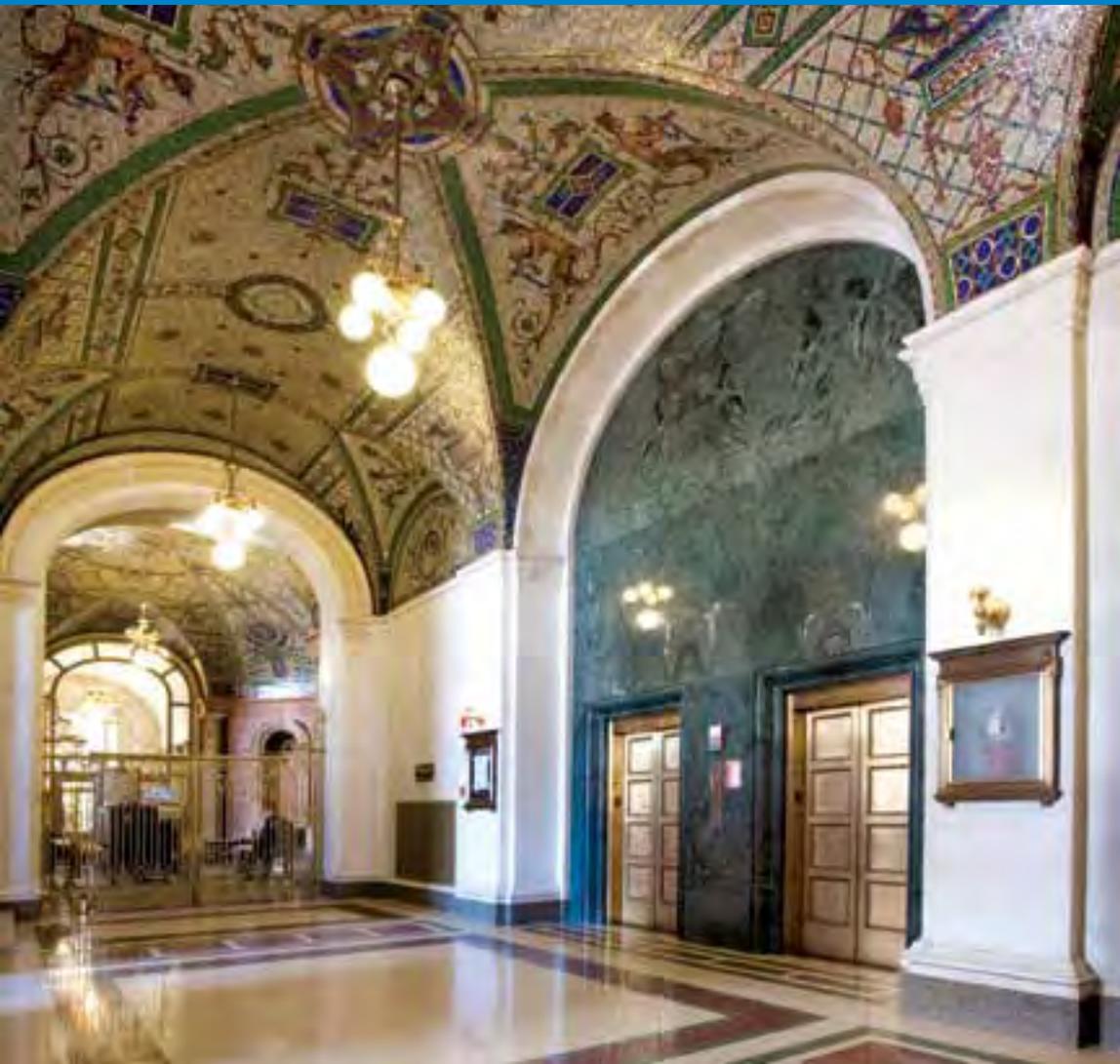


# ForumJournal

WINTER 2012 | VOL. 26 NO. 2

## Section 106 Uncensored: The Insider's Perspective





# ForumJournal

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The National Trust for Historic Preservation works to save America's historic places for the next generation. We take direct, on-the-ground action when historic buildings and sites are threatened. Our work helps build vibrant, sustainable communities. We advocate with governments to save America's heritage. We strive to create a cultural legacy that is as diverse as the nation itself so that all of us can take pride in our part of the American story.

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PHOTO COURTESY CAROL M. HIGHSMITH PHOTOGRAPHY, INC./GSA

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# Introduction

STEPHANIE K. MEEKS

**T**his issue of the *Forum Journal* is unlike any that we have done before. For one thing, as you will see, it is almost double the length of our typical quarterly publication. But it is also unusual in the depth to which we have delved into a topic of central importance to us all—Section 106 of the National Historic Preservation Act.

As Milford Wayne Donaldson, chairman of the Advisory Council on Historic Preservation, points out in the first essay, Section 106 is a tremendously powerful tool for preserving America’s cultural heritage. Its obligation that federal agencies “stop, look and listen” before jeopardizing historic resources has saved thousands of special places across the country.

Yet, for all that success, there is far more we can do to maximize the potential of this important law. Too

often, Section 106 provisions are ignored, short-changed or, in the case of anticipatory demolitions, actively thwarted. The public’s role in the process is not always used effectively, despite the fact that local communities often stand to benefit most from the preservation of a beloved school, courthouse or community building.

These and other concerns led the National Trust to commission an independent report last year, titled *Section 106 of the National Historic Preservation Act:*

*Back to Basics* (available at [www.preservationnation.org/106](http://www.preservationnation.org/106)). Author Leslie Barras undertook a comprehensive, nationwide study, including more than 50 interviews with a variety of Section 106 stakeholders, and an exhaustive review of documents. Based on that work, she developed a number of specific recommendations, which are summarized in her essay on page 56.

This issue of the *Forum Journal* continues the conversation begun by that report. To represent the broad cross-section of perspectives involved in the Section 106 process, we enlisted an extraordinary group of authors, with decades of experience in Section 106 consultation.

In addition to the Advisory Council on Historic Preservation (ACHP), these

**SECTION 106 is a tremendously powerful tool...Its obligation that federal agencies “stop, look and listen” before jeopardizing historic resources has saved thousands of special places across the country.**

authors represent the views of a state historic preservation office (SHPO); a tribal historic preservation officer; a federal agency that is justifiably proud of its historic preservation program; statewide and local preservation advocates; a lawyer who represents preservation advocates; consultants who advise applicants for federal permits and licenses; and the author of the *Back to Basics* report, Leslie Barras.

Many of these authors have held multiple Section 106 roles over the course of



The Hickam Community Center, originally the non-commissioned officers' mess hall, was recently restored as part of the Section 106 consultation with the Air Force as part of the public private venture for military family housing. The building is now part of Joint Base Pearl Harbor Hickam, which was created in 2010 through the consolidation of the Naval and Air Force bases into a single installation.

PHOTO COURTESY OF MASON ARCHITECTS, INC.

their careers, including stints at SHPO offices, federal agencies, and even the ACHP itself.

They have been remarkably generous in sharing their advice, wisdom, challenges, and candid perspectives on the Section 106 process. You will find powerful arguments for innovative outcomes, as well as case studies from Hawaii, Kentucky, Arizona, and Indiana demonstrating Section 106 at its best.

As our contributors well know, Section 106 may not always function perfectly, but no other federal environmental law requires stakeholders to sit down together and affirmatively seek consensus. This simple mandate of “consultation” often opens the door to productive collaboration and compromise.

We have certainly witnessed this many times at the National Trust over the past 45 years. Just recently, for instance, we celebrated a win/win solution at the Pearl Harbor National Historic Landmark District in Hawaii, where Section 106 nego-

tiations helped to preserve the historic character of this iconic naval base. We partnered with several public and private groups at Pearl Harbor, including the Historic Hawaii Foundation. As Executive Director Kiersten Faulkner points out in the article on page 34, the Section 106 process brought everyone to the table, and new understanding has developed on both sides as a result.

State and local organizations such as the Historic Hawaii Foundation have a vital role to play in the Section 106 process. Yet, as the *Back to Basics* report found, effective use of the review process is not always a top priority among state and local preservation organizations, and many would benefit from additional training in Section 106 consultation. The Trust took this finding to heart, and as a first step, we offered a day-long training session for state and local partners at the

National Preservation Conference last fall. More training opportunities are in the works at the Trust, and at the ACHP and other organizations. As we have learned through these training programs, and in compiling this issue of the *Forum Journal*, there is always some fresh insight to discover about Section 106, no matter how well we think we know the review process and the perspectives of other stakeholders.

We certainly drew new ideas and plenty of inspiration from the wonderful spirit of collaboration that distinguished this issue. We hope that spirit comes through in these pages, and inspires you with renewed energy for the important work of saving the places that matter in your communities. **FJ**

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STEPHANIE K. MEEKS is president of the National Trust for Historic Preservation.

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## Definitions

As you read these articles, you will come across a number of frequently used terms that apply to Section 106 review. A few key terms are defined here. You can also find a helpful question-and-answer guide to Section 106 at [www.achp.gov/106q&a.html](http://www.achp.gov/106q&a.html).

**Area of Potential Effect (APE):** The geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties.

**Consultation:** The process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process. Consulting parties might include the state historic preservation officer, local governments, and applicants for federal assistance, permits, licenses, and other approvals. Individuals and organizations with a demonstrated interest in the site being reviewed can also participate.

**Effect:** An alteration to the characteristics of a historic property that qualify it for inclusion in or eligibility for the National Register.

**Memorandum of Agreement:** Document that records the terms and conditions agreed upon to resolve the adverse effects of an undertaking on historic properties.

**Programmatic Agreement:** Document that records the terms and conditions agreed upon to govern the implementation of a federal agency program or the resolution of adverse effects when the undertaking is complex, or the adverse effects cannot be fully determined in advance.

**Undertaking:** A project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a federal agency, including those carried out by or on behalf of a federal agency; those carried out with federal financial assistance; and those requiring a federal permit, license or approval.

# Section 106: Responding Successfully to New Challenges

MILFORD WAYNE DONALDSON, FAIA

**S**ection 106 of the National Historic Preservation Act (NHPA) is one of the most important tools in the American historic preservationist's workshop. Without Section 106, tens of thousands of important historic properties would have been lost or badly degraded. The tangible physical evidence of our nation's history would have been compromised.

When Congress created the NHPA to form a national historic preservation program, it included Section 106 to reduce federal impacts on places important to Americans. In the 1950s and 1960s, highway construction and urban renewal were the principal threats to historic resources. Today, new sets of challenges have arisen, and Section 106 remains key to involving organizations and individuals in identifying and resolving these challenges.

Approximately 100,000 Section 106 cases are initiated annually. Most are resolved by agency consultation with the SHPO or THPO. However, the ACHP examines a few thousand each year, and is an active participant in 600 to 800 cases at any given time. Cases that come before the ACHP generally involve complex or controversial issues, have the potential to set precedents, or impact National Historic Landmarks or other iconic places.

Public involvement is a critical element of the Section 106 process and has resulted in better outcomes in countless cases. New challenges continue to surface which can

best be resolved by informed, positive public participation at the earliest stages. Today these major challenges include the following:

- Sustainability, including downsizing or rightsizing of cities and military bases and energy-efficiency standards for historic buildings
- Disaster management such as emergency preparedness and response to natural and man-made disasters
- Large-scale and traditional cultural landscape issues
- Emergence of new historic places such as mid-20th-century architecture
- Emerging energy-generation technologies and transmission corridors

## SUSTAINABILITY

Sustainability has always been an important dimension of the historic preservation movement. The greenest structure is almost invariably the one already built. This also applies to transportation and other forms of infrastructure that support existing communities. Regularly, efforts are made in Section 106 cases to find alternative uses for a historic structure that will avoid demolition. In the case of

[Public participation in the Section 106 process has made a difference in finding alternative uses for Fort Monroe in Hampton, Va. Now a National Monument, the property will be managed by the Commonwealth of Virginia subject to agreements that will ensure the survival of the historic resource while allowing carefully planned new development.](#)

COURTESY OF THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

downsizing government property inventories or shrinking cities such as Detroit and Buffalo, finding new uses becomes an important consideration and a challenge for the preservation community in an era of reduced budgets.

One fairly recent instance where public participation is making a difference in finding alternative uses is at Fort Monroe, Va. A moated, walled fort that played a key role in the Civil War and civil rights history, Fort Monroe is a National Historic Landmark that became surplus to the U.S. Army's needs and was the subject of a Base Realignment and Closure (BRAC) action. Because of the strong public interest and the iconic nature of the resource, this case involved more than 30 formal consulting parties. No longer needed as a military base, the post is undergoing a multipurpose rebirth. President Barack Obama designated a portion of Fort Monroe as a National Monument on November 1, 2011, to be managed by the National Park Service. The balance of the property will be managed by the Commonwealth of

Virginia with covenants and agreements that will assure its survival as a historic resource while allowing carefully planned new development that will contribute to the economic vitality of the region.

Another case that has attracted intense public interest and participation involved the Presidio of San Francisco National Historic Landmark (part of the Golden Gate National Recreation Area) and its steward, the Presidio Trust. The latest issue in a complicated Section 106 process was the update to the Presidio Trust Management Plan for the Main Post area. The historic importance of the site of San Francisco's founding, the Presidio's military history, and the availability of prime real estate in the center of one of the nation's iconic urban areas resulted in unprecedented challenges for the Presidio Trust in its Section 106 consultation. The Section 106 process provided the opportunity for public input and resulted in unique solutions balancing preservation and management needs. The final Section 106 agreement, com-





The historic home of former Confederate States of America President Jefferson Davis in Biloxi, Miss., was heavily damaged by Hurricane Katrina in August 2005. Federal disaster response often triggers the Section 106 review process.

PHOTO COURTESY FEMA

pleted in October 2010, is steering the successful preservation outcome, future use, and interpretation of the property.

### DISASTER MANAGEMENT

Disasters take a toll on historic properties and federal disaster responses have often exacerbated the losses. Dealing with the aftermath of Hurricane Katrina focused attention on the need for an accurate and technologically advanced knowledge of historic properties to assist what are essentially triage preservation efforts in the earliest stages of disaster recovery. Agency efforts to comply with Section 106 regarding the federal response to Katrina included innovative measures to support the development of a more complete inventory of historic properties in these areas in order to improve the communities' ability to prepare for and manage such impacts in the future. They also provided lessons for dealing with future disasters.

### LARGE-SCALE AND TRADITIONAL CULTURAL LANDSCAPES

Nine Mile Canyon, Utah, was another Section 106 case attracting great public interest. Truck traffic relating to energy development projects on a road through

the canyon was degrading prehistoric petroglyphs and endangering archeological sites in culturally sensitive areas of importance to American Indians. The Bureau of Land Management, the responsible federal agency, had invited the Navajo Nation, the Hopi Indian Tribe, the Ute Indian Tribe, and the Paiute Indian Tribe of Utah to join consultations on the government-to-government basis that exists between Indian tribes and the federal government. The National Trust also played a significant advocacy role. With ACHP involvement and oversight, the Section 106 process brought the parties together and led to decisions that safeguarded the area's cultural sites and ensured future monitoring.

An unusual discovery in New York City in 1991 highlighted the fact that listings in the National Register and our contemporary knowledge of richly historic places are far from complete. When the General Services Administration began construction on a new federal building in lower Manhattan, workers discovered hundreds of burials in a colonial-era cemetery whose existence was unknown when work began. A quick effort to determine the significance of the remains grew into an unprecedented discovery of an important chapter from America's past, as the site proved to be a previously unknown cemetery for African Americans. More than 100 organizations were consulting parties to the Section 106 process that ensued. Hundreds of individuals were involved in the effort. The culmination of the saga was the respectful reburial of the discovered remains after scholarly examination, the construction of the needed federal building, and creation of the African Burial Ground National Monument.

## Section 106: The Basics

The NHPA created the Advisory Council on Historic Preservation (ACHP) to administer Section 106. The process stipulates that a project carried out by a federal agency or needing federal assistance or approval (an “undertaking”) must be examined to determine if it poses an “adverse effect” to a property listed in, or eligible for listing in, the National Register of Historic Places. If so, the responsible federal entity *must* attempt to negotiate measures that avoid, minimize, or mitigate adverse effects. Of critical importance, Section 106 and the ACHP give the public a seat at the table when such undertakings may threaten historic properties. It is a vital means for the non-federal community to engage with federal agencies when historic properties are threatened.

The ACHP recognizes that Section 106 is dependent on public involvement and works with federal agencies to find ways to better include the public. The ACHP offers Section 106 training, information, and resources, including the development of web-based training and distance learning. Information is available at [www.achp.gov](http://www.achp.gov), including an informative *Citizen's Guide to Section 106*.



An observer documents a bighorn petroglyph at Nine Mile Canyon, Utah. Section 106 issues regarding the West Tavaputs Plateau Natural Gas Full Field Development Plan focus on how dust from increased truck traffic would impact petroglyphs and archeological sites in the canyon, as well as the cumulative effect on the character of the area through increasing industrialization.

PHOTO COURTESY JERRY D. SPANGLER, COLORADO PLATEAU ARCHAEOLOGICAL ALLIANCE.

Section 106 generally moves in concert with other required federal planning actions, such as National Environmental Policy Act (NEPA) requirements. Unlike NEPA, which focuses on public notification and comment, Section 106 is based upon consultation with involved and impacted parties.

