



Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, D.C. 20001

February 27, 2026

Re: Regulatory Reforms to Improve Efficiency and Predictability in the Section 106 Process

Dear Vice Chairman Voyles and Members of the Council,

Our law firm writes to offer a set of targeted regulatory reforms to 36 CFR Part 800 that the Advisory Council on Historic Preservation (“ACHP”) could adopt by regulation alone—without statutory amendment to the National Historic Preservation Act (“NHPA”)—to make the Section 106 process more efficient, predictable, and defensible for project sponsors, while preserving the statute’s core consultation protections.

Cultural Heritage Partners, PLLC (CHP) is a nationally recognized law firm focused exclusively on historic preservation, cultural heritage, and Indigenous rights law. Clients across the country hire us when the Section 106 process is going badly. For over sixteen years, we have negotiated and litigated complex matters under NEPA and NHPA, including high-profile disputes over infrastructure and renewables projects involving federal agencies, Tribes, descendant communities, preservation advocacy organizations, local governments, and other consulting parties. Clients look to us to help them get their voices heard, to advocate for location and design changes to avoid and minimize impacts of development on historic and cultural resources, and when adverse effects are unavoidable, to negotiate for meaningful mitigation for the communities who value these resources.

We have extensive experience working with federal agencies, state and tribal historic preservation officers, and national advocacy organizations, giving us deep insight into the needs and goals of the various Section 106 stakeholders. Our goal in providing these comments is to share what we think would improve the process and help agencies strike the right balance between development needs and preservation goals. We would much rather be hired to guide our clients through an efficient, predictable Section 106 process than to have to clean up the pieces when agencies have made bad decisions.

These recommendations are informed in significant part by the demonstrated success of the federal permitting reforms under Fixing America's Surface Transportation Act (“FAST Act”), specifically Title 41 (“FAST-41”). The FAST-41 framework—administered by the Federal Permitting Improvement Steering Council—has shown that structured initiation requirements, early scoping discipline, coordinated schedules, and transparent tracking mechanisms can materially improve predictability and interagency coordination without weakening substantive environmental protections. Notably, FAST-41 has enjoyed sustained bipartisan support across administrations,

reflecting a shared recognition that procedural clarity and early planning enhance—not undermine—responsible review.

The FAST-41 process is currently only available to infrastructure projects with budgets in excess of \$200 million, or projects that fit certain categories that are priorities of the Administration. Strategies for keeping permitting reviews on these larger, complex projects on time can inform strategies for all Section 106 projects.

The central premise of the reforms proposed below is the same: greater structure and more informed planning at the initiation stage reduces downstream disputes, delays, and litigation. These reforms would front-load planning, clarify scope, reduce late-stage conflict, and increase schedule discipline—without altering the procedural nature of Section 106 or diminishing tribal consultation rights.

Below we outline reforms for your consideration.

I. Create a Standardized “Initiation Package” Requirement: Revise §800.3 (Initiation of the Section 106 Process)

ACHP could require that agencies provide a standardized Section 106 Initiation Package when formally initiating consultation. This would not change statutory duties—it would clarify what constitutes sufficient initiation.

- Similar to the Federal Initiation Notice (“FIN”) required under FAST-41, ACHP regulations could spell out that Section 106 initiation packages submitted to federal agencies, State Historic Preservation Offices (“SHPOs”), and Tribes and Tribal Historic Preservation Offices (“THPOs”) require:
 - Defined undertaking description (including all known phases);
 - GIS-based project footprint and preliminary Area of Potential Effects (“APE”) map(s);
 - Summary of early resource screening (NRHP-listed properties, previously recorded sites, known historic districts, tribal interest areas);
 - Preliminary identification of anticipated federal permits/approvals;
 - What cultural resources survey reports are anticipated for the project; and
 - Proposed consultation plan and anticipated schedule.

Why This Improves Efficiency

- Reduces repeated “incomplete submission” cycles;
- Forces early clarity about scope and segmentation;
- Provides SHPOs/THPOs with usable materials at the outset;
- Reduces disputes over whether consultation was properly initiated; and
- Reduces the need for additional subsequent 30-day reviews as more information is provided.

This reform would require amendment to §800.3(c) but does not require statutory change.

II. Clarify and Strengthen APE Delineation Standards: Revise §800.4(a)(1)

Current regulations require agencies to define the APE, but they provide limited detail on documentation standards. ACHP could add regulatory language requiring:

- Separate delineation of direct and indirect APEs;
- Written justification for APE boundaries;
- Identification of analytical methods used (e.g., viewshed modeling for visual effects where applicable); and
- Explicit discussion of why foreseeable phases are included or excluded.

