CONSERVATIVE COALITION *for* CLIMATE SOLUTIONS

Modernizing Section 106 of the National Historic Preservation Act

Restoring Clarity, Predictability, and Purpose to the Process

by Cecilia Fassett

April 2026

Executive Summary

Section 106 of the National Historic Preservation Act requires federal agencies to consider how projects they fund, permit, or carry out affect historic and cultural resources. While the process is important to ensure historic preservation, inconsistent implementation, undefined timelines, litigation, and outdated systems have made it a source of delay for energy, transmission, and conservation projects. This paper proposes five reforms: 1. clarify scope of effects and the Area of Potential Effects, 2. narrow judicial review and align NHPA claims with the Administrative Procedure Act, 3. modernize data systems using proven state models, 4. expand the use of programmatic agreements for routine projects, and 5. explore creative ways to encourage voluntary, incentive-based mitigation.

As Congress considers broader permitting reform and the Advisory Council on Historic Preservation continues its review of Section 106, these changes to the National Historic Preservation Act and its implementation would improve predictability and reduce unnecessary delays while preserving the Act's core mission of protecting America's cultural heritage.

Understanding the National Historic Preservation Act and Section 106

The National Historic Preservation Act (NHPA) of 1966 is a landmark law designed to protect and preserve America's cultural heritage, including Native American cultural sites, archaeological ruins, and historic buildings (such as centuries-old churches or schools). It was enacted during the rapid post-World War II development that often destroyed these historic sites and archaeological resources without meaningful review by federal agencies or developers. By the time the law was enacted, half of the National Park Service's Historic American Building Survey[1] sites had been destroyed or damaged beyond repair. That tragic reality encouraged the prompt passage of the law.

The Act established the Advisory Council on Historic Preservation (ACHP), which is an independent agency created to advise Congress and the President and coordinate relevant federal, state, local, and private entities' roles in historic preservation.[2] The council has the authority to make rules and regulations relating to Section 106. The Act created the State Historic Preservation Offices (SHPOs), was later amended in 1992 to include Tribal Historic Preservation Offices (THPOs), and established a federalist system in which states and tribes lead much of the preservation work.

Section 106, the Act's core compliance process, requires federal agencies to take into account the effects of their undertakings, which include projects they fund, permit, or carry out, on historic properties. As a result, the scope of what triggers Section 106 review can be broad, from an Army Corps project to a geothermal project on federal land. The Act does not mandate any outcome of the review; it mandates that the review be done. It is purely procedural in statute, much like the National Environmental Policy Act (NEPA).

However, because NEPA has been litigated far more frequently, it has a more developed case law. The NHPA has not received comparable attention from the Supreme Court as NEPA has, leaving courts' interpretations inconsistent. Additionally, because the same federal actions trigger NEPA and NHPA, they are frequently litigated together.

The scope of what triggers Section 106 review can be broad, from an Army Corps project to a geothermal project on federal land.

The compliance process, as established by the Advisory Council on Historic Preservation (36 C.F.R. Part 800), involves four steps.

1. Determine if there is an undertaking with potential effects.
2. Identify historic properties in the Area of Potential Effects (APE).
3. Assess effects on those properties.
4. Resolve any adverse effects through avoidance, minimization, or mitigation.

Importantly, these steps, notably the fourth step, come from ACHP's regulations, not from the statute itself. Section 106's text requires only that effects be "taken into account." (54 U.S.C. § 306108)

Unlike NEPA, which now has statutory deadlines following the Fiscal Responsibility Act of 2023, Section 106 has no statutory deadline for completion. While the regulations give SHPOs and THPOs 30 days to respond to specific findings, the preceding steps (defining the area of potential effects, identifying and evaluating historic properties, and surveying) have no fixed timeline. When a project reaches the adverse effects stage, the parties negotiate a Memorandum of Agreement. This legally binding document spells out how the agency will mitigate harm to the historic property. There is no deadline for when the negotiation must conclude, so it can drag on for months or years. Additionally, mitigation requirements may have little, if any, relevance to the preservation of the cultural site.[3] During the review, agencies consult with SHPOs, THPOs, the Advisory Council on Historic Preservation (ACHP), and other stakeholders (whether that be archaeologists, NGOs, Native Hawaiian Organizations, or historians).