To comply with Section 106, the relevant federal agency must carry out the following four steps in consultation with state historic preservation offices

(SHPOs), tribal historic preservation offices (THPOs) and other consulting parties:

- Initiate the Section 106 process to determine whether it applies to an undertaking.
- Identify potentially affected historic properties.
- Assess impacts on those properties.
- Resolve adverse effects.

Even when no other regulatory process is involved (such as NEPA), Section 106 still applies when historic properties may be affected by an undertaking. The federal agency must complete the process before it makes a final decision on whether to carry out, assist, or approve the undertaking. Therefore, it requires federal decision makers to consider historic preservation issues as an essential early step in project planning. It thus gives grassroots preservationists a voice in efforts to preserve historic properties.

The Section 106 process may quickly reveal that the undertaking poses no adverse effect on any historic property. In fact, the vast majority of undertakings are planned so as to avoid effects to historic properties, making Section

**OF CRITICAL IMPORTANCE, Section 106 and the ACHP give the public a seat at the table when such undertakings may threaten historic properties.**

106 successful from the outset in those cases. In order

to reach that “no adverse effect” conclusion, consultations among affected organizations, groups, or individuals are convened. Failure to consult with these parties, or failure to consult early enough in the fact-gathering process, is a major concern. The need for early and effective consultation is stressed in Section 106 regulations, comments, training, public information, and outreach.

The federal agency involved with making a decision about an undertaking is responsible for conducting Section 106 consultations, as well as making the ultimate decision on how to proceed and how the undertaking is carried out. The ACHP’s role is advisory, as is the role of the SHPO and the THPO.

Section 106 does not require an outcome that puts preservation ahead of other factors that the agency must weigh in reaching a decision, such as cost, safety, demonstrated need in the public interest or protection of other environmental resources.



When GSA began construction on a new federal building in lower Manhattan, workers discovered an unmarked burial site of enslaved and free Africans dating from the 17th and 18th centuries. Following years of Section 106-related work, the construction of the building went forward, the remains were respectfully reburied, and the African Burial Ground National Monument was created.

PHOTO COURTESY ADVISORY COUNCIL ON HISTORIC PRESERVATION.

## SITES FROM THE RECENT PAST

Someone once stated that the difficulty of keeping up with history is that there is more of it every day. So it is with the National Register. Although the criteria for listing specifies that a site normally be at least 50 years old, places can suddenly become historic when associated with events of national importance, as was the case with the World Trade Center in New York City, which became National Register-eligible following the 2001 attack.

Hilliard Homes in Chicago is a modernist masterpiece designed by world renowned Chicago architect Bertrand Goldberg. Significant because of its architecture, the building was listed in the National Register in 1999 despite being less than 50 years old. Completed in 1966—the same year the NHPA was enacted—it was funded by the Department of Housing and Urban Development (HUD). When the structure faced possible demolition because of its deteriorated state in the 1990s, the Chicago Housing Authority and the City of Chicago instead ended up selecting the modernist masterpiece as the first redevelopment project for its massive city-wide transformation plan.

As a result of Section 106 consultation, HUD ensured that the project developer would rehabilitate the building consistent with the Secretary of the Interior's Standards and would seek federal historic rehabilitation tax credits for the project.

## NEW ENERGY TECHNOLOGY

The recent Cape Wind project in Massachusetts is a poster child for issues that arise when emerging energy generation technologies and development overlap with large-scale traditional cultural landscapes. Plans for Cape Wind, the first major offshore wind farm proposed for U.S. coastal waters, called for the project to be located within Nantucket Sound.

The project will affect 34 historic properties, including two National Historic Landmarks (the Nantucket Historic District and the Kennedy Compound), 26 other historic structures or districts that are listed in or eligible for the National Register, and six properties of religious and cultural significance to tribes, including Nantucket Sound, which was determined eligible. Unfortunately, that determination did not take place until late in the Section 106 process.



In the 1990s, the Chicago Housing Authority and the City of Chicago selected the modernist masterpiece Hilliard Homes as the first redevelopment project for its massive citywide transformation plan. As a result of Section 106 review, the project developer was required to rehabilitate the building according to the Secretary Standards and apply for the historic rehabilitation tax credits.

PHOTO COURTESY HOLSTEN REAL ESTATE DEVELOPMENT CORPORATION.

In this case, the Section 106 process was fraught with challenges. The ACHP noted that there was not sufficient early consultation with stakeholders, particularly local Indian tribes. The developer's choice of site was made before Section 106 was fully engaged, limiting opportunities to relocate the project and avoid adverse effects. Further complicating the process was a change in the federal agency responsible for review (from the Army Corps of Engineers to Minerals Management Service), and the developer's reluctance to consider alternative sites. In the end, the consulting parties could not agree on how to resolve the effects of the project on historic sites. In such a case, the ACHP gathers public testimony, often visits sites and investigates the situation firsthand. It issues its findings and recommendations (called "comments") to the head of the federal agency responsible for the final decision. The ACHP did so and submitted comments to the Secretary of the Interior.

The Secretary considered the ACHP's comments when making his decision that the importance of the project going forward and its overall benefits outweighed the negative effects on historic places. The role of the ACHP is advisory, and ultimate decisions must weigh all factors, including preservation—but if Section 106 had been applied earlier in the review process, the outcome may have been more balanced in favor of preservation. One positive outcome for future historic preservation efforts was a decision by the Department of the Interior to proactively analyze what off-shore areas are appropriate for such development before permitting more projects.

## ENCOURAGING PUBLIC PARTICIPATION

Every year, the Section 106 process spares thousands of historic places from destruction or reshapes federal undertakings to benefit preservation. The mere fact that it exists has caused a cultural shift in how federal agencies have gone about their various missions since 1966. Perhaps the most important feature of Section 106 is how it provides a place at the table for local groups and individuals that otherwise would not have a voice in how federal agencies decide the fate of historic properties. A key need as the federal government grapples with these emerging issues is to ensure widespread participation by affected citizens.

While not perfect, and although there are cases where the preservation outcome was not as favorable as the preservation community would prefer, Section 106 is a valuable tool that should be better understood and more widely used by preservation practitioners and the public. FJ

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MILFORD WAYNE DONALDSON, FAIA, is chairman of the Advisory Council on Historic Preservation and California State Historic Preservation Officer. For more information on the ACHP go to [www.achp.gov](http://www.achp.gov).

# Returning Section 106 to Its Populist Roots

DON KLIMA

**W**alk or ride your bike down Chattanooga's Walnut Street Bridge over the Tennessee River, a distinctive linear park and a vital lynchpin in the city's remarkable revitalization, and you will gain a unique appreciation for the value of Section 106 of the National Historic Preservation Act. This 1890 truss bridge, now one of the world's longest pedestrian bridges, would be little more than a memory if Section 106 had not put the brakes on plans by the mayor and highway planners to demolish the bridge following completion of a replacement span. While officials saw no option but to bring it down, committed citizens had another vision and used the Section 106 review process to make their case.

Similar stories can be found throughout the country where Section 106 led to rethinking project plans and saving historic resources. Although limited to federal actions—those carried out, assisted or approved by the federal government—the sweep of Section 106 has been broad. In countless cases the signature process of good faith consultation among stakeholders provided for by Section 106 has helped to better reconcile development plans with preservation values, often resulting in improved projects.

Clearly, Section 106 has played an important role in shaping the legacy of the

modern preservation movement over the past 50 or so years. Looking back over this history, virtually every successful Section 106 case—like the Walnut Street Bridge—has included an indispensable ingredient of active public involvement. In the recently released study *Section 106 of the National Historic Preservation Act: Back to Basics* commissioned by the National Trust, the author, Leslie E. Barras, correctly makes a strong case

**INDEED THERE IS EVIDENCE to suggest that the public struggles to have a meaningful role in the operation of Section 106 today.**

that “the vitality and effectiveness of Section 106 depends on active and engaged preservation advocates and members of the public...”<sup>1</sup>

Given this, one would expect to be able to track over time a growing upward trend of citizen involvement in Section 106 cases, particularly judged against the tens of thousands of projects that have moved through Section 106 review over the years. Unfortunately, this has not been the trend. Indeed there is evidence to suggest that the public struggles to have a meaningful role in the operation of Section 106 today. Barras' research and interviews with state historic preservation officers (SHPOs) and others highlighted the troubling fact that statewide and local preservation advocacy groups and the public are seldom involved in Section 106



Committed preservationists in Chattanooga, Tenn., used the Section 106 process to halt the demolition of the historic Walnut Street Bridge.

PHOTO COURTESY OF DAVE MICHAELS AND HISTORICBRIDGES.ORG

consultations. Why? And, what do we do about it? Answering these questions will be necessary to ensure the continued relevance of Section 106 to the future of the preservation movement.

Those familiar with the daily operation of Section 106 know that the governing regulations (36 CFR Part 800) have traditionally reserved for the SHPO the central role of advising federal agencies on the critical findings in the process, i.e., National Register eligibility, assessment of effects, and resolution of adverse effects. The SHPOs have always been the keystone in the Section 106 arch, fundamental to the operational success of the process. (For projects on tribal lands or affecting properties of religious and cultural importance to federally recognized Indian tribes or Native Hawaiian Organizations, this role is shifted to the tribal historic preservation officer (THPO) under the current regulations.)

Through changes over the years, the Section 106 regulations have always encouraged agencies to involve other interested stakeholders. But in a disturbing trend, agencies have increasingly decided that the course of least resistance to completing Section 106 review is to

consult solely with the SHPO. Practical considerations and workload volume have typically limited the SHPOs' ability to reverse this trend. For agencies, there is little incentive to change this strategy since it continues to deliver outcomes under Section 106. But the net result of this situation is that the public has become further and further removed from decision making in Section 106. Needed systemic changes in the regulations by the Advisory Council are unlikely. There are, however, ample opportunities for greater public involvement in Section 106 if there is a willingness on the part traditional stakeholders to rethink their roles, and on the part of preservation advocates to become more skilled in the use of Section 106.

#### NEED FOR MORE TRAINING

Too often preservationists are not trained or experienced in dealing with the Section 106 regulations, are not familiar with their rights under the regulations, and are left frustrated when they do attempt to participate. Often intimidated by the Advisory Council's regulations, they do not feel like they have the support they need in the process. Training in Section 106 that is currently offered by the Advisory Council or others largely focuses on teaching federal agencies, SHPOs, project proponents, and their consultants how to follow the process. Comparable training for the public has not been available.

Not surprisingly, the need to improve public involvement in Section 106 is among the key recommendations coming out of the *Section 106: Back to Basics* report. One of the best ways to achieve this recommendation is to develop training for preservation advocates that will enable them to effectively navigate the Section

106 process, capitalizing on the potential strengths of Section 106, while avoiding pitfalls that can marginalize public involvement. The pilot workshop sponsored by the National Trust at the 2011 National Preservation Conference in Buffalo, *Harnessing the Power of 106 to Save Historic Places: A Citizen Boot Camp*, is a step in that direction. This hands-on training helps preservation advocates develop techniques to serve as consulting parties in the process, build coalitions with other Section 106 stakeholders, and construct a memorandum of agreement under Section 106 that represents and protects the public interest. This training has the potential to provide preservation organizations an important tool to improve their involvement in Section 106.

### BALANCING THE WORKLOAD

In their unofficial “crossing guard” role under the Section 106 regulations, the SHPOs have accomplished much, holding federal agencies accountable to plan better for how projects affect historic properties, and protecting important heritage values. Faced with agencies often willing to defer to SHPOs on key Section 106 determinations, and concerned that failure to act could mean the needless loss of historic resources, SHPOs have often stepped into the breach, shouldering much of the burden of the Section 106 process. But fulfilling this role has exacerbated a growing Section 106 workload that has seriously strained nationwide SHPO staff resources and budgets.

The consequence of this dynamic is a situation where the federal agencies continue to coast through the process, over-relying on the SHPOs with little or no effort to invite other likely consulting parties to participate. Preservation advo-

cates who do want to participate in a Section 106 review may discover that the federal agency, with the SHPO’s opinion in hand, has little motivation to listen to contrary opinions from the public. The end result is that the public, by default or design, is effectively cut out of the Section 106 process.

There are no magic-bullet solutions to this problem; however, some options might help rebalance the operation of Section 106 while alleviating SHPO workloads. For example, a SHPO could initially advise agencies to identify how they intend to involve the public, and to identify and invite other consulting parties as required under the regulations (36 CFR §§ 800.3(e)-(f)). As appropriate, a SHPO could direct agencies to certified local governments (CLGs). Another option would be to engage the panel of experts designated in each state to serve as the State Review Board in shaping advice to agencies under Section 106. These, and other measures—along with a willingness by the SHPO to “step-aside” so that all consulting parties can be full players—could help change the dynamics of the process in a way that might better enfranchise the public. This approach could point to new and promising directions for how Section 106 might evolve in the future to better recognize that all historic preservation is—and should be—local. FJ

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DON KLIMA served in key leadership positions during his 30-year career at the Advisory Council on Historic Preservation. His management of the Council’s activities under Section 106 helped define the national preservation program. He now serves as president of the Klima Consulting Group, the company he established to help clients navigate the Section 106 process and to provide cultural resource training.

<sup>1</sup> Leslie E. Barras, *Section 106 of the National Historic Preservation Act: Back to Basics* (Washington, D.C.: National Trust for Historic Preservation, 2010), 139.

# The Decision Maker's Guide to Section 106

AMOS J. LOVEDAY, JR.

Shortly after becoming Ohio's historic preservation officer (SHPO), I was invited to speak to a gathering of economic development professionals. With prepared remarks in hand (as I recall the title was "Good for the Purse and Good for the Soul"), I showed up at the appointed time eager to make the case for preservation. In due course the program chair invited me to the podium with the standard introduction—but before stepping away from the microphone added "and, oh, by the way, this is the man who will make your planning life a living hell." The audience's subdued chuckles should have alerted me of what to expect—the torrent of horror stories, most associated with Section 106 experiences, that followed.

Over the next 15 years, part spent as a SHPO, part spent in the Federal Communications Commission (FCC) preservation office, and the remainder as a law firm staff member and business owner, I often encountered similar complaints—expressed more or less artfully. Simply put, people who need to comply with preservation rules often see them as a form of torture. Indeed preservationists sometimes even seem to agree. Robert Stipe, for example, described preservation rules and laws as "often highly technical, sometimes to the point of unintelligibility," and Donovan Rypkema opined that "design standards may seem arbitrary, erratic, and sometimes downright silly."<sup>1</sup>

In fact, preservation regulations are no more difficult than rules in other areas that

my audiences must comply with. So, why was it that preservation was so frequently regarded as a trip through hell?

There are several reasons, not the least of which is the complexity that Stipe alluded to. While preservation rules are seen as complicated, I decided the real culprit lay in how they are presented. Most educational opportunities around preservation regulations are directed at Cultural Resource Management professionals, agency preservation professionals, or citizen advocates. Business and government decision makers who had little need for the level of technical information that the typical Section 106 course offers, received minimal attention. They had, as it were, been left to fend for themselves in a world of experts and activists.

What these decision makers needed, I soon concluded, was an orientation that provided sufficient background for them to determine when preservation obligations existed, a summary explanation of how preservation compliance worked, guidance on how to organize resources for efficient compliance, and practical suggestions on how to avoid or minimize the unpleasantness that can arise during the 106 process. Accordingly, I began to replace "Good for the Soul and Good for the Purse" in business circles with "The Decision Makers' Guide," a presentation tailored for non-preservationists who in course of doing their jobs were responsible for overseeing compliance with Section 106. What follows is a summary of the "guide," and a sidebar

describing programs that delivered it to staff in two specific industries—public safety and pipelines.

## FIVE MYTHS

As a starting point, project managers should assume that obligations exist to comply with preservation rules for any project that alters the built environment and requires a government (federal, state or local) permit, license or funding. Put differently, the smart project manager assumes there will be a need for preservation compliance until such obligation is ruled out.

Next, project managers should be aware of and avoid certain misconceptions, myths if you will, about Section 106. There are many, but five most often lead project managers astray.

1. Perhaps the most common myth, and one that preservationists often encourage, is that Section 106 is really just procedural, or that it does not presuppose any particular outcome. The reality is that, while Section 106 does not require preservation of sites, it can impose substantial procedural delays and additional costs on an applicant or organization that does not accept the preferred preservation outcome. As Leslie Barras pointed out in her recent report for the National Trust (see [www.preservationnation.org/106](http://www.preservationnation.org/106)), Section 106 (and I would argue other preservation rules) are really “thumbs on the scales” that use procedure to influence desired outcomes.<sup>2</sup>

2. Another myth is that federal Section 106 and state/local rules are independent of each other. Again, while technically correct, in practice, this simply is not the case! Common definitions, shared administration, and on occasion actual incorporation

of references to the National Register of Historic Places in state and local legislation can mean that decisions made in Section 106 contexts have state and local implications and vice versa. So, for example, a determination made under Section 106 that a previously unevaluated property is eligible for the National Register could bring state and local preservation laws into play. Since local laws often impose more obligations than Section 106, these links can have unanticipated and often financially significant consequences.<sup>3</sup>

3. A third myth implies that preservation is broadly opposed to change and, by extension, that Section 106 is a tool used to block progress. In most instances nothing could be further from the truth. Preservation is about controlling and accommodating change, and the entire network of preservation rules, beginning with Section 106, is designed to accomplish that end. Understand what kind of change preservationists are willing to accept, be prepared to work for compromise, and preservation will cease to be a significant obstacle in most instances.

