

Section 106 Regulations Under Threat: Specifics on the Technical Complexities

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Permitting Reform and Section 106:
Why Statute Matters

The relationship between federal law, regulation, and congressional intent.



Current Environment

Two reform efforts are happening simultaneously:

- **Administration / ACHP**: agency is pursuing a comprehensive revision of NHPA's Section 106.
- **Congress**: Senate negotiations and legislation seek to make federal permitting more predictable, efficient, and timely.
  - Legislative language reforming NHPA's Section 106 process is under development.
  - Legislative text could be released in September



Understanding the difference: Statute v. Regulation

Statute

- Passed by Congress and signed by the President—or enacted over a veto.
- Establishes binding legal requirements.
- Defines the authority and limits of federal agencies.
- Can *amend, supersede, or constrain* existing regulations.

Regulation

- Developed by an agency pursuant to authority granted by Congress.
- Provides the procedures and details for implementing a statute.
- Must remain consistent with the statute.
- Can generally be changed by a subsequent administration through rulemaking.

Takeaway: Regulations implement statutes; they do not replace them.

What regulations can and cannot do:

Regulations CAN:

Establish procedures

Define how agencies conduct consultation

Create timelines consistent with the statute

Establish exemptions/alternatives where authorized

Regulations CANNOT:

Contradict the statute
Eliminate statutory obligations
Override Congressional requirements
Rewrite congressional policy
Exercise authority Congress did not grant
Supersede subsequent legislation

Congress has given ACHP substantial discretion to structure the Section 106 process. That makes statutory boundaries and congressional direction particularly important.

The ACHP Proposal: Why It Matters

Regulatory Reform Can Have Statutory Consequences in Practice

Regulatory changes can substantially affect:

- What projects receive review
- What geographic area is considered
- Which historic properties are considered
- Who participates in consultation
- How long consultation lasts
- When consultation can be terminated
- How agencies document decisions
- How Tribal and community interests are incorporated



JULY 21ST, 2026

HEINRICH, ENR MEMBERS RELEASE STATEMENT URGING ADVISORY COUNCIL ON HISTORIC PRESERVATION TO REJECT RULE GUTTING TRIBAL CONSULTATION

WASHINGTON – This week, the Advisory Council on Historic Preservation — the federal agency that oversees historic preservation reviews — is considering a draft rule that would make sweeping changes to the Section 106 consultation process under the National Historic Preservation Act, allowing government agencies and developers to move forward without consultation with Tribes and states. The proposed changes would undermine critical protections for historic, cultural, and religious sites and eliminate the role of Tribal communities in decisions that directly affect places of deep cultural and spiritual significance.

In response to the news, U.S. Senator Martin Heinrich (D-N.M.), Ranking Member of the U.S. Senate Energy and Natural Resources Committee, U.S. Senator Ron Wyden (D-Ore), U.S. Senator Maria Cantwell (D-Wash.), U.S. Senator Mazie Hirono (D-Hawai'i), U.S. Senator Angus King (I-Maine), U.S. Senator Catherine Cortez Masto (D-Nev.), U.S. Senator John Hickenlooper (D-Colo.), U.S. Senator Alex Padilla (D-Calif.), and U.S. Senator Ruben Gallego (D-Ariz.), released the following statement:

"These draft regulations by the Advisory Council on Historic Preservation are unacceptable — eliminating Tribal consultation as we know it. This proposal disrespects the expertise that states and Tribes have in protecting our national history and culture, and it erases the requirement for the federal government to meaningfully consult with Tribal governments before they take actions that would negatively impact sacred, historic, and cultural sites for Tribal communities.

"Let's be clear: there is a difference between making the consultation process work better and cutting Tribes out of the process. We support efforts to modernize and improve the Section 106 review process, but that cannot come at the expense of meaningful Tribal consultation or the expertise of the people who have protected these places for generations.

"We urge the Advisory Council on Historic Preservation to go back to the drawing board and work directly with Tribes and states on a new proposal that actually improves the consultation process without undermining the rights and voices of those most directly affected."

Last October, during a U.S. Senate Energy and Natural Resources Committee hearing on the National Historic Preservation Act, Senate Democrats on the Committee emphasized the need to ensure that Tribes and local communities have a meaningful voice in the federal permitting approval process.

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Congress Can Change the Equation



If Congress subsequently legislates on the same subject, the statute controls.