The goal of the act is noble and worth preserving. It seeks to keep our nation's history as "a living part of our community life," rather than hide it or destroy it under new development. But inconsistent implementation often creates uncertainty, delays critical projects, and drives up costs for energy infrastructure, transmission lines, and conservation projects.

An October 2025 Senate Energy and Natural Resources Committee hearing[4] outlines real-world case studies showing how Sec. 106 can lead to unclear, open-ended consultations that cause significant permitting delays and legal battles. In February 2026, the ACHP initiated a formal review of the Section 106 process, citing challenges identified by this hearing[5].

Impacts on Energy and Conservation Projects

Section 106 reviews are often straightforward. According to a 2010 National Trust for Historic Preservation report[6], of the 114,000 eligibility actions reviewed annually under Section 106, approximately 85 percent resulted in a finding of "no historic properties affected." 13 percent resulted in "no adverse effect," and 2 percent had effects and were resolved through a Memorandum of Agreement (MOA).

However, delays can arise at any stage. Early in the process, disputes over how broadly to define the Area of Potential Effects determine which properties must be surveyed and which tribes or stakeholder groups must be consulted; a broader APE means more reviews, more parties involved, and more time. Cultural or historic resources identified late can force the process to restart. When a project crosses land managed by different

agencies, such as BLM and the Forest Service, each agency may define the APE differently, compounding delays. And at the adverse effects stage, open-ended negotiation over how to mitigate harm to a historic property can drag on indefinitely, with no deadline to compel resolution.

These challenges have played out clearly in the energy sector. For example, Montana-Dakota Utilities' Andy McDonald testified in 2025[7] about a maintenance project that was significantly delayed. The company was rebuilding a three-mile distribution line across federal and private land, including upgrades for wildfire mitigation and grid stability. But the project stalled when one agency limited the APE to the portion of federal land within its jurisdiction. In contrast, the other agency involved included the entire 3 miles, including private land where no federal approval was required, in the APE.

Idaho Power's proposed 300-mile transmission line spanning Oregon and Idaho spent 18 years in permitting and reviews before beginning construction in 2025. While NEPA contributed significantly to the delays, Section 106 had also been a recurring bottleneck. BLM initiated the NHPA process in 2011,[8]and the review was ongoing through 2024.

Beyond administrative delays, litigation under Section 106 is an additional source of uncertainty. As Stacey Bosshardt has argued, some federal courts have strayed from treating the NHPA as a procedural statute. In some cases, courts have suggested that agencies must adopt binding mitigation measures with developers or commit to preservation agreements before an agency can grant a license[9]. Again, NHPA's text does not mandate an obligation to mitigate harm. As a procedural statute, it merely requires agencies to "stop, look, and listen," as Bosshardt stated.

Congress should clarify the language relating to APEs, limiting them to areas with a direct, proximate causal relationship to the specific federal action.

In the fourth stage of Section 106, project developers typically sign an MOA where they agree to carry out some form of mitigation, minimization, or avoidance activity. While some instances of collaboration result in positive mitigation outcomes, other activities are not true mitigation and have little, if anything, to do with the preservation of a site. For example, FAI's Thomas Hochman noted, the developers of the Susquehanna-Roseland Transmission Line were required to complete four interpretive products, including podcasts, scenic byway signs, and publications. Certain mitigation activities within the same project, such as rehabilitation of historic features of the Appalachian Trail, may have achieved positive mitigation, but others appear, at best, loosely connected to the affected site. In another instance, a wind developer had to contribute funding for a fitness lane near a boardwalk[10].

U.S. Forest Service management projects and USDA conservation and rural development programs have faced similar hurdles, but have overcome many of them through the use of project-specific programmatic agreements and national programmatic agreements (NPAs). Programmatic agreements (PAs) are negotiated

in advance to set rules for how certain categories of projects will be reviewed under Section 106. In 2021, the U.S. Forest Service, recognizing that the wildfire crisis needed to be addressed, signed a national programmatic agreement[11] with the Advisory Council on Historic Preservation (ACHP) to phase the Section 106 compliance for large-scale projects, so that a project decision may be granted while the full Section 106 process is still underway. These offer more predictability and allow projects to move forward on a shorter timeline. However, use of the phasing NPA is optional, and the Forest Service may still choose to complete the full process before issuing a project decision. While a solid tool for streamlining the process, developers may face obscure and costly mitigation requirements even under NPAs.