**PRESERVATION IS ABOUT controlling and accommodating change, and the entire network of preservation rules, beginning with Section 106, is designed to accomplish that end.**

4. In many problem cases I have worked on, project managers have viewed preservation as a tool for other agendas—the “darling of the NIMBYs” as one frustrated executive put it. As with several of the other myths, there is an element of truth here, and, yes, preservation actions often fuel that perception.<sup>4</sup> In truth, preservation is most likely to be used for other agendas when the project manager cedes control. Well planned and active engagement by project managers generally prevents Section 106 and other preservation processes from being hijacked.

## The FCC's Outreach to Decision Makers

The Federal Communications Commission, which is involved in 10,000-12,000 Section 106 cases per year (most involving communication towers), has made a concerted effort to insure that its licensees are aware of and have tools that facilitate compliance. The Nationwide Programmatic and the Collocation Agreements ([wireless.fcc.gov/siting/npa.html](http://wireless.fcc.gov/siting/npa.html)) and the Tower Construction Notification System, a tool that facilitates Tribal comments, ([wireless.fcc.gov/outreach/index.htm?job=tower\\_notification](http://wireless.fcc.gov/outreach/index.htm?job=tower_notification)) are perhaps the best known of these tools.

While the practices and procedures articulated in these documents have worked well for the commercial wireless industry, they have been less successful with entities such as public safety agencies and pipeline companies, whose communication undertakings are an ancillary part of their overall business or mission. When the commission discovered that applicants in these industries were not fully aware of Section 106 responsibilities, it launched an educational outreach effort designed to provide their project managers with the information they needed for compliance.

In particular, the commission wanted it clearly understood that the holder of the FCC license was responsible for compliance in spite of claims to the contrary from suppliers and contractors. The commission also wanted to provide the project managers with an understanding of the FCC and preservation rules sufficiently complete to allow them to determine when compliance was required and to permit effective supervision of the specialist often hired to do much of the work. The intent was not simply to provide the standard Section 106 training, but to tailor the outreach to the industry and those within it who hire and supervise Section 106 contractors. To accomplish this end it encouraged educational activities that explained Section 106 and provided guidance on how to find, manage, and evaluate the work of preservation specialists.

The seminars and follow-up activities that resulted reached about 700 people in decision making positions within major pipeline companies, public safety communications equipment manufacturers, and public safety agencies, plus more than 100 Cultural Resource Management professionals who service or wanted to service public safety entities. While it is too soon to evaluate the success of the initiative (the sessions were conducted during the spring and summer of 2011), post seminar contacts indicate that they clearly raised awareness of Section 106 and historic preservation among people in both industries who are in a position to protect historic assets.

To get copies of printed materials for the public safety seminars, send an email to [ajloveday@AHLhistory.com](mailto:ajloveday@AHLhistory.com)

5. The fifth myth is that Section 106 compliance is expensive. It need not be. If NPS statistics are to be believed, a relatively small number of 106 reviews actually find National Register-eligible sites or adverse effects.<sup>5</sup> Even when there is an adverse effect, mitigation costs are seldom more than a small fraction of a project's budget when preservation is considered honestly and done early in the project's planning. In virtually every instance the costs associated with any delay that comes from poor management of or resisting Section 106 are far greater than the costs associated with timely compliance.

### THE BARE ESSENTIALS

Once the myths are dealt with, it is important that project managers understand why and how federal preservation policy works. Here two points are essential. First, project managers need to understand their projects are subject to Section 106 because of the "federal handle." Agencies that are required by the National Historic Preservation Act to "take into account" historic sites are allowed to and frequently do transfer part of their responsibility to applicants receiving the permit or funding. Consequently businesses often are swept into the agency's compliance process.

Second, project managers should be aware that, while Section 106 imposes similar compliance requirements for each undertaking, agency procedures often differ. More will be said of this presently, but the point cannot be overstated, since it often causes problems for firms that deal with new agencies. A pipeline company accustomed to working with Federal Energy Regulatory Commission (FERC) and Army Corps of Engineers Section 106 procedures, for instance, will find that FCC procedures are very different when it seeks licenses for wireless communications.

### GETTING THE JOB DONE OR WORKING WITH CONTRACTORS

Once it is established that a preservation obligation exists, the project manager should turn to experienced people to define and map out those obligations. For entities that expect many Section 106 cases involving the same agencies, it may be effective to employ in-house professionals to do the work. Most, however, find it more efficient to rely on contractors.

The good news is that there is a sizable community of contractors, often called Cultural Resource Management (CRM) contractors, who specialize in Section 106 compliance work. Many state historic preservation offices and some industry trade associations keep contractor lists. Another useful source is the American Cultural Resources Association (ACRA), a CRM trade group that maintains an excellent website, which lists its members by state and specialty, and also provides rate information and a code of ethics that, among other things, defines its members' responsibility to clients.<sup>6</sup>

The bad news is that "buyer beware" should be the guiding principle in working with CRM contractors.

It goes without saying that references should be checked, work samples reviewed, and, for sensitive projects, interviews conducted. At a minimum a CRM contractor (or a subcontractor working for a general environmental contractor) should:

1. have the qualifications required by the Secretary of the Interior for certification. (see [http://www.nps.gov/history/local-law/arch\\_stnds\\_9.htm](http://www.nps.gov/history/local-law/arch_stnds_9.htm));
2. be certified in the subject area(s) the project requires. Simply put, archeologists cannot do the work of a historian and vice versa;

3. have experience working in the state and preferably the area in which the project is located;

4. have worked with the agency that is requiring Section 106 review; and

5. be aware of preservation “politics” that may affect the project.

The CRM contractor, in other words, should be familiar with the likely consulting parties, be knowledgeable about issues that have arisen with similar projects, be aware of preservation sensitivities, and be prepared to discuss these with the project manager during the selection process.

**IN VIRTUALLY EVERY INSTANCE the costs associated with any delay that comes from poor management of or resisting Section 106 are far greater than the costs associated with timely compliance.**

It also goes without saying that the relationship with the contractor should be spelled out in a written agreement. Although agency requirements and varying project scopes make it difficult to describe a “generic” agreement, a typical agreement will specify that the contractor:

1. Identify the Area of Potential Effect (APE)—the geographic area in which historic sites need to be identified and the project’s impact evaluated.

2. Identify and invite consulting parties to comment on the project and then evaluate their suggestions. This is a critical part of any agreement. While there is a natural tendency to avoid critics (and most consulting parties will be critics), failure to identify and maintain proof that consulting parties have been given an opportunity to comment is one of the procedural steps that can delay a project—and might turn into the one that opponents use as a delaying tactic.

3. Identify sites within the APE that are listed in or eligible for the National

Register of Historic Places. There is a tendency among some project managers to encourage CRM contractors to under-identify eligible sites. This is a mistake! Typically when this happens, SHPOs will require that the work be revisited. Once the SHPO requires additional work, the procedural clocks in many instances are restarted, costing time.

4. Determine whether adverse effects exist. This is an important provision. Some CRM contractors will identify sites they believe to be eligible and expect the SHPO to determine if effects will occur. Many SHPOs

will either send the work back to the contractor or lay the report aside until they have time to do the additional work.

Either way the project can be delayed. Moreover, SHPOs, when left on their own, will usually overestimate adverse effects, which can increase mitigation costs.

5. Suggest strategies for resolving adverse effects if adverse effects are found.

6. Develop a memorandum of agreement if needed.

7. Complete reports required by the state historic preservation office, the agency, and the Advisory Council.

8. Confidentiality may be required depending on the type of project and the business environment. Unless this is made clear from the beginning, CRM staff frequently will feel under no obligation to protect business information. On several occasions I have discovered consultants sharing confidential information about clients’ plans with SHPO staff and even with the clients’ competitors.

9. Establish points at which the project manager will review the contractor’s work. It is not possible to overstate how important

it is to review CRM contractors' work—both the reports to be submitted and communications with the SHPO and agency.

Accurate reports are particularly important since SHPO and agency decisions are based on the written record. If that record is inadequate or incomplete, the work will need to be redone, often causing delays.

The “dirty little secret” is that many CRM reports are poorly done. Hence I advise anyone employing CRM contractors to review reports before submitting them to the SHPO or agency. Insisting on this step reduces mistakes and delays from work needing to be redone. Often project managers shy away from doing reviews, feeling they have limited understanding of the process. However they, or a designee, can spot common problems such as inappropriate boilerplate language, bad proofreading, poor photographs/maps, and inadequate fact checking. Any or all of these can indicate broader problems that should be addressed.

Finally, the project manager should keep good records. Section 106 and many state and local rules are designed to allow persons who do not agree to easily challenge conclusions at any stage. In most instances the challenges rely on procedural grounds, so it is particularly important to ensure that a complete record is kept.

## CONCLUSION

In summary the project managers should *integrate* preservation into their planning early; have an overall *understanding* of Section 106 and related preservation requirements; *employ* qualified people to do compliance work; *review* the work those people do; and keep good *records*. If one follows these steps, preservation in

general, and Section 106 in particular, need not be a trip through Hades. **FJ**

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- 1 Bradford J. White, and Paul W. Edmondson, *Procedural Due Process in Plain English: A Guide for Preservation Commissions* (Washington, D.C.: The National Trust for Historic Preservation, 2004), 1. Donovan D. Rypkema, *The Economics of Historic Preservation: A Community Leader's Guide*, Second edition. (Washington, D.C.: National Trust for Historic Preservation, 2005), 98.
- 2 Leslie E. Barras, *Section 106 of the National Historic Preservation Act: Back to Basics* (Washington, D.C.: National Trust for Historic Preservation, 2010), ii, 29.
- 3 Anyone who doubts such linkage exists or wants to see the extent should look at the Lincoln Place Apartments Case in Venice, Calif. There a determination of National Register eligibility (which was later rejected by NPS) triggered both state and local rules and years of appeals. For an overview of the case and an insight into how rules interlace see Committee on Resources U.S. House of Representatives One Hundred Eighth Congress First Session, *Reauthorization of The Advisory Council On Historic Preservation and Private Property Protection Under The National Historic Preservation Act, Oversight Hearing June 3, 2003* (Washington, D. C.: U.S. Government Printing Office, 2003), 22-24. The online version can be seen at <http://www.gpo.gov/fdsys/pkg/CHRG-108hrg87420/html/CHRG-108hrg87420.htm> (accessed October 3, 2011).
- 4 William E. Schmickle, *The Politics of Historic Districts: A Primer for Grassroots Preservation* (Lanham, MD: AltaMira Press, 2007), 9. For example, William Schmickle observed historic districts “are designated for any number of economic and social advantages may in fact have little to do with genuine preservation.”
- 5 See the following documents produced by the National Park Service, “*Historic Preservation Fund Grants to States Program Area Histories FY 1969 Through FY 2005, Program History-Review and Compliance*,” dated March 3, 2006, and “*Historic Preservation Fund Grants to States FY 2005 Preliminary Data End-of-Year Report Review and Compliance Program Area*,” also dated March 3, 2006.
- 6 American Cultural Resources Association, ACRA, <http://acra-crm.org/> (accessed October 10, 2011). Lists of contractors are often posted on state historic preservation office websites. The most efficient way to find these lists is to select the state on the NCSHPO website and then search for the consultant list. See National Conference of State Historic Preservation Officers, NCSHPO, <http://www.ncshpo.org/> (accessed October 10, 2011).

# Sustaining Section 106 into the 21st Century: GSA's Perspective

BETH L. SAVAGE

In 2010, the National Trust for Historic Preservation issued a *Section 106 Back to Basics* report which identified the General Services Administration (GSA) as setting “the gold standard” in its sophistication and commitment to preservation through staffing and planning. GSA was recognized for transforming its approach from dilatory compliance to being “exemplary in its planning to protect and maintain historic properties.”<sup>1</sup> Yet for all of the time, effort, and resources invested in establishing effective preservation policies, processes, and personnel, GSA’s compliance workload has become, in many ways, more burdensome, as the 106 compliance net is stretched to encompass more buildings, larger contexts, and more extensive analysis at a time of increasing federal austerity and heightened concern with regulatory constraints. Many 106 stakeholders have come to assume that the federal government has deep pockets and can support mitigation measures unrelated, or disproportionate, to the impact of anticipated effects.

**GSA TAKES PRIDE in a public building legacy that includes custom houses, courthouses, post offices, border stations, and federal agency offices across the United States and its territories.**

A risk of widening the compliance net too much is the regulatory backlash evident in recent legislative proposals that could exempt many federal activities from

compliance with the National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA). How can federal and non-federal preservationists collaborate to be a step ahead of the changing federal environment, working together to foster effective and efficient compliance where all stakeholders are heard and the best possible preservation outcomes are achieved while preventing regulatory backlash?

Historic buildings contribute significantly to the variety of spaces and settings GSA’s Public Building Service has to offer its customers. GSA takes pride in a public building legacy that includes custom houses, courthouses, post offices, border stations, and federal agency offices across the United States and its territories. More than one-fourth of GSA’s inventory, or 478 buildings, is listed in or eligible for the National Register of Historic Places.

Over the past three decades, GSA’s stewardship program has evolved in step with a maturing preservation profession worldwide. The emergence of the profession enabled GSA to raise its professional standards as the supply of experienced preservation design, planning, and conservation specialists expanded to meet the needs of federal, state and local agencies implementing the NHPA and pro-



GSA is responsible for a large inventory of mid-century buildings. It has carried out a modern-era context study and has nominated a substantial number of significant buildings constructed in the 1950s, 60s and 70s to the National Register, including the boldly-cantilevered U.S. tax court building in Washington, D.C., designed by Victor Lundy.

PHOTO COURTESY CAROL M. HIGHSMITH PHOTOGRAPHY, INC./GSA

grams and regulations spurred by the Act. GSA project teams now benefit from direct access to a nationwide network of subject matter experts whose abilities include negotiating and problem-solving skills, as well as a sophisticated understanding of preservation theory and practice.

GSA's federal preservation officer oversees a national preservation program that supports 11 regional preservation officers proximate to where projects and actions affecting historic properties are initiated and carried out. Through monthly conference calls, interactive annual training, and "on call" support, GSA has had an opportunity to identify emerging trends and collaborate with its regional programs on response strategies.

GSA regional preservation program staff interact regularly with project managers, facilities staff, leasing specialists,

asset managers, and professionals who handle disposal of unneeded or excess federal real property, cultivating collaborative relationships and raising the expertise of employees whose work may affect historic buildings.

Leadership as well as frontline employees share an awareness of GSA's ability to contribute to the vitality of places where it does business and its global responsibility to conserve finite natural resources. This broadened awareness and collaborative organizational philosophy have contributed to many Section 106 triumphs. By and large, the process allows community concerns to be heard and seriously considered. A recent example is GSA's historic border inspection station in San Ysidro, Calif. In response to community interest, new inspection lanes needed to improve traffic



GSA renovated the Wallace F. Bennett Federal Building in Salt Lake City in 2001, upgrading the seismic design features to ensure a safe, durable workplace. Correcting performance problems of some mid-century buildings can be a challenge. In this case, an energy-efficient curtain wall system was added to allow more natural light to enter the building.

PHOTOS COURTESY GSA

flow were reconfigured so the picturesque Spanish Colonial Revival custom house could be reused as a welcome center.

Section 106 consultation fosters cooperative relationships that bring federal, state, and local governments together for better preservation outcomes. In Mobile, Ala., a small Greyhound bus station, the site of mob violence that galvanized the civil rights movement in 1961, is now part of GSA's expanded federal courthouse. The station reopened to the public in 2011 as the Freedom Riders Museum, under a long-term lease to the State of Alabama.

At the St. Elizabeth's campus in Washington, D.C., Section 106 consultation played a major part in maximizing the reuse of historic buildings in the property's redevelopment as the consolidated headquarters of the Department of Homeland Security. Aided by cooperation between GSA and the District of Columbia, along with cutting-edge technology that simulated design and mitigation alternatives, significant new

construction has been carefully sited and configured to preserve a treasured cultural landscape.

In Grand Junction, Colo., Section 106 consultation led to cooperation between GSA and the city to create energy-saving opportunities enabling GSA to maintain a federal presence and preserve the historic character of the Wayne Aspinall U.S. Courthouse, with the target of becoming GSA's first net zero building, one that generates as much energy as it uses.

Being an effective preservation voice within a mission-focused organization requires a strong grasp of GSA's internal business and customer agency requirements to advocate for alternatives that meet those federal needs as well as preservation goals. It requires access to expertise for generating preservation options and effective communication to build on past successes. Building internal support often requires proving that mission goals can be accomplished through preservation alternatives that may not have emerged

in a project's initial planning or may not appear realistic, compared to more familiar approaches. Sustained stewardship success depends on persistent vigilance and continual communication with agency leadership and encouraging staff and client agencies to consider flexible approaches for meeting current standards and agency space requirements. Given the constant concern with public scrutiny that is sometimes rooted in skepticism or hostility toward the federal government, GSA preservationists must negotiate solutions that are defensible both within and outside the agency, solutions that are reasonable long-term investments for American taxpayers.

