechanism to gauge the community’s experience with the mitigation project (see Section 6-6 below).

Another theme raised in comments by interviewees is that better insights are needed into specific *techniques* of public participation in Section 106. Many agency officials are familiar with having painstakingly prepared for a public forum that has been noticed in the local newspaper or announced on a radio advertisement, only to find less than a handful of people in the audience. Traditional approaches to “involving” the public through esoteric legal notice invitations and a chance to stand and talk at an intimidating podium in places familiar to the project sponsor, but not the affected community, have largely been discredited and discarded over the past 15 years in favor of more insightful models of inclusive public involvement. Useful guidance can be found in:

- *The Model Plan for Public Participation*.¹⁸
- *The Secretary of the Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act*.¹⁹
- *Guide on Consultation and Collaboration with Indian Tribal Governments and The Public Participation of Indigenous and Tribal Members in Environmental Decision Making*.²⁰
- *Archeology and Civic Engagement*.²¹

Two of these models were developed specifically for outreach to minority and low-income communities as a result of a 1996 presidential executive order that promotes environmental justice in federal agency planning and decision making. Nevertheless, their principles transcend any particular groups of people. In some ways, these guidance documents provide what should be common-sense techniques to more meaningfully relate to people from all backgrounds and walks of life. One interviewee for this study observed that the key to successful public engagement is to figure out “how information moves in a community,” in order to identify the community or neighborhood leaders to engage, to learn inviting places and times to meet, to understand how to more effectively use language that the intended audience can comprehend, and to disseminate information about a project in more effective ways.

These types of inquiries and approaches are not difficult to carry out, nor are they expensive when considering the substantial costs of most large infrastructure projects. However, alternative techniques for reaching out to the

public on grounds and terms more familiar to everyday people are unfamiliar territory to most bureaucracies and businesses, where the values of control, a common technical language, efficiency, and unemotional dialogue rule (in varying degrees).

Project delays can occur when managers are inattentive to or intentionally avoid early and direct interaction with locally affected members of the public. Permits have been rescinded, headlines splashed, and selected sites abandoned as a result of failure to assess and gauge public reaction. Extensive demolition plans affecting Ellis Island (New York City) and the Chaille Block of Miami, delivered as a final decision by the National Park Service and Bureau of Prisons, respectively, in the early 1990s, were defeated by a mobilized public.²² This scenario may be unlikely for most projects, but one never knows this in advance. At minimum, prudent risk management requires a thoughtful effort to attempt to engage the local community proactively.

There is one caution about techniques of public engagement based on experiences of some of the preservation advocates interviewed for this study. Federal agencies, applicants for federal funding or permits, and their consultants should not orchestrate public information and participation in ways that override preservation principles. The most common concern in this regard is when project advocates solicit broad popular “votes” on design alternatives rather than basing decisions on standards of historic character and compatibility. In one specific transportation case mentioned during the interviews, such voting results directly countered extensive and in-depth input from historic preservation advisory teams established in a Section 106 MOA to specifically advise transportation agencies on the design of road and bridge structures in historic neighborhoods.

6-5. Federal agencies and applicants for federal funding or approvals should be more responsible to the public for project changes and commitments made in Section 106 reviews.

Standard measures are recommended to address the problem of project changes that often occur after Section 106 reviews; such changes sometimes cause new harmful impacts, yet an additional review of the project is not always conducted though required under the Section 106 rules (and NEPA rules). Additionally, there should be some mechanism to promote accountability for implementing commitments made during Section 106 and NEPA reviews regarding ways project sponsors will protect historic properties or minimize harms to these properties. Federal agencies should impose these conditions on applicants, through incorporation in Section 106 agreement documents, NEPA decision documents, permit or grant conditions, or program alternatives. Federal agencies should adhere to these recommendations as well for their own projects. Ways to improve accountability to consulting parties and the public for project changes that should trigger a re-evaluation under the NHPA (and NEPA)—and empower them to continue to monitor projects—could include, but are not limited to, the following:

- Federal agencies should post paper or digital copies of Section 106 and environmental commitments in accessible public repositories (e.g., libraries, websites) and record such commitments in the real property records of the locale where the project is proposed to be built. Agencies should also be required to post paper or digital copies of all required studies or reports produced after NHPA and NEPA reviews in the same repositories, with copies also sent to all consulting parties that participated in the consultation

process. Section 800.6(c)(9) of the Advisory Council rules requires that consulting parties be provided a copy of MOAs; this recommendation would broaden the distribution list and format.

- As a way to promote recognition of the Section 106 rules requiring that consultation be reopened when project changes are made after Section 106 reviews are finished, applicants should be required to submit sworn certifications of "truth, accuracy, and completeness," modeled after existing environmental certifications, which affirm that: (1) their project was built or installed in substantial compliance with the approved or original design and construction plans (and specifically identifying any substantial deviations from these plans); and (2) required mitigation measures have been implemented. These types of legal certifications are widely used among federal and state agencies to ensure that applicants can be held legally responsible for their representations to government agencies during required review processes (e.g., air permit applications, water pollution control system construction certifications, and registrations of antenna structures with the Federal Communications Commission). Especially with respect to environmental approval certifications, the EPA and states impose this mechanism to guard against the scenario in which final construction plans cause substantially new and harmful impacts that were not analyzed during their administrative processes. The federal Fraud and False Statements Act (FFSA) imposes civil and criminal sanctions for wrongful certifications in almost every federal program.
- Federal agencies should also actively and aggressively implement their audit programs to specifically monitor compliance with, and hold applicants accountable for, the accuracy of these certifications as well as legal commitments relating to the protection of cultural resources in permits, licenses, and grant agreements. Action on the recommendation above for sworn certifications must be accompanied by at least *some* federal enforcement under the FFSA—as is done when statements in environmental documents are discovered to have been made falsely or fraudulently—in order that individuals who sign such statements have a reasonable belief that they might actually be held accountable for their actions and, therefore, will take such statements more seriously.

The Advisory Council has suggested in the past that it is not empowered to take corrective action when a Section 106 agreement is violated, and must instead rely on the public's enforcement of such agreements.²⁴ However, litigation is an unreasonable burden and expectation to place on the public. Applicants should be held by federal funding or approval agencies to a higher and more solid standard for project changes and implementation of mitigation commitments after Section 106 consultation is completed. First, the Advisory Council should reevaluate its earlier position because it is not in reality as powerless as it has suggested. Many MOAs include termination clauses which can be invoked by the Council for cause. The Council can also terminate program alternatives, including programmatic agreements, for noncompliance with Section 106, including failure to seek additional consultation or reopen project reviews upon later changes. Although the agency's broad commenting authority under the Section 106 rules can be used as a "soft" type of enforcement response, the authority nevertheless does provide a platform for the agency membership panel or professional staff to provide their expert opinion on whether applicants and federal agencies have properly addressed project changes after the initial Section 106 review.

In general, applicants want predictability from regulators, but they crave flexibility in designing and implementing their projects. Funding availability, market conditions, and other similar factors at times promote intentional attempts to avoid finite project definition during federally required review processes. These factors often lead to inefficient and wasteful use of time and money by federal agencies and preservation advocates alike, for example, if a project has no near-term chance of being built because funding has not been committed. Road projects are especially troublesome because the “horizon for execution is so long,” as one interviewee noted. Regional and state transportation “planning” processes mostly produce extensive lists of projects desired by every local government. As a result, many plans are over-programmed (have more projects than can be funded), sometimes in amounts measured in billions of dollars. It is not atypical, therefore, for a state department of transportation to conduct Section 106 and environmental reviews with a subsequent lag time of one or two decades until the project is advanced to final design and construction (if ever).

Two flaws in the process often occur during projects that take years to bring to fruition, or projects that are purposely ill-defined during NHPA and NEPA reviews. First, the design may change in a way that poses new or unexamined impacts (mostly harmful) on historic properties and environmental resources. Section 800.5(d)(1) of the Advisory Council’s rules requires that a federal agency official reopen consultation when a project is subsequently changed from that proposed when the initial “no adverse effect” finding was made. Section 800.8(c)(5), which applies when NEPA substitution is used for Section 106 compliance, provides that if a project is modified in a way that alters its effects on historic properties after the NEPA decision document is finalized, supplemental NEPA documentation is required (with prior notice to the Advisory Council and all consulting parties).²⁵ There is not much evidence, based on the interviews for this report, of project reviews being reopened, except in rare examples involving highly visible and controversial projects that are covered by the media.

The second difficulty in connection with projects that drag on for years is that the original participants (agency staff, consultants, preservation advocates) may change job positions or physically move to a different area, resulting in the loss or reduction of “institutional memory” regarding the commitments in NEPA decision documents and Section 106 agreements. Road and development projects, both susceptible to long lead times, are prime examples in this respect.

Most of the public interest representatives interviewed for this study reported cases where project plans by applicants for federal funding or approvals changed significantly after Section 106 reviews. These changes often occurred in ways that harmed historic properties, and those changes were not considered in the initial consultation. Additional problems were tardy or nonexistent implementation of mitigation commitments made in MOAs and programmatic agreements. The types of projects most frequently noted as examples of these problems include land development activities or infrastructure—such as water, sewers, and roads—that supports expanded development. These projects are typically carried out by businesses, quasi-governmental utility companies, or, in the case of roads, state agencies. Often, these activities involve some level of federal review, such as Clean Water Act permits issued by the Army Corps of Engineers for construction impacts to “waters of the U.S.,” and/or funding (EPA, EDA, FHWA), thus triggering Section 106 review. Adopting and enforcing the types of standard conditions

recommended above could promote accountability to consulting parties and the public in actual project implementation.

6-6. Consulting party and public feedback on their experience in Section 106 reviews needs to be actively solicited.

Most of the data and information compiled by federal agencies, the tribes, and the states to measure the effectiveness of Section 106 are related to case management, e.g., tracking the absolute number of project reviews conducted or agreement documents signed. These numerical measures (also referred to as “performance metrics”) are useful when government agencies develop budgets and legislatures consider budget requests, but they do not measure the *quality* of Section 106 reviews. Numerical measures have also been used to highlight chronic problems in Section 106 implementation. For a number of years, for example, the Advisory Council reported annually to the president and Congress the number and percentage of cases, separated by each federal agency, that were elevated to the Council for formal comment. The Departments of Interior, Transportation, and HUD collectively comprised the majority of such cases reported from FY 1974 through FY 1991.²⁶

At the same time, data on the sheer volume of federal agency cases that are considered by the Advisory Council is not discriminating enough to account for single actions of an agency that have a lasting and devastating impact on historic properties. For example, the Federal Deposit Insurance Corporation seldom triggers Section 106 reviews because the agency’s routine activities do not typically involve historic properties. However, in 1993, the agency allowed a bank to demolish the S.M. Damon building in Honolulu over strong public outcry and Advisory Council membership objections. An April 26, 1937 issue of *Life* had featured the edifice while celebrating Hawaiian businessmen for creating an “attractive way of life.” The 1925 building was identified by the Advisory Council in an annual report as the last example of Classical Revival style-architecture in the entire state.²⁷

Raw numbers also do not measure the extent of participation of stakeholders and what participants thought about the quality of the process or the outcomes. Such feedback from public interest consulting parties and the public can serve a useful purpose in improving the process and outcomes if it is timely, specific, and provided to federal agency Senior Policy Officials and their staff and the Advisory Council. Indeed, the Advisory Council has successfully used a survey at least once before to request feedback on the Section 106 process. In the early 1990s, the agency issued a questionnaire to 1,200 stakeholders—and received a remarkable 35 percent response rate within one month.²⁸

In the interviews for this report, some stakeholders reflecting on their Section 106 consultation experience felt that the process effectively reached broad consensus among all parties, often with creative compromise. Others came away from the Section 106 experience (most notably involving housing development, disaster recovery projects, road projects, and Army Corps of Engineers permits) feeling highly frustrated and that Section 106 consultation is a charade. Feedback from consulting parties could help the Council and other agencies alike to find ways to reduce public dissatisfaction in future consultations.