Suppose Congress says:

"For projects affecting historic properties, the agency shall consult with the SHPO and affected Tribes before making a final decision."

An agency regulation could not simply say:

"Consultation is unnecessary when the agency determines that consultation would delay a project."

The more specifically Congress legislates, the less room future administrations have to reinterpret the policy through regulation.

What You Can Do – Upcoming Advocacy Opportunities

- Submit a Meeting Request with the Office of Information and Regulatory Affairs (OIRA):

  Regulation Identifier Number (RIN) 3010-AA10. Encourage your Governor to do the same!

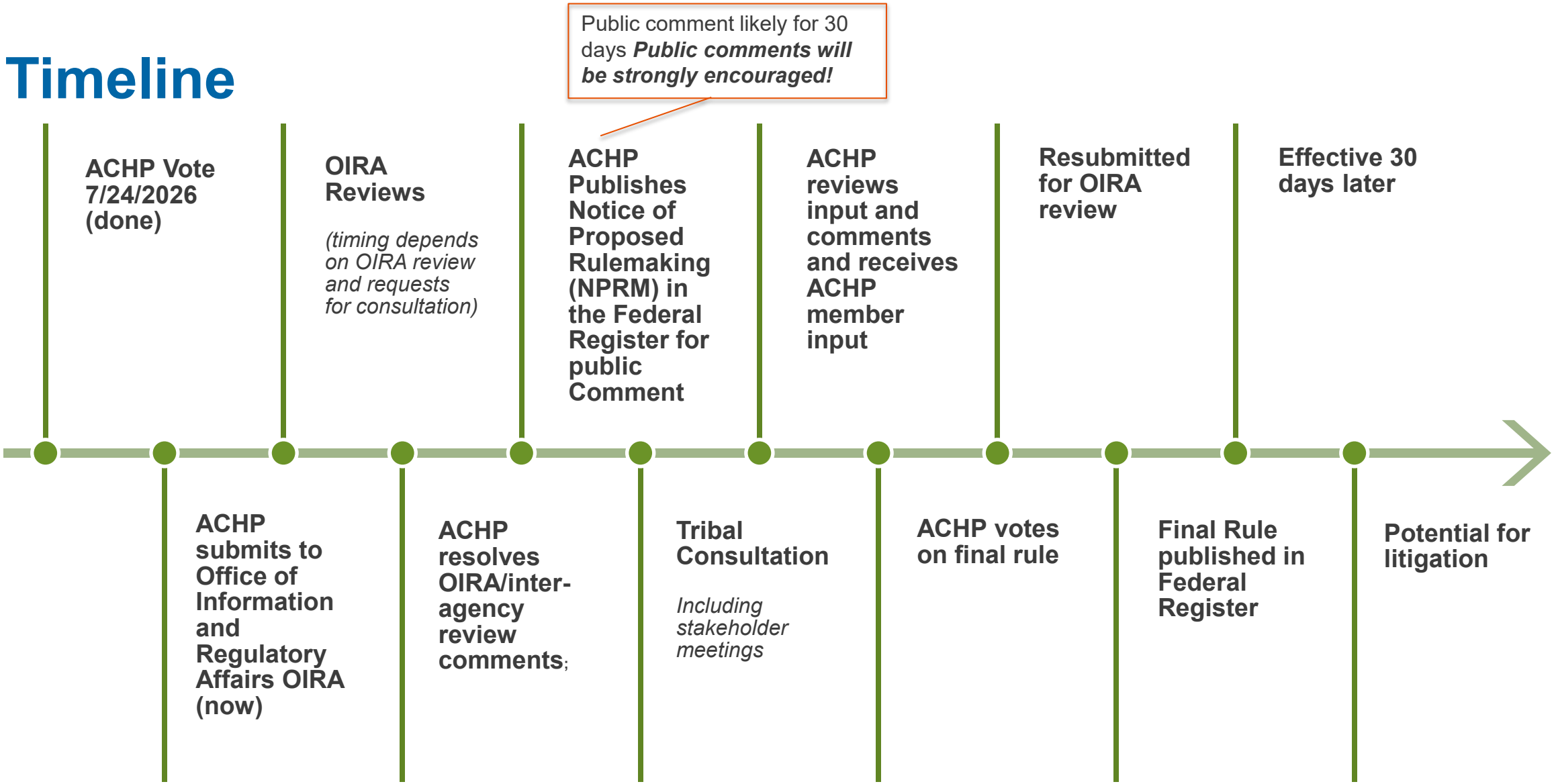
- Ask to meet with your Congressional Delegation and/or their Staff during the summer recess:

  Senate: August 10 – Sept. 14 **House**: July 23 – August 31

- Prepare for ACHP's Public Comment Period on the Interim Proposed Rule
- Stay tuned for the introduction of Federal Permitting Legislation – September? Lame Duck Session?
- Attend the National Preservation Summit in Washington, DC – Advocacy Day, **September 24**

Follow NTHP Updates at: https://savingplaces.org/section106.

