Advisory Council on Historic Preservation

Federal Historic Preservation Case Law, 1966-1996

Thirty Years of the National Historic Preservation Act

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1996
Part One

Acknowledgments

The Advisory Council on Historic Preservation is grateful to the United States Army Environmental Center for its generous financial support that has made this revised and updated publication possible.

The Council would also like to acknowledge the efforts of the following attorneys who reviewed this report and offered valuable comments during its preparation: Scott M. Farley, Environmental Attorney, United States Army; Andrea C. Ferster, Attorney at Law; Lars Hanslin, Attorney Advisor, Department of the Interior; Edward V.A. Kussy, Acting Chief Counsel, Federal Highway Administration; and Elizabeth Merritt, Associate General Counsel, National Trust for Historic Preservation.

On the Council staff, the editorial and production work of Elizabeth Moss, publications coordinator, and Stephanie A. Woronowicz, writer/editor, are greatly appreciated. The Council also thanks legal intern Daniel Wedemeyer.

This revised and updated report is adapted from the Council's 1985 publication authored by Charlotte R. Bell. Case summaries prior to 1985 and portions of the overview section relating to pre-1985 legal matters are the work of the prior author.
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I. Introduction

A. Background

Thirty years after passage of the National Historic Preservation Act of 1966 (NHPA), Federal law clearly reflects the Nation’s commitment to preserving and protecting its wealth of historic resources. This was not always the case. Although Federal statutes containing preservation policies have existed since the turn of the 20th century, these laws typically were limited in scope and lacked effective means of enforcement.

The earliest Federal preservation statute was the Antiquities Act of 1906, which authorized the President to set aside historic landmarks, structures, and objects located on lands controlled by the United States as national monuments.\(^1\) It required permits for archeological activities on Federal lands, and established criminal and civil penalties for violation of the act. The Historic Sites Act of 1935 was the second major piece of Federal historic preservation legislation.\(^2\) This act declared it national policy to preserve for public use historic sites, buildings, and objects of national significance and directed the Secretary of the Interior to conduct various programs with respect to historic preservation.\(^3\) Although these statutes were significant, they did not create a national awareness of the need for preservation or provide a means to incorporate preservation concerns into Federal agency programs.

In 1964, the United States Conference of Mayors undertook a study of historic preservation in the United States. The resulting report, “With Heritage So Rich,” revealed a growing public interest in preservation and the need for a unified approach to the protection of historic resources.\(^4\) This report influenced Congress to enact a strong new statute establishing a nationwide preservation policy: the National Historic Preservation Act of 1966.\(^5\)

The National Historic Preservation Act was a watershed in preservation law, for it created a means by which the Nation’s preservation goals could be achieved. Recognizing that increased knowledge and better administration of historic resources would improve the planning and execution of Federal undertakings and benefit economic growth and development nationwide,\(^6\) the act promoted the use of historic properties to meet the contemporary needs of society. It directed the Federal Government, in cooperation with State and local governments, Native Americans, and the public, to take a leadership role in preservation. Since 1966, Congress has strengthened national preservation policy further by recognizing the importance of preserving historic aspects


\(^{3}\) Under the act’s authority, the Secretary of the Interior established the National Historic Landmark Program, under which properties of national significance are designated as National Historic Landmarks.


of the Nation’s heritage in several other statutes—among them the National Environmental Policy Act7 and several transportation acts8—and by enacting statutes directed toward the protection and preservation of archaeological resources.9 These laws require Federal agencies to consider historic resources in their planning and decisionmaking and, although they are not co-extensive with NHPA, often overlap with the provisions of NHPA.

The Executive Branch has expressed its support for preservation through several key Executive Orders. In 1971, for example, President Nixon signed Executive Order No. 11593, which instituted procedures Federal agencies must follow in their property management activities.10 In 1996, President Clinton signed another important Executive Order, this one setting forth the Administration’s support for locating Federal offices and facilities in historic districts and properties in the Nation’s inner cities: Executive Order No. 13006 directs Federal agencies to use and rehabilitate properties in such areas wherever feasible and reaffirms the commitment to Federal leadership in the preservation of historic properties set forth in NHPA thirty years before.11 Another 1996 Executive Order, No. 13007, expresses support for the protection of Native American sacred sites.12

The National Historic Preservation Act and other preservation statutes, as well as the Executive Orders mentioned above, have clarified and refined the duties and responsibilities of Federal agencies with regard to the protection of America’s cultural heritage. Federal compliance with these authorities, however, has not always been consistent, giving rise to a number of lawsuits brought primarily by citizens and preservation organizations. The resulting court opinions interpret and elucidate the historic preservation provisions of these laws.

**B. Scope of Report**

This report contains summaries of those opinions, as well as an overview of Federal historic preservation law from 1966 to 1996 to put them in context. It presents an objective review of the case law addressing NHPA and its implementing regulations in addition to preservation-related Executive Orders and other Federal statutes dealing with historic preservation. It also addresses various procedural questions involved in preservation.

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742 U.S.C. § 4331(b)(4)(1994); see 40 C.F.R. § 1502.16(g), 1508.27(b)(3), (8) (1995).


II. The National Historic Preservation Act

A. Purpose and Structure

The National Historic Preservation Act expresses a general policy of supporting and encouraging the preservation of prehistoric and historic resources for present and future generations, directing Federal agencies to assume responsibility for considering such resources in their activities.\textsuperscript{14} NHPA does not mandate preservation of such resources but requires Federal agencies to consider the impact of their actions on historic properties. The statute sets forth a multifaceted preservation scheme to accomplish these policies and mandates at the State and Federal levels.

The act first authorizes the Secretary of the Interior to expand and maintain a National Register of Historic Places,\textsuperscript{15} an inventory of districts, sites, buildings, structures, and objects significant on a national, State, or local level in American history, architecture, archeology, engineering, and culture. It is up to the Secretary to list properties in the National Register and to determine the eligibility of properties for listing using published criteria and procedures.\textsuperscript{16} Listing in the Register qualifies a property for Federal grants,\textsuperscript{17} loans,\textsuperscript{18} and tax incentives.\textsuperscript{19}

Second, NHPA encourages State and local preservation programs. States may prepare and submit to the Secretary of the Interior programs for historic preservation, which the Secretary must approve if they provide for the designation of a State Historic Preservation Officer (SHPO) to administer the State preservation program; establish a State historic preservation review board; and provide for adequate public participation in the State program.\textsuperscript{20} The SHPO must identify and inventory historic properties in the State; nominate eligible properties to the National Register; prepare and implement a statewide historic preservation plan; serve as a liaison with Federal agencies on preservation matters; and provide public information, education, and technical assistance.\textsuperscript{21}

\textsuperscript{13}This report does not include NHPA cases that resulted in settlements rather than court opinions.


\textsuperscript{16} 36 C.F.R. pts. 60, 63 (1995).

\textsuperscript{17} 16 U.S.C. §§ 470a, 470b (1994).


Although the organization of the State programs and the actual roles of the SHPOs may differ from State to State, the provisions of NHPA have influenced States' administrative structures. For example, most State governments now undertake comprehensive survey and planning activities and retain professional staff with preservation expertise to oversee State activities affecting historic properties. Many States have certified local governments to carry out preservation activities and, since NHPA was amended in 1992, Indian tribes may now assume all or part of the functions of a SHPO with respect to tribal lands.

NHPA also authorizes a grant program, supported by the Historic Preservation Fund, to provide monies to States for historic preservation projects and to individuals for the preservation of properties listed in the National Register. The grant program provides for two categories of grants: one for survey and planning purposes, which provides essential financial support for administering each State program; the other for "bricks and mortar" preservation or rehabilitation of historic properties. States and other grant recipients must match the Federal funds. Through the Historic Preservation Fund, in 1995 the Federal Government gave States $30,940 million to carry out preservation-related activities.

Finally, NHPA established the Advisory Council on Historic Preservation, which is now an independent Federal agency. Composed of 20 members from both the public and private sectors, the Council employs a professional staff trained in many aspects of preservation. Council members include the Secretaries of the Interior and Agriculture and four other Federal agency heads designated by the President; the Architect of the Capitol; four members of the general public; a Native American or Native Hawaiian; four historic preservation experts; one governor; and one mayor, all appointed by the President. The chairman of the National Trust for Historic Preservation and the president of the National Conference of State Historic Preservation Officers serve as ex officio members. NHPA directs the Council to advise the President and Congress on historic preservation matters, review the policies and programs of Federal agencies to improve their consistency with the purposes of the act, conduct training and educational programs, and encourage public interest in preservation. Most importantly, the act places the Council in the central role of administering and participating in the preservation review process established by Section 106.

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2716 U.S.C. § 470i(a) (1994) The size and composition of the Council has been periodically adjusted.
B. Legislative History

The act has been amended several times since its inception in 1966, each time strengthening and clarifying various aspects of the law. Significant amendments occurred first in 1976 when Congress established the Historic Preservation Fund as the source of matching grants to States and to the National Trust for Historic Preservation to carry out historic preservation activities. The 1976 amendments also extended the application of Section 106 to include properties eligible for listing on the National Register, not just those already listed. Of great importance to the Council, the 1976 amendments rendered it an independent Federal agency; previously, it had been staffed and supported through the National Park Service.

NHPPA changed significantly again in 1980 when Congress added Section 110, which directed Federal agencies to assume more responsibility for the stewardship and protection of historic properties they owned or controlled. The 1980 amendments also better articulated the duties of SHPOs, provided for the certification of local government preservation programs and for local government participation in National Register nominations and the Section 106 process itself. The Council's duties were expanded as well to include the evaluation of Federal agencies' historic preservation programs.

Congress amended NHPPA most recently in 1992, providing a greater role for Native Americans and Native Hawaiians in Federal and State preservation programs, requiring Federal agencies to establish their own internal procedures to incorporate historic preservation planning into agency programs, and obligating Federal agencies to withhold Federal assistance in cases of anticipatory demolition. The amendments also set forth more specific measures to withhold confidential information about the location of historic properties, specify the responsibilities of Federal agencies that receive formal comment from the Council, and clarify several key terms, among them "undertaking," "State," and "Indian tribe." Although the 1992 amendments did not directly amend the language of Section 106 of NHPPA, the new provisions significantly affect the Section 106 compliance process.