Many agencies already have existing policies, requirements, and tools to capture feedback and lessons learned in their compliance programs. These measures should be extended to Section 106 implementation.²⁹ Additionally, the use of accessible and cost-effective advances in web-based surveys—or simply using e-mail questionnaires—should be highly encouraged as a way for federal agencies and the Advisory Council to seek electronic feedback from nongovernmental consulting parties, e.g., as a consultation follow-up to gauge “customer satisfaction” from this underserved constituency.

Notes to Section 6

1. 64 Federal Register 27044, 27049 (May 18, 1999).
2. U.S. Department of the Interior, *Standards and Guidelines for Federal Agency Historic Preservation Programs*, 63 Federal Register 20498 and Standard 5, Guideline (a), 20504.
3. 39 Federal Register 3368 (Jan. 25, 1974); §§800.5(b), 800.5(c).
4. *Ibid.*; §800.6.
5. 64 Federal Register 27044, 27046 (May 18, 1999).
6. *Ibid.*
7. *Ibid.*
8. See 36 C.F.R. §§800.2(d)(3), (d)(1), (d)(2).
9. 36 C.F.R. §800.2(c)(5).
10. 36 C.F.R. §800.3(f); see also §800.6(a)(2).
11. See <<http://preservationnation.org>> (“Statewide and Local Partners” link).
12. U.S. Department of the Interior, *Standards and Guidelines for Federal Agency Historic Preservation Programs*, Standard 5, Guideline (a)(2), 20504.
13. Advisory Council response to the author’s request for records. A list of eight cases was reported from the ACHPCONNECT database as having been appealed since 2004 pursuant to §800.5(c)(2).
14. 1990 A.R., 104.
15. See <www.thefirstamendment.org>, citing *Washington Revised Code* §§4.24.500-4.24.520; *New York Civil Practice Law*, Rule 3211(g), Rule 3212(h); *New York Civil Rights Law* §§70-a and 76-a.; *California Code of Civil Procedure* §425.16. Some state courts have generally immunized public interest advocacy from legal liability pursuant to the First Amendment right “. . . to petition the Government for a redress of grievances,” see, e.g., *Protect Our Mountain Environment, Inc. v. District Court, County of Jefferson*, 677 P.2d 1361 (Colo. 1984) (real estate developer sued individuals who challenged county approval of his rezoning application for \$10 million in compensatory damages and \$30 million in exemplary damages).
16. Also, Sec. 4(b) of E.O. 13,287 (*Preserve America*) directs federal agencies to “cooperate with communities to increase opportunities for public benefit from, and access to, Federally owned historic properties.”
17. One SHPO’s website features an “Advocacy” link for the public which takes viewers to a series of resources, including ways to identify and contact elected officials and the National Trust and to use the Internet for public advocacy, <www.preservation.ri.gov/resources/links_adv.php>.
18. Public Participation and Accountability Subcommittee of the National Environmental Justice Advisory Committee, a federal advisory committee to the U.S. Environmental Protection Agency (Nov. 1996 version), <www.greenlink.org/-assess/pdfs/modelplan.pdf>.
19. U.S. Department of the Interior, *Standards and Guidelines for Federal Agency Historic Preservation Programs*, Standard 5, Guideline (h), 20504.
20. Indigenous Peoples Subcommittee, National Environmental Justice Advisory Committee (Nov. 2000), <www.epa.gov/-Compliance/resources/publications/ej/ips_consultation_guide.pdf>.
21. U.S. Department of the Interior, National Park Service, *Archeology Program, Technical Brief 3* (Nov. 2008), by Barbara J. Little, National Park Service, and Nathaniel Amdur-Clark, Harvard University, <www.nps.gov/archeology/pubs/-techBr/tch23.htm>.
22. 1992 A.R., 71-78 (regarding Ellis Island, the Advisory Council should be credited because its staff urged early and broader public input on the proposal); 1991 A.R., 40-43 (the Advisory Council wryly noted prison officials’ surprise at the community’s opposition to demolishing “a rare specimen of Miami’s first generation, or pre-boom architecture” because the

reaction “was perfectly in keeping with community sentiments”; residents had organized around protecting this block a decade earlier when a transit line threatened to obliterate several buildings).

23. The Fraud and False Statements Act (FFSA), 18 U.S. Code §1001 et seq., broadly applies to anyone who knowingly or willfully falsifies or conceals information or makes materially false or fictitious representations on matters within the jurisdiction of the executive branch. Specific sections of the FFSA separately apply to certain types of acts, such as false statements by federal or state agencies, their employees, or their agents (including consultants and contractors) regarding the quality of work performed in relation to highways (§1020). Violations of the FFSA can result in civil or criminal fines or imprisonment of not more than two years (for false statements to HUD, §1010) to five years for other types of false information (§1038). Civil sanctions for false statements made in the context of federal programs can also be pursued administratively through 31 U.S. Code §3801 et seq. in an amount of not more than \$5,000 per statement.
24. 1985 A.R., 23. *Washington Trust for Historic Preservation v. City of Seattle*, No. 87-1506C (W.D. Wash. 1988) is one of the earliest third-party enforcement cases. The court held that the trust had standing to sue to enforce an MOA, and enjoined the city from demolishing historic buildings until the requirements of the agreement were fulfilled. Six of the 12 historic buildings in Discovery Park were saved as a result of the suit, 1988 A.R., 67 and < www.achp.gov/book/case97.html>.
25. NEPA regulations also require documentation to be reopened in certain instances, see, e.g., 40 C.F.R. §1502.9(c)(i) (substantial changes in the proposed action) and (c)(ii)(significant new concerns or information bearing on the proposed action or its impacts.)
26. Advisory Council Section 106 case tracking by agency, based on annual reports:

Year (total cases)	DOI/NPS %*	DOT %	HUD %	GSA %	DOD %	Other %	USDA %
1974 (689)	29/17	21	20	5	12	13	0
1975 (1104)	25/15	14	18	4	16	23	0
1979 (2267)	22	15	17	0	13	28	5
1989-1991 (avg. 2555)**	8	32	28	NR	10	NR	6

*National Park Service (NPS) percentages are included in the Department of the Interior percentages.

**The numbers were incompletely reported in the annual reports and, therefore, do not total 100 percent. Additionally, some 1989-1991 data were interpolated from bar graphs in the annual reports.

NR=not reported; see Table of Acronyms at the end of this report for an identification of agency acronyms.

27. 1993 A.R., 33.
28. Ibid.
29. E.g., ISO 14001, total quality management, Department of Energy Order 451.1B.

SECTION 7: FUNDING

Key Recommendation: State and Tribal Section 106 Programs Should Be Supported by Fees and Full Appropriation of Proceeds in the National Historic Preservation Fund Account

In 1966, Congress affirmed historic preservation as a value of the federal government, but gave no formal role to the states or tribes in federal agency preservation programs. Our national legislature initially carved out roles and responsibilities for federal agencies, including the Advisory Council, to ensure that this value is recognized and given due consideration in the conduct of government programs and private activities supported or authorized by the federal government. As the scale of government undertakings has proliferated in response to constituent expectations and demands, Section 106 review has largely been delegated to the state historic preservation officers. This trend, begun soon after the 1980 NHPA amendments that created authority for SHPOs as formal preservation stakeholders under federal law, was adopted in the 1986 revisions to the Advisory Council's Section 106 rules, and was reaffirmed in subsequent amendments to these rules.

Federal agencies and industry have endorsed this trend. They have likewise supported the delegation of environmental programs from the U.S. EPA to states and tribes. Applicants certainly prefer the statehouse, city hall, and the county courthouse to Washington, DC, when it comes to doing their business at a project level. Their public rationalizations about the superiority of these forums claim that elected officials and regulators who are geographically closer to the project better understand the nuances of needs, site selection decisions, and benefits of such activities. From the public's perspective, however, local elected officials are in a prime position to be pressured by legislative bodies and other powerful, well-funded interests eager to remove perceived obstacles to economic development.

Congressional action in 1992 formally established a role for Indian tribes in the NHPA. This step gave legal voice to remedying past exclusionary practices. However, the action can also be viewed as recognizing the federal government's trust responsibility to protect tribal lands, assets, and resources. Tribes have a critical and mandatory role under Section 106 to review and consult on projects affecting reservation lands, as well as lands with which they have a cultural or ancestral affiliation.

Funding sources for state and tribal historic preservation offices primarily consist of state or tribal appropriations and federal grants from the national Historic Preservation Fund. Many states also fund some Section 106 review staff positions through cooperative funding arrangements with other state agencies, particularly departments of transportation. As noted in a recent review of the national historic preservation program, overall, SHPOs are un-

derfunded and THPOs are “*sorely* underfunded [emphasis in original].”¹ Comparing grants awarded to the states versus grants awarded to the tribes is not an apples-to-apples analysis since the scope of their respective programs is different. Nevertheless, when viewed on its own, the average national Historic Preservation Fund grant to tribes in FY 2008 was only \$75,200, “barely enough to cover basic office expenses and the salary of a single employee.”²

Full appropriation of proceeds in the national Historic Preservation Fund is a recurring goal of the preservation community, including the National Trust, the National Conference of State Historic Preservation Officers, the National Association of Tribal Historic Preservation Officers, and Preservation Action, a nonprofit lobbying organization. As contemplated under the NHPA, every year the Minerals Management Service of the Department of the Interior deposits into the U.S. Treasury account for the Historic Preservation Fund the full amount (\$150 million) that Congress authorized to be transferred from industry’s offshore oil and gas leasing payments to the federal government. Congress, however, has only appropriated an average of 25 to 50 percent of that amount during each budget cycle over the past 20 years.³ Full appropriation of the Fund proceeds is a vital step to support state and tribal review programs.

In the absence of SHPO and THPO participation in the Section 106 program, responsibility for the 100,000-plus review and comment actions each year would presumably revert to the Advisory Council, based on the express language of the statute and the Section 106 rules. This “regular” caseload does not even include the looming project reviews occurring as a result of the 2009 federal initiative to stimulate economic recovery, which is 14 times the size of the last significant jobs creation bill.

Given the critical nature of state and tribal participation in the NHPA, federal mandates associated with historic preservation programs, and the desire of federal agencies and industry to delegate the Advisory Council’s role in Section 106 over the decades, it is essential that state and tribal Section 106 programs be fully funded and staffed to carry out this important work. In the absence of sufficient direct appropriations, other funding sources should be explored. Consequently, this section begins with a recommendation relating to Section 106 regulatory fees to support state and tribal Section 106 program elements.

7-1. The authority of states and tribes and states to assess fees to support their Section 106 review responsibilities should be seriously explored.