Why This Improves Efficiency

- Reduces later challenges alleging artificial narrowing;
- Decreases segmentation disputes;
- Makes effect determinations more defensible;
- Aligns expectations across agencies and SHPOs; and
- Reduces need for resurvey as a result of APE disputes late in the process.

This change strengthens documentation and reduces conflict without expanding substantive obligations. By ensuring the APE is properly delineated, consultation can proceed on schedule and the level of effort required for identification efforts can be properly scoped.

III. Formalize Consultation Planning and Scheduling: Add New §800.3(f) – Consultation Plan

Consultation is a critical part of the Section 106 process, but one where schedules can bloat, especially if critical stakeholders are not invited to participate until late in the process. ACHP could require agencies to provide, at initiation:

- List of consulting parties to be invited; and
- Proposed schedule for:
 - APE concurrence;
 - Identification completion;
 - Effect determinations;
 - Draft MOA circulation; and
 - Anticipated public involvement steps.

The schedule could be advisory, or it could form the basis of an enforceable contract between the agency and the proponent. Holding federal agencies to timelines for response has been successful in the FAST-41 context, where schedule deviations require explanation. Regardless, the consultation plan would establish shared expectations and force a reality check early in the process as to which Tribes and stakeholders need to be at the table and how the project schedule can realistically unfold.

Why This Improves Efficiency

- Reduces open-ended consultation timelines;
- Provides project sponsors greater predictability;
- Encourages early coordination with Tribes and SHPOs; and
- Minimizes last-minute disputes.

IV. Clarify Limits on Phased Identification: Revise §800.4(b)(2)

Vice Chairman Voyles identified long linear projects as an area that needs attention. Agencies often approach long linear projects through a phased identification. This process leads to selection of final routes with incomplete or absent information, late discoveries, re-opened consultations, and construction delays. The ACHP could reduce some of these risks by:

- Requiring agencies to explain why full identification is not feasible at initiation;
- Requiring agencies to describe predictive methods used prior to deferral; and
- Clarifying that phasing should not substitute for early planning where engineering is sufficiently developed.

Why This Improves Efficiency

- Encourages earlier conflict detection, when route changes are less costly and time consuming; and
- Reduces emergency consultation and the need for last minute mitigation agreements.

V. Clarify Scope of the “Undertaking” to Address Segmentation: Revise §800.16(y) (Definition of Undertaking)

Vice Chairman Voyles suggested that cumulative effects need to be reconsidered, consistent with recent changes to NEPA. The areas of conflict around cumulative effects in the Section 106 context could be resolved with clearer guidance about segmentation, which occurs when a developer artificially divides a whole project into parts and seeks to permit them as separate undertakings. Such an approach prevents the federal agency from taking into account the full effect of the project on historic properties. One recent example of this phenomenon has been the Biden Administration’s shameful approach to segmenting offshore wind projects, which has led to the industrialization of the ocean with woefully inadequate consideration of adverse effects.

To resolve this tension, the ACHP could clarify that:

- Agencies must consider reasonably foreseeable phases of a project.
- Agencies should include written analysis demonstrating that the selected APE and undertaking definition is not segmented from a planned project phase, and include it in early project initiation.
- Undertakings should not be artificially narrowed to avoid identification of historic properties.
- Agencies should explain the basis for excluding future phases of a project.

This approach would codify best practices already reflected in ACHP guidance and case law without expanding statutory reach.

Why This Improves Efficiency

- Reduces litigation risk;
- Aligns Section 106 practice with broader federal permitting norms exemplified by FAST-41; and
- Prevents repeated re-openings of consultation for subsequent phases, creating efficiencies for all parties.

VI. Encourage Early Alternatives Disclosure (Procedural Only)

Without importing NEPA's alternatives requirement, ACHP could amend §800.3 to require agencies to identify, at initiation:

- Known design alternatives under consideration; and
- Potential avoidance or minimization strategies.

This approach would not mandate alternatives analysis—it would simply require disclosure of known options.

Why This Improves Efficiency

- Facilitates earlier avoidance-based solutions;
- Reduces late-stage redesign, when it is more costly and time-consuming; and
- Enhances trust with Tribes and SHPOs.

VI. Establish a Secure, Project-Level Digital Consultation Workspace: Add New §800.3(g) – Digital Coordination Platform

Consultation often occurs through fragmented email chains and static document circulation, which makes it difficult to track versions, comments, and responses—particularly for large projects with multiple consulting parties. ACHP could require agencies, at initiation, to establish a secure digital coordination workspace that provides:

- A current list of consulting parties and points of contact;
- A document repository with version control;
- A running consultation log (invitations, meetings, comment deadlines, agency responses);
- A milestone schedule tied to the consultation plan; and
- Controlled access levels to protect confidential Tribal information.