For the foreseeable future, preservationists must learn to adapt to a new federal paradigm defined by economic austerity and the common goals of sustainability, wise use of resources, and streamlining work processes to do more with less. It will also require prioritizing among competing stewardship goals to make the best use of limited federal resources, working toward consensus on what matters most.

### **RETHINKING EFFECTS ON SURROUNDING BUILDINGS**

One obstacle to achieving these important goals is a trend toward casting a very wide compliance net. This approach assumes that all alterations within a historic area, including changes to non-historic structures, will have adverse effects on surrounding historic buildings, whether that is the case or not. As a result, SHPOs will sometimes push for costly documentation of historic buildings even where effects are negligible. This tendency diverts limited resources to interpretation disproportionate to a project's impact. A related source of

concern is a trend toward widening the area of potential effects (APE) to include all historic buildings within sight of the government-controlled property, regardless of the type or extent of the undertaking. As responsible federal stewards, GSA needs to advocate reasonable APEs that accurately reflect anticipated effects and degrees of impact.

### **ASSESSING MID-CENTURY BUILDINGS**

Modern-era buildings present a special challenge because major alterations are often necessary to address their performance deficiencies. Changes should be determined adverse only when they will affect character-defining qualities of a bona fide historic building or district, and mitigation should be proportionate to the project's impact.

Another obstacle to effective compliance is widely varying professional judgment on eligibility assessments for buildings of the recent past. Increasingly, GSA is confounded by the wide range of opinions on the eligibility of its modern buildings, which run the gamut from "why would you waste my time assessing it at this young age" to rejecting findings of non-eligibility by experts grounded in the application of criteria exception G—which stipulates that a property achieving significance within the past 50 years is eligible for the National Register if it is of exceptional importance. Many of these opinions completely disregard the age of the building and broadly stretch interpretations of what constitutes the necessary threshold of exceptional significance under this criteria exception. The eligibility standards for buildings of the recent past have been widely debated for some time and the debate continues.<sup>2</sup>

Because many modern-era federal office buildings stood out at the time of their construction as the largest, most differentiated, or most incongruous building on Main Street, the factors of size and differentiation from surrounding buildings have come to

point to an original intent of shared federal and state responsibility.

To be proactive on evaluating its own large mid-century building inventory, in 2003 GSA commissioned a modern-era context study and developed a tool

for assessing the eligibility of GSA buildings constructed during the 50s, 60s and 70s.

It has nominated

a substantial number of exceptionally significant modern-era buildings to the National Register and has a strong pool of internal peer professionals and consultant experts specializing in buildings of the recent past to turn to for initial and in-depth eligibility assessments.

GSA's mid-century modern federal office buildings also present major sustainability and investment challenges. On one hand, because of their large amount of square footage and workspace layout flexibility, modern-era buildings are inherently favored for retention and reinvestment. But improving their performance to meet current standards can require disproportionate investment that limits the availability of reinvestment funds for GSA's smaller monumental historic buildings. The tradeoff of setting a high preservation standard for modern-era buildings is above-market reinvestment costs that reduce the pool of funding for needed rehabilitation and restoration of character-defining features in GSA's older historic buildings—buildings

**PRESERVATIONISTS MUST LEARN to adapt to a new federal paradigm defined by economic austerity and the common goals of sustainability, wise use of resources, and streamlining work processes.**

be regarded as eligibility triggering values. An assumption that large, non-contextual buildings inherently had a major impact on their environments and are therefore all significant makes preservationists appear extreme and indiscriminate by taking a position in which virtually all federal buildings would be treated as historic. Ironically, when these same types of buildings were first built, they were viewed as intrusions in otherwise historic areas. Sweeping judgments of universal National Register-eligibility for modern federal buildings provide fodder to the criticism that if everything is significant, then nothing is significant. To remain credible, preservationists must be discerning in their collective significance assessments of large classes of resources within their appropriate contexts, whether national, state or local.

A byproduct of inadequate expertise and organizational support among some federal agencies has been reliance upon compliance oversight agencies, particularly state historic preservation officers (SHPOs), to direct the consultation process. In response, many SHPOs have assumed primary responsibility for making eligibility and effect determinations and for crafting agreement documents and mitigation terms. However, National Historic Preservation Act provisions clearly

[Thanks to early and ongoing public consultation and concerted effort on GSA's part to explore alternatives, the U.S. border inspection facility in San Ysidro, Calif., will expand to accommodate greatly increased traffic volume while preserving the picturesque custom house as a visitor's center.](#)

PHOTO COURTESY GSA



already at a disadvantage competing for project funds because they cannot generate the rental revenues of the larger more modern buildings. Practical solutions for improving the performance of GSA's mid-century federal buildings will help to ensure that reinvestment funds are also available to keep the government's monumental public building legacy viable.

### REWARDING STRONG COMPLIANCE RECORDS

A third obstacle to cost-conscious compliance is the insufficient benefits for agencies who strive to comply with the spirit, not just the letter, of the law. Rather than simplifying compliance by the book for agencies with strong compliance track records, increasing emphasis is placed on programmatic agreements, program alternatives, and other special procedures requiring extensive negotiation and administrative effort. It is difficult for federal agencies to justify an investment in expertise, research, or design alternatives on the basis that proactive compliance saves time and money, if it isn't necessarily so. An alternative is an increase in agencies seeking legislative exemptions for individual federal actions, and, in time, for broader categories of federal actions, as pressure to seek legislative relief continues.

For Section 106 to endure as a meaningful federal process, agencies need incentives other than the threat of litigation to invest agency resources in compliance programs, education, and expertise. Above all, the consultation process needs to benefit agencies that go the extra mile to integrate stewardship into their business practices. The 106 process should be streamlined to allow federal agency personnel, federal preservation officers, and others meeting DOI professional criteria

to make appropriate professional judgments on eligibility and effect. The level of effort required for routine compliance should reflect an agency's compliance track record.

Federal and nonfederal preservationists have a shared interest in a 106 process that promotes preservation. Toward that end, GSA has made an earnest effort to build and sustain a well-integrated preservation program. GSA invites fellow preservationists in state programs and communities across the nation to participate in the process and work with it to bring about positive preservation outcomes. American taxpayers and communities large and small benefit when consulting parties come to the table in good faith to help the government meet all of its obligations. **FJ**

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- 1 National awards recognizing GSA policy and process achievements include the 2002 National Trust for Historic Preservation Main Street Leadership Award for Civic Leadership; the 2003 National Trust for Historic Preservation John H. Chafee Trustee's Award for Outstanding Achievement in Public Policy, for GSA's Legacy Vision; a 2004 Presidential Citation from the Association for Preservation Technology International for GSA's *wise management and the encouragement of creative design that retains the historic character of the nation's built heritage while meeting contemporary codes and standards and creating exemplary workplaces*;<sup>1</sup> the 2008 National Trust for Historic Preservation Honor Award for GSA's Modern-Era Buildings Initiative; the 2010 American Institute of Architects Thomas Jefferson Award to Chief Architect Les. Shepherd for Design Excellence in Public and Government Architecture; and the 2011 University of Notre Dame School of Architecture Henry Hope Reed Award to GSA Public Buildings Service Commissioner Robert A. Peck for *Commitment to creating and preserving public architecture*.
- 2 In 1995, the National Park Service hosted its first Preserving the Recent Past conference, followed by Preserving the Recent Past II in 2000, the Fall 2005 issue of *Forum Journal*, Preservationists Debate the Recent Past, and this issue on Section 106.

# Anticipatory Demolition: Tool for Protection or Paper Tiger?

ANDREA C. FERSTER

**P**icture this real-life situation: A city agency embarks on a project to redevelop a city-owned parcel of land that is the site of its former hockey arena, which is eligible for listing in the National Register. The first step in the city's redevelopment plans is to demolish the historic hockey arena in order to construct a conventional linear street grid on the site using funding from the Federal Highway Administration (FHWA). The city informs the FHWA of its plans to immediately move forward with demolition of the historic arena using "non-federal" funds. Despite pleas from preservation advocates, the FHWA refuses to warn the city to refrain from demolishing the arena until the FHWA completes the future reviews and consultations that will be mandated by Section 106 of the National Historic Preservation Act (NHPA).

Following demolition of the arena, the city applies for federal funding for the street grid improvements, and argues that the undertaking will have no effect on historic properties (because the historic arena has already been demolished).

This chutzpah maneuver—called "anticipatory demolition"—is the historic preservation equivalent of killing your parents and asking for mercy because you are an orphan. Anticipatory demolition occurs when an applicant or a potential

applicant for a federal loan, loan guarantee, permit, license, or other assistance has intentionally and significantly adversely affected a historic property with the intent of avoiding the requirements of Section 106 of the NHPA.<sup>1</sup> Section 110(k) of the NHPA, enacted by Congress in 1992, penalizes anticipatory demolition by specifically empowering, and even encouraging, agencies to deny the grant of federal assistance or approval.<sup>2</sup>

However, there is little evidence that this draconian penalty has had an impact in actually preventing anticipatory demolition. According to the recent report on Section 106 issued by the National Trust for Historic Preservation, failure to prevent anticipatory demolition of

**THIS CHUTZPAH MANEUVER**—called "anticipatory demolition"—is the historic preservation equivalent of killing your parents and asking for mercy because you are an orphan.

historic properties is a weakness in federal agency compliance with Section 106.<sup>3</sup> The Advisory Council on Historic Preservation (ACHP), which is the independent federal agency charged with implementation and oversight of Section 106, has sent out 40 formal letters to agencies regarding Section 110(k) issues or consultation between 2007 and 2011.<sup>4</sup> And yet, in the nearly 20 years since the passage of Section 110(k), the harsh penalty for intentional anticipatory demolition has rarely been invoked.

## STATUTORY AND ADMINISTRATIVE POLICIES CONCERNING ANTICIPATORY DEMOLITION

Anticipatory demolition was identified as a growing problem in 1987 by the ACHP. To address this problem, the ACHP adopted a “Policy Statement on Anticipatory Demolition” on June 22, 1987. This policy statement was premised on the specific finding that “potential applicants for federal assistance or permits have sometimes demolished historic properties before, or in the early stages of, applying for such assistance or permits, apparently in an effort to avoid review under Section 106 of the National Historic Preservation Act.”<sup>5</sup> Among other things, the policy statement directed federal agencies to “ensure that anticipatory demolition does

such assistance despite the adverse effect created or permitted by the applicant.”<sup>6</sup>

The ACHP’s regulations specify the standards and procedures for determining whether the statutory penalty for anticipatory demolition will be imposed. Under these regulations, “[w]hen an agency official determines, based on the actions of an applicant, that section 110(k) is applicable, and that circumstances may justify granting the assistance, the agency official shall notify the Council and provide documentation specifying the circumstances under which the adverse effects to the historic property occurred and the degree of damage to the integrity of the property.”<sup>7</sup>

The 1992 amendments to the NHPA also direct the Secretary of the Interior, in consultation with the ACHP, to “promulgate guidelines for Federal agency responsibilities under section 110 of this title.”<sup>8</sup> Like the ACHP’s 1987

### IN THE NEARLY 20 years since the passage of Section 110(k), the harsh penalty for intentional anticipatory demolition has rarely been invoked.

not occur in connection with projects that they undertake, and do everything feasible to discourage it with respect to projects in which federal assistance or permits may be directly or indirectly involved.”

In 1992 Congress amended the NHPA to specifically empower and encourage agencies to penalize anticipatory demolition. As enacted, Section 110(k) requires each federal agency to ensure that the agency will not grant any license or assistance to “an applicant who, with intent to avoid the requirements of section 106, has intentionally significantly adversely affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting

policy statement, the Secretary’s Section 110 Guidance focuses on “[a]voidance of anticipatory demolition.”<sup>9</sup> This Guidance specifically directs federal agencies “to establish procedures to warn applicants and potential applicants that anticipatory demolition of a historic property may result in the loss of federal assistance, license or permit, or approval for a proposed undertaking.”<sup>10</sup> The ACHP’s regulations adopt these guidelines.<sup>11</sup>

## INEFFECTIVE DETERRENT

An application for a federal permit or assistance need not be pending at the time of the demolition in order to later invoke Section 110(k)’s penalty. Instead, the key issue is whether the potential applicant intended to avoid future Section 106 review by allowing or causing the demolition to occur prior to filing the application.

However, several courts have held that an action to enforce Section 110(k) is not “ripe” for judicial review until at a minimum, an actual application for a federal permit or assistance is submitted, even if the demolition is threatened prior to that time.<sup>12</sup> These rulings signify that Section 110(k) cannot be used as a legal tool to prevent destructive actions by potential applicants who demolish historic properties prior to filing an application for a federal license or funding. Instead, Section 110(k) is an after-the-fact penalty, designed to deter but not prevent anticipatory demolition.

Also undermining the effectiveness of Section 110(k) is the fact that the statute sets a relatively high bar for a finding of anticipatory demolition—intentional destruction of a historic property to avoid Section 106—and the penalty is so draconian that agencies are reluctant to invoke it. So far, the ACHP is aware of only one agency—the U.S. Army Corps of Engineers—that has ever utilized the process set forth in the Section 106 regulations to make a formal finding of intentional anticipatory demolition.<sup>13</sup>

That one case, however, is very instructive. The case involved the demolition and dismantling of four historic Hulett iron ore unloaders in 1999 and 2000 by the Port Authority of Cleveland, which were located immediately adjacent to an area that the Port Authority planned to seek a dredging permit for from the Army Corps.<sup>14</sup> While the court held that the issue of whether unlawful anticipatory demolition had occurred must await the filing of a future dredging permit application, when such an application was filed by the Port Authority five years later, the Army Corps itself concluded that unlawful anticipatory demolition *had indeed previously* occurred.<sup>15</sup> As of this writing, the Port Authority has still

not received that dredging permit, because of the anticipatory demolition actions it took more than a decade ago.

At least one court has indicated that an agency’s finding that a potential applicant’s anticipatory demolition is not “intentional” will be upheld if there is any independent reason to demolish the historic property.<sup>16</sup> This arguably misinterprets the statute, which does not indicate that the “sole” intent of the demolition must be to avoid the requirements of Section 106.<sup>17</sup>

Rather, applicants that engage in anticipatory demolition typically do so because they perceive Section 106 as thwarting or obstructing their independent and often preexisting plans to demolish the historic property. If a potential applicant for federal funding is aware of the need for federal approval or funding at the time the property is demolished, the demolition should be considered intentional regardless of whether the plan to demolish the historic property predated the potential applicant’s awareness of the need for federal approval or assistance.

#### **IS SECTION 110(K) A PAPER TIGER?**

The ACHP’s 1987 Policy Statement, which has never been rescinded, as well as the Secretary’s Section 110 Guidelines do make clear that federal agencies can and should take affirmative steps to discourage anticipatory demolition by potential applicants. This includes, if appropriate, issuing individual warnings when agencies are made aware that a potential applicant intends to demolish a historic property prior to applying for a federal permit or funds.

However, very few agencies have established procedures for warning potential applicants as directed by the Secretary’s Section 110 Guidelines. Instead, the burden of enforcing Section 110(k) is often left to the preservation advocacy groups,

who typically write letters and sometimes even threaten litigation, warning entities who intend to apply for future federal permits or funds concerning the risks of going forward with anticipatory demolition of a historic property.

A few agencies include some general information about anticipatory demolition in their policies or websites, but this information rarely tracks the explicit warning to applicants and potential applicants recommended by the Secretary's Section 110 Guidelines.<sup>18</sup> One exception is the U.S. Department of Housing and Urban Development (HUD), whose website cautions that "A potential HUD grant recipient who engages in anticipatory demolition

anticipatory demolition."<sup>22</sup> Ironically, inaction by federal agencies prior to the demolition can then allow an applicant to evade any penalty for its anticipatory demolition under Section 110(k) by arguing that it was unaware of the consequences, or that the federal agency's silence implied its acquiescence in the demolition.

Section 110(k) is not a remedy for preventing anticipatory demolition by future applicants for a federal permit or license. This does not mean, however, that anticipatory demolition is beyond the reach of the courts. A future permit applicant that intentionally demolishes a historic property even as it engages in planning for future federal assistance, runs the risk that a court

will find the demolition has been unlawfully segmented from the larger federally assisted project for the purpose of evad-

ing compliance with federal environmental and historic preservation laws, including Section 106 of the NHPA.<sup>23</sup> Some federal agencies have specifically adopted rules designed to prevent such piecemealing of permit applications.<sup>24</sup> Inaction by federal agencies in the face of such threatened anticipatory demolition may itself be subject to review.<sup>25</sup>

## CONCLUSION

Section 110(k)'s ability to prevent anticipatory demolition from occurring is undermined by the following factors:

- the failure of agencies to develop the warning procedures required by the Secretary's Section 110 Guidelines;
- a lack of clear understanding by federal agencies about their obligations to prevent and discourage anticipatory demolition by potential applicants;

## THE KEY ISSUE IS whether the potential applicant intended to avoid future Section 106 review by allowing or causing the demolition to occur prior to filing the application.

may be denied funding or assistance."<sup>19</sup>

Very few programmatic agreements executed under the NHPA include provisions designed to discourage anticipatory demolition. Those programmatic agreements that do include specific provisions addressing anticipatory demolition focus on the procedures for determining whether to impose the after-the-fact penalty for anticipatory demolition prescribed by Section 110(k) rather than on discouraging anticipatory demolition in the first instance.<sup>20</sup> Those programmatic agreements that do include a warning requirement invariably direct this warning to "applicants" rather than "applicants and potential applicants," as the Secretary's Section 110 Guidelines recommend.<sup>21</sup>

As a result, many agencies fail to warn even known potential applicants for federal permits or assistance against

■ a reluctance by agencies to invoke the draconian penalty set by Section 110(k); and  
 ■ the lack of clear policies and guidance from the ACHP and the courts for determining whether the penalty for anticipatory demolition should be applied.