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3416 U.S.C. §§ 470a(d) and 470w(4) (1994).
C. Key Statutory Provisions: Sections 106 and 110

1. Section 106

The Council's most significant involvement in the Federal preservation process is through Section 106 of NHPA. Section 106 provides that:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under Title II of this Act a reasonable opportunity to comment with regard to such undertaking.

Section 106 requires each Federal agency to do two things prior to carrying out, approving financial assistance to, or issuing a permit for a project that may affect properties listed or eligible for listing in the National Register of Historic Places. First, the agency must consider the impact of the project on historic properties. Second, the agency must seek the Council's comments on the project. Section 106 originally applied only to properties actually listed in the National Register; however, in 1976, Congress extended its provisions to properties not yet listed but still meeting the criteria. Much of the Council's daily work involves commenting in response to agency requests under Section 106. To administer these requests under the authority granted by Congress, the Council has issued regulations to govern agencies' compliance with Section 106. These regulations set forth procedures, known as the "Section 106 process," that explain how Federal agencies must take into account the effects of their actions on historic properties and how the Council will comment on those actions.


41 Id.

42 If a State or local agency is acting pursuant to a delegation, then that agency is required to comply with Section 106 as if it were a Federal agency. See 16 U.S.C. § 470w(7)(D) (1994); 36 C.F.R. § 806.2(b) (1995).


44 In 1995, the Council received approximately 3,500 requests for comment.


47 In 1992 Congress gave the Council specific authority, in Section 211, to implement Section 106 in its entirety. 16 U.S.C. § 470s (1994). Prior to that time, some agencies interpreted the Council's authority as being limited to implementing regulations only on how the Council would comment on undertakings.
2. Section 110

Section 110 of NHPA governs Federal agency programs by providing for consideration of historic preservation in the management of properties under Federal ownership or control. Originally a codification of Executive Order No. 11593, Section 110 established special preservation responsibilities for Federal agencies with an emphasis on property management activities.\(^{48}\) Section 110 does not replace or invalidate Executive Order No. 11593, but rather supplements it.

As passed in 1980, Section 110 established procedures for Federal agencies managing or controlling property. Among other things, agencies must assume responsibility for the preservation of historic properties under their jurisdiction and, to the maximum extent feasible, use historic properties available to the agency.\(^{49}\) Additionally, Federal agencies were directed to carry out their programs and projects in accordance with the purposes of NHPA.\(^{50}\) Further, Section 110(f) requires that, prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark,\(^{51}\) agencies must undertake such planning and action as may be necessary to minimize harm to the landmark and obtain Council comments on the undertaking.\(^{52}\) The review required by Section 110(f) is similar to that required under Section 106 but involves a higher standard of care. Generally, Section 119(f) review is accomplished under the Council’s procedures implementing Section 106.

The 1992 amendments to NHPA added greater Federal agency responsibility for consideration of historic properties during agency decisionmaking.\(^{53}\) The amended Section 110 requires each Federal agency to establish a historic preservation program. The program must provide for the identification and protection of the agency’s historic properties; ensure that such properties are maintained and managed with due consideration for preservation of their historic values; and contain procedures to implement Section 106, which must be consistent with the Council’s regulations.\(^{54}\) Specifically, the amendments explain that such procedures must provide a process for the identification and evaluation of historic properties for listing in the National Register and the


\(^{51}\) A National Historic Landmark is a property of national historic significance. All landmarks are designated by the Secretary of the Interior under the Historic Sites, Buildings, and Antiquities Act of 1935, 16 U.S.C. §§ 461-467 (1994), and are listed in the National Register as a result of Section 106 of the National Historic Preservation Act, 16 U.S.C. § 470a(1)(B) (1994). See also 36 C.F.R. pt. 85 (1995).


development of agreements in consultation with SHPOs, local governments, Native Americans and Native Hawaiians and the interested public. 55

Congress also added a new provision that directs Federal agencies to withhold grants, licenses, approvals, or other assistance to applicants who intentionally significantly and adversely affect historic properties. 56 This provision, known as the “anticipatory demolition” section, is designed to prevent applicants from destroying historic properties prior to seeking Federal assistance in an effort to avoid the Section 106 process. Finally, the 1992 amendments to Section 110 add the responsibility that the head of a Federal agency, without delegation, must document any decision under Section 106 where a Memorandum of Agreement has not been executed. This provision ensures a high level of Federal agency review where there is a failure to reach an agreement and, thus, strengthens the incentives for agencies to sign MOA. 57 The amendments also codified a provision of the Council’s regulations stating that an MOA will govern implementation of the undertaking in a binding manner. 58

The Secretary of the Interior, in consultation with the Advisory Council, is responsible for developing guidelines to implement the requirements of Section 110 of the act. 59 The Council and the National Park Service jointly issued guidelines in 1989 60 and new guidelines are under development to address the 1992 amendments to NHPA.

III. Section 106 Implementing Regulations

The National Historic Preservation Act authorizes the Council to issue regulations—as opposed to guidelines—to implement Section 106. 61 These regulations structure a process through which Federal agencies must take into account the effects of their undertakings on historic properties and afford the Council an opportunity to comment. The Council has revised its regulations once (in 1986) since their first promulgation in 1979 and is currently revising them again. Following the regulations, Federal agencies collect information regarding the impacts of their actions and decisions on historic properties; consult with stakeholders to seek ways


56 16 U.S.C. § 470h-2(k) (1994). This provision does allow assistance if, after consultation with the Council, the Federal agency determines that circumstances justify granting the assistance.


58 Id.

59 16 U.S.C. § 470a(g) (1994). In addition, the Secretary of the Interior must consult with the Secretaries of Agriculture and Defense, the Smithsonian Institution, and the Administrator of GSA to develop specific standards for the preservation of federally owned and controlled properties. 16 U.S.C. § 470a(h) (1994).


to mitigate or avoid any adverse effects; and resolve the adverse effects through consultation that considers the interests of the stakeholders.

A. Current Regulations

In 1986 the Council promulgated its most recent regulations. The regulations provide that when a Federal agency determines that its actions will fall within the definition of an undertaking as defined by NHPA and the Council’s regulations, it must first consult with the State Historic Preservation Officer from the State(s) in which the undertaking will have an effect. This step helps the agency identify all properties listed in or eligible for the National Register that may be affected by its undertaking. Eligible properties include all properties that meet the criteria of eligibility for the National Register, even if the properties have not been formally determined eligible by the Secretary of the Interior or other official. As part of the identification effort, the Federal agency must solicit the views of public and private organizations, Native Americans, local governments and others likely to have knowledge of, or concerns with, the historic properties. Agencies may pursue identification through a variety of means, including literature searches and field surveys. The agency, in consultation with the SHPO, applies the National Register criteria to assess the eligibility of identified properties. The agency and the SHPO can agree or stipulate that the property is eligible and continue the Section 106 process. Alternatively, if there is disagreement, the agency must ask the Secretary of the Interior to make a formal determination of the property’s eligibility.

The agency, in consultation with the SHPO, must next determine the nature of the effect its undertaking will have on any historic properties it has identified. If there is no effect, the agency may proceed with the project after notifying the SHPO and receiving no objection within 15 days of notification. If there is an effect but it

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64 36 C.F.R. § 60.4 (1995).


68 36 C.F.R. § 800.4(a)(2) (1995). The agency may complete the Section 106 process prior to seeking a determination of eligibility from the Secretary.


71 36 C.F.R. § 800.5(b) (1995).
is not adverse, the agency makes a determination of no adverse effect and either obtains the SHPO’s concurrence and advises the Council of its finding, with supporting documentation, or advises the Council of its finding, with supporting documentation, and notifies the SHPO. Providing the Council does not object, the agency is deemed to have satisfied its Section 106 responsibilities and may proceed with the undertaking. If there will be an adverse effect on the historic properties, the agency notifies the Council and enters into a consultation process with the SHPO and, where appropriate, the Council.

Under this consultation process, the agency, the Council, if participating, and the appropriate SHPO(s) negotiate to reach agreement on means to avoid or mitigate the adverse effects of the undertaking. If they are successful, they execute a Memorandum of Agreement (MOA), a written agreement among the parties that sets out the agreed-upon measures. The MOA is analogous to a binding, enforceable contract, and it governs implementation of the undertaking.

When entire Federal programs are involved or when a project is complex, an agency may choose to negotiate a Programmatic Agreement (PA). A PA covers ongoing and future activities undertaken as part of the program it addresses, affording a Federal agency flexibility in adapting the normal Section 106 procedures to its specific needs. When an activity falls within the scope of a PA, the agency is not required to seek additional comments from the Council before proceeding, since a PA signed by the Council governs implementation of the program.

The Council resolves the vast majority of undertakings it reviews through negotiation, reaching solutions that have no adverse effect on historic properties or agreements detailing how adverse effects will be avoided, mitigated, or accepted. In the unusual event that the parties cannot reach an agreement, the Federal agency must request formal comments from the Council, prior to making its decision. The Council membership then reviews the case and issues advisory comments on the undertaking within 60 days. The agency considers the Council’s comments and reaches a final decision on the undertaking. The head of the Federal agency must document the decision, and may not delegate this responsibility.

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72 36 C.F.R. § 800.5(d) (1995).
74 36 C.F.R. § 800.5(e) (1995).
79 36 C.F.R. § 800.6(b) (1995). Failure to reach agreement generally occurs less than a half-dozen times each year.
B. Proposed Regulations

On September 13, 1996, the Council published in the Federal Register proposed regulations to streamline the Section 106 process and implement the 1992 amendments to the National Historic Preservation Act and the Administration’s “Reinventing Government” initiative. The proposed regulations would change the overall Section 106 process by removing the effect determination step and proceeding directly to an assessment of adverse effects on historic properties; providing alternative procedures for Federal agencies to follow under certain circumstances; and withdrawing the Council from routine case-by-case review. In general, the proposed regulations would delegate more discretion and flexibility to Federal agencies and SHPOs to work out agreements under Section 106. The proposal would allow for more tailoring of Section 106 obligations based on the project’s importance, the historic property’s significance, and the nature of the impact. The process would be streamlined through the use of standard treatments for adverse effects, categorical exemptions, programmatic comments, flexible identification requirements, and Programmatic Agreements. The proposed regulations would also encourage better coordination with the environmental review process conducted under the National Environmental Policy Act. In fulfilling documentation requirements, Federal agencies could use environmental assessments and environmental impact statements for Section 106 purposes, as long as certain criteria are met. The proposed regulations also include a new section on Native American involvement in the Section 106 process, which implements the 1992 amendments by setting forth the rights of Native Americans and the duties of Federal agencies to seek Native American participation.