In the 20th anniversary report on the NHPA, the Advisory Council recognized that, as its role in Section 106 reviews becomes more decentralized and delegated to the states, “it is inevitable that the question of paying for the services arises.” The Council then predicted that the debate over who should pay for Section 106 reviews “will undoubtedly sharpen.”⁴ In the face of severely declining finances—and substantially incomplete allocation of proceeds from the national fund for historic preservation (see Section 7-2 below)—interested states or tribes should evaluate their own authority as a matter of state or tribal law to systematically assess user fees (also commonly referred to as service fees) to support their Section 106 responsibilities and mandates, as they have with respect to fees that support their environmental review programs. Further, the EPA has supported state, tribal,

and local fees as a policy matter to ensure adequate implementation of federal programs as the responsibilities have shifted to these governments. As early as 1991, for example, the agency's top officials convened a joint federal-state task force to "examine ways EPA can help states augment their ability to protect the environment" which included an in-depth review of alternative financing mechanisms to federal grants and state appropriations, particularly fees.⁵ On the other hand, the Advisory Council's initial foray into the question of Section 106 service fees, issued in 2001 and discussed below, seems cautious and narrow, and should be reevaluated on broader legal and policy grounds.

Environmental review fees. State environmental and natural resource agencies employ staff and invest in equipment to perform multiple functions in carrying out air, water, and waste permit programs and associated plan reviews under authority of the EPA. (Tribes often are responsible for both historic and environmental preservation programs.) Minimum standards for state and tribal environmental review programs have been promulgated by EPA, similar in concept to the Interior Department's requirements for federally authorized state preservation programs. Before the EPA delegates a federal environmental program to a state or tribe, certain program requirements must be demonstrated and maintained, such as adequate levels of staffing and sources of funding.⁶ States and tribes are required to report annually, semiannually, and quarterly on various aspects of their programs, and the EPA routinely audits these programs.

In its oversight role, the EPA may actively disapprove aspects of delegated programs, and has even withdrawn program authorization to particular states or tribes for a period of time, in response to documented deficiencies. The most recent example occurred on June 30, 2010 when EPA rejected Texas' ability to continue to issue "flexible" operating permits to industrial plants; these permits allowed more air pollution from some individual pieces of equipment in plants, as long as the overall emission limits of the "umbrella" of the entire plant were met, an approach that EPA found is inconsistent with the federal Clean Air Act.⁷ Regulated industry applicants dislike these actions because companies must then interact directly with EPA's regional offices until the state agency or tribe resolves the deficiency, usually by strengthening requirements to meet federal standards. Additionally, attempts by state legislatures to limit or repeal aspects of these environmental programs—through slashing budgets or amending state environmental laws—may be grounds for EPA's withdrawal of federal program delegation if minimum requirements are not met.⁸

Federal statutes authorize the EPA to award grant funding to the states, tribes, and local pollution control districts to help them carry out federal programs, typically in a 60 percent (federal) to 40 percent (local) ratio, similar to the national Historic Preservation Fund grant ratio for the states. However, funding for these grants is determined each year in congressional appropriations. Locales cannot always depend upon a certain level of EPA allocations for their programs because priorities may change during the federal budgeting process; for example, EPA grants have only provided approximately 25 percent of state and local air quality program budgets.⁹

As a result of the federally required performance standards, incomplete allocation of federal grant funds, and severely constrained state budgets, most state and local environmental review programs rely on fees to cover much of the costs of staff time for permit and plan reviews, determination requests, training, public education, monitor-

ing, enforcement, and administrative overhead. A recent review by the Environmental Council of the States (ECOS) found that states spend about \$15 billion annually on environmental and natural resource regulatory programs, which are substantially supported by user fees, even though no federal law actually requires that pollution control agencies assess fees (except for one air permit program addressed below).¹⁰

While state and local regulatory fees vary widely in the amount collected for each permit or plan review action, one common element is that applications for environmental permits or plan reviews are not considered complete—nor do review timeframes commence—until the fees are paid. Further, these charges apply to all types of regulated industry, and generally apply to federal facilities as well. Such fees are widely recognized as a “cost of doing business” and are completely separate from the cost to federal agencies and businesses of hiring their own consultants to collect required information and prepare permit applications or compliance plans.¹¹

Environmental review fee systems are largely supported, or at least tolerated, by state elected officials and regulated industries alike. Fees can often be imposed through administrative rules, rather than requiring legislative action with its associated political fallout. In addition, states often prohibit setting fees in amounts that raise more funds than the cost of providing the review service, which guards against proceeds being diverted to agency “slush funds.” Regulated industries tread a delicate position regarding fees: if polluters outright oppose these charges in the face of dwindling state general revenue funds, then their projects may suffer from delays in state reviews.¹² At the same time, businesses reasonably expect the fees to be applied directly to the regulatory program, and that the environmental review agencies will be accountable for process improvements that facilitate more timely permit and plan reviews. It is not uncommon, therefore, for environmental fee programs to be coupled with watchdog committees comprised of industry and other stakeholder members.

In 2003, the ECOS report found significant variability in basic fee structures, given the diversity of industry profiles, case loads, and revenue needs of states and local governments. For example, wastewater discharge permit fees and annual facility operating fees ranged from \$0 to \$500,000 per polluter, with such fees averaging \$33,500 per operating facility.¹³ Annual air permit fees under one particular program, Title V (see more below), ranged from \$1,700 to \$92,000, with the highest annual fee set at \$1.5 million.¹⁴ Nonhazardous waste landfill fees exceed \$1 million in a couple of states.¹⁵

California gives regulated businesses and government agencies the option of entering into a cost-reimbursement agreement so that the state may recover the direct and indirect expenses of staff and overhead costs to review hazardous waste facility permit applications. In lieu of such an arrangement, the permit applicant can pay a set fee based on size of the operating facility—such fees range from \$104,187 to \$381,602.¹⁶ Supplementary fees are often also imposed for procedural requirements of environmental review programs. One state assesses a \$10,000 fee to hold mandatory public hearings, for example.¹⁷

The Clean Air Act’s Title V operating permit program is the only federally delegated environmental review regime that requires an annual fee in order for states, tribes, and local pollution control agencies to recover reasonable direct and indirect costs associated with program administration. A “presumptive minimum fee,” annually

adjusted for inflation, is established by the U.S. EPA in an amount that generates revenues the agency deems adequate to implement the program. The calendar year 2010 fee is \$45.33 per ton of pollutant emitted; however, states, local air pollution control districts, and tribes can set more stringent fees. One state collects an annual fee that is comprised of a base fee (calculated by the hours of staff time spent on each facility in the previous five years) plus a user fee (based on emissions from each facility).¹⁸ The concepts underlying the presumptive minimum fee approach, as well as supplemental state and tribal fees imposed above this minimum in order to account for more intensive review activities, could be applied to Section 106 user fees. Data on Section 106 review and compliance activities exists through the states' and tribes' year-end reporting to the National Park Service and could be analyzed to facilitate consideration of a minimum fee schedule, as well as possible higher gradations of fees based on correlations with the level of staff time spent in reviews on more complex Section 106 undertakings.

Section 106 review fees. Fifteen years after the Advisory Council first acknowledged that fees could become an issue in Section 106 reviews, the agency issued its first formal statement on the practice of "certain parties" (Indian tribes) to charge fees "for participation in the Section 106 process."¹⁹ The result was a cautionary and restrictive stance on fees, which this report recommends should be re-evaluated on broader legal and policy grounds. However, this recommendation also suggests that the states and tribes should independently analyze their own authority to impose a fee structure to help defray staff, administrative, and overhead costs associated with their Section 106 activities mandated by the NHPA.

The Advisory Council's first formal review of Section 106 fees appears to be based on a very narrow reading of its own Section 106 rules, the NHPA itself, and the role of Indian tribes (and, implicitly, the states) under the law and regulations. In 2001, the agency issued a memorandum in response to a "growing concern about the practice of charging fees from Federal agencies or their applicants for their participation in the Section 106 process." The specific practice identified in the analysis was requests by Indian tribes "to be compensated for activities connected to the Section 106 process."

In summary, the Advisory Council concluded that the NHPA and the Section 106 rules do not require:

- Federal agencies or applicants to "engage anyone to provide data or information" for Section 106 compliance;
- Payment for tribal assistance; or
- Payment for seeking the views of tribes.

The memorandum concluded that tribes can "ask" for fees if they are "treated" by a federal agency or applicant as a "consultant" (by conducting survey work, for example). A broader view might instead evaluate whether there are any federal barriers if the tribes or states determine that, in order to support their federally approved historic preservation programs, they need to impose user fees when they implement project reviews pursuant to delegated responsibility to carry out a substantial portion of the Advisory Council's commenting authority in the Section 106 process.

No federal law *requires* a state or tribe to implement a preservation program within its geography or to designate a historic preservation officer. Presumably, if a tribe or state elected not to assume such responsibilities under the NHPA, federal agencies would be required to communicate directly with the Advisory Council regarding every project proposal, based on the specific language of Section 106. Given the lean Section 106 staffing levels currently in place at the Council (see Appendix 5-2), that prospect may give pause to federal agencies and industry alike.

However, if a tribe or state *does* elect to assume certain preservation program responsibilities under the NHPA, and their program is approved by the Interior Department, enforceable obligations are created, similar to the mandates on states and tribes when they take on primary responsibility for implementing federal environmental programs. Once the Department of the Interior approves state and tribal preservation programs under criteria established at 36 C.F.R. Part 61 and the NHPA, SHPOs and THPOs are required to consult with federal agencies regarding projects; to meet 30-day review and comment deadlines; to cooperate in planning efforts by federal agencies and others to ensure that historic properties are taken into account; and to implement a historic property survey and identification program.²⁰ The Section 106 rules have intentionally delegated the bulk of the ongoing Section 106 project review caseload to the states and tribes. Additionally, thousands of programmatic agreements, highly sought by federal agencies and applicants, often impose binding obligations on THPOs and SHPOs as well.

The Interior Department is required to review approved state and tribal programs at least every four years, and can disapprove a program, suspending it in whole or part, for inadequacies in implementing the NHPA mandates.²¹ For example, in a recent (March 2010) in-depth audit report issued by the National Park Service, the federal agency forewarned that it might suspend Hawaii's historic preservation program authority and federal recognition because of "significant operational problems in . . . *mandated activities* . . . including Review & Compliance . . . [emphasis added]"²² "Review and compliance," a term that describes the state's implementation of Section 106, was identified in the audit report as one of the two "most critical deficiencies" in the state's program.²³

When considering all of the activities of the SHPOs and THPOs, it becomes clear that many aspects of their programs support Section 106 consultation, not solely the "review and compliance" function. Therefore, these relevant costs should also be considered for recovery in any Section 106 user fees that may be established. General survey and identification work, for example, significantly contributes to Section 106 reviews. Almost 30 years ago, Congress directed federal agencies to ensure that properties under their jurisdiction or control "are identified, evaluated, and nominated to the National Register."²⁴ Compliance with this directive remains substantially incomplete by most agencies. As a result, the majority of work to identify and evaluate historic properties takes place during Section 106 reviews for discrete projects. During these reviews, project sponsors (federal agencies or nonfederal applicants for federal funding or permits) often rely on state or tribal documents or expertise before conducting their own survey work, or they depend on the professional staff of these offices to complete or correct project documentation, based on the interviews for this report. In comparison, in the context of environmental reviews, charging applicants a fee for these types of services would be a matter of course.