If federal agencies took affirmative responsibility for preventing anticipatory demolition and exercised their after-the-fact authority to withhold federal permits or assistance after demolition occurs, Section 110(k) of the NHPA could become a potent deterrent to anticipatory demolition rather than a seldom-invoked and easily disregarded paper tiger. **FJ**

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- 1 Section 106 of the NHPA requires federal agencies to take into account the effects of any federally assisted "undertaking" on historic properties in consultation with the Advisory Council on Historic Preservation and other consulting parties, prior to the approval of any federal funds for the undertaking or the issuance of any license or permit. 16 U.S.C. § 470f; 36 C.F.R. Part 800.
- 2 16 U.S.C. § 470h-2(k); 36 C.F.R. § 800.9(c)(1).
- 3 Leslie Barras, *Section 106 of the National Historic Preservation Act: Back to Basics* (National Trust for Historic Preservation, 2010). <http://www.preservationnation.org/106>.
- 4 Email from Kelly Fanizzo, ACHP on October 25, 2011.
- 5 See Advisory Council on Historic Preservation "Policy Statement on Anticipatory Demolition" (June 22, 1987).
- 6 16 U.S.C. § 470h-2(k).
- 7 36 C.F.R. § 800.9(c)(2).
- 8 16 U.S.C. § 470a(g).
- 9 The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act ("Secretary's Section 110 Guidelines"), 63 Fed. Reg. 20,496, 20,503 (April 24, 1998).
- 10 *Ibid.*
- 11 36 C.F.R. § 800.9(c)(1) ("Guidance issued by the Secretary [of the Interior] pursuant to section 110 of the act governs [Section 110(k)'s] implementation.").
- 12 *Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d 776,

792-93 (N.D. Ohio 2001); *Brewery District Society v. Federal Highway Administration*, 996 F. Supp. 750, 754 (S.D. Ohio. 1998).

- 13 However, there is some anecdotal evidence of agencies exercising their general discretion to withdraw or refuse funding for projects where anticipatory demolition is suspected, without formally invoking Section 110(k)'s procedures.
- 14 See *Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers*, supra, note 12.
- 15 The court did however find that the Army Corps of Engineers violated Section 106 of the NHPA by issuing a dredging permit to the Port Authority, 163 F. Supp. 2d at 791.
- 16 For example, in *Young v. GSA*, 9 F. Supp. 2d 59 (D.D.C. 2000), the court rejected a challenge to an agency's finding that the demolition of a historic building (by an owner who then built a new office building on the site to lease to the federal government) did not constitute "anticipatory demolition," because the building had been scheduled for demolition before a lease on the new building was offered to the agency.
- 17 16 U.S.C. § 470h-2(k).
- 18 [http://www.neh.gov/grants/guidelines/Section\\_106\\_FAQs.htm](http://www.neh.gov/grants/guidelines/Section_106_FAQs.htm); (downloaded on 10/24/11)
- 19 [http://www.comcon.org/programs/historic\\_preservation/special-situations\\_2.html](http://www.comcon.org/programs/historic_preservation/special-situations_2.html) (downloaded on 10/24/11)
- 20 <http://wireless.fcc.gov/siting/npa/construction.html> (downloaded on 10/24/11)
- 21 [http://www.achp.gov/docs/PA\\_Nationwide\\_RUS.pdf](http://www.achp.gov/docs/PA_Nationwide_RUS.pdf) (downloaded on 10/26/11)
- 22 One exception is the case of the anticipatory demolition of Cleveland's historic iron ore unloaders by the Cleveland-Cuyahoga Port Authority prior to filing an application with the Army Corps. The Army Corps warned the Port Authority that future permit applications could be subject to an anticipatory demolition claim. *Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d at 793. As noted above, the Army Corps ultimately made a finding under Section 110(k), many years later, that the iron ore unloaders had been intentionally destroyed to evade Section 106 review.
- 23 See *Old Town Neighborhood Ass'n Inc. v. Kauffman*, 333 F.3d 732, 736 (7th Cir. 2003) (holding that where a city had proceeded with a street widening project using local funds based on a plan to obtain future funding for a related roadway project, thereby "decomposing the transaction into 'local' demolition followed by federal reimbursement," it was appropriate to enjoin the City "from seeking or accepting federal reimbursement").
- 24 See e.g., 33 C.F.R. § 325.1(d) (regulations of the U.S. Army Corps of Engineers) (All activities which the applicant plans to undertake which are reasonably related to the same project and for which a DA permit would be required should be included in the same permit application. District Engineers should reject, as incomplete, any permit application which fails to comply with this requirement.)
- 25 See 5 U.S.C. § 551(13) ("Agency action" includes ...failure to act.").

# Statewide Organizations' Involvement in Section 106

KIERSTEN FAULKNER

**T**he history of Hawaii, the United States, and the entire world was altered on December 7, 1941, when imperial Japan attacked United States forces on Oahu. That day of destruction, when eight battleships and 13 other ships were sunk or damaged, and on which 2,000 sailors and hundreds of members of other military services and civilians lost their lives, led directly to the entrance of the United States into World War II.

The facilities most associated with that day—and the war buildup that followed—were located at Pearl Harbor Naval Station. The installation had a distinguished history even before the Day of Infamy, from Native Hawaiian settlements that gave way to a military buildup in the late 19th century, which eventually grew into a critical component of the United States' national defense. Following the war, the naval base was scaled back to a lower level of occupation, but its service as a critical part of national defense strategy continues to the present day.

Pearl Harbor's significant history and ongoing utility were recognized when it was named a National Historic Landmark in January 1964, less than 23 years after the December 1941 attack. The NHL designation recognized Pearl Harbor's historic role in the expansion of the United States as a Pacific power, but also as an active military facility that could continue to change and modernize.

As the statewide preservation organization dedicated to perpetuating significant historic properties in the Hawaiian Islands, Historic Hawaii Foundation (HHF) found itself in regular discussions with the United States Navy about impacts to historic resources on the naval base. The Navy focused on its mission requirements, but also had stewardship responsibilities for one of the most important historic sites in the country. The formal framework for these discussions came through the Section 106 process, specifically the requirement that federal agencies consult with organizations that have “a demonstrated interest in the undertaking” (36 CFR § 800.2(c)(5)).

HHF joined other preservation partners—including the state historic preservation office (SHPO), the National Trust for Historic Preservation, the National Park Service, the Office of Hawaiian Affairs, and the Advisory Council on Historic Preservation—to work with the Navy in a systematic and sustained effort to bring a preservation ethic to planning and analysis of construction and demolition projects at Pearl Harbor. The efforts resulted in a Programmatic Agreement (PA) that outlined consultation processes that would be followed for major projects, as well as a monitoring and reporting protocol to address minor undertakings. The PA was executed in 2003 and remains in effect; HHF signed as a concurring party to the agreement.

## “MODERNIZATION” THREATENS SHIPYARD

This momentum and collaboration was interrupted when the Navy came under increasing pressure to demonstrate mission and financial efficiencies. The situation came to a crisis point when the Congressional Base Realignment and Closure Commission recommended in 2005 that the then 97-year-old Pearl Harbor Naval Shipyard be closed. The shipyard is the state’s largest industrial employer and is a major supporter of engineering and trades programs, critical to economic diversity and development of a skilled workforce. State leaders leapt to the shipyard’s defense and pledged to find greater efficiencies to make it a 21st-century facility. A probationary period then began which allowed time for needed changes to be made.

In a sweeping over-generalization, the Pearl Harbor Shipyard declared that its operational difficulties were almost solely the result of aging infrastructure and the constraints of historic preservation regulations. The preservation issues became a convenient scapegoat that masked weaknesses in industrial operations, including “silos” of shop-based workflow that had been entrenched for decades. “Modernization” efforts included a 25-year plan that relied on wholesale demolition of everything from the dry docks to industrial shops and office buildings. The plans gave no consideration to historic significance, character-defining features, cultural landscapes, or viewsheds. The price tag for demolition and new construction was in the billions.

The first undertaking brought forward under the modernization scheme proposed demolition of three of the oldest industrial shops in the district, some dating to before World War I, and the demolition of newer building additions, deemed incompatible by the Navy. Navy planners cited the need to address inefficiencies; preservation partners countered with the need to respect and embrace the district’s rich history and significant architecture.

Community leaders took sides, with some angry that preservation concerns appeared to obstruct progress and job creation, while others were livid that the

**SOME [WERE] ANGRY that preservation concerns appeared to obstruct progress and job creation, while others were livid that the military and business interests appeared to...discard a century of history.**

military and business interests appeared to cavalierly discard a century of history and dismiss the importance of the places that turned the tide of world affairs. Both sides dug in, creating a major impasse.

Against this backdrop, the Section 106 consultation process played out. The process followed the prescribed steps: define the undertaking; define the area of potential effect; identify the historic properties; determine if there is an adverse effect; determine how to avoid, minimize or mitigate that adverse effect; document and execute the agreement.

The first stages proceeded quickly: yes, there is an undertaking; yes, it has an adverse effect on historic properties. So what is to be done about it?

Through the consultation process, the preservation partners asked the Navy to look at alternatives, not only in regard to the built environment, but also to operational considerations. What size facilities

were needed for the functions, where did they need to be located, and what changes were needed to allow those functions to be placed in historic buildings? The shipyard checked and re-checked assumptions, and found new and creative ways to meet its operational needs by making changes to co-locating functions

**WORKING MILITARY FACILITIES have security and operational needs that make some designs incompatible with the Secretary of the Interior's Standards.**

and revising workflow processes, which would then be supported by physical changes to shops and the industrial yard.

After numerous meetings, site visits, discussions, relationship-building exercises, and a change in key Navy leadership, an agreement was reached. The shipyard revised the undertaking to include demolition of only two, later-period additions to two of the shops; adaptive use of an office building; and preservation of three industrial shops. The preservation partners agreed to major interior changes, adaptations to some facades and finishes, as well as site changes and new construction, subject to design review.

**As a result of the consultation process, the Navy agreed to preserve three industrial shops at the Pearl Harbor Naval Shipyard and to take significant historic sites into consideration in its long-range planning.**

PHOTOS COURTESY OF PEARL HARBOR NAVAL SHIPYARD AND INTERMEDIATE MAINTENANCE FACILITY

More importantly, the consultation process resulted in rethinking the 25-year “modernization” plan. The shipyard scrapped the original plan of demolishing the entire district to make way for new construction, and instead forwarded a plan that included adaptive use of significant historic facilities, removal of temporary structures, selective demolition and de-accessioning, and design guidelines for new construction.

The revised plan integrated operational changes with facilities upgrades.

Rear Admiral-Select Greg Thomas (then Captain) became commander of the Pearl Harbor Shipyard during this critical time frame. He credits the turnaround and ultimately successful agreement to several key factors. He feels strongly that developing a long-range plan for the shipyard’s infrastructure made a difference. He said, “I believe the rational insistence that we show how each proposed building modification, demolition, or addition fit into a larger plan helped us understand impact and options much better than had that not been stressed.”



## NEW STRATEGIES DEVELOPED

The broader Navy Region Hawaii is using the case study from the shipyard to develop a new way to think about its facilities and its stewardship responsibility to the Pearl Harbor National Historic Landmark. A new preservation unit was established within the design and construction engineering command, with the goal of addressing preservation issues much earlier in the planning process. Master planning for the base strives to integrate mission needs within existing facilities, with directives to look first to historic buildings for adaptive use before proposing demolition or new construction. In addition to the preservation benefits, the new approach is proving more financially prudent and fiscally responsible.

The preservation partners have also had to adjust, especially in acknowledging that working military facilities have security and operational needs that make some designs incompatible with the Secretary of the Interior's Standards and have learned to respond with greater flexibility. The partners have also learned to better understand mission needs and to help find ways to achieve project goals. Preservationists have established a hierarchy of priorities—the preservation of interior features ranks much lower than preserving the exteri-

ors, for example. If an entirely new function can occur inside a historic exterior, it is considered a good outcome.

## HISTORIC HAWAII FOUNDATION'S ROLE

HHF's role in this process is unique. The organization is non-governmental, which means it lacks the regulatory authority that the SHPO and ACHP can invoke. However, it also has stronger and deeper community ties. It has built a base of members and supporters over 40 years of history, and that gives it moral authority as the voice for the places, culture, and stories that matter in Hawaii. HHF's relationships proved to be critical in moving forward, as the organization worked to educate and secure the support of its congressional delegation, state and local officials, business and labor leaders.

The foundation listened to the broader community concerns, not only about preserving history, but also about meeting the timelines and changes needed to keep the shipyard viable. In many ways, HHF served as a translator and convener of value systems and goals; preservation and economics; national defense and being good neighbors. HHF became the voice that balanced input from all sources, ultimately resulting in an outcome that everyone could accept.





The Palm Circle National Historic Landmark, including officers' quarters at Fort Shafter, had a positive outcome from the Section 106 process that addressed long-term preservation and maintenance through the Army's public-private venture for military family housing.

PHOTO COURTESY OF HISTORIC HAWAII FOUNDATION.

From the agency's perspective, RDML Thomas also emphasized the importance of relationship building. He noted that thanks to the involvement of HHF and others, the Navy was able to revisit the adaptive use of a number of older buildings and develop architectural modifications that make new facilities match the historic skyline features.

Thomas also said that the consultation process and the involvement of the advocacy groups affected the attitude of both the Navy leadership and shipyard workers. "The relationship helped our shipyard team see the beauty in the property we were in," he said. "We committed to taking better care of our shipyard, in part because of the sense that people, particularly the partners, were willing

to work with us to preserve the beauty without compromising the mission."

Not all of the progress resulted from the formal consultation process. The discussions and the search for common ground also occurred in other ways, especially through networking, community outreach, and informal discussions. Thomas agreed, saying that, "A couple of key senior leader meetings to maintain great relationships helped keep us in a positive frame of mind."

#### **VALUABLE LESSONS LEARNED**

The lessons learned from the shipyard consultation experience also inform the HHF's Section 106 interactions with other federal agencies. HHF regularly participates as a consulting party in

major undertakings with federal agencies such as the Federal Transit Administration, Federal Highway Administration, Department of Veterans Affairs, National Park Service, and Department of Agriculture.

HHF follows several principles that guide its participation:

1. Get the facts. What is the historic property, what makes it significant, what is the project, and what is the agency trying to achieve? Does the proposed undertaking endanger a historic resource and how can that effect be changed?

2. Be prepared. Be organized and responsive; identify the players and potential allies; understand the agency, community, stakeholder, and regulatory concerns.

3. Be selective. Because there are a limited number of people and hours in the day, use them on the right projects and at the right time. We need to triage the projects that warrant our participation, based on the significance of the resource, the level of threat, the participation of other stakeholders or organizations, and internal capacity of time and personnel.

4. Be reasonable, but don't be afraid to say no. Use experts, have the law on your side, work to find win-win solutions. But don't underestimate the power of standing firm in the protection of the historic resource. There are usually alternatives that haven't yet been developed that would protect the historic property and still achieve the project's objectives.

5. Act with integrity. We strive to be consistent in our objectives and build credibility, trust, and community sup-

port. In the heat of discussions, it is easy to be drawn into personalities, but try to stay objective. The proponents aren't evil, they just have different objectives. Don't let it be personal.

6. Document the agreement. The final written agreement needs to stand on its own. It cannot rely on institutional knowledge or the relationship of the parties. People move on, memories fade, and circumstances change. Make sure the written document clearly explains the agreement without the need for interpretation.

As our staff has become expert in the Section 106 process, we have tried to share that expertise with other preservation advocacy groups. We've provided technical assistance and guidance to all-volunteer grassroots groups to help them become empowered and confident in their rights and ability to participate in the process.

The effects of HHF's involvement as a consulting party to Section 106 have continued to ripple out, resulting

**“WE COMMITTED to taking better care of our shipyard, in part because of the sense that people... were willing to work with us to preserve the beauty without compromising the mission.”**

in protection of historic bridges and railroads, rehabilitation of sugar plantation workers' housing, and substantive mitigation measures in situations when the adverse effect cannot be avoided or minimized. We feel that the results have been extremely positive, both in preservation of historic properties and in building the capacity of our organization and our partner groups. FJ

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KIERSTEN FAULKNER is the executive director of Historic Hawaii Foundation.

# Section 106 from the SHPO Perspective

CRAIG POTTS

**T**housands of projects are submitted to individual state historic preservation offices (SHPOs) annually for Section 106 review, and each provides an opportunity to protect the well-being of our cultural heritage. While this opportunity does not always result in protection, Section 106 review remains one of the most powerful mechanisms for historic preservation in the nation.