IV. Court Opinions on Compliance with Section 106 and the Council’s Regulations

The preponderance of historic preservation case law since 1966 involves compliance with Section 106 of NHPA. The courts have addressed two broad areas: first, whether Section 106 applies at all in a given case, and second, whether an agency has complied with Section 106 and the Council’s regulations.

A. Applicability of Section 106

The existence of a Federal undertaking is the trigger for Section 106 compliance. In deciding cases involving alleged violations of the National Historic Preservation Act, courts often focus their inquiry on several threshold questions: 1) To whom does Section 106 apply? 2) To what sorts of actions does it apply? 3) At what time does Section 106 apply? 4) To what properties does Section 106 apply?

1. Section 106 applies to Federal agencies

Section 106 requires the “head of any Federal agency” to comply with its provisions. Cabinet-level departments, such as the Department of the Interior or the Department of Housing and Urban Development; their subagencies, such as the Army Corps of Engineers or the Forest Service of the Department of Agriculture; and independent agencies, such as the Federal Energy Regulatory Commission, must all comply. Routinely, responsibility for compliance is delegated from the agency head to regional officials and project managers.
Federal Historic Preservation Case Law

Section 106 applies only to Federal agencies, not to State or local governments unless they are acting as the "Federal agency" under a specific Federal law.\(^81\) NHPA does not apply to private entities or individuals.\(^82\)

Defining what is a Federal agency generally presents no problem. The question becomes complicated, however, when entities with both Federal and private attributes, such as federally created corporations, are involved. To determine whether an entity is, in fact, a Federal agency, the courts examine that entity's enabling statute to discover its structure, financing, authorities, and responsibilities. The corporation's enabling statute often specifies that the corporation is not a Federal agency.\(^83\) If not, the courts balance the entity's "Federal" aspects with its "private" attributes to decide whether Congress intended the entity to be considered a Federal agency required to comply with Federal preservation laws.

For example, one court found a Federal Reserve bank to be an agency subject to NHPA, despite the fact that Federal Reserve banks operate as private corporations in many respects.\(^84\) Noting that the bank was a fiscal arm of the Federal Government, created and operated in furtherance of national policy, the court was convinced that the bank was a Federal agency. Some entities, like the Federal Deposit Insurance Company (FDIC) and the now defunct Resolution Trust Corporation, have enabling statutes that provide dual roles. The Federal Deposit Insurance Act defines different functions for FDIC, including those of corporation, receiver, and conservator. When FDIC is acting as a receiver, the enabling statute prevents courts from hearing suits that would restrain its exercise of functions or powers. At least one court has interpreted this provision to bar suits to enjoin demolition of a historic property because FDIC was, in this instance, acting as a receiver, not in its corporate capacity.\(^85\)

When there has been no judicial ruling on whether an entity must comply with NHPA, it is useful to examine opinions handed down under other related statutes. For example, the United States Postal Service has been found to be an agency for purposes of the National Environmental Policy Act.\(^86\) Application of the principles expressed in this opinion would render the Postal Service subject to Section 106 as well.

Section 104(f) of the Housing and Community Development Act (HCDA) allows local governments to act legally as Federal agencies for purposes of compliance with environmental statutes, including NHPA.\(^87\) Under HCDA, the Department of Housing and Urban Development awards block grants to local governments. The act

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\(^83\) See Miltenberger v. C. & O. Ry., 450 F.2d 971 (4th Cir. 1971) (AMTRAK not a Federal agency).


\(^86\) Chelsea Neighborhood Ass'n v. United States Postal Serv., 516 F.2d 378 (2d Cir. 1975).

\(^87\) 42 U.S.C. § 5304 (1994). Similar authorities are found in other HUD programs.
explicitly designates the grant recipient as the "Federal agency," and the regulations implementing HCDA specifically state that in order to receive funding, the recipient must carry out HUD's environmental review procedures. Thus, where such a grant is involved, the local government grant recipient is responsible for meeting the requirements of Section 106. The Council’s regulations define "agency official" to include local governments when they are acting pursuant to a delegation.

A Federal agency may authorize the participation of non-Federal entities in complying with the Council's preliminary requirements and in considering historic resources during the planning of an undertaking. However, the agency retains ultimate responsibility for Section 106 compliance; it may not simply "rubber-stamp" the work of other participants. In one case, for example, the court found that the Federal Highway Administration (FHWA) had improperly delegated to a State its NHPA responsibilities for a highway project. Although the State could participate in the review process, FHWA was responsible for the required studies, reports, evaluation, and determinations of effect and, ultimately, for compliance with Section 106. Agencies often require applicants for Federal licenses, permits, approvals or other assistance to conduct various steps of the Section 106 process. However, the statutory language of Section 106, as well as the Council’s regulations, make it clear that Section 106 is a Federal agency responsibility. Courts have determined that Federal agencies may not delegate their own responsibilities to independently assess the environmental impact of their actions or proposals subject to Federal agency approval. Indeed, Federal agencies are subject to suit when they exclusively rely on applicants and do not independently ensure that historic properties were properly considered; such reliance on applicants is at the Federal agency's own risk.


94 Id.

95 El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991) (Rural Electrification Administration subject to suit when rural cooperative on which it relied failed to properly carry out Section 106 obligations).
2. **Section 106 applies to Federal undertakings**

Federal agencies must comply with Section 106 when they directly undertake Federal activities and when they are involved indirectly through funding, approving, permitting or licensing. Federal agencies also must comply with Section 106 when there are indirectly involved by delegating a Federal program under which State or local agencies issue permits. The 1992 amendments to NHPA specifically defined the term undertaking as “a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including A) those carried out by or on behalf of the agency, B) those carried out with Federal financial assistance; C) those requiring a Federal permit, license, or approval; and D) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.”

The Council’s current regulations define undertaking as:

> any project, activity, or program that can result in changes in the character or use of historic properties, if any such historic properties are located in the area of potential effects. The project, activity, or program must be under the direct or indirect jurisdiction of a Federal agency, or licensed or assisted by a Federal agency. Undertakings include new and continuing projects, activities, or programs and any of their elements not previously considered under Section 106.

Although the proposed regulations would change the current regulatory definition to track the exact language in the statute, the Council has taken the position that its current regulatory definition of undertaking is broad enough to encompass the 1992 definition.

The courts have applied Section 106 to a wide variety of direct Federal undertakings, such as military operations, building leases, construction of refugee camps, dam construction, building demolition, and land

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exchange agreements, \textsuperscript{103} solarization of lighthouses, \textsuperscript{104} construction of fences and livestock watering facilities, \textsuperscript{105} and land management activities. \textsuperscript{106} Federal agency regulatory revisions are also another category of direct undertakings falling under Section 106. \textsuperscript{107}

An interesting question that received a fair amount of judicial attention in the 1970s and 1980s involves the Government's NHPA responsibilities when it seeks to acquire land by condemnation. One court dismissed a condemnation action because the United States had not complied with the Council's regulations. \textsuperscript{108} Other courts rejected this approach, finding that the duties imposed by NHPA arise only after the Federal Government owns the property involved. \textsuperscript{109} Therefore, although most courts find that noncompliance with Section 106 cannot be used to prevent a condemnation action, \textsuperscript{110} the Federal Government must nonetheless comply with Section 106 before it can take possession or control of the condemned property. \textsuperscript{111} Applying the conclusion reached in earlier condemnation cases—that transfer of title is an environmentally neutral action—one court found that the Government's reclamation of title to property previously held by others under a special use permit was not an undertaking. \textsuperscript{112}

The approval of Federal financial assistance to private, State, or local projects is also an undertaking. \textsuperscript{113} Federal financial assistance falls into two basic categories: direct assistance grants for specific projects, such as

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\textsuperscript{104} Ferris v. Secretary of the United States Dep't of Transp., No. 89-C-779-C (W.D. Wis. 1990).


\textsuperscript{106} Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).


\textsuperscript{108} United States v. 4.18 Acres of Land, 542 F.2d 786 (9th Cir. 1976).


\textsuperscript{110} United States v. 45,149.58 Acres of Land, 455 F. Supp. 192 (E.D.N.C. 1978).


\textsuperscript{112} Paulina Lake Historic Cabin Owners Ass'n v. United States Dep't of Agric. Forest Serv., 577 F. Supp. 1188 (D. Or. 1983) (citing United States v. 162.20 Acres of Land, 639 F.2d 299 (5th Cir. Unit A), cert. denied, 454 U.S. 828 (1981)).

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transportation,\textsuperscript{114} housing,\textsuperscript{115} rural electrification,\textsuperscript{116} and urban development projects,\textsuperscript{117} and indirect assistance, such as block grants for programs such as urban renewal,\textsuperscript{118} community development,\textsuperscript{119} and law enforcement.\textsuperscript{120} Federal loan guarantees also have been held to be within the scope of Section 106.\textsuperscript{121} Other types of assistance, such as technical assistance, may also be considered an undertaking.\textsuperscript{122} The legislative history of NHPA indicates that the term “assistance” was intended to be viewed broadly, not limited to financial assistance.\textsuperscript{123} The 1992 amendments to NHPA also refer broadly to Federal “assistance” in Section 101(k), the anticipatory demolition


\textsuperscript{116}El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991).


\textsuperscript{118}Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982); WATCH v. Harris, 603 F.2d 310 (2d Cir.), cert. denied, 444 U.S. 995 (1979); Hart v. Denver Urban Renewal Auth., 551 F.2d 1178 (10th Cir. 1977); Wisconsin Heritage, Inc. v. Harris, 460 F. Supp. 1120 (E.D. Wis. 1978), 490 F. Supp. 1334 (1980).


\textsuperscript{120}Ely v. Velde (Ely I), 451 F.2d 1130 (4th Cir. 1971).