The adequacy of SHPO and THPO office technological capabilities can greatly impact Section 106 implementation. Several SHPO offices do charge a user fee for certain select activities, e.g., to access a historic property database. This report recommends more comprehensive recovery of technology and associated staffing costs, because adequate state staffing levels, equipment, and software can facilitate timely and cost-effective Section 106 compliance by federal agencies and applicants. Examples include:

- Planning for Section 106 submittals; state and tribal websites can greatly streamline preparing project documentation and conducting Section 106 reviews when forms, requirements, and specific staff reviewers are provided.
- Accessing previous survey and evaluation studies, including the ability to research agency records, databases, and the “gray literature” of previous cultural resource investigations, or to research or contribute to site identification in the cultural resource layer of state or tribal geographic information systems (GISs).²⁵
- Facilitating transmission of federal agency or applicant required Section 106 information, such as submitting survey work on “smart forms” or from field devices that can be quickly inserted into a state’s relational database.

Several recent reports have evaluated how states and tribes apply technology in their project review and preservation activities.²⁶ While several progressive uses of technology were cited, many more limitations and barriers were identified. Labor costs to implement and upgrade database management systems were estimated at \$1.235 million, while technology costs per office to install such systems averaged \$168,000.²⁷ Tribes can access the primary GIS used to digitally map cultural resources through the federal Bureau of Indian Affairs, without having to pay a subscription, but many do not have the staff to do so.²⁸

In summary, then, a broader legal and policy evaluation of fee-supported Section 106 reviews should focus on whether, having assumed a federally approved preservation program, state and tribal offices have a duty to administer Section 106 consultation. If SHPOs and THPOs do exercise these responsibilities as a required, not discretionary, function—which appears to be the case—then they are obligated to perform to certain levels by federal mandate, and SHPOs and THPOs, as essential preservation partners, should determine how best to financially distribute the costs of their required roles among all stakeholders.

Any further evaluation of a widespread fee structure for Section 106 reviews should also address whether Congress has waived the federal government’s “sovereign immunity” from state requirements.²⁹ Under the legal concept of sovereign immunity, the federal government is not subject to certain liabilities or requirements of state laws (among other matters), unless the U.S. Congress has directed otherwise. Congress can either specifically waive sovereign immunity in a law, or language in a law can be interpreted by courts as implying a waiver. In this regard, it is worth noting that Section 110(g) of the NHPA (*Preservation activities as an eligible project cost*) appears to expressly waive federal agency immunity regarding Section 106 user fees through its recognition that project costs may include federal agency monies paid to states “to be used in carrying out . . . preservation re-

sponsibilities of the Federal agency under this Act . . .” Sovereign immunity does not apply to nongovernmental parties; therefore, fees can clearly be charged to private applicants for federal funding or permits.

Finally, many SHPO offices employ “liaison” staff, similar to the Advisory Council liaison positions described above in Section 5-4. Most of these staff positions are directly funded by state departments of transportation or housing and community development agencies to conduct Section 106 reviews for the federal funds managed by these agencies. These arrangements, therefore, often create the same conflict-of-interest concerns among the public that exist for the Advisory Council’s liaison positions. Section 106 user fees could support state preservation agency staffing levels in a more predictable and consistent way, while at the same time eliminating concerns about the potential for partiality in project reviews. Environmental review fees can be reliably estimated for budget purposes. Once collected, these fees are typically deposited into the general revenue fund of the pollution control agency. The proceeds can then be directly apportioned by agency directors and their boards or commissions according to federally required, overall program priorities. In contrast, there is no certainty in funding staff liaison positions; payments are made by a “regulated” state agency that can impose its own project and staffing priorities for Section 106 reviews and may elect to withhold or discontinue funding arrangements at any time.

7-2. Congress should fully appropriate the proceeds in the national Historic Preservation Fund account.

The Minerals Management Service (MMS), a bureau of the Department of the Interior that manages the Outer Continental Shelf program, touts itself as “one of the largest revenue generators for the Federal government” because of the receipts it collects from industry for offshore leases.³⁰ Each year, the MMS deposits into the U.S. Treasury Historic Preservation Fund account \$150 million of royalty payments from leasing approximately 43 million acres within the Outer Continental Shelf of the Atlantic Ocean and Gulf of Mexico for oil and gas exploration and production. An additional \$900 million from these royalty payments are deposited into the Land and Water Conservation Fund account, which supports state and local conservation activities and national parks, forests, and wildlife areas. These royalty deposits set aside funds, which the Interior Department is authorized to use to support preservation and conservation programs, up to the maximum amounts authorized by Congress.³¹

Congressional authorization of these maximum amounts does not, however, result in actual appropriation of all of these monies when the federal budget is approved each year. The Historic Preservation Fund was established in 1976 amendments to the NHPA to provide a matching grant program to the states (and later the tribes) to support their preservation programs. Unfortunately, Congress has never approved disbursing even the majority of the full \$150 million in the Interior Department’s annual spending bill.

During the early 1980s, the national preservation program survived a proposal to completely eliminate this fund.³² Data provided by the National Conference of State Historic Preservation Officers during this controversy showed that the Fund’s support of state programs was more cost effective than the federal government’s assumption of the work.³³ At that time, for every \$1.00 spent in state review and compliance programs (i.e., Section 106 reviews), it was estimated that the federal government would have to spend \$1.32 if it did the work in-house, and \$1.82 if it hired outside contractors to do the work.³⁴

Federal mandates on SHPOs and THPOs continue to accrue, particularly as a result of special legislation like ARRA. At the same time, state and tribal fiscal conditions have suffered dramatically during the recent and ongoing financial crisis. Indeed, during the interviews for this study, several state officials and staff were repeatedly on unpaid furloughs when their offices were contacted. The report entitled *Hard Times for America's Heritage*, produced for Congress by the American Association for State and Local History in 1982, concluded that states cannot fill the gap provided by federal preservation assistance.³⁵ They still cannot, nor can the tribes. Congress should therefore support full appropriation of the annual proceeds contributed to the Historic Preservation Fund account to promote the policies established in the NHPA.

Notes to Section 7

1. National Academy of Public Administration, *Towards More Meaningful Performance Measures for Historic Preservation* (Jan. 2009), 14.
2. Ibid. Tribes are especially disadvantaged by the fact that the total budget allocation for tribal historic preservation programs has remained relatively constant, while the number of THPOs has increased every year. Thus, the very success of the expanding tribal preservation program under the NHPA forces all THPOs to accept a smaller and smaller piece of the funding pie every year. Tribes also receive less in federal historic preservation grant allocations than do the U.S. territories. Defined as “states” for purposes of the grant program are the Territories of American Samoa and Guam, Federated States of Micronesia, Republics of the Marshall Islands and Palau, the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Virgin Islands. The territories thus benefit from the particular formula apportionment for states, receiving an average FY 2005 grant of \$316,752.85. See National Academy of Public Administration, *Back to the Future*, Appendix G. The territories and the tribes have no matching requirement, unlike the states.
3. Coalition for the Full and Permanent Funding for the Historic Preservation Fund, “Fact Sheet Historic Preservation Funding History,” <www.fullyfundhpf.org>.
4. 1986 A.R., 61-62.
5. U.S. Environmental Protection Agency, *Alternative Financing Mechanisms for Environmental Programs* (Aug. 7, 1992), EPA/205/R-92/1999, “Acknowledgements” page.
6. See, e.g., 40 C.F.R. §123.22(b) relating to Clean Water Act program delegation, including issuing permits to discharge pollutants into waters of the U.S. States must describe, among other factors, their staffing levels and sources of funding to run the program.
7. <www.epa.gov/region6/6xa/pdf/federal_register_on_texas_air_permit_063010.pdf>. In another example, the U.S. EPA rejected part of the Texas State Implementation Plan under the Clean Air Act for failing to comply with minimum requirements for public participation relating to certain types of pollutant-emitting facilities and types of air permits, 73 Federal Register 72001 (Nov. 26, 2008).
8. See, e.g., 40 C.F.R. §123.63(1)(ii) relating to criteria for EPA’s withdrawal of Clean Water Act program delegation to states, including “Action by a State legislature or court striking down or limiting State authorities.”
9. *Testimony of the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officials Before the Senate Appropriations Subcommittee on Interior and Related Agencies Regarding the Fiscal Year 2006 Budget of the U.S. Environmental Protection Agency*, Apr. 19, 2005, 3, <www.4cleanair.org/SenateTestimony0405.pdf>.
10. R. Steven Brown, D. Morgan, M. Kiefer, and S. Korac, *ECOS Environmental Permit Fees Report 2003-2004* (Washington, DC: Environmental Council of the States, 2004), <www.ecos.org/section/publications>.
11. Private, for-profit businesses can generally deduct regulatory fees as a business expense according to the Internal Revenue Service. Internal Revenue Service, *Publication 535 Business Expenses* (2009), 44, <www.irs.gov/pub/irs-pdf/p535.pdf>.
12. Even when industry has sued to challenge regulatory fees, companies have been careful to parse their reasons. In 2005, for example, when a consortium of business groups challenged Illinois’ fee program, a representative took pains to explain that the suit was not intended to challenge the Illinois EPA’s ability to fund its programs, but rather the practice of sweeping some revenues into the state general fund. Kerry L. Smith, “State environmental permit fees provoke more court action,” *Illinois Business Journal*, Feb. 7, 2005, <www.ibjonline.com/-print_state_environmental_permit_fees.html>.
13. R. Steven Brown, *ECOS Environmental Permit Fees Report*, 1.
14. Ibid., 14.
15. Ibid., 5.
16. *California Health and Safety Code*, Division 20, Ch. 6.5, Article 9.1, §25205.7.
17. Illinois Environmental Protection Agency, <www.epa.state.il.us/fees/construction.html>.