The benefits of Section 106 review are all around you. Chances are that many of the historic places you enjoy and take pride in—from dense urban environments to rural landscapes—were, at some point, considered in part or in whole by this component of the National Historic Preservation Act (NHPA). Highways may have been redesigned to avoid historic farmsteads or archeological resources, cellular towers may have been reduced in height or built on an alternate site to avoid impacts to historic landscapes, monumental government buildings may have been spared from inappropriate renovations, and community development projects may have been altered to better respect the size and scale of neighboring historic buildings. Since its adoption in 1966, Section 106 review has influenced countless projects in both subtle and dramatic ways.

## ASSISTANCE THROUGH PROTECTION

A project is considered a federal undertaking subject to the Section 106 process

when its implementation relies on federal funding, assistance, permits or other approvals, and when it has the potential to directly or indirectly affect historic and/or prehistoric resources.<sup>1</sup> Despite the complaints often heard by SHPOs that Section 106 review impedes progress or is unnecessarily burdensome on federal agencies and their applicants, the language of the NHPA clearly states an intention that is quite the opposite. Section 1 of the NHPA (Purpose of the Act) states that,

The Congress finds and declares that the increased knowledge of our historic resources, the establishment of better means of identifying and administering them, and the encouragement of their preservation will improve the planning and execution of Federal and federally assisted projects and will assist economic growth and development.

Helping to improve planning and execution along with assisting appropriate growth and development is at the center of the SHPO's role in Section 106 review. It is sound public policy to consult with various stakeholders, concerned citizens, and interest groups, and to avoid, minimize or mitigate harm to non-renewable historic and prehistoric resources through responsible planning and consensus building. Despite instances of poor consultation and the reluctance of some federal agencies to properly comply with the NHPA at all, most of the projects that go through Section 106 review successfully avoid,

minimize or mitigate harm to the historic environment and as a result are planned more responsibly.

## COMPLICATIONS AND LIMITATIONS

While every SHPO has its own dynamic, they operate similarly to one another and try to consistently apply the law. However, consistency is one of the greatest challenges they face. There are a multitude of federal agencies they consult with (some more regularly than others), and a much larger number of applicants who apply for federal assistance and are delegated authority for Section 106 compliance.<sup>2</sup> Despite the SHPO's best efforts, a great disparity exists among these entities regarding their commitment to compliance, their understanding of the requirements, and their internal rules and policies. The reality is that Section 106 on paper is often much different than Section 106 in practice. Too often, the process gets modified to suit specific projects or the needs of federal agencies and/or applicants.

While custom-tailored approaches can certainly meet the spirit and intent of the law, they can and occasionally do push the limits of flexibility. Inconsistency mixed with poor planning and tardy consultation weakens the process and inevitably pits the SHPO and other consulting parties against the applicant and at times the federal agency. This can create political and economic consequences, including pressure on SHPOs from within state government and costly delays to applicants. The pressure increases when arguments concerning the need for job creation and economic development are made.

SHPOs have the ability to influence undertakings in a number of ways, but they hold no veto power and have no decision making "authority." Influence comes from the process itself and the time it can take to resolve issues that otherwise could turn into legal liabilities for federal agencies. For instance, an agency approach that is more sensitive to historic properties will often reduce delays and limit the potential for lawsuits to be filed by consulting parties and other preservation stakeholders.

Given the SHPOs role in the process, compromise cannot be treated as a dirty word. In some ways, compromise is a necessary outgrowth of the pressures being applied to SHPOs from opposing points of view. Preservation leaders and activists will at times perceive that the SHPO is giving in too much, while applicants, agencies, and

**THE REALITY IS THAT Section 106 on paper is often much different than Section 106 in practice. Too often, the process gets modified to suit specific projects or the needs of federal agencies and/or applicants.**

elected officials at the federal, state, and local level may perceive that SHPOs wield too much power and push too hard to preserve too much. Given the particular situation, one side may end up much less satisfied with the SHPO position than the other. The process allows for competing interests to be heard at the state level and at the federal level through the Advisory Council on Historic Preservation (ACHP). Attempting to balance these interests is a challenging but valuable component of the regulations.

## IMPROVING THE CONSULTING PARTY PROCESS

While SHPOs represent the citizens of their state and help to ensure federal taxpayer's dollars are being used in compliance with

federal law, SHPO budgets and staffing levels are not sufficient to address all issues on all projects. Despite having access to a tremendous number of survey forms, National Register nominations, historic context and thematic studies, documentation reports, and reference materials housed in their collections, and despite the combined years of staff experi-

reasonable opportunities for its participation. While the NHPA directs federal agencies to invite consulting parties, there is no regulation regarding how notification must be accomplished. Some agencies use their own staff to oversee the notification process, while others delegate the responsibility to applicants who may have little or no experience with Section

**MANY HISTORIC RESOURCES are protected because of the ability of preservation groups and individuals to get formally involved under the 106 process.**

106. SHPOs are far too often left with the responsibility to educate these applicants on what

ence, SHPOs simply don't have all of the information that may be pertinent to a given project area and don't always know the full range of concerns. This is why the participation of additional consulting parties is so valuable.

In addition to federally recognized tribes and tribal historic preservation officers (THPOs), Native Hawaiian organizations, local governments, applicants for federal assistance, and of course the ACHP, consulting parties include preservation groups, and individuals who can demonstrate a legitimate interest in a project (such as the owners of affected historic properties). These consulting parties often provide valuable information and reliable perspectives regarding the presence of historic resources and how the proposed undertakings would affect them. Unfortunately, participation by this group is frequently quite low. Preservation organizations and individuals with a desire to be involved should reach out to SHPO staff and stay current on the status of projects being proposed in their local area.

The greatest impediment to consulting party involvement is the inconsistent approach used by federal agencies to properly notify the public and provide

can be a very complicated process. Any number of undertakings can be moving forward concurrently, and given that SHPOs have their own responsibility to comment on submissions within a legally defined 30-day period,<sup>3</sup> little time is left to monitor or correct the efforts of inexperienced project managers.

In spite of this imperfect notification process, it is worth pointing out that many historic resources are protected because of the ability of preservation groups and individuals to get formally involved under the 106 process. In addition to providing valuable information and perspectives, preservation organizations and concerned individuals can have tremendous influence over the decision-making process. SHPOs often rely on the views of other consulting parties to bolster arguments for preservation. In addition, these consulting parties can play extremely valuable roles when monitoring project activities at the local level. SHPOs have limited travel budgets, and staff are usually unable to visit the undertakings they review. As such SHPOs often rely on consulting parties to tell them when projects are not in compliance, allowing them to take appropriate steps to rectify the situation.

## ENSURING SUCCESS

The flexible nature of Section 106 review can be extremely effective when used to reach decisions that preserve or enhance historic assets while accommodating needed projects. Indeed, this flexibility opens the floor to different ideas and perspectives. However simply going through the process to “check boxes” that do little more than illustrate compliance, fails to meet the intent of the law. In some instances, SHPOs have witnessed the adoption of rigid schedules by federal agencies and applicants with the aim “to keep the process moving.” But this can push consulting parties from one point in the process to the next, without adequately resolving or responding to disputed issues raised at each step. This is only slightly better than failing to consult at all.

In the experience of the Kentucky SHPO, the most successful Section 106 reviews share common denominators. These include early coordination, a willingness to consider alternatives in project planning, experienced federal agency staff, applicants with a genuine desire to work with and be responsive to participants in the process, well informed consulting parties who work toward consensus, and a general willingness on the part of all involved to be creative. When a clear path to sound decision making presents itself and the conditions above are present, SHPOs are often able to move efficiently through consultation and complete the process to most everyone’s satisfaction. Three noteworthy Kentucky examples illustrate the point:

### Sensitivity to Resources Leads to Efficiency in Review

Paris Pike (US-27/US-68) was a meandering two-lane highway connecting Lexington



The Kentucky state historic preservation office has worked with federal agency staff and applicants to ensure several successful outcomes of the Section 106 process including rehabilitation of the Wright Barlow House, which was affected by a road-widening project (above) and in the context-sensitive solution for the design of Paris Pike which cuts through the state’s Bluegrass region.

PHOTOS COURTESY OF THE KENTUCKY HERITAGE COUNCIL

ton with Paris, Ky., through a 10,000-acre rural historic district in the heart of the Bluegrass Region. Nestled in the largely pristine rolling landscapes are expansive historic horse farms bounded by miles of dry-laid stone fences. Traffic and safety concerns on the 12-mile stretch of roadway resulted in a plan by transportation officials in 1973 to slice a four-lane divided highway straight through the landscape. More than 12 years of heated debate followed, pitting the SHPO and consulting parties against transporta-



tion officials, eventually resulting in a lawsuit and a court injunction halting the project. In the mid-1980s, however, something noteworthy happened. The Federal Highway Administration and the Kentucky Transportation Cabinet adopted an approach called Context Sensitive Solutions and applied it to the Paris Pike project. The landscape and heritage of the area would inform a major overhaul of the design, and the SHPO and other consulting parties would be fully involved in the decision-making process.

Within a relatively short period of time, the issues were resolved and a Section 106 agreement document was in place. The road was designed and constructed within the landscape rather than through it. Miles of dry-laid stone walls were reconstructed and historic buildings were avoided and preserved. The federal agency and the applicant now promote this award-winning project as a national model. We would argue the lessons learned regarding thoughtful consultation and creativity were equally important.



To mitigate the foreseeable disinvestment in the West End of Louisville resulting from a bridge project, the Federal Highway Administration committed \$10 million to rehabilitate an 1879 trolley barn for reuse as the Kentucky Center for African American Heritage.

PHOTOS COURTESY OF THE KENTUCKY HERITAGE COUNCIL.

### Indirect Effects and Archeology

The Mountain Parkway Interchange project near Winchester, Ky., was designed to facilitate emergency vehicle access and response time in a rural area of Clark County known as Indian Old Fields. Transportation officials insisted that the project was not intended to facilitate development despite the commercial development already taking place. As the name Indian

Old Fields might suggest, the immediate area was linked with an important Shawnee village and trading post named Eskippakithiki. In addition, archeological investigations, in what was determined to be a National Register-eligible archeological district, revealed a great diversity of historic and prehistoric time periods represented. Given the reasonably foreseeable cumulative adverse effects to archeological resources from development pressure, the SHPO, the Absentee Shawnee Tribe, the Eastern Shawnee Tribe, private consulting parties, and representatives from local governments in Clark County and Winchester successfully argued that indirect adverse effects to archeological resources were present.

Typically, only direct effects are considered when evaluating impacts to archeological resources. The Federal Highway Administration and particularly the Kentucky Transportation Cabinet were willing to consult in good faith and work with consulting parties to resolve the issue. A Section 106 agreement was entered into and funding was set aside for additional analysis, development of a National Register nomination for the archeological district, and the purchase of protective covenants, if possible, in partnership with The Archaeological Conservancy. These measures are currently being implemented. The result is a good reminder that Section 106 review is flexible and can be applied in new ways. Factoring the potential for indirect effects to archeological resources is one such example that has the ability to set a valuable long-term precedent.

### **Creative Mitigation**

With an initial project cost of more than \$4 billion, the Louisville-Southern Indiana Ohio River Bridges project is one of the largest and most expensive undertakings

currently underway in the country. The project is intended to improve safety, reduce congestion and improve access by constructing two new bridges over the Ohio River—one linking downtown Louisville, Ky., with Jeffersonville, Ind., and one linking eastern Jefferson County, Ky., with eastern Clark County, Ind. The redesign of a critical interchange where I-65, I-71, and I-64 converge in downtown Louisville is also planned. Throughout the Section 106 review process, diverse consulting parties were engaged in the assessment of eligibility and effects to historic properties within a large geographical area, and a substantial number of affected historic properties were identified. The result was a comprehensive Memorandum of Agreement and Record of Decision that stipulated a great variety of mitigation measures to address adverse effects.

Disinvestment in the West End of Louisville was seen as a foreseeable indirect adverse effect from the project's disproportionate enhancement of accessibility and land value in other parts of the Louisville metro area. As a way to mitigate this disinvestment, both from a historic preservation and environmental justice perspective, the Federal Highway Administration (FHWA) committed \$10 million to rehabilitate an 1879 trolley barn complex in west Louisville for reuse as the Kentucky Center for African American Heritage. The trolley barn, located in the Russell Historic District, had suffered many years of neglect and its poor condition discouraged revitalization in the traditionally African American neighborhood. The \$10 million commitment coupled with additional unrelated financial contributions from the Environmental Protection Agency, the Commonwealth of Kentucky,

the City of Louisville, and private donors resulted in a massive historic rehabilitation project that now houses and celebrates the history and culture of African Americans in Louisville and throughout Kentucky. The project is expected to catalyze redevelopment of the area.

The FHWA also provided \$1.5 million in additional funding to create a minority craftsman training program in historic preservation to be housed in the new Heritage Center. The goal of this program is to provide opportunities for disadvantaged residents of the west end to develop traditional building skills that can be used to further revitalize Louisville's West End and beyond. While this example is far from typical, it underscores the value of thoughtful consultation and full consideration of project effects. Working collaboratively and creatively through Section 106 review can benefit historic properties in profound ways and has the ability to encourage ongoing preservation activities long after the federal undertaking is complete.

### FINAL THOUGHTS

SHPOs must frequently look for ways to do more with less. This is particularly true in harsh economic times, like the one we are in now where governors and state legislatures struggle to prioritize funding for critical services such as public education and health and family services. States value the role SHPOs play in facilitating the expenditures of federal dollars, but are generally unwilling to provide additional funding for regulatory review that could improve and enhance the Section 106 process. This limits SHPOs' ability to spend the time truly required to properly monitor the many undertakings occurring throughout the state. As a result, they rely on other consulting parties—particularly preserva-

tion organizations and interested individuals—for assistance. SHPOs also attempt to streamline review by encouraging better and earlier consultation, project manager education, and inclusive decision-making protocols. Proper compliance and due diligence on the part of the federal agencies and their applicants creates efficiencies in the process and requires less shepherding by SHPOs. It is safe to say that the current political climate does not favor regulation. But the Section 106 regulations are sensible and responsible, because they work affirmatively to cultivate community consensus, and they work best when they are taken seriously and complied with in good faith. **FJ**

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- 1 School lunch programs are an example of a type of federally funded program that does not have the "potential to affect" historic properties. "Indirect" effects are those that are "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." 36 CFR § 800.5(a)(1).
- 2 Certain programs funded by the Department of Housing and Urban Development (HUD), such as the Community Development Block Grant (CDBG) program, have operated for decades by formal legal "delegation" of responsibility for NEPA and Section 106 compliance to the funding recipient, usually a state or local government. 42 USC § 5304; 24 CFR Part 58. In addition, beginning in 1999, the Section 106 regulations allowed federal agencies to authorize "applicants" for permits and funding to initiate consultation directly with SHPOs and THPOs. 36 CFR § 800.2(c)(4). The regulations caution that the federal agency remains legally responsible for all findings and determinations under Section 106 (as well as government-to-government consultation with Indian tribes). However, applicants range from sophisticated state transportation departments or companies with expert consultants to those that have very limited experience or capacity to carry out meaningful Section 106 consultation.
- 3 SHPOs are under constant pressure because, if the SHPO misses a 30-day comment deadline to respond to determinations of "no historic properties affected" or "no adverse effect," the agency is entitled to treat the lack of response as an "approval," even if the SHPO would not otherwise have approved it. 36 CFR §§ 800.4(d)(1)(i), 800.5(c)(1).

# Section 106 in Indian Country

ALAN DOWNER

Indian Tribes had no formal role in the national preservation partnership established by the 1966 National Historic Preservation Act (NHPA) until 1992. Since then, Indian tribes have been playing an increasingly visible role in the national preservation program. But tribes are not new to the game. Every Indian tribe has had, since time immemorial, long established means of protecting their places of traditional and cultural significance. These practices were implemented consistently and with great vigor even though they were not necessarily highly visible to the preservation community or to federal agencies implementing actions subject to review under Section 106 of the NHPA.

Section 106 of the NHPA is an essential tool for preserving places of importance to Indian tribes. All of the United States was once “Indian Country.” Every tribe surrendered vast tracts of land when making peace with the United States. Today, only a tiny fraction of land is still under the jurisdiction of Indian tribal governments. Consequently, for every tribe there are numerous places of traditional religious and cultural significance located outside of its territorial jurisdiction. Many tribes currently occupy only a minute portion of the lands they occupied in pre-contact times. Other tribes have been removed from their traditional

homeland—some moved thousands of miles away. The tribal government can only directly protect places that are located within its boundaries. Some states have laws that protect historic properties, many do not. But Section 106 applies to federal undertakings whether they occur on federal or tribal, state, or private lands. The federal regulations

**TRIBAL PRESERVATION TECHNIQUES are sometimes quite similar to the ones found in the standard tool kit, but other times they differ dramatically.**

implementing Section 106 provide a specific and mandatory role for Indian tribes in the Section 106 process. Tribes must be consulted any time a federal undertaking may affect a place of traditional religious or cultural significance to the tribe, whether that undertaking occurs on or off tribal lands. For those places not located on tribal lands, Section 106 often provides the only means a tribe has of influencing decisions about what will happen to those places of concern that may be affected by a federal undertaking.

