



Section 106 of the National Historic Preservation Act: BACK TO BASICS

by Leslie E. Barras

SUMMARY OF RECOMMENDATIONS



The direct and indirect influence of the federal government on America's heritage is inescapable. Hundreds of thousands of historic buildings, archaeological sites, and cultural landscapes are owned and administered by federal agencies. Hundreds of thousands of others are affected by projects carried out with federal financial support – including the huge infusion of federal recovery funds now being used for state and local infrastructure improvements. And thousands of historic sites and cultural resources are affected each year by the actions of private companies or individuals operating under federal licenses or permits, from wind farms to mining operations.

Since the mid-1960s – largely in response to the widespread demolition of historic neighborhoods in the name of urban renewal – federal agencies have been directed by Congress to evaluate the impacts of their programs and activities (and non-federal programs and projects they assist through funding or permits) on historic properties – and to do so before taking action and before approving any permit or funding.

This statutory requirement, set out in Section 106 of the National Historic Preservation Act, imposes a procedural obligation that federal agencies consider the effects of their actions on historic sites and cultural resources listed in or eligible for the National Register of Historic Places, and obtain the views of an independent federal agency – the Advisory Council on Historic Preservation – regarding actions that will adversely affect historic resources. While there is no mandate that federal agencies avoid harming historic resources, the simple obligation to “stop, look, and listen” has proved to be one of the most important aspects of federal historic preservation law.

When applied properly, “Section 106” (the shorthand term used by practitioners in the historic preservation field) has proved to be an effective planning tool, encouraging agencies to engage the Advisory Council, interested members of the public, statewide and local preservation organizations, representatives of State Historic Preservation Offices, Tribal Historic Preservation Officers and other representatives of Native American Tribes – often resulting in reshaping federal (or federally-assisted) projects to avoid or minimize harm to historic resources.

On the other hand, when Section 106 is not applied properly, agencies lose critical opportunities to avoid harming historic properties, and the results can be devastating for communities that value their heritage. All too often, this happens because the Section 106 consultation process is poorly integrated into federal agency planning, and is carried out too late to allow project plans to be changed. However, in some cases, federal agencies ignore their responsibilities altogether.

In recent years, the National Trust for Historic Preservation has become increasingly concerned about whether federal agencies are fully complying with the consultation obligations of Section 106. To explore and address this issue, the National Trust commissioned a detailed study by Leslie Barras, a lawyer and consultant on issues relating to environmental and historic preservation advocacy and compliance. Her report is “**Section 106 of the National Historic Preservation Act: Back to Basics.**”

This report—the first comprehensive review of federal compliance with federal preservation law in recent years—concludes that, “[w]hile the statutory and regulatory framework of Section 106 remains sound, actual implementation of this important preservation tool suffers in several key respects.” First, Ms. Barras notes, many federal agencies recognize their responsibilities and ensure that their paperwork is managed well, but tend to apply their obligations in a “rote” manner that gives little serious consideration to planning to avoid or minimize harm to historic places. Second, other federal agencies “do not often understand, or give only perfunctory attention to, their compliance responsibilities” under Section 106.

In both cases, Ms. Barras concludes, “there is a compelling need for attention to and reinforcement of the basic purpose of the [Section 106] review and consultation process.” Quoting from the regulations implementing Section 106, she emphasizes that the essential obligation under the statute is that federal agencies, *at the early stages of project planning*, “identify historic properties potentially affected by [a federal] undertaking, assess its effects, and seek ways to avoid, minimize, or mitigate any adverse effects on historic properties.” Too often, the

report suggests, agencies treat this statutory requirement simply as a process to endure, and not a meaningful obligation—or opportunity—to consider alternatives that would actually preserve historic resources. It is also often commenced too late in the federal decisionmaking process to have any real chance of serious consideration.

Addressing these shortcomings, *“Section 106 of the National Historic Preservation Act: Back to Basics,”* suggests a number of different ways to ensure that federal agencies take more seriously their statutory obligation to consider the impacts of their activities on America’s cultural heritage. The report makes seven key recommendations, each accompanied by a set of more detailed suggestions to improve Section 106 compliance:

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

- A presidential memorandum should be issued reinforcing federal agency responsibilities under the National Historic Preservation Act and requiring reporting on current compliance.
- The Secretary of the Interior and Advisory Council Chair should consult with federal agencies on the adequacy of historic preservation staff capacity.
- Federal agencies that oversee or delegate Section 106 compliance to nonfederal applicants for project funding or approvals should implement robust management systems to ensure procedural compliance with the law.
- Special responsive strategies should be developed to address the challenges of Section 106 compliance when nonfederal parties receive project funding or approvals as a result of massive economic or disaster recovery initiatives.
- Government performance and accountability reports should more specifically and prominently identify progress made and improvements needed in federal preservation programs.

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

- In many cases, consideration of historic properties could be improved through better coordination or integration with National Environmental Policy Act compliance.
- The Advisory Council should be more active in fulfilling its commenting responsibilities under the National Environmental Policy Act.
- Environmental management systems should be expanded to encompass cultural resources, including Section 106 implementation.
- Sanctions should be imposed on federal agencies that misuse environmental reviews and prevent meaningful Section 106 compliance.
- Interstate projects provide an opportunity to plan for strategic and consistent ways to identify and evaluate archaeological sites.
- Earlier consideration of preservation values should be promoted through increasing preservation advocates’ participation in agency advisory committees.
- Outreach to groups not traditionally familiar with Section 106 should be further expanded, including development interests and the media.

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

- Advisory Council members should increase their direct involvement in strategic Section 106 cases.
- The agency’s role in “Preserve America” should be redefined.
- The Advisory Council should consider reopening a western office..
- Checks and balances are needed to reduce conflict-of-interest concerns when the Advisory Council’s “liaison” staff participate in Section 106 reviews for their funding agencies’ projects

- There is a compelling need for timely and concrete Section 106 advice from the Advisory Council; opinion letters are one possible solution.
- Facilitated negotiations should be conducted more often in controversial Section 106 cases, and training in conflict resolution skills should be provided to the Advisory Council’s staff.
- Expansion of basic and advanced Section 106 training should be facilitated by the Advisory Council.

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

- Federal agencies should honor the requirement to directly “invite” consulting parties to participate.
- Consulting parties should be provided a tentative plan of action or roadmap for consultation.
- The Section 106 advocacy capacity of the National Trust’s statewide and local preservation partners requires strengthening.
- The use of public participation models of inclusiveness has languished and needs to be resurrected.
- Federal agencies and applicants for federal funding or permits should be more responsible to the public for project changes and commitments made in Section 106 reviews.
- Consulting party and public feedback on their experience in Section 106 reviews needs to be actively solicited.

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

- The authority of states and tribes to assess fees to support their Section 106 review responsibilities should be seriously explored.
- Congress should fully appropriate the proceeds in the national Historic Preservation Fund account.

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

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

- “Web 2.0” technology should be harnessed to enhance implementation of the National Historic Preservation Act.
- Project management software needs to include Section 106 compliance milestones to help early and coordinated consideration of historic properties in construction projects.
- The Advisory Council should establish deeper content on its website for Section 106 practitioners, consider establishing a compliance-oriented website name for inexperienced Section 106 stakeholders, and offer a targeted Section 106 link for the public on its homepage.
- Metropolitan and regional transportation planning organizations need access to digitized cultural resource information.