\textsuperscript{122}H.R. Rep. No. 1457, 96th Cong., 1st Sess., at 45 (1980) (committee notes that there is a spectrum of Federal undertakings, ranging from direct Federal funding to Federal technical assistance for privately funded actions).

\textsuperscript{123}Id.
provision. However, some courts have narrowly interpreted assistance as strictly referring to financial assistance.

Federal approvals, permits, or licenses for non-Federal activities are also undertakings. Thus, Section 106 encompasses approvals such as those for mining activities, railroad abandonments and exemptions, changes in use of park land, and authorizations for activities or use of public lands under the jurisdiction of the Forest Service or the Bureau of Land Management. Permits falling under the definition of an undertaking include certain dredge and fill permits, navigational permits, and permits for private activities on Federal properties. Licenses issued by Federal agencies are also undertakings.


130 Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994).


134 16 U.S.C. § 470w(7)(C) (1994); 36 C.F.R. § 800.2(o) (1995); Weintraub v. Rural Elec. Admin., 457 F. Supp. 78 (M.D. Pa. 1978) (Rural Electrification Administration’s requirement that its borrowers receive agency approval of construction plans and the agency’s right to control surplus funds did not amount to a license; NHPA did not apply).
Although the term “undertaking” encompasses many activities, the courts have placed limitations on its breadth. In some cases, even if a Federal agency approves of a project or issues a permit, courts have found that an undertaking does not exist. Courts will examine the type of approval given by the Federal agency and, whether the approval was a prerequisite to the project, or was merely a non-binding recommendation, in which case the approval does not rise to the level of an undertaking, according to the courts.\(^{135}\) Similarly, if permit issuance was merely a ministerial act\(^{136}\) or authorized truly inconsequential activities,\(^{131}\) the Federal action is not viewed as an undertaking by some courts. Generally, when the Federal agency has minimal control over or involvement in the project, courts have increasingly found that Section 106 does not apply.\(^{138}\) Additionally, if portions of a project are federally funded or approved, courts will examine the relationship between those aspects of the project to the project as a whole in order to determine whether an undertaking exists.\(^{139}\) The courts tend to look at such factors as the independent utility of the federally funded section, the stated purpose of the Federal action, and the magnitude of the Federal portion of the action in relation to the action as a whole.\(^{140}\) Some courts have declined


\(^{140}\)Id.
to apply NHPA when a proposed project entailed only effects of short duration, or the effects on historic properties were slight.

The degree of Federal control over a project and the retention of Federal authority to influence a project is also essential in determining whether a project that once had Federal involvement still constitutes an undertaking. The Council’s regulations include continuing projects as undertakings, as long as aspects of the continuing projects have not been previously considered. If all the elements of a project have been considered previously, the project is not considered an undertaking, and Section 106 is deemed to have been satisfied. Courts have declined in two cases to interpret Memoranda of Agreement as providing the basis for a finding of continued Federal involvement. The courts reasoned that completion of the original project terminated Federal involvement. In contrast, courts have determined that ongoing projects may require ongoing NHPA compliance. The general rule is that an agency must fulfill its historic preservation review requirements as long as it is still possible to effect changes in an undertaking to prevent or mitigate an adverse impact on a historic resource. The courts may use this rule to define the point at which the agency “decision” is made.

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149 Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); Wisconsinn Heritages, Inc. v. Harris, 460 F. Supp. 1120 (E.D. Wis. 1978) ("decision" was execution of loan and capital grant contract at time when agency could no longer require alterations in plans); Committee to Save the South Green v. Hills, [1977] 7 Envtl. L. Rep.
3. Timing: When an agency must comply with Section 106

Another major issue in Section 106 litigation has been determining the precise point in an agency's planning and decisionmaking process when NHPA is triggered. Section 106 requires that the agency must comply "prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license as the case may be ...."150 The Council's regulations require compliance "early in the planning stages of the undertaking, when the widest feasible range of alternatives is open for consideration ...."151 The courts have made several attempts to define the phrase "prior to the approval of the expenditure of funds." In 1969, one court noted that "prior to the approval" did not mean "prior to the expenditure."152 In that case, the agency had approved funding prior to the enactment of NHPA but had not yet distributed all the funds; the court held Section 106 to be inapplicable. More recently, the D.C. Circuit found it acceptable that an agency conditionally approved an airport expansion plan before Section 106 had been completed, provided that no expenditures of Federal monies for construction were made until completion of the Section 106 process.153 Similarly, where an order is conditioned upon compliance with Section 106, no violation has been found in light of the Council's regulatory provision allowing nondestructive planning activities and phased compliance.154 However, if a project is conditionally approved upon completion of the Section 106 process, but funds have already been released and construction initiated, the Federal agency runs the risk of a court finding a violation of NHPA.155

Although a Federal agency should comply with NHPA as early in its decisionmaking process as possible, failure to comply early does not relieve an agency of its Section 106 responsibilities, for the courts have held that NHPA applies to all unexecuted parts of a large project.156 Indeed, courts have held that as long as there is still an ability to influence the project, Section 106 applies.157 Whenever an agency is to approve funds in stages,

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151 36 C.F.R. § 800.3(c) (1995).
154 Yerger v. Robertson, 981 F.2d 460 (9th Cir. 1992); 36 C.F.R. § 800.3(c) (1995).
155 El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991) (court preliminarily enjoined applicant from continuing construction where Rural Electrification Administration failed to ensure that applicant adhered to conditional approval of project).
157 Vieux Carré Property Owners, Residents & Assocs. v. Brown, 948 F.2d 1436 (5th Cir. 1991) (court states that it is impossible to pre-judge outcome of consultation process).
courts have decided that NHPA applies until the final approval is made.\textsuperscript{158} In one case, the Federal agency initiated the consultation process after issuance of a permit, and the court found the agency in compliance with NHPA where the Federal agency had obtained SHPO concurrence after issuing the permit, implemented extensive mitigation measures, and responded to public concerns.\textsuperscript{159} In another case, the court explained that as long as environmental effects were considered prior to a Federal agency's making "irretrievable commitments," the agency complied with the National Historic Preservation Act.\textsuperscript{160}

4. Section 106 applies to eligible and listed properties

Another threshold requirement in triggering the Section 106 process is the historic property's listing or eligibility for listing in the National Register of Historic Places. As noted above, prior to 1976, Section 106 applied only when an undertaking affected properties actually listed in the National Register.\textsuperscript{161} Since the 1976 amendments, courts have required agencies to comply with Section 106 when National Register-eligible properties are involved. The Council's regulations define "eligible" as including both properties formally determined as such by the Secretary of the Interior and all other properties that meet the National Register criteria.\textsuperscript{162} An eligible property—one that meets the criteria—may be submitted to the Secretary for a formal determination of eligibility under separate regulations.\textsuperscript{163} The Secretary, acting through the National Park Service, determines the eligibility of the property by a formal procedure. Most courts find that a property need not be

\textsuperscript{158}Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); WATCH v. Harris, 603 F.2d 310 (2d Cir.), cert. denied, 444 U.S. 995 (1979).

\textsuperscript{159}Sierra Club v. Watt, No. CV-83-5878 AWT (C.D. Cal. Nov. 18, 1983), aff'd sub nom. Sierra Club v. Clark, 774 F.2d 1406 (9th Cir. 1985).

\textsuperscript{160}Illinois Commerce Comm'n v. Interstate Commerce Comm'n, 848 F.2d 1246 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989) (ICC regulations provided for Section 106 process to begin prior to effective date of railroad exemption but after publication of notice of abandonment).

\textsuperscript{161}In several cases where the agency action occurred prior to the 1976 amendments, the courts held NHPA inapplicable because the affected properties were not listed in the National Register at the time of the agency's approval of the expenditure of funds. Hart v. Denver Urban Renewal Auth., 551 F.2d 1178 (10th Cir. 1977); South Hill Neighborhood Ass'n v. Romney, 421 F.2d 454 (6th Cir. 1969), cert. denied, 397 U.S. 1025 (1970); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975); Saint Joseph Historical Soc'y v. Land Clearance for Redevelopment Auth., 366 F. Supp. 605 (W.D. Mo. 1973). But see Committee to Save the South Green v. Hills, [1977] 7 Envtl. L. Rep. (Envtl. L. Inst.) 20,061 (D. Conn. Nov. 5, 1976) (agency must comply with Council's regulations because property was eligible even though agency need not comply with § 106 because property was not listed in National Register).

\textsuperscript{162}36 C.F.R. § 800.2 (e) (1995).

\textsuperscript{163}36 C.F.R. §§ 63.2, 63.3 (1995).
formally determined eligible to be considered an “eligible property” for purposes of the application of Section 106.164

B. Court Decisions Interpreting the Section 106 Process

The courts have generally followed the Council’s regulations, finding them to be in accord with both the letter and the spirit of NHPA. Courts generally defer to the judgment of the Council in interpreting the regulations and in deciding whether an agency has complied with Section 106.165 One court found the Council’s regulations to be “particularly persuasive” concerning the proper interpretation of NHPA because Congress was aware of and had considered the regulations in 1976 and 1980 when it amended NHPA and had declined to change the Council’s interpretation of its statutory authority.166 Furthermore, the manner in which the Council allows agencies to afford the opportunity to comment is left entirely to the Council’s discretion.167 In interpreting the Council’s regulations, the courts have dealt with several aspects of the Section 106 process—the collection of information regarding historic properties during identification and evaluation, the assessment of effects, the actual commenting process, and the effect of the Council’s comments.

1. Identification and evaluation

Once a Federal agency has determined that an undertaking exists, the Federal agency must begin the Section 106 process by identifying any National Register-listed or eligible properties in the area of potential effects.168 Defining the area of potential effects is a controversial aspect of the Section 106 process, although few courts have specifically addressed this issue. The Council’s regulations define that area as “the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such

164Boyd v. Roland, 789 F.2d 347 (5th Cir. 1986); Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983); Hough v. Marsh, 557 F. Supp. 74 (D. Mass. 1982). See also Pueblo of Sandia v. United States 50 F.3d 856 (10th Cir. 1995), Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985) (agency may not apply different standards of historic review to properties listed in or officially determined eligible for the National Register and properties that might be eligible but have not been listed or officially determined to be eligible). A minority view is that neither Section 106 nor the Council’s regulations apply if no properties have been determined formally by the Secretary to be eligible for the Register. Birmingham Realty Co. v. General Servs. Admin., 497 F. Supp. 1377 (N.D. Ala. 1980); Committee to Save the Fox Bldg. v. Birmingham Branch of the Fed. Reserve Bank, 497 F. Supp. 504 (N.D. Ala. 1980).


166Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271 (3d Cir. 1983).


properties exist.\textsuperscript{169} In some cases, the area of potential effects is viewed broadly to go beyond the project limits or permit area,\textsuperscript{170} while in other cases courts have not required Federal agencies to consider the effects of their actions beyond the permit area or project limits.\textsuperscript{171} The area of potential effects may include public or private property.\textsuperscript{172}

The exact nature of a Federal agency’s identification effort will depend on the circumstances of each case,\textsuperscript{173} but in every case the agency must make a “reasonable and good faith effort” to identify historic properties.\textsuperscript{174} Some courts interpret the procedural steps of identification and evaluation strictly,\textsuperscript{175} while others deem the agency as having fulfilled its NHPA responsibilities if it has substantially complied with the requirements of NHPA without following the exact procedures.\textsuperscript{176}

To identify historic properties, the agency may need to conduct field surveys and predictive modeling of the affected area.\textsuperscript{177} The courts have found that a survey need not canvass 100 percent of the impact area and that its scope may vary from case to case. When other evidence suggests that a complete survey would be fruitless, a survey that encompasses less than 100 percent of the affected area may be sufficient.\textsuperscript{178} Surveys conducted

\textsuperscript{169}36 C.F.R. § 800.2(c) (1995).


\textsuperscript{172}See Pacific Gas Transmission Co. v. Richardson’s Recreational Ranch, 773 F. Supp. 246 (D. Or. 1991), aff’d, 9 F.3d 1394 (9th Cir. 1993).

\textsuperscript{173}The Council’s proposed new regulations would clarify that identification efforts depend upon the nature of the project, the degree of its impact, and the likely nature and location of historic properties.

\textsuperscript{174}36 C.F.R. § 800.4(b) (1995); Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).

\textsuperscript{175}Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995); Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990); Ferris v. Secretary of the United States Dep’t of Transp., No. 89-C-779-C (W.D. Wis. 1990), National Trust for Historic Preservation v. United States Army Corps of Eng’rs, 552 F. Supp. 784 (S.D. Ohio 1982).

\textsuperscript{176}Commonwealth of Kentucky v. United States Army Corps of Eng’rs, No. 899-77 (E.D. Ky. Sept. 21, 1992); Sierra Club v. Watt, No. CV-83-5878 AWT (C.D. Cal. Nov. 18, 1983), aff’d sub nom. Sierra Club v. Clark, 774 F.2d 1406 (9th Cir. 1985).

\textsuperscript{177}36 C.F.R. § 800.4(a)(2) (1995).

without consultation with the SHPO are not enough, however, to satisfy the identification requirement. Consultation with the SHPO is considered an essential component of the identification effort. Absent consultation with the SHPO, courts have found that the agency had no reasonable basis to determine what further actions, aside from a survey, may be necessary. Additionally, early contact with the SHPO is essential, so that alternatives to the proposed undertaking are still available.

Another essential component of the identification effort is the requirement that agencies seek information from Indian tribes, local governments, organizations, and the public. A recent decision indicates that courts will carefully examine identification efforts when Native American concerns are implicated. In that case, form letters to tribes requesting detailed information on the location and use of sites by Native Americans and meetings with tribal leaders to seek specific information on traditional cultural properties was not enough to constitute a reasonable and good faith effort to identify historic properties. Given the sensitive nature of eliciting information from Native Americans on such properties, the information provided to the Federal agency indicated a need to further investigate the existence of sacred sites.

After identifying properties involved, the agency must evaluate those properties to determine whether they are eligible for listing on the National Register. A Federal agency applies the National Register criteria to all

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184 Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995).

185 Compare Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995) (court notes that reasonable effort to identify traditional cultural properties depends on likelihood that properties may exist) with Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994) (court found that Forest Service appropriately and consistently solicited Native American input) and Native Americans for Enola v. United States Forest Serv., 832 F. Supp. 297 (D. Or. 1993), vacated, 60 F.3d 645 (9th Cir. 1995) (district court rejected Native American claims that further investigation was required).
properties that may possess historic value and, if the agency and the SHPO agree that a property meets the criteria, the property is considered eligible.\textsuperscript{186} If they agree that the property does not meet the criteria, then the property will not be considered eligible.\textsuperscript{187} If they disagree, or if the Council or Secretary so requests, the Federal agency must request a determination of eligibility from the Secretary of the Interior.\textsuperscript{188} If the question of a property's eligibility is submitted to the Secretary of the Interior and the Secretary determines the property to be eligible, the agency must continue with the Section 106 process.\textsuperscript{189} If, however, the Secretary makes a determination of eligibility on its own motion and after an agency has passed the decision point in its undertaking, an agency is not required to go back and comply with Section 106.\textsuperscript{190}

If no historic properties are found, a Federal agency is required to make that determination known to the SHPO by forwarding the necessary documentation and notifying interested persons of its finding.\textsuperscript{191} The adequacy of the documentation is an essential aspect of the evaluation step. Courts have observed that consultation is meaningless unless the SHPO has access to all relevant information when it makes its identification and evaluation decisions and have interpreted the consultation requirement to mean "informed consultation."\textsuperscript{192} Additionally, the Federal agency must make its documentation available to the public. If no historic properties are found, then the agency is not required to take any further steps.\textsuperscript{193} If historic properties are found, the effect of the agency's undertaking must be assessed.\textsuperscript{194}

\textsuperscript{186}36 C.F.R. § 800.4(c)(2) (1995).

\textsuperscript{187}36 C.F.R. § 800.4(c)(3) (1995). However, members of the public can appeal to the Keeper of the National Register. 36 C.F.R. § 60.12 (1995).

\textsuperscript{188}36 C.F.R. § 800.4(c)(4) (1995).

\textsuperscript{189}36 C.F.R. § 800.4 (1995). \textit{But see} Native Americans for Enola v. United States Forest Serv., 832 F. Supp. 297 (D. Or. 1993), vacated, 60 F.3d 645 (9th Cir. 1995) (court found Forest Service in compliance with NHPA even though it issued permit without the Secretary of the Interior issuing a determination of eligibility).


\textsuperscript{191}36 C.F.R. § 800.4(d) (1995).

\textsuperscript{192}Pueblo of Sandia v. United States, 50 F.3d 856 (10th Cir. 1995) (court held that failure to provide affidavits to SHPO and misrepresentation of Tribe's position evidenced lack of good faith effort to identify and evaluate properties).

\textsuperscript{193}36 C.F.R. § 800.4(d) (1995).

\textsuperscript{194}36 C.F.R. § 800.4(e) (1995).
2. Assessing effects

For each property listed in or eligible for listing in the National Register, the agency must apply the Council’s criteria of effect\textsuperscript{195} to determine whether the undertaking will have an “effect” on historic resources.\textsuperscript{196} If the agency determines there is no effect, the agency must document its finding, and notify the SHPO and interested persons. One court has found a Federal agency in violation of Section 106 where it failed to notify the SHPO of its “no effect” determination.\textsuperscript{197}

If the undertaking will have an effect on the historic property, the agency applies the Council’s criteria of adverse effect in consultation with the SHPO.\textsuperscript{198} The criteria of adverse effect apply only to those characteristics of a property that qualify it for inclusion in the National Register.\textsuperscript{199} When the agency decides that the effect will not be adverse, it must obtain SHPO concurrence and forward a determination of no adverse effect to the Council or, alternatively, submit its finding to the Council and notify the SHPO of its finding.\textsuperscript{200} Adequate documentation must accompany the notifications to the SHPO and Council.\textsuperscript{201} However, at least one court found a Federal agency’s documentation satisfactory when it mentioned one historic site but failed to mention others nearby, since the Council was aware of the location of the project and its proximity to other historic sites.\textsuperscript{202} If the Council does not object to the determination of no adverse effect, the agency is deemed to have satisfied its Section 106 duties, and the undertaking may proceed.\textsuperscript{203} Agencies have also made conditional no adverse effect determinations in

\textsuperscript{195} 36 C.F.R. § 800.5(a) (1995).

\textsuperscript{196} The “effect” step would be eliminated under the Council’s proposed regulations. Instead, the agency would proceed directly to evaluating whether the undertaking would have an “adverse effect.”

\textsuperscript{197} Ferris v. Secretary of the United States Dept’ of Transp., No. 89-C-779-C (W.D. Wis. 1990).

\textsuperscript{198} 36 C.F.R. §§ 800.5(c), 800.9(b) (1995).


\textsuperscript{200} 36 C.F.R. § 800.5(d)(1) (1995).

\textsuperscript{201} 36 C.F.R. § 800.5(d) (1995); Ferris v. Secretary of the United States Dept’ of Transp., No. 89-C-779-C (W.D. Wis. 1990).

\textsuperscript{202} Daingerfield Island Protective Soc’y v. Babbitt, 40 F.3d 442 (D.C. Cir. 1994) (court notes that Council could have requested additional information or suo sponte considered the effects on the nearby properties).

consultation with SHPOs. Although such agreements are not specifically provided for in the regulations,204 at least one court has recognized the validity of such a determination.205

If the agency determines that there will be an adverse effect or if the Council objects to a determination of no adverse effect, the parties enter into the consultation process, the primary means by which the Council exercises its opportunity to comment.206

3. The Council’s opportunity to comment

At the heart of Section 106 review is the commenting process. In most cases, this takes the form of consultation among the agency, the State Historic Preservation Officer, and the Council staff, although at times other interested parties may be invited to participate. During consultation, these parties attempt to reach agreement on measures to avoid or mitigate the adverse effects of the agency’s undertaking on historic resources.207 If the parties agree, they generally execute a Memorandum of Agreement208 or, if an entire program is involved, a Programmatic Agreement (PA).209 Execution of an agreement for every project is not required by the Council’s regulations, although it is encouraged and has evolved as the most practical means of obtaining resolution of the consultation process.210

When Memoranda of Agreement have been executed according to the procedures in the Council’s regulations, courts have upheld them.211 Under the Council’s regulations and court decisions, a ratified MOA or PA constitutes the comments of the Council, evidencing the agency has satisfied its Section 106 responsibilities.212 The 1992 amendments to the National Historic Preservation Act acknowledged the importance of the MOA in the Council’s regulations, stating that, where an MOA has been signed, it must govern the

204See 36 C.F.R. § 800.5(d)(2) (1995) (this provision is used as a justification for such agreements).