Timeline


Public comment likely for 30 days ***Public comments will be strongly encouraged!***
ACHP Vote 7/24/2026 (done)
ACHP submits to Office of Information and Regulatory Affairs OIRA (now)
OIRA Reviews
(timing depends on OIRA review and requests for consultation)
ACHP resolves OIRA/inter-agency review comments;
ACHP Publishes Notice of Proposed Rulemaking (NPRM) in the Federal Register for public Comment
Tribal Consultation
Including stakeholder meetings
ACHP reviews input and comments and receives ACHP member input
ACHP votes on final rule
Resubmitted for OIRA review
Final Rule published in Federal Register
Effective 30 days later
Potential for litigation

Section 106

"The head of any Federal agency having **direct or indirect jurisdiction** over a proposed Federal or **federally assisted undertaking** in any State ... or ... having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall **take into account** the **effect of the undertaking** on **any historic property**."

54 U.S.C. § 306108

NHPA Definition of "Undertaking"

54 U.S.C. § 300320 Undertaking

[T]he term "undertaking" means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—

(1) those carried out by or on behalf of the Federal agency;

(2) those carried out with Federal financial assistance;

(3) those requiring a Federal permit, license, or approval; and

(4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

ACHP Proposed Definition of "Undertaking"

§ 800.3 Determining Whether There is an Undertaking~~Initiation of the section 106 process~~.

(a) ***Establish undertaking.*** The agency official shall determine whether the proposed ~~Federal~~ action is a~~n~~ Federal undertaking which section 106 analysis is required~~as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties~~.

ACHP Proposed Definition of "Undertaking" § 800.3(a)(2)-(3)

Section 106 does not apply:

(ix) For actions with no or minimal Federal funding, or with no or minimal Federal involvement where a federal agency cannot control the outcome of the project. A but-for causal relationship is insufficient to make an agency responsible for a particular action and thus, does not by itself convert that action into a Federal undertaking within the meaning of the language of the Act.

(3) In determining whether a proposed project constitutes an undertaking for which section 106 review applies, the agency official will consider only the action or project over which the agency has discretion and control to approve, fund, or otherwise authorize.

ACHP Proposed
Definition of "Undertaking" § 800.3(a)(2)-(3)

Section 106 does not apply:

(v) [W]here the state or local government is exercising delegated federal authority to act . . . .

Nine states have delegated authority from the Federal Highway Administration for project management and implementation:

Alaska	Florida	Ohio
Arizona	Maine	Texas
California	Nebraska	Utah

Would this exempt all of those federally funded transportation projects from Section 106 compliance?

"Effects" to be Considered



ACHP Proposal would eliminate consideration of:

- All visual, atmospheric, & audible effects;
- Reasonably foreseeable cumulative effects;
- Effects that fall outside the agency's regulatory jurisdiction

ACHP Proposed Definition of "Historic Property" – § 800.16(k)(2)

Historic property requirements:

(i) It includes, or has included at some point in the past, tangible human improvements; and

(ii) It is geographically compact.

Definition of "Historic Property"

NHPA Statute

"'historic property' means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object." 54 U.S.C. § 300308

ACHP Proposal

"noncompact, unimproved natural features such as mountains, valleys, bodies of water, or landscapes, including ethnographic landscapes, do not qualify as [historic] property for the purposes of section 106."

(§ 800.16(k)(2))

Responsibilities of SHPOs
NHPA Statute
54 U.S.C. § 302303(b)

(5) advise and assist, as appropriate, Federal and State agencies and local governments in carrying out their historic preservation responsibilities;

(6) cooperate with the Secretary, the Council, other Federal and State agencies, local governments, and private organizations and individuals to ensure that historic property is taken into consideration at all levels of planning and development;

* * * *

(9) consult with appropriate Federal agencies in accordance with this division on—

(A) Federal undertakings that may affect historic property; and

(B) the content and sufficiency of any plans developed to protect, manage, or reduce or mitigate harm to that property;

Responsibilities of SHPOs
ACHP Proposal § 800.2(c)(1)

(c) ***Consulting parties***. The following parties may have consultative roles in the section 106 process.

