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National Historic Preservation Act: National Conference of State Historic Preservation Officers Letter Addressing Section 106 Rules

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The National Conference of State Historic Preservation Officers ("NCSHPO") sent an August 3rd letter to members of the Advisory Council on Historic Preservation ("ACHP") addressing the Section 106 rules.

The rules implement Section 106 of the National Historic Preservation Act ("NHPA").

The ACHP voted on July 24th in favor of a Notice of Proposed Rulemaking ("NPRM") regarding revisions to the regulations.

The August 3rd letter to members of the ACHP is stated to be in response to its:

... call to provide input regarding Section 106 regulation changes by August 3...

The NCSHPO indicates it convened a working group to identify points of concern and generate a broad list of discussion concepts to address perceived problems with the Section 106 process.

The discussion concepts were then submitted to the broader NCSHPO membership of 59 State Historic Preservation Officers for feedback. The August 3rd letter summarizes their conclusions as related to the five questions NCSHPO were asked to consider.

The NCSHPO describes itself as a non-profit organization whose members are the state government officials (State Historic Preservation Officers) and their staff who carry out the National Historic Preservation Program as delegates of the Secretary of Interior pursuant to the NHPA.

The questions addressed in the letter include:

1. Could the Section 106 regulations, or any portion thereof, be streamlined to more effectively achieve the statutory objectives of the NHPA? If so, what changes should be made?
 1. Clarify Areas of Potential Effect (APEs) and Address National Environmental Policy Act ("NEPA") Language.
 2. Improve Agency Communication and Accountability.
 3. Encourage and Expand the Use of Programmatic Agreements.
 4. Designate a Lead Federal Agency.
2. Is there any portion of the Section 106 regulations that are difficult to interpret or have become unnecessary, ineffective, or ill-advised? If so, please identify them.

1. Supports removing the bulk of the language in 36 CFR 800.8 regarding coordination with NEPA, retaining only 36 CFR 800.8(a)1, which encourages early coordination of Section 106 and NEPA.
3. Have the Section 106 regulations, or any portion thereof, become outdated? If so, how can they be modernized to better accomplish the statutory objectives of the NHPA?
 1. 106 regulations as written provide a remarkably resilient framework for implementing the complex and nuanced requirements of the NHPA.
 2. Modifications to the regulations may be necessary at times to keep them current, however, an extensive re-write of the regulations aimed at bypassing or fast-tracking key aspects of the NHPA is unwarranted and unlikely to yield any efficiency, as it would involve a vast retooling of the mechanisms that agencies and stakeholders rely on to carry out the process.
4. Can any new technologies be leveraged to modify or streamline the Section 106 regulations? If so, please identify them.
 1. Over the years, NCSHPO's members have routinely pointed out that investments in up-to-date technology are instrumental to a smooth Section 106 process.
 2. Many SHPOs still lack the funds to bring those systems to fruition or to support yearly maintenance costs.
 3. Adequate funding of these systems would improve access to historic property information and survey data, and reduce avoidable stakeholder conflicts by allowing early identification of properties.
5. What additional information should the ACHP collect regarding the Section 106 process? Should the collection of such data be directed in the regulations?
 1. ACHP should collect the following information:
 1. Average consultation timelines.
 2. Timing of consultation initiation.
 3. Completeness of agency submissions.
 4. Staffing capacity.
 5. Utilization of programmatic agreements.
 6. Implementation of agreement documents.
 7. Frequency and causes of project delays.
 8. Measures of consultation outcomes and effectiveness.
 2. ACHP has so far operated on the assumption that Section 106 is a significant source of project delay, yet little evidence has been presented to show either that Section 106 is the primary cause of delays or that sweeping regulatory changes would improve project timelines.
 3. Consequential decisions are being made based primarily on anecdotal evidence.
 4. In polling its members, NCSHPO found that SHPOs overwhelmingly complete reviews in far less time than the 30 days allotted by regulation, and that agencies frequently do not initiate consultation until projects have already been under development for months or even years.

6. SUMMARY:

1. NCSHPO and its members conclude that the principal challenges affecting the Section 106 process are operational rather than regulatory.
2. Earlier consultation, stronger agency accountability, improved staffing and training, better guidance, expanded use of programmatic agreements, technology modernization, and improved performance data are far more likely to support efficiency than broad revisions to the regulations themselves.

A copy of the NCSHPO letter can be found [here](#).