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undertaking and all its parts. If a Federal agency consults with the Council and SHPO and agrees to certain mitigation measures by incorporating them into permit conditions, but does not execute an MOA, courts have found substantial compliance with the Council's regulations and the intent of NHPA fulfilled. Although an agreement should be reached prior to the final agency decision, courts may find compliance with NHPA if a permit is issued prior to execution of an MOA where the Federal agency complied with the procedural steps of the Council's regulations, incorporated mitigation measures into a permit as conditions, and/or continued to negotiate with the Council after permit issuance. If several agencies are involved in a project, the court may allow one agency to initiate and another to complete consultation, if the Council so approves.

Memoranda of Agreement are similar to contracts, and courts defer to the interpretation of the signatories in questions regarding the meaning of agreement's language. One court has held that persons who were not party to an MOA do not have the privity of contract necessary to maintain an action based on alleged breach of duties imposed by the MOA. Other courts have permitted challenges to an MOA or enforcement actions when the privity issue was not raised. Once an MOA is executed, courts have relied on its language to interpret the scope of the Federal agency's Section 106 obligations.

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Occasionally, parties to the consulting process fail to agree on the terms of an MOA, and the Section 106 process is terminated. When this occurs, the agency must request the comments of the Council. In recognizing the importance of resolution through agreements, the 1992 amendments provide that the head of the agency must document the decision where an agreement has not been made; the decision may not be delegated. Terminations of consultation are extremely rare, but when they occur, Council members consider the matter and issue comments. Comments from the Council membership do not represent agreement between the agency and the Council. The head of the agency must consider the Council's comments in reaching a final decision on the undertaking and report that decision to the Council.

Until the Council issues its comments, the agency is precluded from taking or sanctioning any action that could either result in an adverse effect on the historic property or foreclose the consideration of modifications to the undertaking that would avoid or mitigate adverse effects. However, courts will find that the Council still has an opportunity to comment as long as irretrievable commitments have not been made.

If the agency proceeds with its undertaking before completing the Section 106 process, it may be in violation of NHPA. When agencies have failed to comply with Section 106 before final approval was given, courts have enjoined those undertakings and required agencies to comply with Section 106. Ultimately, however, this remedy may delay, but does not halt, completion of undertakings. When an agency makes a final decision on an

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221 36 C.F.R. § 800.6(b) (1995). See Vieux Carré Property Owners, Residents, & Assocs. v. Pierce, No. 81-4777 (E.D. La. Aug. 10, 1982) (after unsuccessful consultation, panel meeting was held; court upheld the agency’s compliance with NHPA).


223 Terminations occur approximately 5-10 times per year.

224 There have been two suits alleging that the Council’s commenting process was influenced improperly by political pressure. Natural Resources Defense Council v. City of New York, 534 F. Supp. 279 (S.D.N.Y.), aff’d, 672 F.2d 292 (2d Cir.), cert. dismissed, 456 U.S. 920 (1982); National Center for Preservation Law v. Landrieu, 496 F. Supp. 716 (D.S.C.), aff’d per curiam, 635 F.2d 324 (4th Cir. 1980). In each case, the court examined the administrative record to ascertain what factors were involved in the decisionmaking process. Where the evidence showed that decisions were made on the basis of factors properly in the record and not on the political communications, the commenting process was upheld.


226 36 C.F.R. § 800.5(d) (1995); National Trust for Historic Preservation v. United States Army Corps of Eng’rs, 552 F. Supp. 784 (S.D. Ohio 1982) (Corps permit invalidated because it had been issued before the Section 106 process was complete).


undertaking without complying with Section 106, however, it has foreclosed the Council’s opportunity to comment. A court may, therefore, enjoin the agency from implementing its undertaking. As long as the Federal agency solicits the Council’s comments in advance of making its final decision, courts have determined that the Council’s opportunity to comment has not been foreclosed. In some cases, after examining the circumstances of the consultation and the Federal agencies’ efforts in obtaining Council comment, courts will find that an agency was in “substantial compliance” with Section 106 even if the agency did not adhere to every step in the Section 106 process.

4. Effect of the Council’s comments

Although Section 106 and the Council’s regulations impose important procedural duties on Federal agencies, the Council is purely an advisory body; it has no authority to impose substantive requirements on an agency. When an agency enters into an MOA, an enforceable legal document, it agrees to implement the agreement’s terms. Similarly, where an agency agrees to impose certain conditions on permits and licenses, such conditions must be upheld. If the agency obtains the Council’s comments upon termination or foreclosure of the

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22936 C.F.R. § 800.6(d) (1995). See National Trust for Historic Preservation v. United States Army Corps of Eng’rs, 552 F. Supp. 784 (S.D. Ohio 1982) (all work was permanently enjoined under permit issued before § 106 process completed); Ferris v. Secretary of the United States Dep’t of Transp., No. 89-C-779-C (W.D. Wis. 1990) (court found Council’s opportunity to comment foreclosed where Coast Guard approved changes to lighthouse prior to notifying Council).

230Connecticut Trust for Historic Preservation v. Interstate Commerce Comm’n, 841 F.2d 479 (2d Cir. 1988) (Council had concluded that its opportunity to comment on abandonment of historic railroad line as a whole was foreclosed but opportunity to comment on individual affected features was not).

231Commonwealth of Kentucky v. United States Army Corps of Eng’rs, No. 89-77 (E.D. Ky. Sept. 21, 1992) (court found agency in compliance with NHPA even though parties failed to agree to MOA); Sierra Club v. Watt, No. CV-83-5878 AWT (C.D. Cal. Nov. 18, 1983), aff’d sub nom. Sierra Club v. Clark, 774 F.2d 1406 (9th Cir. 1985) (agency in “substantial compliance” with NHPA even though consultation and mitigation measures instituted after issuance of permit); Pennsylvania v. Morton, 381 F. Supp. 293 (D.D.C. 1974) (agency was in “substantial compliance” with NHPA even though it did not seek the Council’s comments until after entering into a land exchange agreement because the agency made an effort to carry out the Council’s recommendations made after the fact). But see Don’t Tear It Down, Inc. v. General Servs. Admin., 401 F. Supp. 1194 (D.D.C. 1975) (court found agency actions in violation of NHPA where agency proceeded with demolition prior to completing consultation and receiving Council comment).


consultation process, it has the discretion not to follow them.\(^{235}\) However, an agency’s actions are reviewable under the Administrative Procedure Act,\(^{236}\) a statute which prohibits agencies from acting arbitrarily or capriciously in their decisionmaking.

V. Court Opinions on Compliance with Section 110

While Section 110 is designed to promote internal agency programs, it also contains directives for the management of federally owned historic properties. Under Section 110, each Federal agency must establish a program to locate, inventory, and nominate to the Secretary of the Interior all properties under its control that appear to qualify for the National Register, must also use available historic properties to the maximum extent feasible (rather than acquiring, constructing, or leasing other buildings); and must manage and maintain historic properties under its control with due consideration for preservation of their historic values.\(^{237}\)

Section 110 also creates duties that are not limited to federally owned historic properties. When impairment or demolition of a historic property is necessary, the responsible agency must record the property in accordance with professional standards.\(^{238}\) When National Historic Landmarks are involved, the agency has a substantive obligation to undertake such planning and actions as may be necessary to minimize direct and adverse effects on the landmark and must afford the Council a reasonable opportunity to comment on the undertaking.\(^{239}\)

The 1992 amendments added several new aspects to Section 110. Section 110(/i) specifies the responsibilities of Federal agencies that receive formal comment from the Council, stating that the final agency decision taking into account the effects of an undertaking on historic properties must be made by the head of the Federal agency and documented for the Council’s review.\(^{240}\) This section also clarifies the effect of an executed MOA, specifying that its terms are binding on the conduct of the undertaking in its entirety.\(^{241}\)

While litigation under this section has been sparse, several courts have interpreted Section 110. In an early case, a panel of Council members considered a city’s proposal to construct a hotel and retail facility near a National Historic Landmark and issued comments on the project.\(^{242}\) The main issue in the case was whether a provision of the Housing and Community Development Act—the Federal statute under which the city had


\(^{241}\) Id. See also 36 C.F.R. § 800.6(c)(1) (1995).

obtained project funds and, acting as “Federal agency,” assumed responsibility for environmental review—applied to duties under Section 110(f) just as it did to those under Section 106. The court held that that was the case; by obtaining the Council’s comments, the city had complied with Section 110(f). A later case, however, observed that compliance with Section 106 does not necessarily satisfy the mandate of Section 110(f), because 110(f) establishes a higher standard of care to be exercised by Federal agencies when a project may affect a National Historic Landmark.\(^{243}\)

Several later court decisions also address the relationship between Sections 110 and 106. In one case, the Coast Guard argued that it had adhered to the requirements of Section 110(a) when it modified a lighthouse in order to convert it to solar power. The court recognized that the Coast Guard was complying with Section 110 in attempting to use the lighthouse to the maximum extent feasible; however, the court found that the agency was also required to adhere to the Section 106 procedures when it modified the lighthouse.\(^{244}\) In another case interpreting the relationship between Sections 110 and 106, the court adopted a narrow view, finding that Section 110 clarified and codified agencies’ responsibilities but did not intentionally expand them.\(^{245}\) Similarly, a 1996 decision described Section 110(a) as an “elucidation” of Section 106 and declined to find that 110(a) created an independent substantive obligation different from Section 106.\(^{246}\)

Another decision addressed the scope of Section 110(a)’s requirement that Federal agencies inventory historic sites under their ownership or control. The court declined to apply Section 110 to Indian lands held in trust by the Federal Government, reasoning that the tribes held real ownership in the land and the archeological resources it contained.\(^{247}\) Finally, in interpreting the application of Section 110, one court found that Federal agencies are not required to rehabilitate surplus property; agencies must undertake preservation activities only when it is determined that the property will be of use to the agency’s mission.\(^{248}\)


\(^{244}\)Ferris v. Secretary of the United States Dep’t of Transp., No. 89-C-779-C (W.D. Wis. 1990).