The Navajo Nation is located in the Southwest and covers parts of Arizona, New Mexico, and Utah. It encompasses an area of more than 27,000 square miles—almost exactly the size of West Virginia—and is the largest land area governed by a single Native American tribe within the United States. Although the Navajo Nation has retained a large

percentage of its original territory, millions of acres were ceded to the United States in the 19th century. Consequently, the Navajo Nation, like all tribes, has many culturally and historically important places located outside its jurisdiction. Section 106 gives the Navajo Nation a voice in what happens to such places in situations where it may be affected by a federal undertaking.

### **“TRADITIONAL” APPROACHES TO MITIGATING ADVERSE EFFECTS**

Within the preservation community, a more or less standard tool kit of preservation techniques for protecting or mitigating damage to historic properties evolved during the 1970s and '80s. Tribal preservation techniques are sometimes quite similar to the ones found in the standard tool kit, but other times they differ dramatically. These different approaches are only just recently being recognized and accepted in the Section 106 context.

Some years ago, AT&T was upgrading long distance telephone cables by replacing copper wire with fiber optics. One of the lines AT&T was replacing ran west through the southern part of the Navajo Nation and then over the foothills of the San Francisco Peaks, a mountain range located in north central Arizona. The Peaks, which are located off of Navajo Nation lands on lands managed by the United States Forest Service, are among the most sacred places to the Navajo, as they mark the boundary of the Dine bikeyah (the traditional Navajo homeland) and are the location of significant events in Navajo traditional history.

AT&T's cable upgrade project involved removing old, buried copper

cables from a trench, cleaning the trench, and laying the new fiber optic cable in the original trench. These trenches were located in a right-of-way already owned by AT&T. However, the Federal Communications Commission (FCC) informed AT&T that the project would require compliance with Section 106.

AT&T provided the Navajo Nation Historic Preservation Department (HPD) with an archeological survey report of its existing right-of-way. The department accepted the archeological report, but informed AT&T that it needed to identify Traditional Cultural Places (TCPs)<sup>1</sup> within the right-of-way. This led to considerable discussion between the HPD, AT&T, and AT&T's cultural resources contractor about what needed to be done in order to identify TCPs within the project right-of-way. In particular, HPD was concerned about the San Francisco Peaks. Eventually, AT&T commissioned tribal staff to help carry out the TCP study.

To identify TCPs, tribal staff interviewed residents in the vicinity of the AT&T right-of-way. Staff also sought out and interviewed hataathli (chanters, traditional healers who are often referred to as “medicine men”) with specific knowledge of the San Francisco Peaks and the ceremonies in which they figure prominently. A hataathli was found in the western part of the Navajo Nation whose ceremonial practice included the songs that involve the Peaks. He consented to be interviewed. After the nature of AT&T's project was explained to him, he was asked if this project would harm the Peaks. He said it would definitely cause harm to the mountains and would reduce the healing power of the ceremonies in which they figure. In Section 106 terms, he explained that the cable replacement would be an “adverse effect.”



The installment of fiber optic cables near the foothills of the San Francisco Peaks, a sacred place to the Navajo Nation, required compliance with Section 106 and resulted in a traditional tribal ceremony to mitigate adverse effects.

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When asked what he would recommend as a means of addressing this harm, staff expected that he would tell them that the cable should be rerouted away from the Peaks. Instead, he explained that this would not be necessary, and that he knew of a ceremony that would fix the harm of retrenching on the Peaks. He went on to say that, not only would the ceremony fix the spiritual damage to the Peaks, but in the process of doing so, it would make the fiber optics work better. In Section 106 terms, the hataathli had told us that there was a traditional means of “minimizing” or even “avoiding” the adverse effect.

Tribal staff consulted with AT&T about this proposed approach to resolving the adverse effects of the project. They were pleased that the company agreed to fund the ceremony and even asked permission to attend. The hataathli agreed to AT&T participation and conducted the ceremony. In the end, an acceptable, and even very positive, outcome was achieved.

## LESSONS LEARNED

This outcome was successful for several reasons. Most importantly, AT&T came into the process with no preconceptions. The company was willing to discuss options openly and was completely willing to admit that it didn’t understand the concept of TCPs, how to identify them, evaluate them or how to address adverse effects resulting from their undertaking. The company did not presume that it knew better than the Navajo Nation or the hataathli.

Often federal agencies and the companies they license are reluctant to engage tribes in the Section 106 process in the mistaken belief that tribes are only concerned with sacred places and that effects on sacred places cannot be mitigated. When a project will harm an archeological site or a historic building, most preservation practitioners know what to do based on their professional expertise, experience, and past practice. But when it comes to traditional cultural properties, many find themselves in unfamiliar territory. They

must work with tribal governments and with tribal traditional practitioners and rely on their expertise. The preservation professionals' expertise and experience may not prove to be especially useful when dealing with tribal concerns. In fact, it may work against the professional unless he or she is willing from the beginning to set aside his or her assumptions and accept the expertise of the real experts—the tribe's traditional practitioners.

Effective Section 106 compliance involving Indian tribes requires open dialogue and acceptance of the fact that only tribal traditional cultural experts have the necessary knowledge and experience to identify and determine which TCPs are significant (i.e., are National Register eligible); when an undertaking will affect an important TCP and in what manner; and whether or not there are appropriate ways to avoid, minimize, or mitigate adverse effects to TCPs. The Section 106 professional's principal role in the process, whether that person is a federal, state or tribal government official, or a technical consultant, is to facilitate communication between the federal decision maker or applicant and the traditional cultural expert. His or her other role is to ask questions relating to Section 106 determinations by the tribal expert in a manner that he or she will understand, and to communicate the responses in terms that can be readily understood by a federal official who must make a decision that is at least partially based on the outcome of the Section 106 process.

## SUMMARY

The San Francisco Peaks AT&T project illustrates some very important points about Section 106 compliance in Indian Country. First, TCPs, even TCPs of

immense cultural and spiritual importance can be dealt with effectively. The presence or potential presence of TCPs in a project's area of potential affect need not derail a project. Sometimes it is possible to use traditional means to mitigated adverse effects to such places. That is not possible unless tribal traditional practitioners are engaged openly and in good faith at every step in the Section 106 process. Their expertise is essential to making decisions about where TCPs are located, their significance, and whether and how they may be affected by an undertaking, as whether or not and by what means affects can be avoided or mitigated.

Equally important, is the lesson this case study offers about dealing with historic properties that are not TCPs. Over the last three decades, Section 106 practitioners have developed more or less standardized tools for dealing with historic properties potentially affected by a federal undertaking. If it's an archeological site: avoid it or conduct scientific excavations to recover important data. If it's a building: avoid, rehabilitate it or document it. The tribes have come to view these as the first choice options. But the AT&T-San Francisco Peaks case study suggests the interests of communities and historic preservation may be better served by doing away with a narrow, standard tool kit in favor of thinking much more broadly about how to deal with the effects to historic properties resulting from projects subject to Section 106. FJ

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# Wilson Bridge—A Section 106 Adventure in Saving Indiana’s Historic Bridges

PAUL BRANDENBURG

**T**he directions were simple: head east on Main Street out of Delphi to the first road, turn right and keep going back in time.

Pretty soon you’ll find it—the Wilson Bridge. Built on the site of Carrigan’s Ford in 1898, the graceful simplicity of this Pratt “through truss” has captured the hearts of those who passionately believe that Indiana’s historic bridges are worth protecting.

In a scene playing out across the state, headlines of the April 8, 1988, edition of the *Carroll County Comet* declared “County to Wilson Bridge Supporters—Time’s Up.” The commissioners had spoken: “Get out of the way; the Wilson Bridge is in the way of our idea of progress for the county.”

To the opposition, the cost was too high—\$1.2 million dollars for a new bridge and the loss of several acres of pristine Indiana rural landscape. It made little sense to spend four times the rehabilitation cost to provide a crossing for a narrow road with a daily traffic count of less than 100.

With the battle lines drawn, the Carroll County Historic Bridge Coalition turned to two provisions of federal law—Section 106 of the Preservation Act of 1966, 16 U.S.C. § 470f, and Section 4(f) of the Transportation Act of 1966, 49

U.S.C. § 303. Both apply to any project involving federal funding that impacts a structure eligible for inclusion in the National Register of Historic Places. Section 106 calls for review of the impact on the site and mandates public involvement. Section 4(f) establishes that in the case of transportation projects, historic resources must be avoided unless there is no feasible alternative. Unfortunately in Indiana, preservation advocates found that transportation projects involving historic bridges were not given the level of scrutiny required by Section 4(f). At the same time Section 106 review was becoming little more than a paperwork exercise to justify the construction of a new structure, even

**“DO WE LIVE IN A LAND governed by law or the transient whims of elected officials?” was the question being asked nationally, and it needed a test case to answer. Wilson Bridge would become that case.**

though in many cases, the existing bridge could be rehabilitated at a fraction of the cost of replacement.

Indiana it seems was not alone. “Do we live in a land governed by law or the transient whims of elected officials?” was *the* question being asked nationally, and it needed a test case to answer. Wilson Bridge would become that case. Preservationists hoped to build a strong alliance at the local, state, and national levels and force the application of federal law. Indiana’s Historic Bridges were included



The proposed demolition the Wilson Bridge in Carroll County, Ind., sparked a spirited advocacy effort to preserve the bridge, which in turn led to a statewide program to protect Indiana's historic bridges by becoming more involved the Section 106 review process.

PHOTO BY PAUL BRANDENBURG.

on the “Ten Most Endangered” list by Indiana Landmarks, and also on the National Trust’s list of America’s 11 Most Endangered Historic Places in 2002. For five years, a group of volunteers coordinated the advocacy effort for the Wilson Bridge with invaluable assistance provided by Indiana Landmarks and the legal department of the National Trust. Volunteers attended Section 106 consulting party meetings and prepared detailed rebuttals, in addition to community outreach and education.

### A TEST CASE GETS RESULTS

Finally, all that could be said was said—it was time to put this case to the test. In the spring of 2002, the Department of the Interior, in exercising its review and comment role under Section 4(f), simply stated: “We do not believe that all possible planning to minimize potential harm to Section 4(f) resources has been employed.” A few months later, the Federal Highway Administration’s Indiana Division (FHWA) brought representatives of interested public agencies together in an effort to engage in

the development of a programmatic agreement addressing historic bridges statewide.

In listing Indiana's Historic Bridges on its "11 Most Endangered Historic Places List,"

the National Trust stated that "Indiana needs a bridge preservation plan that takes a comprehensive look at these

endangered resources throughout the state and sets clear priorities for preservation, with funding to allow for rehabilitation." While Indiana preservationists applauded the listing, this was only the beginning of a journey requiring focused coordination across the state. Within a few short months, Indiana Landmarks announced the formation of the Historic SPANs task force with the stated goal of "forming an effective alliance with state and federal agencies in order to develop a comprehensive historic bridge rehabilitation program for Indiana." Additionally, the SPANs task force would provide advocacy in coordination with local preservation organizations as a "Consulting Party" for a number of Section 106 reviews that were underway for historic bridge replacement projects.

### THE INDIANA HISTORIC BRIDGE FRAMEWORK

In an effort to reverse entrenched public policy, SPANs reviewed existing policy and developed an "Indiana Historic Bridge Framework" that included:

- Establishing comprehensive and consistent historic review criteria.
- Conducting a statewide historic spans survey and review.
- Recognizing the need for early involvement of local and state preservation advocates in transportation projects involving historic bridges.

- Establishing the necessary oversight to ensure consistency and quality of Section 106/Section 4(f) management by consulting engineers.

**THIS FRAMEWORK also recognized the need...to follow federally-mandated review guidelines and to make sure local preservation interests were included when dealing with historic structures.**

- Providing greater oversight of the Section 106/Section 4(f) review process by FHWA—especially in the area of defining the Purpose and Need for historic bridge projects to ensure that the purpose was not defined as simply "replacement."
- Encouraging the adoption of special American Association of State Highway and Transportation Officials (AASHTO) Guidelines for Low-Volume Local Roads in Indiana's bridge inspection and funding process.
- Establishing a funding process for the rehabilitation of historic bridges.

This framework served as the basis for advocacy with the FHWA, Indiana Department of Transportation (INDOT), the state historic preservation office (SHPO), and the Advisory Council on Historic Preservation (ACHP). This framework also recognized the need to maintain pressure on the existing system to follow federally-mandated review guidelines and to make sure local preservation interests were included when dealing with historic structures. For example, when the Indiana FHWA established its formal committee to develop a Historic Bridge Programmatic Agreement, it deliberately excluded the preservation community. Although a variety of special interest organizations outside the

agency were engaged initially, representation from the preservation community was deliberately excluded. In response, SPANs identified threatened historic bridges for inclusion in a “Watch List,” ultimately working with the National Trust and legal counsel in the role of “Consulting Parties” for 23 distinct historic bridge projects. This required SPANs members to conduct a detailed analysis of each project in preparation for engagement and comments at Section 106 consultation meetings.

Furthermore, certain bridge replacement projects were identified as legal test cases for potential litigation to enforce compliance with Section 106 and Section 4(f). In an effort to encourage more effective communications with federal/state agencies and the preservation community, SPANs took the approach of “transparent” communications with

state and federal agencies—sharing its concerns and planned actions. This included inviting agency representatives to participate in SPANs meetings in an effort to foster communication and find common ground for moving forward. This direct engagement approach resulted in a noticeable shift among the transportation agencies in their attention to preservation interests, with Indiana Landmarks and SPANs eventually being asked participate directly in developing the Programmatic Agreement.

### **THE PROGRAMMATIC AGREEMENT**

The strategy of focusing on the Indiana Historic Bridge Framework while maintaining pressure on existing projects yielded results. In late 2006, a Programmatic Agreement regarding the management and preservation of Indiana’s Historic Bridges was signed between

**As a result of the work by the Historic SPANs task force to include state and local preservationists in transportation projects involving historic bridges, a number of bridges such as Indiana’s Carrollton Bridge pictured here, have been restored.**

PHOTO BY PAUL BRANDENBURG



the FHWA, the SHPO, the ACHP, and INDOT. The first major provision of the Programmatic Agreement was the completion in 2010 of a statewide survey detailing the National Register eligibility status of all bridges in the state constructed prior to 1966, based on criteria specific to the context of Indiana's transportation history. Each National Register-eligible span was identified as either "Select" or "Non-Select." The Programmatic Agreement defines "Select" bridges as those most suitable for preservation and excellent examples of a given type of historic bridge. Since the information used to make these determinations was developed as a part of the survey process, SPANs, along with Indiana Landmarks, mobilized the local preservation community to engage in the public involvement process as the decisions were being developed and the methodology was applied for each bridge.

The second major provision of the Programmatic Agreement defined the process necessary to satisfy the historic review requirements of Section 106 and to ensure that designs are reviewed for context sensitivity once a bridge is determined to be "Select" or "Non-Select." "Select" bridges will not be demolished if they are part of a transportation project involving federal or local funding. Instead, preservation for continued use, bypassing, or relocation would be the only acceptable alternatives. "Non-Select" bridges could be demolished if it were shown that preservation options are not feasible and prudent after a streamlined historic review process.

### SERVING A "WATCHDOG" ROLE

Finally, even with a Programmatic Agreement in place, SPANs continues to func-



Although the replacement of this Putnam County Bridge was under consideration during Section 106 review; the Historic Bridge Survey determined it to be "Select" status and therefore suitable for preservation.

PHOTO BY PAUL BRANDENBURG

tion in a "watchdog" capacity to ensure consistency and quality in the execution of Section 106 and 4(f) processes defined by the Programmatic Agreement. In general, the Programmatic Agreement and the statewide inventory of historic bridges have been effective in helping to change the culture among consulting engineers in Indiana, by encouraging more widespread adoption of rehabilitation for historic bridges, rather than replacement. In the current economic climate of severely constrained budgets, these historic preservation projects, which are typically less expensive than demolition and replacement, have also helped leverage public dollars. **FJ**

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PAUL BRANDENBURG is chair of the Indiana Historic SPANs Task Force. Portions of this article appeared in the following publications with the full content being published in *Bridge News: Society for Industrial Archeology Newsletter*, Vol.134, No.1, 2005 and Fall/Winter 2006 and Spring/Summer 2007 editions of *Bridge News* by the Historic Bridge Foundation.

# Back to Basics—Directions for Change in Implementation of Section 106

LESLIE E. BARRAS

**S**ection 106 of the *National Historic Preservation Act, Back to Basics*, set out to evaluate implementation of this important law with the following questions in mind: Have federal agencies fully embraced and incorporated its concepts in their planning for projects? How well is consultation working? Do applicants for federal assistance have clearly defined roles and responsibilities in the process? Do the regulations that implement this law need to be changed? The National Trust commissioned this report—the organization’s first comprehensive evaluation of Section 106—in large part because of its increasing concern about the program based upon its experience in several massive projects.<sup>1</sup> These projects include post-Katrina disaster recovery efforts in New Orleans and the redevelopment of part of the Pearl Harbor National Historic Landmark. In such cases, the law’s emphasis

Act (NEPA) documentation through the analysis of mitigation options.