18. See, e.g., *Delaware Annual Title V Fee Committee Status Report, Calendar Year 2008*, 14, <[www.awm.delaware.gov/Pages/Title V Committee Information.aspx](http://www.awm.delaware.gov/Pages/Title%20V%20Committee%20Information.aspx)>.
19. Advisory Council on Historic Preservation, *Fees in the Section 106 Process*, July 6, 2001, <www.achp.gov/regs-fees.html>, website summary updated April 26, 2002. The analysis does not expressly address fee assessment by the SHPOs; some states do assess fees on nonfederal parties and their consultants for certain limited aspects of Section 106 reviews, such as access to electronic databases or file documentation on previously surveyed historic properties.
20. NHPA, Sections 101(b)(3)(I) and 101(d) (duty to consult); 16 U.S. Code §§470a(b)(3)(I) and 470a(d); and Sections 101(b)(3)(F) and 101(d) (duty to assist in planning); 16 U.S. Code §§470a(b)(3)(F) and 470a(d); and Sections 101(b)(3)(A) and (B) and 101(d) (duty to survey and identify historic properties); §§470a(b)(3)(A) and (B) and 470a(d).
21. NHPA, Sections 101(b)(2)(A), (b)(2)(B), and (d)(2); 16 U.S. Code §§470a(b)(2)(A), (b)(2)(B), and (d)(2).
22. National Park Service, *Report on Hawaii State Historic Preservation Division Operations* (Mar. 19, 2010), cover letter, <www.nps.gov/history/hps/hpg/hpf/index.htm>.
23. *Ibid.*, 5.
24. NHPA, Section 110(a)(2)(A); 16 U.S. Code §§470h-2(a)(2)(A).
25. One of the consistent observations among cultural resource consultants interviewed for this report was the absence of comprehensive repositories of “gray literature” (e.g., survey and evaluation reports completed for individual projects), especially at the state level, and incomplete cultural resource layers in governmental GISs. From a librarian’s perspective, there is “no comprehensive bibliographic control over contract archaeology reports,” Nancy J. Schmidt, “NTIS Reports on Contract Archaeology: Their Bibliographic Characteristics and Place in an Academic Library Collection,” *American Antiquity* 49, no. 3 (1984): 586-99. Some interviewees for this report commented that the backlog of filing or compiling archaeological reports submitted for Section 106 reviews in some states at times results in redundant investigations. The Federal Geographic Data Committee (FGDC) works on the National Spatial Data Infrastructure (NSDI) system. NSDI is a nationwide publishing effort for information that identifies the geographic location and characteristics of natural or constructed features and the Earth’s boundaries. In February 2008, the FGDC endorsed a proposal to create national geospatial data standards for cultural resources (a national digital map of historic places). A summit was held among cultural resource stakeholders in mid-March 2009 to try to develop a consensus approach on developing standards and addressing concerns regarding tribal and state involvement and attribute-level data for sensitive sites. The NSDI initiative is a welcome development for many, but will take time to accomplish. See <www.fgdc.gov/standards/projects/FGDC-standards-projects/cultural-resources/>.
26. See, e.g., Shosky, *Building Capacity*; Advisory Council on Historic Preservation, *The Preserve America Summit*.
27. Shosky, *Building Capacity*, 24, citing a 2007 NCSHPO survey.
28. *Ibid.*, 30.
29. The Department of Defense has contested certain fees imposed by the California EPA. The defense agency does not, however, question other environmental fees in which Congress has clearly waived sovereign immunity in authorizing legislation, e.g., storage tank and hazardous waste facility regulation. The state requested that the U.S. EPA regional office assume regulatory responsibility for the contested programs. “Memorandum from the California EPA, Unified Programs Section, to All Certified Unified Program Agencies regarding Department of Defense Facility Fee Payment Guide,” Unified Program Bulletin 0809-01, June 26, 2009, <www.calepa.ca.gov/CUPA/-Bulletins/2009/0809_01.pdf>.
30. U.S. Department of the Interior, Minerals Management Service, “Oil and Gas Leasing on the Outer Continental Shelf,” <www.mms.gov>.
31. The Outer Continental Shelf of the Atlantic and Pacific Oceans and the Gulf of Mexico extends from three nautical miles off the coastal states to 200 miles from the coast, except for Texas and the Gulf Coast of Florida where the limit begins nine nautical miles from the coast. The area encompasses 1.76 billion acres, of which 600 million acres are subject to a moratorium on oil and gas leasing. <www.mms.gov/offshore/>. A presidential directive issued in early 2010 could, however, ul-

timately open 167 millions acres of the moratorium area to drilling following a review of safety practices initiated as a result of the disastrous explosion on a Gulf of Mexico drilling platform in April 2010 and the massive oil spill that followed.

32. 1982 *A.R.*, 20.

33. *Ibid.*, 20-21.

34. *Ibid.*

35. *Ibid.*, 21-22.

SECTION 8: PROGRAM ALTERNATIVES

Key Recommendation: Prior to Further Federal Agency Use of Alternative Approaches to Comply with Section 106, the Advisory Council Should Establish Standards to Promote Accountability in Implementing These “Program Alternatives”

Further federal agency use of alternative ways to comply with Section 106, categories of which are authorized as “program alternatives” in the Advisory Council’s rules, should be limited until standard terms and conditions that promote accountability for implementation are established and systematically imposed. Suggested standards include facilitating public access to agreement documents used in alternate procedures (through more systematic website posting), requiring federal agencies and their nonfederal representatives to ensure qualified staffing and adequate funding to carry out the alternative approach, reporting on implementation on a routine basis and making such reports easier for the public to access, and monitoring performance through internal reviews and, as needed, outside audits.

Regulations by nature invite exceptions and alternatives to implementation. Such is the case with the Advisory Council’s Section 106 rules codified at 36 C.F.R. Part 800, although they are among the most flexible and least prescriptive of federal agency regulations. Soon after promulgation of the initial rules in 1974, the federal land management agencies and the Advisory Council developed the concept of a “programmatic memorandum of agreement” (PMOA).¹ Among the first examples of this type of program alternative was an agreement between the National Park Service and Advisory Council relating to development of general management plans for the federal park lands. PMOAs were initially developed to avoid “rote review” of individual projects and activities that posed low-level repetitive effects associated with routine activities (such as maintenance) or to address large, planned projects with repetitive impacts.²

The Advisory Council’s agreement or authorization for a federal agency to use a program alternative is essentially the Council’s one-time “comment” on the covered activity, project, or program. As a practical matter, these alternatives generally provide for categorical treatment of certain types of historic resources or projects instead of following the step-by-step process of consulting with SHPOs/THPOs and other consulting parties on the area of potential effects, historic properties within this area, impacts to these properties, and mitigation for any harmful impacts. Some of the alternatives completely remove, or exempt, a type of historic property or project from Section 106 review.

Alternative approaches to the consideration of historic properties in federal or federally assisted projects have been codified in Subpart C—Program Alternatives—of the Section 106 rules. Appendix 8-1 identifies the specific alternative programs approved to date, with the exception of programmatic agreements (PAs).

Programmatic agreements (formerly PMOAs).³ This alternate was first formally adopted in revisions to the Section 106 rules on March 1, 1979, and was subsequently modified to expand its use in the rule amendments that became effective on October 1, 1986. Within this alternate, there is a further option (adopted in 2004) for the Advisory Council to designate a “prototype” PA that federal agencies can use as a template for the same type of program or project without the need for further Council involvement. Initiatives to develop prototype PAs have been pursued by the Department of Energy for its ARRA-funded weatherization programs, and by FEMA for future disaster recovery efforts.⁴

Alternate procedures.⁵ This option authorizes a federal agency to adopt substitute, but consistent, procedures, as determined by the Advisory Council, to implement the step-by-step review and consultation process of Subpart B of the Section 106 rules.

Exempted categories of properties, programs, or projects.⁶ An exemption completely removes from Section 106 review certain types of activities or properties that might otherwise be National Register-eligible, such as the 2005 exemption of the federal interstate highway system that was approaching 50 years of age, and the 2002 exemption for historic natural gas pipelines.

Standard treatments.⁷ This category provides for a systematic approach to considering certain types of historic properties or their elements, projects, or impacts. To date, no standard methods for treating a particular type of property, project, or impacts have been established, in large part because the Advisory Council has determined that standard treatments cannot “stand alone” as a program alternative, and must instead be implemented through another alternative, such as a program comment.⁸

Program comments.⁹ This option authorizes the Advisory Council to exercise its commenting authority for a category of projects or activities as a whole, rather than exercising its authority in a project-by-project fashion. It functions, in effect, as a type of exemption by providing the Council’s comments upfront for all properties or activities encompassed in the program.

Concerns about PAs identified during interviews. This section of the report primarily focuses on PAs because they are the oldest and by far the most widely used alternative to the step-by-step consultation process carried out for every project, as outlined in Subpart B of the Advisory Council’s Section 106 regulations. Examples of the types of applications for PAs include: (1) project impacts that are similar and repetitive (e.g., replacing historic wood windows with new windows made of alternative materials; controlled burns for habitat improvement in national forests; minor transportation projects, such as resurfacing existing roads); (2) project impacts that occur over multiple states or a region (e.g., a linear project like a pipeline); (3) effects on historic properties that cannot be fully determined prior to approval of a project; (4) delegation of major Section 106 decision-making responsibilities to nonfederal parties; (5) routine management activities by federal agencies responsible for managing land

or historic buildings (e.g., maintaining heating, ventilation, and air conditioning systems); and (6) a catchall—when circumstances “warrant a departure from the normal section 106 process.” Opportunities are provided in the Advisory Council’s rules for input from multiple stakeholders when PAs are negotiated, including participation by the SHPOs, THPOs, National Conference of State Historic Preservation Officers, Indian tribes, Native Hawaiian organizations, other federal agencies, and members of the public.¹⁰ However, consultation input from statewide and local groups and the public is often lacking in PAs with broad statewide or nationwide applicability, according to interviewees for this report, in part because these concerned stakeholders are often unaware that such PAs are being considered.

Conceptually, PAs are a legitimate way to improve administrative and professional efficiency in Section 106 reviews. One state department of transportation estimates a total savings of \$480,000 to \$540,000 annually in streamlined review of minor road projects through execution of a programmatic agreement.¹¹ Further, such agreements can reduce the load on state and tribal review offices to sift through thousands of projects that pose only minor effects. A SHPO interviewee reported that such agreement documents have freed up at least three full-time positions, thus allowing staff to focus on more substantial reviews.

Unless a PA is terminated or expires, a federal agency (or an authorized representative) satisfies its Section 106 responsibilities for every project or activity of the type described in the particular PA by complying with the terms and conditions in the agreement which is executed with the Advisory Council and any other Section 106 stakeholders (e.g., NCSHPO). As a failsafe, the Advisory Council can terminate programmatic agreements if federal agencies or nonfederal stakeholders do not comply with the terms of this type of program alternative (as can the president of NCSHPO when the organization is a signatory to a PA).¹²

Significant concerns about program alternatives were raised in the interview process for this report by practically every person, in response to questions about the practical consequences of such agreements and approvals, particularly in regards to how the public can be assured that they are fully and correctly carried out.

One threshold problem with the use of PAs in particular is that it is unclear how many are currently in effect. Except for the recently adopted prototype PA option, the Advisory Council has been a required signatory on every PA ever executed. The agency’s website lists 19 PAs that apply to certain federal agencies on a nationwide basis that have been executed since the late 1970s.¹³ However, this list does not include PAs that have been executed by states and local governments or federal operating sites, such as national laboratories or military bases. The research for this study could not locate any comprehensive list of PMOAs or PAs that have been executed at less than a national level of coverage.¹⁴ When asked during the interview process about whether each state, at least, has compiled their own statewide list, SHPOs and their staff reported a wide variation in the ability to readily identify PAs in effect in their states. Some indicated that their office has almost no ability to produce a comprehensive list or copies of all such agreements, while others reported that they maintain a set of binders with paper copies collected over the years. Based on the Advisory Council’s annual reports of its activities, and the states’ annual Historic Preservation Fund reporting to the National Park Service, it appears that several thousand

PAs may exist.¹⁵ A related matter to the number of PAs is whether many are even legally valid any longer, particularly those executed before major changes to the Section 106 rules in 1986, 1999, 2000, and 2004.¹⁶

Additionally, PAs are often viewed by the public as giving too much unscrutinized authority to individual agencies, a concern that appears warranted in many cases because there does not appear to be any systematic monitoring of their implementation after these agreements are signed. Further, there are no standard terms and conditions that strengthen PA implementation. Such contractual conditions should include, for example, requiring that the federal agency or authorized representative (e.g., state agency) maintain sufficient staffing to ensure compliance; implement routine internal compliance evaluations; require external reporting to interested stakeholders; and feature a public outreach component (e.g., posting PAs on their websites, making them available in other public repositories, and conducting outreach so that interested stakeholders can monitor compliance). A number of SHPOs report that they are now requiring some of these controls in their PAs, particularly in-house staffing and public outreach.