\(^{245}\)Lee v. Thornburgh, 877 F.2d 1053 (D.C. Cir. 1989) (court interpreted Sections 110(b) & (d)’s reference to “assistance” as an expenditure of funds, and Section 110(b)’s reference to “agency action” as a license or other approval). [Ed. note: The 1992 amendments use the term “assistance” more broadly in Section 110(k).]


VI. Executive Orders

A. Executive Order No. 11593

In 1971, five years after Congress enacted NHPA, President Nixon signed Executive Order No. 11593.249 The Executive Order required Federal agencies to administer cultural properties under their control and direct their policies, plans, and programs in such a way that federally owned sites, structures, and objects of historical, architectural, or archeological significance were preserved, restored, and maintained.250 To achieve this goal, Federal agencies were required to locate, inventory, and nominate to the National Register of Historic Places all properties under their jurisdiction or control that appear to qualify for listing in the National Register.251 The courts have held that Executive Order No. 11593 obligates agencies to conduct adequate surveys to locate "any" and "all" sites of historic value,252 although this requirement applies only to federally owned or federally controlled properties.253 Moreover, the Executive Order directed agencies to reconsider any plans to transfer, sell, demolish, or substantially alter any property determined to be eligible for the National Register and to afford the Council an opportunity to comment on any such proposal.254 Again, the requirement applied only to properties within Federal control or ownership.255 Finally, the Executive Order required agencies to record any listed property that may be substantially altered or demolished as a result of Federal action or assistance and to take necessary measures to provide for maintenance of and future planning for historic properties.256


250*Id. at § 7.

251*Id. at § 2(a).


255*Stop H-3 Ass'n v. Coleman, 533 F.2d 474 (9th Cir.), cert. denied, 429 U.S. 999 (1976).

Two courts have found that citizens have a right of action under Executive Order No. 11593, but other courts disagree, finding that the Executive Order is only a “managerial tool” for the Executive Branch. Other courts have not addressed this issue but simply allowed the action. Opinions differ as to whether compliance with other preservation laws satisfies the requirements of Executive Order No. 11593. Just as for Section 106, noncompliance with Executive Order No. 11593 is not a defense to a condemnation action.

B. Executive Order No. 13006

In 1996, President Clinton issued Executive Order No. 13006, “Locating Federal Facilities on Historic Properties in our Nation’s Central Cities.” This Executive Order reaffirms the Federal Government’s commitment to historic preservation leadership as articulated in NHPA, calling upon Federal agencies to give, whenever economically prudent and operationally appropriate, first consideration to historic properties in historic districts when locating Federal facilities. If no such property is suitable, agencies must next consider other sites in historic districts, and then historic properties outside of historic districts. Any construction or rehabilitation undertaken by Federal agencies must be architecturally compatible with the surrounding historic properties. The Executive Order also directs Federal agencies to reform regulations and procedures that impede location of Federal facilities in historic properties or districts and to seek the Council’s assistance in this effort.


258See James v. Lynn, 374 F. Supp. 900 (D. Colo. 1974) (Exec. Order No. 11,593 not enforced; evidence of historic resources presented at trial was sufficient compliance with historic review requirements); Warm Springs Dam Task Force v. Gribble, 378 F. Supp. 240 (N.D. Cal. 1974) (adequate discussion in environmental impact statement of archeological resources is not compliance with Exec. Order No. 11,593).


261Id.

262Id.

263Id.

264Id.

265Id. at § 3.
Executive Order No. 13006 calls upon Federal agencies to seek partnerships with States, local governments, Indian tribes and private organizations with the goal of enhancing the Nation's preservation program.\textsuperscript{266} 

C. Executive Order No. 13007

In 1996, President Clinton also issued Executive Order No. 13007, intended to protect Native American religious practices. This Executive Order directs Federal land-managing agencies to accommodate Native Americans’ use of sacred sites for religious purposes and to avoid adversely affecting the physical integrity of sacred sites.\textsuperscript{267} Some sacred sites may be considered traditional cultural properties and, if older than 50 years, may be eligible for the National Register of Historic Places. Thus, compliance with the Executive Order may overlap with Section 106 and Section 110 of NHPA. Under the Executive Order, Federal agencies managing lands must implement procedures to carry out the directive’s intent. Procedures must provide for reasonable notice where an agency’s action may restrict ceremonial use of a sacred site or adversely affect its physical integrity.\textsuperscript{268} Federal agencies with land-managing responsibilities must provide the President with a report on implementation of Executive Order No. 13007 one year from its issuance. 

Executive Order No. 13007 builds upon a 1994 Presidential Memorandum concerning government-to-government relations with Native American tribal governments. The Memorandum outlined principles Federal agencies must follow in interacting with federally recognized Native American tribes in deference to Native Americans’ rights to self-governance.\textsuperscript{269} Specifically, Federal agencies are directed to consult with tribal governments prior to taking actions that affect federally recognized tribes and to ensure that Native American concerns receive consideration during the development of Federal projects and programs. The 1994 Memorandum amplified provisions in the 1992 amendments to NHPA enhancing the rights of Native Americans with regard to historic properties.

VII. Attorneys’ Fees and Costs in Preservation Cases

Prior to 1980, NHPA did not provide for the award of attorneys’ fees or costs. Without this explicit statutory authority, plaintiffs’ ability to obtain fees and costs was limited. One court held that attorneys’ fees and costs

\textsuperscript{266}Id. at § 4.


\textsuperscript{268}Id. at § 2.

\textsuperscript{269}Presidential Memorandum on Government-to-Government Relations with Native American Tribal Governments, April 29, 1994.
would be allowed in NHPA actions only in cases of bad faith or when there would be a "benefit to a limited class of special beneficiaries against whom the award is taxed." 270

In 1980, Congress added Section 305 to NHPA authorizing the award of attorneys' fees and costs to any person who "substantially prevails" in any civil action to enforce the act. 271 Since then, there have been several decisions on attorneys' fees and costs. In one case, plaintiffs were successful in their suit to require the Department of Housing and Urban Development to comply with Section 106. Although the Federal agency had completed its compliance just a few days before the enactment of Section 305, the court awarded fees, holding that retroactive application of Section 305 would not result in injustice. Responsibility for the fees was shared by the Federal and local agency defendants. 272

In other cases litigated since 1980, courts have also awarded attorneys' fees and costs. 273 In one early case, the court held that fees must be adequate to attract counsel to cases in which damages may be small, although the fees may not constitute a windfall. 274 Even in cases resolved through consent decrees, an award of attorneys' fees and costs is appropriate under NHPA. 275 Comparing NHPA's provisions for attorneys' fees with that of other statutes, the court determined that, when a case is not decided on the merits, courts must examine two issues to determine if plaintiffs substantially prevailed: 1) whether plaintiffs substantially received the relief sought, and 2) whether the lawsuit was a substantial factor in attaining the relief. If the test is satisfied, the court may, at its discretion, award attorneys' fees and costs, provided such an award furthers the purpose of NHPA. 276 Indeed, one case held that even plaintiffs who did not "win" were entitled to fees because the property had been listed in the National Register as a result of their efforts. 277 Finally, one early court decision also held that Section 305 is not limited to legal services rendered in a district court; an appellate court may award fees and costs for services in

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270. Committee on Civic Rights of the Friends of the Newburyport Waterfront v. Romney, 518 F.2d 71 (1st Cir. 1975). Fees and costs were also sought under other authorities in preservation cases. See United States v. 4.18 Acres of Land, 542 F.2d 780 (9th Cir. 1976) (fees denied in condemnation case involving preservation issues); Black Hills Alliance v. Regional Forester, 526 F. Supp. 257 (D.S.D. 1981) (costs granted under Fed. R. Civ. P. 54).


273. Attorney's fees have been awarded, for example, in Indiana Coal Council v. Lujan, 774 F. Supp. 385 (D.D.C. 1991), vacated in part and appeal dismissed, No. 91-5397 (D.C. Cir. April 26, 1993) and Ferris v. Secretary of the United States Dep't of Transp., No. 89-C-779-C (W.D. Wis. 1990). See also Fill the Pool Comm. v. Village of Johnson Cty, No. 82-CV-762 (N.D.N.Y. June 23, 1983). [Ed. note: NHPA fees are based on market rate, in contrast to the Equal Access to Justice Act, 28 U.S.C. § 2412 (1994), and are applicable to NEPA and to § 4(f) of the Department of Transportation Act, which sets a low flat hourly rate adjusted for inflation.]


276. Id.

the appellate court.\textsuperscript{278} Section 305 has also been the basis for finding that NHPA permits a private right of action.\textsuperscript{279}

VIII. Related Authorities Involving Historic Preservation

Although the National Historic Preservation Act is the Nation’s principal historic preservation statute, there are other Federal authorities that include the preservation of historic resources among their purposes and goals. These statutes include the National Environmental Policy Act of 1969,\textsuperscript{280} the Department of Transportation Act,\textsuperscript{281} the Historical and Archeological Data Preservation Act of 1974,\textsuperscript{282} the Archeological Resources Protection Act of 1979,\textsuperscript{283} the Native American Graves Protection and Repatriation Act,\textsuperscript{284} and the American Indian Religious Freedom Act.\textsuperscript{285} This report focuses on the courts’ interpretations of the preservation requirements of the National Environmental Policy Act and the transportation authorities because they are closely related to the preservation review process embodied in Section 106.\textsuperscript{286} A brief summary of the other statutes is also provided.\textsuperscript{287}

\textsuperscript{278}Morris County Trust for Historic Preservation v. Pierce, 730 F.2d 94 (3d Cir. 1983).


\textsuperscript{283}16 U.S.C. §§ 470a-470ll (1994).


\textsuperscript{286}This report does not include a discussion of or citations to the many cases decided under these laws that do not address historic preservation but that deal with other aspects of the statutes.