(1) ***State historic preservation officer***. ~~The State historic preservation officer (SHPO) reflects the interests of the State and its citizens in the preservation of their cultural heritage.~~ In accordance with section 101(b)(3) of the act, the State historic preservation officer (SHPO) advises and assists Federal agencies in carrying out their section 106 responsibilities and cooperates with such agencies, local governments and organizations and individuals to ensure that historic properties are ~~taking~~ taken into consideration ~~at all levels of~~in planning and development.

Role of Local Governments
NHPA Statute

"The Council shall by regulation establish such procedures as may be necessary to provide for participation by local governments in proceedings and other actions taken by the Council with respect to undertakings referred to in section [106] that affect the local governments."

54 U.S.C. § 304108(b)

Role of Local Governments
ACHP Proposal
§ 800.2(c)(3)

(3) ***Representatives of local governments.*** The agency official may invite a~~A~~ representative of a local government with jurisdiction over the area in which the effects of an undertaking may occur ~~is entitled~~ to participate as a consulting party. Under other provisions of Federal law, the local government may be authorized to act as the agency official for purposes of section 106.

Tribal Consultation
ACHP Proposal § 800.4(b)(2)(i)

(i) ***Apply National Register criteria.*** Section 106 applies~~In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance~~ to ~~identified~~ properties that are eligible~~and guided by the Secretary's standards and guidelines~~ for or listed in ~~evaluation,~~ the National Register. The agency official shall determine whether the property is eligible for the National Register by applying~~apply~~ the National Register criteria (36 CFR part 63) to properties identified within the area of potential effects that have not been previously evaluated for National Register eligibility. The passage of time, changing perceptions of significance, or incomplete prior evaluations may require the agency official to reevaluate properties previously determined eligible or ineligible. ~~The agency official shall acknowledge that Indian tribes and Native Hawaiian organizations possess special expertise in assessing the eligibility of historic properties that may possess religious and cultural significance to them.~~

Role of Public Input
ACHP Proposal - § 800.3(d)

(d) ~~*The P*~~*public participation at agency discretion.*~~—~~

(1) ***Authorization to initiate public participation at agency discretion.*** Consistent with Section 106 of the NHPA, an agency may provide the public with an opportunity to participate at any point in the Section 106 process. The agency has exclusive discretion to determine the usefulness of public participation, including, e.g., as necessary to resolve community concerns. The agency shall consider how offering an opportunity for public participation is balanced against the cost of other values, such the public interest.

~~(1)~~(2) ***Nature of involvement.*** In determining whether and how to solicit public involvement, ~~The views of the public are essential to informed Federal decisionmaking in the section 106 process. t~~The agency official ~~shall seek and~~may consider, among other things, ~~the views of the public in a manner that reflects~~ the nature and complexity of the undertaking and its effects on historic properties;~~,~~ the likely interest of the public in the effects on historic properties; the likely utility of public involvement; any delays that may be created by the process of seeking public comment;~~,~~ confidentiality concerns of private individuals, ~~and~~ businesses, and tribes;~~,~~ and the relationship of the Federal involvement to the undertaking.

~~(2)~~(3) ***Providing notice and information.*** The agency official ~~must~~may, ~~except where~~as appropriate ~~to protect confidentiality concerns of affected parties~~, provide the public with information about an undertaking and its effects on historic properties and seek public comment and input. Members of the public may also provide their views on their own initiative. ~~for~~ The agency official shall determine how much weight to assign such views, and when and how to incorporate them into the ~~consider in~~ decisionmaking process.

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ACHP Proposal § 800.14(a)(2)

(2) ***Developing programmatic agreements for agency programs***.

(i) ***Consultation.*** The agency official may consult~~consultation shall involve~~, as appropriate, individual SHPOs/THPOs, the National Conference of State Historic Preservation Officers (NCSHPO), Indian tribes and Native Hawaiian organizations, other Federal agencies, and members of the public, in developing ~~. If~~ the programmatic agreement. If a programmatic agreement has ~~the~~ reasonable foreseeable potential to affect historic properties on tribal lands or historic properties of religious and cultural significance to an Indian tribe or Native Hawaiian organization off tribal lands, the agency official shall also follow paragraph (d~~f~~) of this section.