The most common PA condition used in practice to track performance is the requirement that the federal agency or their authorized representatives periodically report on implementation, most often once per year. SHPOs' experience with the success of such reporting is, nevertheless, mixed. One office reported that about 50 percent of required PA reports are submitted. Another office conducts a random audit-style review of PAs each year, but at 10 percent coverage, the chances for identifying noncompliance problems are slim. Annual field reviews are jointly conducted by one SHPO office along with the state agency that uses the PA for its activities; while this effort represents a very encouraging practice, it is, nevertheless, one that is seldom followed in most program alternatives of this type.

In theory, members of the public can serve as private "attorneys general" by seeking to enforce such agreements in court when there is evidence of poor or faulty implementation—but only if they know that such agreements exist.¹⁷ Public interest enforcement, though possible, is onerous and expensive for individuals or nonprofit organizations, however.

Comments from Interviewees on Programmatic Agreements

"We take 18 to 19 pages of pretty good regulations (the Advisory Council's Section 106 rules) and replace them with a 400-page PA and that's called an 'efficiency' document."

"They are like phone books" or consist of "poor paraphrases or vast elaborations of the standard rules."

The Advisory Council has stated several times in its annual reports to the president and Congress that it will conduct PA reviews to monitor implementation of the requirements of these documents. A systematic effort on the part of the Council to at least identify nationwide PAs appears to have happened twice: in 1986 and 2004.¹⁸ As a result of the more recent review, the Advisory Council is currently determining which of the 19 nationwide PAs require updating, amendment, or termination.¹⁹ Changes to these documents are not accomplished quickly, however, and the "devil is in the details." For example, the January 2009 addendum to the BLM's nationwide PA took over five years to negotiate, according to one

participant, and is still only an agreement *to develop* an amendment in the future.

Are PAs passé? Programmatic agreements remain a popular approach among federal agencies and many SHPO offices as an authorized avenue to manage their Section 106 caseloads more efficiently. Nevertheless, a strong sentiment was voiced during the interview process that the “day of the PA” is passing. For one, negotiating them requires a huge upfront investment of time and energy. Nationwide PAs, in particular, were reported to be destined for oblivion due to the scope of consultation requirements.

The absence of monitoring and enforcement of these often outdated documents is recognized in some quarters as a disincentive to perpetuating the universe of such agreements. PAs work best, as reported during the interviews, when the implementing agency has qualified staff in house and has forged a strong working relationship with the tribal and state review offices.

Other program alternatives. Appendix 8-1 identifies program alternatives other than PAs that have been approved to date. All of these optional paths to Section 106 compliance were adopted in a significant overhaul of the Council’s regulations first proposed in 1996 and then adopted in 1999 and 2000.²⁰ A program comment on historic concrete stringer bridges is being developed according to a recent Advisory Council budget justification report, and a new initiative to consider a program comment for work to the interior of Army buildings will reportedly begin soon.²¹

Dramatic federal agency cost savings from these alternative programs are reported. The program comment on Cold War-era Capehart and Wherry family housing on military bases, for example, is purported to have saved the Army \$5.5 million in avoided costs for Section 106 reviews, while the Army alternate procedures were predicted to save \$1.5 to \$4 million.²² Exempting over 46,000 miles of the federal interstate highway system from Section 106 review was estimated to save “millions of dollars.”²³

Like PAs, these other types of program alternatives provide agencies with the procedural tools to avoid the time and costs of detailed Section 106 reviews for specific types of historic properties or projects. Like PAs, however, they also need to include standard terms and conditions regarding monitoring and compliance, including professional staffing, routine internal compliance evaluations, external reporting to interested stakeholders, and public outreach.

Appendix 8-1: 36 C.F.R. Part 800, Subpart C, Approved Program Alternatives

Program Comments:	
Capehart and Wherry Era Army Family Military Housing and Associated Structures and Landscape Features (1949-1962)	67 Federal Register 39332 (June 7, 2002)
Capehart and Wherry Era Navy and Air Force Family Military Housing and Associated Structures and Landscape Features (1949-1962)	70 Federal Register 69959 (Nov. 18, 2005, effective Nov. 18, 2004)
World War II and Cold War Era (1939-1974) Ammunition Storage Facilities	Aug. 18, 2006, Advisory Council signatory date
Cold War Era Unaccompanied Personnel Housing (1946-1974)	Aug. 18, 2006, Advisory Council signatory date
World War II and Cold War Era (1939-1974) Army Ammunition Production Facilities and Plants	Aug. 18, 2006, Advisory Council signatory date
Department of Defense Rehabilitation Treatment Measures (treatment standards for repairing and rehabilitating historic masonry and stucco)	Nov. 14, 2008, Advisory Council approval; 73 Federal Register 76346 (Dec. 16, 2008) (Department of Defense adoption)
Select Envelope and Infrastructure Repairs and Upgrades to Historic Public Buildings (General Services Administration) (technical preservation guidelines for windows, lighting, and heating, ventilation, and air conditioning systems)	74 Federal Register 41917 (Aug. 19, 2009)
Program Comment for the Rural Utilities Service, the National Telecommunications and Information Administration, and the Federal Emergency Management Agency to Avoid Duplicative Section 106 Reviews for Wireless Communication Facilities Construction and Modification	74 Federal Register 60280 (Nov. 20, 2009, effective Oct. 23, 2009)
Program Comment for the Department of the Navy for the Disposition of Historic Vessels	75 Federal Register 12245 (Mar. 15, 2010, effective Mar. 5, 2010)
Exemptions:	
Projects Involving Historic Natural Gas Pipelines (FERC)	67 Federal Register 16364 (Apr. 5, 2002)
Effects to the Interstate Highway System (FHWA)	70 Federal Register 11928 (Mar. 10, 2005)
The final list of nationally and exceptionally significant features of the federal interstate highway system identifies tunnels, rest areas, and bridges in 36 states that are removed from the exemption (i.e., are subject to Section 106 review).	71 Federal Register 76019 (Dec. 19, 2006)
Alternate Procedures:	
<p>Army Alternate Procedures</p> <p>Individual installations within the Active Army, National Guard, and Army Reserve can comply with these procedures by using Army Integrated Cultural Resource Planning (and NEPA integration with Section 106). These procedures are not available to the Army Corps of Engineers.</p>	July 13, 2001, Advisory Council approval; 67 Federal Register 10138 (Mar. 6, 2002) (Department of Army adoption); 69 Federal Register 20576 (Apr. 16, 2004) (Army amendment)
Standard Treatments:	
No standard treatments have been approved at the time this report was issued.	

Notes to Section 8

1. 1983 A.R., 25.
2. Ibid.
3. 36 C.F.R. §800.14(b). Prototype PAs, added in the August 5, 2004 revisions to the Section 106 rules, are addressed at §800.14(b)(4).
4. See, respectively, <www.achp.gov/news022210.html> and <www.achp.gov/fema_prototype_pa.html>.
5. 36 C.F.R. §800.14(a), adopted in 1999 and 2000.
6. 36 C.F.R. §800.14(c), adopted in 1999 and 2000.
7. 36 C.F.R. §800.14(d), adopted in 1999 and 2000.
8. See the Council's discussion on this point at 73 Federal Register 54356 (Sept. 19, 2008) in relation to program comments proposed for Department of Defense measures to rehabilitate historic exterior building elements. These program comments were approved by the Advisory Council on Nov. 14, 2008 (see the table in Appendix 8-1 above).
9. 36 C.F.R. §800.14(e), adopted in 1999 and 2000.
10. 36 C.F.R. §§800.14(b)(2)(i) and (ii), 800.14(f).
11. Federal Highway Administration, *Statewide Section 106 Programmatic Agreements: A Streamlining Initiative*, Sec. B.3.b., <www.environment.fhwa.dot.gov/histpres/section1/asp>.
12. 36 C.F.R. §800.14(b)(2)(iii) and (v).
13. <www.achp.gov/pas.html>.
14. HUD, in a commendable effort, has posted a database online that claims to contain all of its PAs (and MOAs) executed from 2001 through the present, <<http://nhl.gov/offices/cpd/environment/section106/index.cfm>>.
15. See Appendix 2-2 for the numbers of PAs executed each year based on the Advisory Council's annual reports to the president and Congress.
16. See, e.g., John F. Clark and Melissa Meirink, Holland & Hart LLP, "Programmatic Agreements for Federal Historic Preservation Review and Tribal Consultation—Can They Help Avoid Regulatory Gridlock in the Mineral and Energy Boom?" *Proceedings of the Fifty-Fourth Annual Rocky Mountain Mineral Law Institute* (Denver, CO: 2008), 7-20–7-22.
17. In *Tyler v. Cisneros*, 136 F.3d 603 (9th Cir. 1998), for example, a group of homeowners successfully sued HUD and the city of San Francisco to enforce the terms of an MOA. The appellate court held that the suit could be brought to compel enforcement with a Section 106 agreement document, even though HUD had already disbursed funds for an affordable housing project to the city, and that the city remained liable under the NHPA (and NEPA) for failing to carry out commitments made in the review processes.
18. 1986 A.R., 38 (the agency issued a fact sheet listing all PMOAs identified during the 1986 survey).
19. 2010 B.J.R., 34.
20. 64 Federal Register 27044 (May 18, 1999). Standard treatments for bridges and archaeological sites were omitted in the final rules based on objections of all stakeholders except the federal agencies and industry groups.
21. 2010 B.J.R., 34 and 11, respectively.
22. 2006 B.J.R., 10.
23. 2007 B.J.R., 5.

SECTION 9: TECHNOLOGY

Key Recommendation: Section 106 Stakeholders Should Pursue New Ways of Using Technology, While Improving and Expanding Existing Uses

Technology has been an important tool in the national historic preservation program, at least since the National Register nomination form was modified by the National Park Service in the 1960s, in collaboration with International Business Machines (IBM), in order to enable machines to process data in the completed forms.¹ The first reference in an Advisory Council's annual report to the use of a computer database to record historic properties occurred in 1988 in relation to a system developed by the Army Corps of Engineers Construction Engineering Research Laboratory in Champaign, Illinois.²

Each of the Section 106 stakeholder agencies and groups now uses technology in some way in the review process. The Council itself debuted a computer database in 1998 to administratively manage its Section 106 cases, although the system was not consistently used until approximately 2007.³ The agency's 2004 budget plan highlighted installation of teleconferencing capabilities to improve communication between the Denver and DC offices, a year before the western office was closed.⁴

State and tribal use of technology in relation to their Section 106 reviews varies significantly, based on a May 2009 evaluation of their technological capabilities.⁵ Yet the robustness of SHPO and THPO technology is a vital part of facilitating timely and more cost-effective Section 106 implementation, since they process the vast majority of project reviews.

Consultants aggressively deploy technology to reduce their internal and project costs (therefore reducing the costs to their clients) because of the need to be marketable in a competitive business environment. Further, with the proliferation of "megaprojects"—those exceeding \$1 billion in cost—project management and scheduling software is an essential investment for general engineering contractors who oversee and manage these large construction projects.