The *Back to Basics* report identifies seven recommendations informed by historical research, the substantial experience of the National Trust’s advocacy staff, and interviews with SHPOs, THPOs, representatives from local preservation organizations, and cultural resource consultants (55 interviews in total). In order to strengthen implementation of the law, *Back to Basics* makes the following recommendations:

## **RECOMMENDATION 1** **Federal agencies must endorse and compel compliance with Section 106.**

Implementation of Section 106 is very uneven across the 15 executive departments and 65 independent agencies of the federal government. Based upon federal employment statistics, some agencies do not appear to have sufficient

**FEDERAL AGENCIES may authorize applicants to initiate consultation, but remain responsible for all findings and determinations and direct consultation with tribal and Native Hawaiian organizations.**

on prior planning and consultation with a variety of stakeholders to avoid harmful impacts to historic properties was treated in a perfunctory or ineffective fashion. Consideration of the project’s impacts was tacked onto the final stages of the National Environmental Policy

in-house expertise as required in Section 112 of the NHPA. This expertise, which includes archeologists, architects, conservators and curators, historians, landscape architects, and planners, is needed to ensure the professionalism of federal agency historic preservation programs, especially when considering their mission, real property inventory, or construc-

tion activities. Securing this expertise through the use of outside consultants to carry out reviews for federal projects is a stopgap response to filling these needs and may, indeed, be a more efficient and cost-effective route to Section 106 compliance depending upon the agency. Nevertheless, some federal expertise is required in order to fully carry out the law. Tribal representatives believe government-to-government consultation is undermined when Section 106 compliance is essentially delegated to private contractors. Citizens report that public participation is short-circuited because it is never fully planned for in the contractor's scope of work and budget. SHPO staffs are frustrated when they are forced to work with engineers, environmental scientists, or other non-cultural resource professionals with inadequate qualifications and training in historic preservation. Given government spending constraints, it seems unlikely that this deficiency will be remedied. However, it is both possible and cost-effective to train supervisory and other staff to understand what the law entails. Further, the report recommends that compliance with the NHPA, including Section 106, be built into federal employee performance reviews, as a measure of individual accountability.

Section 106 is often triggered because a federal agency proposes to approve or fund a project being carried out by non-federal applicant (e.g., a developer or local government). Interviewees reported a disturbing trend in which applicants are largely delegated the duty to carry out Section 106 review and consultation, most often through informal or with tacit approval of the federal agency. Formal delegation of Section 106 author-

ity to applicants has been authorized by Congress in very few instances, the most notable being certain programs of the Housing and Urban Development (HUD) agency. Federal agencies may authorize applicants to *initiate* consultation, but remain responsible for all findings and determinations and direct consultation with tribal and Native Hawaiian organizations. *Back to Basics* recommends that federal agencies more clearly define and limit the roles and responsibilities of applicants in Section 106 reviews and “take back” the agencies’ primary obligation to consult, involve the public, and seek ways to minimize harm to historic properties from projects funded, approved, or otherwise assisted by federal action. SHPO staffs can help in this regard by reinforcing with applicants and federal agencies the need for the federal agency itself to carry out the substance of the required review and consultation.

## **RECOMMENDATION 2**

### **Federal agencies need to ensure earlier and broader integration of preservation values in their planning processes.**

Section 106 is not a subset of the environmental review requirements of NEPA. While both laws have common elements, which include the need for early planning to identify and meaningfully consider a range of alternatives, the courts have consistently recognized that each law imposes independent requirements that must be fully and separately met.

Importantly, the concept of *consultation* is unique to Section 106 and requires a two-way communication that simply does not exist within the

fabric of NEPA. Consultation 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.”<sup>2</sup> Guidance to the federal agencies further explains that consultation is “built upon the exchange of ideas, not simply providing information” and that the “willingness to explore the possibilities for agreement” upon matters at issue in a Section 106 review is “fundamental” to the concept.<sup>3</sup>

**WHILE PRESERVATION-MINDED individuals and organizations do not draw NEPA and Section 106 silos around their beloved buildings or sites, professionals may tend to do so.**

Many interviewees, and the overwhelming experience reported by the National Trust, is that the independent planning mandate of the NHPA is often thwarted by the disconnected way that federal agencies, applicants, and consultants carry out NEPA and Section 106. Section 106 and stakeholder consultation should be initiated early in NEPA (e.g., the scoping stage for an Environmental Assessment [EA] or Environmental Impact Statement [EIS]) to identify historic properties so that avoidance or minimization alternatives can be designed and evaluated. Instead, “consultation” is often relegated to the very final stages of NEPA analysis (e.g., a Final EIS or even Record of Decision); is delegated to NEPA staff without the appropriate preservation qualifications; and is carried out as a request for written comment on a plan to mitigate harm to historic properties. The experience of interviewees in this regard spans a broad range of agencies and applicants.

Interviews revealed another challenge with NHPA-NEPA, which is that some environmental and cultural resource professionals may tend to compartmentalize their work, rather than embrace the planning as the multi- and interdisciplinary effort it was intended to be. While preservation-minded individuals and organizations do not draw NEPA and Section 106 silos around their beloved buildings or sites, professionals may tend to do so, arguing that the procedural requirements of each law are not a one-

to-one match.

Neither the Advisory Council nor the SHPOs tend to review NEPA documentation in

their independent roles in Section 106, nor do they comment on EIS scoping requests. (Of necessity, often because of severe funding constraints, THPOs are one-stop shops for both environmental and historic property reviews.) The U.S. Environmental Protection Agency (EPA) has an independent role in NEPA that requires that its regional office staff review every EIS, and some environmental assessments, and “grade” the documentation for completeness of analyzing project impacts and the severity of impacts. Historic properties are often omitted from the scope of these reviews.

To remedy this disconnect, a national panel of historic preservation experts was convened by the Advisory Council in 2009 to evaluate the national historic preservation program. Included in its recommendations is a simple set of clear coordination milestones for Section 106 activities in relation to NEPA documentation:

Before a draft EA or EIS is finished or issued, the following three stages of Sec-



Even modest projects have implications for Section 106. A historic house located in the Old Orange Historic District in Orange, Tex., was relocated, to make way for new fire station following Section 106 consultation. The original station (below) was demolished following damage from Hurricane Ike. The city hopes to find a new buyer for the house.

PHOTO BY LESLIE BARRAS

tion 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.

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).

*Back to Basics* recommends that the Advisory Council, SHPOs, and the EPA use their review and monitoring roles to emphasize the need to respect these milestones. Otherwise, the risk continues that meaningful opportunity to comment on project impacts to historic properties is being foreclosed through implementation of NEPA. *Back to Basics* further recommends that the EPA use its significant leverage given in federal law to grade “down” the sufficiency of EIS documents that do not reflect full and coordinated compliance with Section 106. Negative ratings in this regard can have adverse

promote earlier and better planning for protecting historic properties. For example, proactive options include participation in advisory committees, whether through the Federal Advisory Committee Act (FACA) bodies that each federal agency convenes throughout the U.S., or through local community development block grant committees, or regional transportation committees of metropolitan planning organizations required in each urbanized area of the country. These committees disseminate information and plans of interest to preservationists before projects ever get to the bulldozer stage and they offer the opportunity for preservation to be factored into the planning process.

### **RECOMMENDATION 3** **The Advisory Council should vigorously assert Section 106 as its core mission.**

The Advisory Council is a small, independent federal agency with substantial responsibility to promote our nation’s cultural heritage. *Back to Basics* found that, over the 45 years of Section 106 implementation, the agency’s professional staff formally participated in approximately 1 to 3 percent of federal under-

takings each year and the agency “members”—those positions established by Section 203 of the

NHPA who serve a role akin to board members—formally comment on just 3 to 5 individual projects each year. Under the law, the agency’s formal involvement is reserved to “high-profile” cases, defined as involving important questions of policy or interpretation; proposing

### **UNFORTUNATELY THE SHPOs reported that very few of the projects that come across their desk have any involvement by preservation groups or individuals as a consulting party.**

consequences that federal or applicant project managers want to avoid, such as project delays and cost increases necessitated by additional compliance efforts, adverse publicity, or even litigation.

Finally, the report identifies specific ways that preservation advocates can

substantial damage to important historic properties; precedent-setting in procedural implementation, or involving issues of concern to Indian tribes or Native Hawaiian organizations. These high-profile cases are typically highly controversial. In order to support the Council's role in these cases, *Back to Basics* recommends that the professional staff be trained in conflict resolution skills. As of March 2011, the agency reported that it is midway through this staff training.

The Council's nationwide scope provides excellent opportunities to issue guidance, training, and policy. Thus, the Council can play a significant role in providing clarity in interpretation of the regulations, templates for use in documentation, and concrete examples of effective ways to carry out 106 requirements and the range of mitigation options adopted throughout the country for harmful direct, indirect, and cumulative effects.

#### **RECOMMENDATION 4** **Improvements are needed to increase consulting party access and public involvement in the Section 106 process.**

Over 80 percent of the undertakings reviewed throughout the country from 2004 through 2008 resulted in a "no historic properties affected" determination; 13 percent were determined not to cause adverse effects to historic properties; and only 2 percent required consultation to resolve adverse effects. On the surface, at least, it appears that Section 106 review operates efficiently. The vast majority of these reviews involve only the federal agency or an applicant, or more likely a consultant, and the SHPO. But the involvement of local individuals or groups as consulting parties provides

an essential on-the-ground check and balance in the review process. Unfortunately the SHPOs reported that very few of the projects that come across their desk have any involvement by preservation groups or individuals as consulting parties.

Federal agencies and applicants are supposed to seek out and invite public interest consulting parties, in consultation with the SHPO, but very few ever do so. *Back to Basics* recommends that this requirement to seek out and invite consulting parties be reinforced, especially by the SHPO staff when the project first arrives for review in their office. Further, the report recommends that the National Trust expand its Section 106 technical and training assistance to its local and state preservation partners to better equip them to participate in consultation (see article by Don Klima on page 13).

#### **RECOMMENDATION 5** **State and tribal Section 106 programs should be supported by fees and full appropriation of proceeds in the national Historic Preservation Fund account.**

Nationwide, SHPO staffs review more than 100,000 Section 106 actions each year. The caseload of tribal preservation staff encompasses in total almost 42,000 reviews each year. The Texas Historical Commission alone averaged 10,550 reviews and actions per year from 2004 through 2008. The top caseloads of the federally approved tribal programs included the Tunica-Biloxi (7,138), Eastern Cherokee (4,751), Spokane (4,525), Catawba (4,407), and Lac Vieux Desert Band (3,037). Sheer caseload numbers, however, do not fully depict the challenges of the states and tribes in their essential roles as consulting parties.

Delegation of the Advisory Council's "opportunity to comment" role to the states in the majority of federal undertakings was first codified in the 1986 amendments to the Part 800 regulations, while the 1992 amendments to the NHPA and corresponding regulatory amendments in 1999 and 2001 recognized the role of the

as other direct costs (e.g., travel) and indirect costs (overhead). Regulated industries and federal agencies do not typically challenge these fees because: 1) they want the regulatory staff to stay "local" instead of in Washington, D.C.; and 2) they want their paperwork to be processed in a timely manner.

**BACK TO BASICS URGES state and tribal leaders to emulate the examples in the environmental arena for viable funding sources through a fee-based system. There should be no federal obstacles to doing so.**

tribes and THPOs. Federal agencies and applicants have promoted this trend. At the same time, state legislatures have not provided funding to SHPOs to keep pace with the caseload, and Congress has failed to provide adequate financial support for tribal and state preservation programs. Both tribal and state budgets are further challenged by general economic conditions. Deposits to the National Preservation Fund total \$150 million annually, funded by proceeds from mineral leasing in Outer Continental Shelf waters. However, the fund is doled out by Congress during the annual appropriation process in percentages far short of authorized amounts.

*Back to Basics* recommends a model of funding that is widely used by state environmental agencies: a user or service fee for reviews of projects. States spend about \$15 billion annually on environmental and natural resource regulatory programs, which are substantially supported by user fees. In most states, the agency does not need to ask the legislature for approval to adopt a fee program, but can do so through an administrative rule-making process. Fees are charged based on experience with the amount of staff labor to do certain tasks as well

State and tribal preservation programs that are federally approved have a duty to meet

minimum standards of staffing and other capabilities that require adequate budgets. *Back to Basics* urges state and tribal leaders to emulate the examples in the environmental arena for viable funding sources through a fee-based system. There should be no federal obstacles to doing so. Section 110(g) of the NHPA authorizes federal agencies to include preservation compliance in project costs.

**RECOMMENDATION 6  
Prior to further federal agency use of alternative approaches to comply with Section 106, the Advisory Council should establish standards to promote accountability for implementing these "program alternatives."**

Federal agencies and applicants have sought alternatives to implementing the step-by-step procedures of Section 106 from the very start. A program alternative can take one of five forms under Subpart C of the Part 800 regulations. A *program comment* essentially exempts individual activities or types of historic properties from ongoing, project-by-project review by providing the Advisory Council a one-time opportunity

to comment. Examples issued to date include certain types of Department of Defense buildings, such as some types of military family housing and ammunition manufacturing and storage facilities; disposal of historic naval ships; and certain repairs and upgrades of historic public buildings (windows, lighting, HVAC systems). Natural gas pipelines and the federal interstate system have been removed entirely from Section 106 reviews in an *exemption*, another type of program alternative. *Alternative procedures* are authorized for use by individual Army installations that rely heavily on implementation of their internal management plans and NEPA processes for consideration of historic properties. *Standard treatments* are intended to apply a pre-established method to treat a certain type of historic property, a category of properties, or a category of effects; however, none have been established at this time.

By far, the *programmatic agreement* (PA) is the most widely used program alternative. A PA is an agreement between the federal agency, Advisory Council, SHPO, THPO (where applicable), and other stakeholders (National Conference of SHPOs, applicants) that lays out a future process for identifying historic properties and effects and mitigating such effects. Adherence to the PA allows the federal agency or applicant to begin to undertake its activities prior to completing a project-by-project review. PAs include project impacts that are similar and repetitive (e.g., renewing permits for animal grazing in national forests where there are no changes in area or

activities); project impacts that occur over multiple states or regions, like a pipeline; and for routine management activities by federal agencies responsible for managing land or historic buildings (e.g., maintaining heating, ventilation, and air conditioning systems).

*Back to Basics* identifies serious concerns about the use of PAs, in terms of accountability for carrying them out, public access to the agreement documents, and the absence of any type of monitoring after they are signed. The Advisory Council does not even have a complete tally of how many PAs exist, and very few are publicly accessible. Nationwide at least 19 PAs have been executed since the late 1970s. However, this list does not include documents that apply specifically to individual federal facilities (e.g., research laboratories, military bases), land-management units (e.g., national forests) or regions or to types or categories of activities within a state. Based upon the annual reports of the Advisory Council, several thousand of these latter types of agreements exist. The SHPOs sign such agreements for activities within their states. Not all SHPOs can produce a comprehensive set

**FEDERAL AGENCIES AND APPLICANTS have sought alternatives to implementing the step-by-step procedures of Section 106 from the very start.**

of PAs in effect in their states, however, and compounding the problem is the fact that they have practically no funding to do any type of monitoring of these PAs.

For these reasons, the preservation advocates interviewed for the report eye such agreements as akin to letting the “fox guard the hen house.” Their concerns appear warranted. *Back to Basics*

urges that measures to promote accountability and monitoring be included in PAs before any more are enacted. This would include requiring that the beneficiary of

available project management software packages. These products typically include an “environmental” task or activity with associated deadlines, budgets, and tracking

**GRASSROOTS-BASED EFFORTS...are important ways to update old community surveys and identify those properties that spark the most public interest.**

capabilities, but not a task or activity for compliance with Section 106. *Back to Basics* recom-

the agreement (federal agency, applicant) hire or contract professional staff to carry out the terms of the PA, conduct routine internal audits and reporting of compliance, provide external reporting to interested stakeholders, and conduct public outreach (including posting the agreements on agency websites).

mends that the Advisory Council work with software product vendors and other stakeholders to address this deficiency.

**SUMMARY OF RECOMMENDATIONS**

In conclusion, practically all of those interviewed as part of *Back to Basics* believed that the Advisory Council’s Section 106 regulations provide appropriate flexibility and compliance guidance. However, to make Section 106 better, *Back to Basics* recommends that there needs to be better funding of SHPO and tribal programs so that these consulting parties may fulfill their responsibilities. The report emphasizes the need for federal agencies to directly assume responsibility for compliance and begin early planning to avoid harm to historic properties. It also recommends using the Advisory Council’s substantial Section 106 expertise in expanded ways; promoting accountability when program alternatives are used; and promoting grassroots involvement in identifying historic properties through creative uses of technology and consulting in project reviews.

**RECOMMENDATION 7**  
**Section 106 stakeholders should pursue new ways of using technology, while improving and expanding existing uses.**

Blogs, YouTube, Twitter, Google Earth, and conventional websites are now being used effectively by citizens to highlight the “places that matter” to them. *Back to Basics* argues that there is a substantial, untapped opportunity for states, the National Trust, the Advisory Council, and others to highlight and support such grassroots-based efforts to contribute to the identification of historic properties. Such efforts are important ways to update old community surveys and identify those properties that spark the most public interest.

Recommendation 7 also addresses the need for more timely coordination of NEPA and Section 106 during project implementation. Currently, managers of large federal construction projects, such as levees or dams, or federally assisted projects, like highways or pipelines, use commercially

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- 1 <http://preservationnation.org/106>
- 2 36 C.F.R. § 800.16(f).
- 3 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 (Apr. 24, 1998).



# Forum

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