The United States Department of Agriculture[12] also signed a programmatic agreement for rural development, whereby economic development projects such as telecommunications and waste and water treatment were allowed to move forward while the formal Section 106 process was still underway, to better align with the timing of rural development grant and loan obligations.

Reforms to Improve Permitting and Protect Historic Sites and Artifacts

The proposed reforms would address real implementation issues that are causing delays in energy and transmission projects while preserving NHPA's goal of protecting historic and cultural resources. They draw on proven state successes in Utah and Washington, Stacey Bosshardt's analysis, testimony from the hearing, advocacy from groups such as the National Trust for Historic Preservation and other research.[13.]

1. CLARIFY THE SCOPE OF EFFECTS AND THE AREA OF POTENTIAL EFFECTS (APE)

Federal agencies have long interpreted the APE inconsistently. As Andy McDonald's testimony illustrates, two agencies can apply conflicting APE standards to the same project with no mechanism to solve the differences.

Congress and the ACHP should clarify the language governing what effects must be considered, limiting review to areas with a direct, proximate causal relationship to the specific federal action. The

cumulative effects analysis, in which an action is judged against a broad set of past, present, and hypothetical future impacts, should not be applicable under the NHPA.

This could be achieved by Congress amending the statutory language that currently requires agencies to "take into account the effect of an undertaking" to specify that the effects must be direct, proximate, and with a causal relationship. Alternatively, the ACHP could revise its regulations to align the definition of the Area of Potential Effects accordingly.

For multijurisdictional projects, Congress should require agencies to designate a lead agency before reviews begin (as NEPA does for multi-agency projects[14]). As it currently stands, designating a lead agency is voluntary under ACHP regulations.

The ACHP's ongoing review provides an opportunity to address both the APE definition and the lead agency designation through rulemaking.

2. NARROW JUDICIAL REVIEW AND ALIGN NHPA CLAIMS WITH THE ADMINISTRATIVE PROCEDURE ACT'S EXISTING JUDICIAL REVIEW STANDARD

When a federal agency's Section 106 compliance is challenged in court, the lawsuit is typically brought under the Administrative Procedure Act, which means the court can only review the agency's final decision and must defer to the agency's judgment unless it was arbitrary or unreasonable.

As Stacey Bosshardt argues in a 2026 analysis for the American Bar Association's Natural Resources & Environment journal,[15] federal courts have not consistently applied those constraints to NHPA cases. Courts have treated Section 106 as imposing mitigation obligations that appear nowhere in the statute.

Aligning NHPA reform with NEPA reform that narrows the scope of environmental review, permits remand without vacatur, and shortens the statute of limitations will greatly improve transparency and efficiency.

The Supreme Court has already corrected this under NEPA, holding that procedural statutes enforced through the APA do not require fully developed mitigation plans and that an agency's review is limited to the project at hand.

Congress should codify these principles for NHPA, clarifying that Section 106 does not mandate mitigation outcomes. Aligning NHPA reform with NEPA reform that narrows the scope of environmental review, permits remand without vacatur, and shortens the statute of limitations will greatly improve transparency and

efficiency while ensuring that communities and affected parties can participate in the process.

3. MAKE UTAH AND WASHINGTON'S DIGITIZATION MODELS THE NATIONAL STANDARD

Like many federal government databases, cultural and historic data largely remain in paper files and fragmented systems. This can lead to redundant surveys and delayed reviews. Utah's State Historic Preservation Office has operated on a fully digital system since 2017, having digitized decades of paper records into GIS databases. This enables a streamlined review process. According to Utah's State Historic Preservation Officer, Dr. Christopher Merritt[16], with their entirely digitized system, 98 percent of reviews in Utah occur within 7 days, and the cost savings amount to $350,000 per year, due to reduced printing and mailing. Similar successes include Washington State's WISAARD[17] platform, which speeds up reviews by combining GIS mapping of archaeological and architectural sites with electronic Section 106 submissions. Federal agencies and consultants upload project details and affected areas directly, so the State Historic Preservation Office can often respond within 3 to 4 days[18], well under the statutory 30-day timeline.