Sophisticated individuals and public interest groups often adeptly and creatively use technology (especially websites and e-mail) to rapidly respond to project proposals and to educate other citizens and decision makers about their position on controversial projects. In 2009, for example, a preservation advocacy group used a webcam to videoconference in another consulting party (their structural engineer) located 400 miles from a Section 106 consultation meeting.

9-1. “Web 2.0” technology should be harnessed to enhance implementation of the National Historic Preservation Act.

The Internet offers a vast, quick, and inexpensive opportunity to involve significant numbers of the public in one of *the* most important preservation activities—identifying historic properties—and to improve Section 106 (and NEPA) information about community resources. Indeed, the public’s interest in recognizing individual historic places by harnessing social media technology has been demonstrated through “This Place Matters,” an internet-based program on the website of the National Trust which encourages individuals and organizations to share information about historic places in their own communities. Similar web-based campaigns could be used to augment the existing “formal” recognition system for historic places, the National Register of Historic Places, which is operated by the National Park Service.

In 1976, during a review of the 10th anniversary of the NHPA, the Advisory Council envisioned the following role for the public, which today can be accomplished in extensive ways through “Web 2.0” technology—Internet applications that promote information sharing among individual users, particularly through the expanded use of web-based social media tools:

While professional standards and guidance are essential for a national inventory, local communities, organizations, and individuals should be given an opportunity to participate in identifying historic properties. Public participation in the inventory process has been quite limited. . . . This is unfortunate because historic preservation efforts can only be effective when they are supported by the community. . . . While it is clear that judgments regarding the historical value of inventoried properties must be made on professional standards, public participation may provide access to useful information on people, places, and events that would otherwise be lost. This is particularly true as the national preservation program continues to develop its recognition of ethnic and cultural history. . . .⁶

An emphasis on the importance of the public’s understanding of historic properties and involvement in preservation efforts dates back to enactment of the NHPA, when promoters of a national policy on preservation recognized that a more widespread appreciation of history must be based on its relevance to contemporary personal and economic needs and values. As the groundwork was laid in the mid-1960s for a new national preservation law, a collective sense emerged among decision makers that preservation protections should be expanded beyond properties and places identified as historic under traditional approaches, and should embrace the concept of recognizing historic places as personal, community, and economic assets.

The growth of “Web 2.0” technology in just the past few years provides a remarkable opportunity to enhance and expand this early vision of the role of the public in the work of historic preservation at the grassroots level. This type of technology lends itself, in particular, to: (1) expanding the universe of places identified as historic (and which may in turn be eligible for listing in the National Register); and (2) increasing public awareness of specific federal or federally assisted projects affecting historic properties (and therefore increasing public interest in the processes that afford public participation through Section 106). To roughly quantify the possibilities and power of web-based identification of potentially historic properties, the current inventory of the National Register is approximately 85,000 individually listed properties (although listed properties may have multiple contributing sites

within their boundaries, especially for districts). If an organization like the National Trust (with a membership of 270,000) partnered with one or more other Section 106 stakeholders (e.g., a national environmental organization with 1 million or more members), and each organization engaged just 5 percent of their members to identify *one* potentially historic property in their community, the collaboration could almost double in a brief time period the list formally compiled in the National Register over the past 44 years.

Of course, “nomination” of historic places through social web media cannot serve as a direct substitute for the National Register. Nevertheless, one or more databases developed in this manner by preservation advocate stakeholders (the “Wiki Register”) could enhance the National Register if these tools were well promoted and well organized, and could potentially provide secondary sources of “potentially eligible historic resources” for planners, consultants, and federal agencies to consider as part of their identification responsibilities under Section 106.

Given its experience with “This Place Matters” the National Trust could consider joining with other organizational partners at the national, statewide, and local level to promote further development of an “informal National Register,” based on input from the grassroots level, through Web 2.0 technology. As already demonstrated by “This Place Matters,” existing technology allows any Internet user to identify buildings, objects, structures, and natural resources in an on-line format, which can then be linked to a Google map of the United States or viewed in Google Earth, if an address is known.⁷ Links to other Web tools, such as Flickr, Twitter, and YouTube, can further expand the reach and content of one or more of these web-based databases. In another example, the “Austin Historical Survey,” a sophisticated community survey tool that will be posted on the website of the City of Austin (a Preserve America city and certified local government), is being developed between the city and the University of Texas.⁸ Once posted, the public can input into the website the salient architectural forms, styles, and features of a building based on illustrations from historic architecture field guides; they will also be able to input what is known about a property’s association with important events in history or important people or cultures. A controlled vocabulary will be used so that both the city and the Texas Historical Commission can more readily use the information for official purposes, after it has been vetted by city staff at different data review levels. Each data field will feature a revision history to promote and to record broad-based input from the public.

In addition to this example of a Preserve America community’s effort to promote the active participation of residents in on-line surveys of historic places, federal agencies that manage real property could similarly facilitate community identification and evaluation of their historic buildings by providing public access to certain federal properties, as encouraged through the Preserve America executive order.⁹

Individuals and groups interested in historic preservation or special community places already spend thousands, if not hundreds of thousands, of volunteer hours each year. Targeted outreach could be made to expand the reach and diversity of input (including groups with specialized knowledge of places and properties, such as realtors, railroad engineers, or skilled craft and trade workers). The ability to participate directly in grassroots-initiated efforts to capture and showcase local heritage areas and sites would also serve an empowering function, especially with groups that do not have the resources to hire an expert to prepare a National Register nomination, and

could fill a necessary gap in resources needed to prepare preliminary property inventories during massive federal initiatives, such as ARRA, the most recent economic stimulus legislation.

Checks and balances would be needed to supplement a web-based approach to expanding knowledge of the existence of historic properties. More instruction could be provided to users about National Register criteria (e.g., age, property types) as part of the prompts in a self-reporting web-based identification system. The goal of these kinds of community-generated lists of “places that matter” would be to alert planners and project proponents of the potential for an eligible resource to be affected by their activities. The burden would then shift to reviewers to undertake further research on their own, consult with the nominator, local groups, THPOs or SHPOs, and so on. All of the professionalism requirements and standards of Section 106 would apply, as would National Register eligibility determinations (consideration of historic contexts, individual significance criteria and levels of significance, and integrity). However, it is likely that even if a property on one or more grassroots-based identification lists was not National Register-eligible, and thus not subject to Section 106, it might be recognized and analyzed within the broader scope of NEPA review as a natural, aesthetic, cultural, or social resource.¹⁰

9-2. Project management software needs to include Section 106 compliance milestones to help early and coordinated consideration of historic properties in construction projects.

Initiative should be taken to modify the major project management software products in use for planning, developing, scheduling, budgeting, and executing capital projects to explicitly incorporate deadlines and tracking milestones for Section 106 compliance. Most existing software products feature environmental review compliance steps and deadlines under NEPA, but lack corresponding milestones for activities required in the Section 106 process.

In concert, the Advisory Council and other interested Section 106 stakeholders should identify:

- The most commonly used project management software for construction projects in different activity areas (e.g., transportation, hospitals, land development).¹¹ Trade associations, such as the Project Management Institute, can possibly be a resource in this query.
- Major software vendors in each category willing to work with preservation stakeholders to collaborate on estimating the appropriate ranges of person-hours to adequately complete Section 106 compliance steps. These estimates can then be factored into project-specific management plans and software. The guidance should include, but not be limited to, the steps of tribal consultation, historic property identification, and mitigation implementation. Guidance should also include the Preserve America expert panel’s NEPA and Section 106 coordination deadlines to prevent or minimize foreclosure of historic property consideration before key project milestones are reached.

9-3. The Advisory Council should establish deeper content on its website for Section 106 practitioners, consider establishing a compliance-oriented website name for inexperienced Section 106 stakeholders, and offer a targeted link for the public on its homepage.

The Advisory Council's website (<www.achp.gov>) was first posted in the FY 1995 to FY 1996 timeframe and was brought in-house for management in 1999. During FY 2003, visits to the website averaged 18,000 per month; visits reached 50,000 in one month in FY 2008 and averaged 32,000 visits per month in FY 2009.¹² When asked about the usefulness of the Advisory Council's website during interviews for this study, interviewees' responses varied significantly, although most individuals agreed that listing staff members of the Office of Federal Agency Programs (OFAP, which is where the Section 106 staff is located in the Council) by their assigned federal agency is very helpful.¹³

Practitioner-oriented website content. One readily apparent gap in the Advisory Council's current website, compared to other agencies, is access to the entire body of the Council's expert knowledge and experience. Section 106 guidance documents of general applicability (which are posted under "Publications"), snapshots of high-profile cases, and summaries of historic preservation lawsuits across the country are available on the website. Nevertheless, the Council has, for more than forty years, issued formal and informal membership and staff letters, memoranda, interpretations, pronouncements, agreements, and regulatory preambles. The agency's yearly *Reports to the President and Congress of the United States* and *Budget Justification Reports* contain a wealth of information. Further, according to participants, the quarterly membership meetings and their committee meetings (and associated minutes) have, at times, provided valuable glimpses into the tenor of the agency's Section 106 views as well. The recommendation in Section 5-5 urges the Council to issue opinion letters responding to project-specific questions or applications of the Section 106 rules, which could be posted to its website as well.

Posting this body of practice on the Council's website would immensely help the more sophisticated Section 106 stakeholders (federal agencies, THPOs, SHPOs, industry, some preservation groups).¹⁴ This affirmative disclosure also would help reduce the burden of responding to potential requests for extensive records produc-

Examples of practitioner-oriented websites

<www.epa.gov/ttn/oarpg> (EPA Office of Air and Radiation—proposed/final rules, memos, white papers, reports to Congress, public notices, all indexed by topic or alphabetically)

<www.epa.gov/swerrims/oswerpolicy.htm> (EPA Office of Solid Waste and Emergency Response—policy, guidance, "RCRA online" with a full body search function that allows searches by regulation citation)

<www.epa.gov/compliance/nepa/eisdata.html> (NEPA database, including summaries of U.S. EPA comments on EISs)

<www.ferc.gov/legal/legal.asp> (FERC staff reports, investigations, policy statements, memoranda of understanding)

<www.fda.gov/RegulatoryInformation/Guidances/default.htm> (Food and Drug Administration current policy and guidance in all of its program areas)

tion under the Freedom of Information Act. Finally, agency interpretations, like good websites, are not static; as a result, appropriate disclaimers could accompany practitioner-oriented content established more comprehensively on the Council's website.

A compliance-oriented web domain name for inexperienced Section 106 stakeholders. Section 3-3 suggests improving Section 106 implementation through, among other methods, explicit procedures designed to make recognition of the process more understandable to nonfederal applicants for federal funding or permits. One recommended mechanism to increase education and awareness is registration of a separate compliance-oriented domain name (one example could be a name such as "<www.106compliance.gov>"). A user would be forwarded to the Advisory Council's website at <www.achp.gov>. The new domain name could be used on applicant forms, as well as funding or permitting agencies' websites. The word "compliance" in the domain name is purposefully suggested here: although many applicants may not be familiar with Section 106, they do understand that they can be held accountable under federal grant programs for any activity identified as "compliance" and, therefore, they are more likely to take the review process seriously if "compliance" is emphasized at every opportunity. Although not immediately necessary, the Advisory Council's website could be slightly tailored to better reach the grantee and applicant audience that access the site through this portal (e.g., simplified flowcharts, photos of example historic property types, the Council's policy on affordable housing and historic preservation).

