

National Historic Preservation Act Overhaul: What You Need to Know

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On July 24, 2026, the Advisory Council on Historic Preservation (ACHP) voted to advance a Notice of Proposed Rulemaking that would make substantial revisions to the regulations implementing Section 106 of the National Historic Preservation Act (NHPA). Sources indicate that the rule is set to be formally proposed in the coming weeks, and if finalized in the form leaked to the press in July, the proposed revisions would represent the most significant restructuring of the NHPA's implementing regulations in over 20 years. A restructuring of the Section 106 consultation process could have impacts on a broad range of industries, including energy, pipeline, infrastructure, and national resources projects that require federal permitting.

This proposal is the latest in a series of actions by the federal government aimed at reducing the duplicative nature of federal permitting for large-scale projects, and could de-fang one of the main tools used to slow the process.

Overview of the NHPA

Congress enacted the National Historic Preservation Act in 1966 in response to the widespread destruction of historic downtowns, neighborhoods, and archaeological sites during the interstate highway and urban renewal programs of the 1950s and 1960s.

The NHPA's core provision, Section 106, requires federal agencies to "take into account" the effects of their undertakings on historic properties and to afford the ACHP a reasonable opportunity to comment before approving any such undertaking. An "undertaking" includes any project carried out, funded, licensed, or permitted by a federal agency. "Historic properties" are those listed on, or eligible for listing on, the National Register of Historic Places, which now encompasses more than 1.4 million sites.

Under the existing regulations (found at 36 C.F.R. Part 800), the Section 106 process proceeds through a structured, multi-step framework:

1. Initiation of consultation;
2. Identification of historic properties within the area of potential effects (APE);
3. Assessment of adverse effects; and
4. Resolution of adverse effects.

At each stage, agencies must consult with State Historic Preservation Officers (SHPOs), Tribal

Historic Preservation Officers (THPO)s, Indian Tribes, Native Hawaiian Organizations, and other consulting parties. Adverse effects are typically resolved through a Memorandum of Agreement executed by the agency, relevant historic preservation officers, and, when participating, the ACHP.

The Proposed Changes

On July 17, 2026, ACHP Vice Chairman Travis Voyles circulated a draft revision of 36 C.F.R. Part 800 to ACHP members. The draft Notice of Proposed Rulemaking (NPRM) was approved, and submitted to the Office of Information and Regulatory Affairs within the Office of Management and Budget for interagency review, after which it will be published in the Federal Register for a public comment period. The draft NPRM proposes extensive changes touching virtually every section of the existing regulations.

As it stands, the proposed rule would **fundamentally reframe the nature and process of Section 106 review**. New language would expressly characterize Section 106 as "procedural," stating that it "does not impose any substantive historic preservation outcomes or obligations" and permitting agencies to balance historic preservation against "other interests, such as economic development." The existing hierarchy directing agencies to "seek ways to avoid, minimize or mitigate" adverse effects would be replaced with a general directive to "address" adverse effects, with agencies empowered to determine that "other considerations outweigh effects on historic preservation." Most dramatically, the current multi-step consultation framework would be replaced by an agency-prepared "Section 106 Report" consolidating identification, effects assessment, and proposed mitigation into a single certified document. Agencies would also gain unilateral authority to alter any regulatory deadline and to resolve adverse effects through a "memorandum of decision" without SHPO or THPO agreement—replacing the existing Memorandum of Agreement process.

The proposed rule would also **narrow the scope of what triggers review and what must be considered**. The APE would be limited to "direct material alterations," removing references to indirect effects and potentially excluding visual, audible, atmospheric, and cumulative impacts on nearby historic properties. The definition of "historic property" itself would be revised to require "tangible human improvements" and "geographic compactness," potentially excluding unimproved natural features such as mountains, valleys, bodies of water, and broader cultural landscapes from review. Mandatory public engagement would become discretionary, with agencies given "exclusive discretion to determine the usefulness of public participation."

Impacts of the Proposed Revisions

If finalized, the proposed revisions could have significant legal and operational consequences for any project requiring federal permitting that may affect historic properties, such as oil and gas pipelines, electric transmission lines, service roads and right-of-way corridors, mining operations, and renewable energy installations and operations.

Accelerated Permitting and Consultation Timelines – The consolidated Section 106 Report process, combined with agency control over deadlines and the option to resolve adverse effects unilaterally, could materially shorten the review cycle for federally permitted projects. Under the current framework, Section 106 consultation is a major source of delay for energy, mining, and infrastructure projects on federal lands.

NEPA Integration – The proposed rule would retain the existing framework for integrating Section 106 with NEPA but align it with the new Section 106 Report structure, potentially enabling a single

consolidated environmental review document for projects reviewed under both statutes.

Scope of Protected Property – The proposed narrowing of the definition of "historic property," which requires both "tangible human improvements" and "geographic compactness," could limit Section 106 protections for traditional cultural properties, sacred landscapes, and other ancestral areas that have historically triggered consultation requirements for energy and infrastructure projects.

Litigation Risk – While the proposed changes may accelerate permitting timelines, it correspondingly increases post-approval litigation risk for early projects processed under any new rules. The Society for American Archaeology, in a public statement on the proposed changes, warned that the proposal may "significantly increase business risk for developers, infrastructure companies, lenders, and permitting agencies" by pushing conflicts downstream to the construction phase, when the cost of redesign and delay is far greater than at the consultation stage.

While a final rule is unlikely before 2027, the proposed overhaul represents the most consequential potential change to the Section 106 framework in over two decades. If you have questions about the proposal's implications for your facility, feel free to reach out to us directly.