This workspace would function as the Section 106 equivalent of the coordinated project dashboards used in the FAST-41 context, while preserving all existing consultation rights.

Why This Improves Efficiency

- Eliminates confusion over document versions and comment deadlines;
- Provides real-time transparency for all consulting parties;
- Reduces administrative burden on agencies, Tribes, and SHPOs;
- Creates a clear record of consultation for dispute resolution; and
- Prevents needless delays from staff changes at the federal or state level.

VII. Improve Transparency Through Centralized Posting (Optional but Regulatory)

While a national dashboard would likely require Executive Branch coordination, ACHP could require agencies to:

- Post MOAs and Programmatic Agreements to a publicly accessible centralized repository maintained by ACHP; and
- Provide basic public summaries of undertakings.

FAST-41's public dashboard has demonstrated that transparency enhances accountability and schedule discipline while maintaining environmental safeguards. A modest parallel transparency mechanism for Section 106 could provide similar predictability benefits. This approach would increase consistency without altering statutory confidentiality protections under NHPA §304.

VIII. Incorporate Technology-Assisted Identification and Effects Analysis: Revise §800.4(b) and §800.5(a) – Appropriate Identification and Visual/Indirect Effects Tools

Part 800 allows flexibility in identification methods but does not explicitly acknowledge modern technologies such as LiDAR, geospatial data, marine remote sensing, predictive modeling, or viewshed analysis, and it does not specify how agencies should update their own regulations and guidance to remain current with technological advances. Federal agencies and SHPOs allow and require these types of technologies to greater and lesser degrees, and guidance is often inconsistent between states and agencies regarding required methodologies; SHPO, Tribe, and consulting party review of the methods used; and the extent to which consultants must disclose their qualifications for these technologies and any technological limitations. ACHP could clarify that agencies should consider appropriate technology-assisted methods—particularly for large, complex, or landscape-scale undertakings—and must disclose the methods, assumptions, requirements, and limitations of those tools. This could include:

- Use of viewshed and visual simulation where visual effects to historic properties are at issue;
- Remote sensing (terrestrial and marine) to supplement field identification;
- Predictive modeling to inform early alternatives screening and survey strategies (not as a substitute for consultation or field verification);
- High-accuracy mapping to document survey coverage, resource location, avoidance buffers, and construction footprints; and

- 3D documentation where effects to buildings, structures, or designed landscapes are being assessed or mitigated.

The rule would emphasize that these tools supplement—rather than replace—consultation, direct survey, and Tribal knowledge.

Why This Improves Efficiency

- Improves early project planning and alternatives analysis;
- Increases clarity regarding the quality, extent, and limitations of techniques used to identify and document historic properties;
- Reduces disputes over adequacy of identification and visual effects;
- Allows agencies to focus fieldwork where it is most needed; and
- Creates more transparent and reproducible effects determinations.

IX. What These Reforms Would *Not* Do

Importantly, these changes would NOT:

- Create substantive approval authority for ACHP.
- Impose mandatory mitigation outcomes.
- Alter the consultative nature of Section 106.
- Diminish Tribal consultation rights.
- Require congressional amendment to NHPA.

X. Benefits to Developers, Agencies, and Consulting Parties

These regulatory reforms would improve structure, documentation, and schedule discipline, within existing statutory authority and without diminishing the consultative nature of Section 106 or Tribal consultation rights. These changes would:

- Reduce late-stage surprises;
- Provide clearer expectations at project outset;
- Increase administrative record defensibility;
- Lower litigation risk;
- Align Section 106 practice with modern infrastructure project management principles validated by FAST-41; and
- Improve interagency and intergovernmental coordination.

For developers, predictability is as important as speed. For consulting parties, early clarity improves meaningful engagement. For agencies, structured initiation reduces process friction and reputational risk.

The bipartisan success of FAST-41 demonstrates that procedural modernization can attract broad political support when it improves coordination without weakening substantive protections. Section 106 can benefit from the same disciplined approach.

XI. Conclusion

Section 106 has proven durable and adaptable. These proposed regulatory refinements would preserve its core protections while modernizing its implementation to reflect contemporary infrastructure planning realities.

By front-loading clarity and structure—drawing lessons from the bipartisan success of FAST-41—ACHP can:

- Increase efficiency;
- Reduce conflict;
- Enhance predictability;
- Strengthen the administrative record; and
- Reinforce long-term confidence in the Section 106 process.

We would welcome the opportunity to provide draft regulatory text for specific amendments should the Council wish to advance these concepts. We would also be glad to provide our perspective, based in many years of resolving Section 106 conflicts, throughout this regulatory reform initiative.

Respectfully submitted,



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