The compliance-oriented domain name could also be included in relevant forms (e.g., OMB audit circular, HUD forms, and other applicant forms) for ease of reference. Ideally, anyone filling out an on-line grant, financial assistance, or permit application could be required, through a pop-up box, to at least link to the new domain name and then electronically "certify" or sign that they have read and understand their responsibilities before filling out the remainder of the application.

Public content. Website content that addresses regulatory programs and yet is oriented to the general public is challenging to develop. A direct, prominent, and inviting link should be established on the Advisory Council's homepage, similar to that developed by other federal agencies such as the U.S. EPA's link for "concerned citizens," to promote immediate public access to Section 106 content. Elements of the Advisory Council's current website that should be provided through this "public portal" include the *Citizen's Guide to Section 106 Review* and the OFAP staff listing. Other content directly provided to the public could include links to the formal National Register, the user-promoted "Wiki Register" (as suggested above), a list of federal agency Senior Policy Officials, Senior Real Property Officers, and Federal Preservation Officers with contact information, and the THPO and SHPO offices. Some of this content is currently found in a variety of places in the Advisory Council's website; however, some interviewees explained that the connection between Section 106 and this other type of helpful information is not always clear to the public. Consolidating such information in one "public" place could, therefore, facilitate use of the Internet to more easily access the resources provided by the Advisory Council.

9-4. Metropolitan and regional transportation planning organizations need access to digitized cultural resource information.

Metropolitan planning organizations (MPOs) are federally mandated agencies located in urbanized areas (population greater than 50,000) who are responsible for planning, programming funds, and coordinating federally funded highway, road, transit, and bike and pedestrian projects. They are required to develop and update short-term (3- to 4-year) transportation improvement plans and longer-term (20- to 25-year) transportation plans. Road planning, including bridge replacement projects, begins at MPOs through decisions made by transportation technical and policy committees. The makeup of these important groups includes representatives of local governments; state departments of transportation; FHWA division offices; airport, transit, and port authorities; and economic development interests.

Based on the interviews conducted for this report, it appears that very few MPOs currently integrate their geographic information systems (GISs) (mostly layered with land use, environmental, and demographic data) with cultural resource GISs. The majority of SHPO GISs were developed through state departments of transportation and/or the FHWA. The FHWA and Advisory Council should, therefore, facilitate discussions with the National Association of Metropolitan Planning Organizations on ways to link these state and regional agencies and their resources.

Notes to Section 9

1. Mackintosh, *The National Historic Preservation Act and the National Park Service*, 33.
2. 1988 A.R., 63.
3. The Advisory Council produced many documents for this report, in response to the author's requests. However, some key documents were never produced despite repeated requests, in part because of the limitations or belated implementation of the Council's case management database. For example, despite the mandate in the 2004 rules that the Council "must retain a record of agency responses to Council opinions" when appeals are taken administratively in Section 106 reviews, and to "make this information available to the public" [§§800.4(d)(iv)(D), 800.5(c)(3)(C)], the agency's database does not appear to include a complete set of the Council's comments on these appeals and the federal agency's official response to the Advisory Council in these cases.
4. 2004 B.J.R., 18. The National Trust was advised by the Council recently that the equipment is now in storage and no longer functional.
5. Shosky, *Building Capacity*.
6. Advisory Council on Historic Preservation, *The National Historic Preservation Program Today*, 18.
7. <<http://preservationnation.org/take-action/this-place-matters>>.
8. <http://soa.utexas.edu/hp/austin_survey>.
9. E.O. 13,287 (*Preserve America*), Sec. 4(b).
10. See 40 C.F.R. §1508.8.
11. One major commercial vendor offers project management software products that are tailored for specific industrial and government sectors, for example.
12. 2005 B.J.R., 6 (for FY 2003 data); 2008 B.J.R., 18 (for FY 2008 data); 2009 B.J.R., 20 (for FY 2009 data).
13. However, one of the youngest interviewees for this report assigned a grade of "Web 0.5" (the frame of reference being "Web 2.0") for the site's static nature and content.
14. Updates to the *Federal Historic Preservation Case Law (1966-2000)* compendium, funded in part by the Army Environmental Center (the Army Environmental Command today), are acutely missed by practitioners as well.

GLOSSARY & TABLE OF ACRONYMS

GLOSSARY OF KEY TERMS

Advisory Council on Historic Preservation (ACHP). Independent federal agency responsible for implementing the Section 106 review process. (16 U.S. Code § 470j)

Categorical Exclusion. A type of federal or federally assisted action that does not itself, or in combination with other actions, have a significant effect on the environment. In such cases, an Environmental Assessment or Environmental Impact Statement does not have to be prepared under the National Environmental Policy Act.

Certified Local Government (CLG). A city or town that has met specific standards under the National Historic Preservation Act, enabling participation in certain NHPA programs.

Environmental Assessment (EA) or Environmental Impact Statement (EIS). Documents prepared by federal agencies to establish compliance with obligations under federal or state environmental protection laws to consider the impact of proposed actions on the environment, including historic resources. Typically used to refer to key compliance documents under the National Environmental Policy Act.

Memorandum of Agreement (MOA). Document executed by consulting parties pursuant to the Section 106 review process that sets forth terms for mitigating or eliminating adverse effects on historic properties resulting from agency actions.

National Environmental Policy Act (NEPA). Primary federal law requiring consideration of potential impacts of major federal actions on the environment, including historic and cultural resources. (42 U.S. Code §4332; 40 C.F.R. Part 1500)

National Historic Landmark (NHL). Property included in the National Register of Historic Places that has been designated by the Secretary of the Interior to have “national significance in American history, archeology, architecture, engineering, and culture.” (36 C.F.R. Part 65)

National Historic Preservation Act (NHPA). The federal law that encourages the identification and preservation of cultural and historic resources in the United States through partnership with state, tribal, and local governments. (16 U.S. Code §470 et seq.)

National Register of Historic Places. Official inventory of “districts, sites, buildings, structures, and objects significant in American history, architecture, archeology, engineering and culture.” (16 U.S. Code §470a; 36 C.F.R. Part 60)

Programmatic Agreement (PA) (formerly Programmatic Memorandum of Agreement or PMOA). Document executed by one or more federal agencies and the Advisory Council (and sometimes other parties, such as SHPOs) to provide for categorical treatment of certain types of historic resources or undertakings, generally to remove that resource or its effects from step-by-step consultation requirements under Section 106, or to exempt the resource or undertaking from Section 106 review altogether.

Section 106. Provision in the National Historic Preservation Act that requires federal agencies to consider the effects of proposed undertakings on properties listed or eligible for listing in the National Register of Historic Places. (16 U.S. Code §470f; 36 C.F.R. Part 800)

State Historic Preservation Officer (SHPO) Official appointed or designated, pursuant to the National Historic Preservation Act, to administer a state's historic preservation program.

Tribal Historic Preservation Officer (THPO). Official who has assumed the functions of a State Historic Preservation Officer with respect to tribal lands.

Undertaking. Federal agency actions or private actions pursuant to federal funding, licensing, or permitting authority subject to the requirements of Section 106 of the National Historic Preservation Act. (16 U.S. Code §470w)

Web 2.0. A common, global term applied to World Wide Web functionality marked by user-centered interactive information sharing and/or collaboration via user-oriented interface designs, and exemplified by sites and technologies for web-based communities, social-networking, media-sharing, blogs, wikis, messaging/texting networks, "cloud"-based services and applications, and so on. See http://en.wikipedia.org/wiki/Web_2.0.

COMMONLY USED ACRONYMS

ACHP — Advisory Council on Historic Preservation

ADR — Alternative Dispute Resolution

AID — Agency for International Development

ALI/ABA — American Law Institute/American Bar Association

APA — Administrative Procedure Act

APE — Area of Potential Effects

AR — Annual Report (Report to the President and the Congress of the United States)

ARRA — American Recovery and Reinvestment Act

BIA — Bureau of Indian Affairs

BJR — Budget Justification Report

BLM — Bureau of Land Management

BOR — Bureau of Reclamation

CDBG — Community Development Block Grant

CEQ — Council on Environmental Quality

CFR — Code of Federal Regulations

CLG — Certified Local Government

DHS — Department of Homeland Security

DOCOMOMO — Documentation and Conservation of buildings, sites, and neighborhoods of the Modern Movement

DOD — Department of Defense

DOT — Department of Transportation

EA — Environmental Assessment

ECOS — Environmental Council of the States

EIS — Environmental Impact Statement

EMS — Environmental Management System

EO — Executive Order

EPA — Environmental Protection Agency

FAA — Federal Aviation Administration

FACA — Federal Advisory Committee Act

FCC — Federal Communications Commission

FDIC — Federal Deposit Insurance Corporation

FEMA — Federal Emergency Management Agency

FERC — Federal Energy Regulatory Commission

FFSA — Fraud and False Statements Act

FGDC — Federal Geographic Data Committee

FHWA — Federal Highway Administration

FONSI — Finding of No Significant Impact

FPO — Federal Preservation Officer

FRA — Federal Railroad Administration

FTA — Federal Transit Administration

FTE — Full-Time Equivalents	OFAP — Office of Federal Agency Programs (of the Advisory Council on Historic Preservation)
FY — Fiscal Year	OIG — Office of the Inspector General
GIS — Geographic Information System	OMB — Office of Management and Budget
GSA — General Services Administration	OPM — Office of Personnel Management
HHS — Health and Human Services	OSM — Office of Surface Mining and Reclamation Enforcement
HR — House Resolution	PA — Programmatic Agreement
HUD — Department of Housing and Urban Development	PAR — Performance and Accountability Reports
IBM — International Business Machines	PHS — Public Health Service
ISO — International Organization for Standardization	PMOA — Programmatic Memorandum of Agreement
MMS — Minerals Management Service	PP&E — Property, Plant & Equipment
MPO — Metropolitan Planning Organization	ROD — Record of Decision
MOA — Memorandum of Administration	RTC — Resolution Trust Corporation
NAE — No Adverse Effects	SAFETEA-LU — Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (Transportation Bill)
NAFTA — North American Free Trade Agreement	SBA — Small Business Administration
NAPA — National Academy of Public Administration	SEC — Securities and Exchange Commission
NASA — National Aeronautics and Space Administration	SFFAS — Statement of Federal Financial Accounting Standards
NATHPO — National Association of Tribal Historic Preservation Officers	SHPO — State Historic Preservation Officer
NCSHPO — National Conference of State Historic Preservation Officers	SLAPP — Strategic Lawsuit Against Public Participation
NEPA — National Environmental Policy Act	SLO — State Liaison Officer
NHL — National Historic Landmark	SPO — Senior Policy Official
NHPA — National Historic Preservation Act	SRPO — Senior Real Property Officer
NOAA — National Oceanic and Atmospheric Administration	SSA — Social Security Administration
NPS — National Park Service	THPO — Tribal Historic Preservation Officer
NR or NRHP — National Register of Historic Places	TVA — Tennessee Valley Authority
NRC — Nuclear Regulatory Commission	USDA — U.S. Department of Agriculture
NRCS — Natural Resources Conservation Service	VA — Department of Veterans Affairs
NSDI — National Spatial Data Infrastructure	
NSF — National Science Foundation	
NTHP — National Trust for Historic Preservation	