Congress should allocate funding and technical support to enable State and Tribal Historic Preservation Offices to build modern, centralized databases for cultural and historic resources.

In 2024, the ACHP received funding from the Permitting Council[19] to develop an AI-driven planning tool that draws on existing cultural and historic resource databases to guide project siting decisions. Without better state databases, like Utah's and Washington's, that tool would be ineffective.

Congress should allocate funding and technical support to enable State and Tribal Historic Preservation Offices to build modern, centralized databases for cultural and historic resources. States like Utah have shown that when this information is organized and accessible upfront, conflicts can be flagged early, costs decrease, and timelines are significantly shorter. This would create a more efficient review process and retain strong protections for cultural places.

4. EXPAND THE USE OF PROGRAMMATIC AGREEMENTS FOR LOW-IMPACT, ROUTINE PROJECTS

Federal agencies should proactively look to develop programmatic agreements with ACHP and relevant SHPOs and THPOs, establishing pre-approved exemption categories for routine, low-impact energy

undertakings on federal lands. Similar to FHWA's statewide transportation agreements and USDA rural development PAs, these frameworks would allow agencies to concentrate Section 106 resources on projects with genuine historic concerns.

A 2015 analysis[20] of the Federal Highway Administration's programmatic agreements in California and Ohio found significant time and cost savings. In California, the PA saved $800,000 annually and reduced review time by 45 hours per project, leading to faster project turnaround and greater ability to focus on more complex projects. Ohio saw similar gains, including $1.5 million in annual savings, review times reduced from 6-12 months to just a few weeks, and improved coordination and predictability.

5. CONGRESS AND THE ACHP SHOULD EXPLORE CREATIVE WAYS TO VOLUNTARILY INCENTIVIZE MITIGATION AND EARLY COLLABORATION WITH STAKEHOLDERS

Since mitigation or avoidance is not statutorily required under the NHPA, but the preservation of genuine cultural and historic resources is a societal good, Congress, federal agencies, and the ACHP should explore voluntary frameworks that incentivize and reward proactive engagement.

Certain environmental statutes have done this successfully. Under the Clean Water Act, compensatory mitigation banking allows developers to purchase pre-established credits to offset wetland impacts, transferring liability and accelerating permitting while restoring ecosystems. Under the Endangered Species Act, safe harbor agreements give landowners who voluntarily improve habitat a guarantee that their efforts won't trigger additional regulatory burdens in the future.

The ACHP should use its existing authority to develop expedited pathways for developers who engage tribes and stakeholders early and reach an agreement before the formal Section 106 process begins. Congress should consider statutory safe-harbor protections to provide legal certainty for qualifying early agreements. As part of this effort, what qualifies as a historic property should be evaluated to ensure that the framework incentivizes the meaningful preservation of resources with legitimate cultural and historical significance rather than merely old properties.

Conclusion

Section 106 is an important tool in preserving culture and history. But in the 21st century, it requires modernization. To ensure affordable, reliable energy, project developers need efficient, predictable processes. Critically, the agencies, states, and tribes responsible for NHPA compliance need clear guidance and modernized systems. The right reforms will ensure America's energy future and resilient forests thrive alongside its rich culture and history.

Cecilia Fassett is a Policy Associate and Deputy Editor at C3 Solutions.

Endnotes

1 National Park Service, "National Historic Preservation Act," accessed February 18, 2026, https://www.nps.gov/subjects/historicpreservation/national-historic-preservation-act.htm.

2 Stacey Bosshardt, "NHPA Caselaw Needs a 'Course Correction'—and NEPA Caselaw Can Help," Natural Resources & Environment 40, no. 3 (Winter 2026): 1–5.

3 Thomas Hochman (@ThomasHochman), "As currently implemented, the National Historic Preservation Act…," X (formerly Twitter), March 20, 2026, https://x.com/ThomasHochman/status/2035031266383560932

4 U.S. Senate Committee on Energy and Natural Resources, "Full Committee Hearing to Examine the Section 106 Consultation Process Under the National Historic Preservation Act," October 29, 2025, https://www.energy.senate.gov/hearings/2025/10/full-committee-hearing-to-examine-section-106-of-the-national.