~~(ii) *Public participation.* The agency official shall arrange for public participation appropriate to the subject matter and the scope of the program and in accordance with subpart A of this part. The agency official shall consider the nature of the program and its likely effects on historic properties and take steps to involve the individuals, organizations and entities likely to be interested.~~

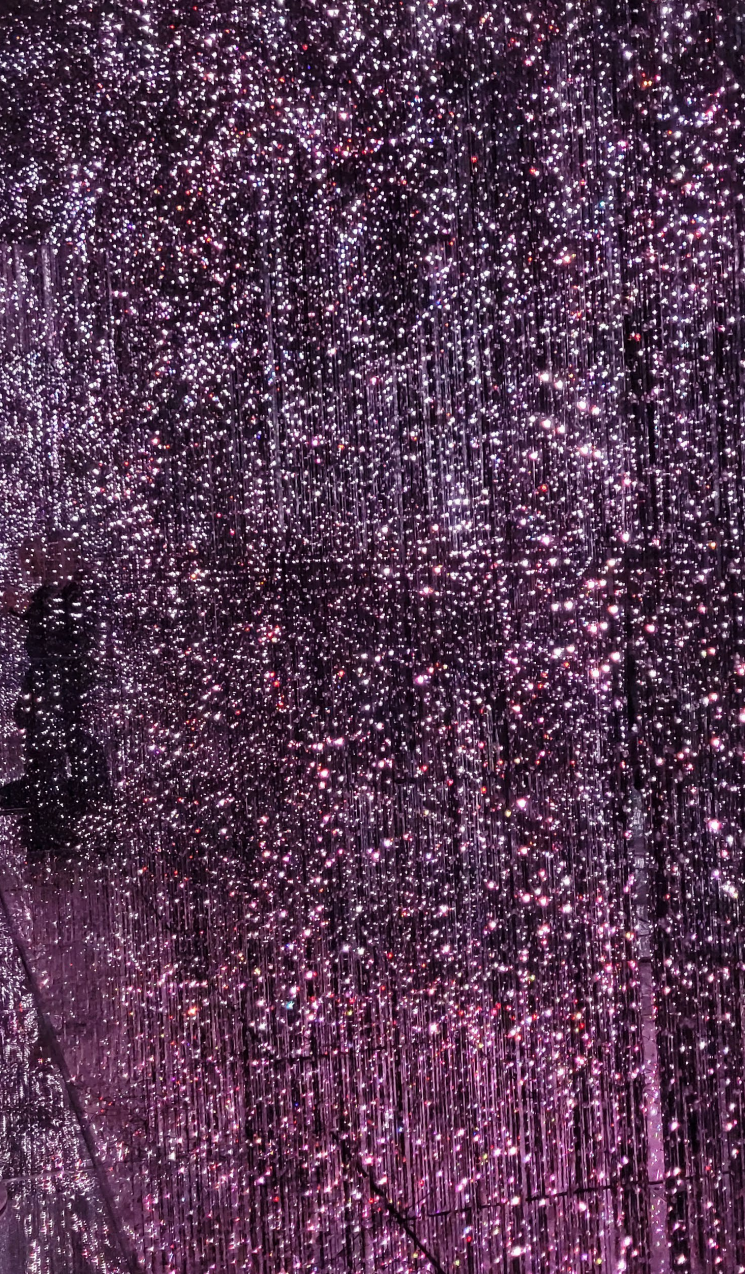
Lack of Consultation

The uniquely effective dynamic of "consultation" under Section 106 would become purely optional, with no incentive to reach agreement. Instead, the agency could make its own unilateral determinations, then submit a Section 106 Report afterwards for comment.



Question and Answer

Please submit questions in the Q&A function located at the bottom of your zoom screen



Upcoming Webinars

August 18, noon eastern
Implementing Heritage-Informed Decarbonization Policies

August 24, 2pm eastern
Section 106 Regulations Under Threat: Guidance for Advocates

September 17, 2pm eastern
Legistlative Update: Key Preservation Priorities on the Hill

For More Information, visit:
SavingPlaces.org/upcoming-webinars

Save the Date! October 19, 2026
Washington D.C. and Online



Thank You!

Questions? Please contact:

FORUM@SAVINGPLACES.ORG



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