5 Advisory Council on Historic Preservation, Final Compiled Meeting Book, February 2026 (Washington, DC: Advisory Council on Historic Preservation, 2026), https://www.achp.gov/sites/default/files/2026-01/FinalCompiledMeetingBookFeb2026.pdf

6 Kristina Alexander, Congressional Research Service, R42538, A Section 106 Review Under the National Historic Preservation Act (NHPA): How It Works, May 16, 2012, https://www.everycrsreport.com/reports/R42538.html.

7 Andy McDonald, testimony before the U.S. Senate Committee on Energy and Natural Resources, "Full Committee Hearing to Examine the Section 106 Consultation Process Under the National Historic Preservation Act," October 29, 2025, https://www.energy.senate.gov/services/files/F5C0E64C-D6E1-4419-A905-D515859ECE6C.

8 Idaho Power, "B2H History," accessed March 1, 2026, https://www.idahopower.com/energy-environment/energy/planning-and-electrical-projects/current-projects/boardman-to-hemingway/b2h-history/.

9 Stacey Bosshardt, "NHPA Caselaw Needs a 'Course Correction'—and NEPA Caselaw Can Help," Natural Resources & Environment 40, no. 3 (Winter 2026): 1–5.

10 Thomas Hochman (@ThomasHochman), "As part of its NHPA mitigation requirements, Empire Wind had to fund the installation of a 'fitness lane' next to the Ocean Grove boardwalk," X (formerly Twitter), March 27, 2026, https://x.com/ThomasHochman/status/2037574310764703920.

11 U.S. Forest Service, "National Programmatic Agreement for Phasing Section 106 for Large-Scale Multi-Year Projects," accessed February 10, 2026, https://www.fs.usda.gov/managing-land/heritage/npa.

12 U.S. Department of Agriculture Rural Development, Nationwide Programmatic Agreement among the U.S. Department of Agriculture Rural Development Programs, National Conference of State Historic Preservation Officers, Tribal Signatories, and the Advisory Council on Historic Preservation for Sequencing Section 106, accessed March 2, 2026 https://www.rd.usda.gov/sites/default/files/USDA_RD_Nationwide_Programmatic_Agreement.pdf.

13 Tom Cassidy, "Early Integration of Historic and Cultural Resources into Infrastructure Planning: If You Don't Map It, You Can't Save It…," Bipartisan Policy Center, August 28, 2019, https://bipartisanpolicy.org/article/early-integration-of-historic-and-cultural-resources-into-infrastructure-planning-if-you-dont-map-it-you-cant-save-it.

14 Advisory Council on Historic Preservation, "Frequently Asked Questions about Lead Federal Agencies," accessed March 10, 2026, https://www.achp.gov/digital-library-section-106-landing/frequently-asked-questions-about-lead-federal-agencies.

15 Bosshardt, "NHPA Caselaw Needs a 'Course Correction'—and NEPA Caselaw Can Help,"'

16 Christopher W. Merritt, testimony before the U.S. Senate Committee on Energy and Natural Resources, "Full Committee Hearing to Examine the Section 106 Consultation Process Under the National Historic Preservation Act," October 29, 2025, https://www.energy.senate.gov/services/files/515006BC-55F7-4E04-A065-344456DBFBDB.

17 Washington State Department of Archaeology and Historic Preservation," WISAARD (Washington Information System for Architec-

tural and Archaeological Records Data)," accessed March 10, 2026, https://dahp.wa.gov/project-review/wisaard-washington-information-system-for-architectural-and-archaeological-records-data.

18 Cassidy, "Early Integration of Historic and Cultural Resources."

19 Advisory Council on Historic Preservation, Final Compiled Meeting Book: February 2026 Business Meeting(Washington, DC: Advisory Council on Historic Preservation, January 2026), https://www.achp.gov/sites/default/files/2026-01/FinalCompiledMeetingBookFeb2026.pdf.

20 Gregory Bucci and Lydia Rainville, Benefits and Costs of Programmatic Agreements (Washington, DC: U.S. Department of Transportation, Federal Highway Administration, Office of Planning, Environment, and Realty, February 2015), https://www.fhwa.dot.gov/innovation/everydaycounts/edc-2/pdfs/benefits_costs_of_programmatic_agreements.pdf.