\textsuperscript{287}The statutes discussed in Section VIII.C. have generated relatively little litigation. Only those cases raising NHPA claims as well as claims under the statutes in that section are cited.
A. The National Environmental Policy Act

The National Environmental Policy Act (NEPA) establishes a national policy of environmental protection. To effectuate this policy, the act requires the Federal Government to carry out its plans and programs in such a way as to “preserve important historic, cultural, and natural aspects of our national heritage.” Generally, in order to ensure that environmental concerns are considered in agencies’ decisionmaking, NEPA directs Federal agencies to prepare an environmental impact statement (EIS) for every “major Federal action significantly affecting the quality of the human environment.” The EIS must contain a detailed discussion of the environmental impact of the proposed action, any adverse environmental effects that cannot be avoided if the proposal is implemented, alternatives to the proposed action, and other information. When uncertain as to whether to prepare an EIS, agencies customarily conduct preliminary analyses and complete an Environmental Assessment (EA) to inform their decision.

Both NEPA and NHPA require agencies to take environmental considerations, including historic properties, into account in their decisionmaking. Courts have described both statutes as procedural statutes containing “stop, look, and listen” provisions requiring the collection of information; they have also described the courts’ role in reviewing agency decisions as that of ensuring that agencies follow the procedures implementing those statutes. In many circumstances where historic properties are involved in large Federal undertakings, if one statute applies, the other will also. This is not always the case, however, for the statutes have different threshold requirements. While Section 106 applies to any Federal undertaking affecting historic properties, NEPA requires an EIS only for “major” Federal actions “significantly” affecting the quality of the human environment. Consequently, there may be instances where NHPA applies but no EIS under NEPA is required. Most courts agree that NEPA and

\[288\] Preservation Coalition, Inc. v. Pierce, 667 F.2d 851 (9th Cir. 1982).


\[291\] More specifically, the process is as follows: If an agency determines that a proposed action is neither adequately covered by an existing NEPA document nor subject to a categorical exclusion, the agency must, at a minimum, prepare an EA to determine whether the action will significantly impact the environment. If the EA supports a Finding of No Significant Impact (FONSI), the agency documents that determination and proceeds with the action. If the agency does not reach a FONSI, it must publish a Notice of Intent to prepare an EIS and begin the scoping process. An agency may opt to proceed directly to preparation of an EIS, without preparing an EA.


\[293\] The Council’s regulations encourage agencies to coordinate their NEPA review with their compliance under § 106 of NHPA. 36 C.F.R. § 800.14(a) (1995).

NHPCA are separate statutes imposing distinct requirements that must be met individually. Some courts have held that, even though an EIS discusses historic resources, it is not sufficient for compliance with NHPCA or, for that matter, Executive Order No. 11593. Many courts, however, have interpreted NEPA and NHPCA similarly and applied the same reasoning in addressing claims under each statute; some have described major Federal actions and undertakings as essentially coterminous.

Cases addressing historic preservation concerns under NEPA generally fall into two categories: 1) cases discussing whether the agency action is a major Federal action significantly affecting the human environment, thereby requiring an EIS; or 2) cases discussing whether the agency properly conducted an environmental review for the major Federal action. Courts generally defer to agency decisions with regard to the application of NEPA, overturning such decisions only upon finding that the agency acted arbitrarily or capriciously, abused its discretion, or acted otherwise not in accordance with the law. As a result, in cases that challenge agency decisions that NEPA does not apply, courts often agree with agency determinations, as long as the record indicates that the Federal agency took the requisite “hard look” at the potential impacts. Although courts are not in agreement as to the amount of Federal involvement necessary to trigger NEPA, courts have declined to apply NEPA and its EIS requirement where Federal involvement was limited to approving and providing financial assistance for

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298Sugarloaf Citizens Ass’n v. Federal Energy Regulatory Com’n, 959 F.2d 508 (4th Cir. 1992); Village of Los Ranchos v. Barnhart, 906 F.2d 1477 (10th Cir. 1990), cert. denied, 498 U.S. 1109 (1991); Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987).


a local environmental study, certifying a power facility where the facility could have relied on self-certification, approving a contract even though approval was not necessary, approving a land exchange, reviewing plans to realign sewers, and deciding not to exercise veto authority. Courts have also approved agency decisions to treat certain actions as categorical exclusions under NEPA. However, in one case, the court found the categorical exclusion decision unreasonable where the agency did not properly conduct identification of the project site; the court in this case determined that an EIS was appropriate given that the project had the potential to affect a traditional cultural resource. In deciding whether a Federal action will have a significant impact, courts have held that mitigation measures may be considered, although Council on Environmental Quality (CEQ) guidance warns agencies not to rely on the possibility of mitigation to avoid preparation of an EIS. CEQ regulations establish certain criteria to assist agencies in determining the intensity of impacts. An impact may exceed the significance threshold depending on the degree to which it affects the “unique characteristics of the geographic area such as proximity to historic or cultural resources” or “districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places...” One court held that if a property is listed in the National Register or is of historic value, its proposed demolition is a “major Federal action” under NEPA, although it is not necessarily one “significantly affecting the quality of

302Id.


304Ringsred v. City of Duluth, 828 F.2d 1305 (8th Cir. 1987).


310Auten v. Nation of Mississquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992), aff’d, 990 F.2d 729 (2d Cir. 1993) (court found that permit conditions obviated need for EIS because conditions reduced impact of the project).


the human environment. Other courts, however, have upheld agencies’ determinations that projects involving demolition of or other impacts on historic properties are not major Federal actions. Thus, an EIS was not required.

When EAs and EISs are prepared, plaintiffs may challenge their content and scope. Issues raised by plaintiffs include an agency’s failure to consider cumulative impacts, improper consideration of alternatives, and inadequate analysis of mitigation measures. If an EIS is prepared, the courts have held that it must include a thorough discussion of the historic and archeological resources involved in the project, the impact of the project on those resources, and alternatives that would allow for their preservation and rehabilitation.

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314 Aertson v. Landrieu, 488 F. Supp. 314 (D. Mass.), aff’d, 637 F.2d 12 (1st Cir. 1980) (demolition in and adjacent to historic district); Nehring v. Harris, No. 79-C-1182 (N.D. Ill. Apr. 13, 1979), dismissed, 605 F.2d 559 (7th Cir. 1979) (demolition of eligible property). In one early decision, Saint Joseph Historical Soc’y v. Land Clearance for Redevel. Auth., 366 F. Supp. 605 (W.D. Mo. 1973), the court found that NEPA was not applicable because the historic properties at issue had not been listed in the Register.

315 City of Grapevine v. Department of Transp., 17 F.3d 1502 (D.C. Cir.), cert. denied, 115 S. Ct. 635 (1994) (court found that agency considered cumulative impacts of most elements of project, but those elements not considered could not be included in approved plan); Walsh v. United States Army Corps of Eng’rs, 757 F. Supp. 781 (W.D. Tex. 1990) (court upheld agency study where EIS included analysis of cumulative impacts of proposed actions, but not cumulative impacts of “contemplated” actions).


317 Communities, Inc. v. Busey, 956 F.2d 619 (6th Cir.), cert. denied, 506 U.S. 953 (1992) (court upheld agency EIS that identified and discussed potential mitigation measures, even though EIS did not specify which mitigation measures would be adopted); Sierra Club v. Watt, No. CV-83-5878 AWT (C.D. Cal. Nov. 18, 1983), aff’d sub nom. Sierra Club v. Clark, 774 F.2d 1406 (9th Cir. 1985) (court found agency in compliance with NEPA where EIS addressed several mitigation measures and agency implemented substantial site-specific mitigation measures which had not been incorporated into EIS).


However, courts have held that an EIS was adequate even though its discussion of historic resources was incomplete because the agency had planned additional archeological surveys and could avoid harming the resources until new surveys were conducted. Another court declined to require an agency to revise an existing EIS to include discussion of historic impacts because plaintiffs had waited too long to assert their claims. Yet another court declined to require an EIS to discuss historic resources because the evidence on historic resources developed at trial was sufficient to inform the agency of the historic impacts.

Courts are in disagreement as to whether a supplemental EIS must be prepared when new information regarding historic resources comes to light after completion of the initial EIS. One court held that a supplemental EIS is required when new historic resources are discovered though others have held this may not be so sufficient a change as to require a supplemental EIS. When a property is determined eligible for the National Register after the EIS is published, one court held that the necessity of a supplemental EIS must be newly determined.  

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Wisconsin Heritage, Inc. v. Harris, 490 F. Supp. 1334 (E.D. Wis. 1980) (the court reasoned that plaintiffs should have brought their concerns about the historic properties to the attention of the agency during the time the EIS was being prepared; the EIS must be judged in light of the information available to the agency at the time it prepared the EIS).


B. Transportation Authorities

Several statutes governing the actions of the Department of Transportation and its subagencies—the Federal Highway Administration, the Coast Guard, the Federal Aviation Administration and the Federal Transit Administration, among them—include strong historic preservation measures.\textsuperscript{327} The language in these authorities was originally enacted as Section 4(f) of the Department of Transportation Act, signed into law the same day as NHPA: October 15, 1966.\textsuperscript{328} Although Section 4(f) has been recodified as Section 303 of Title 49 of the United States Code, the preservation provision is still known as “Section 4(f).” As it pertains to historic properties, Section 4(f) only permits the Secretary of Transportation to approve a project that requires the use of land from a historic site if 1) there is no feasible and prudent alternative to the use of that land and 2) the program includes all possible planning to minimize harm to that historic site. The courts have held that it is premature for an agency to comply with Section 4(f) if project plans are not final; the expectation that future planning will minimize harm to historic property does not relieve the agency of its Section 4(f) compliance responsibilities.\textsuperscript{329}

Section 4(f) applies only if the project at issue will “use” land from a parkland or a historic site. The meaning of the term “use” has been the subject of numerous lawsuits involving Section 4(f) and, as a result, is well defined.\textsuperscript{330} A few courts have specifically addressed the meaning of “use” in the context of historic resources. Courts have held that demolition of a historic structure\textsuperscript{331} or removal of part of a historic property constitutes a use of land from a historic site.\textsuperscript{332} Other courts found that where there will be no physical use, plaintiffs may attempt to show “constructive use” of a property by presenting evidence of an impact that would substantially impair the value of the property in terms of its use and enjoyment.\textsuperscript{333} Courts have recognized noise, pollution, and visual intrusion as constructive uses.\textsuperscript{334} However, two courts have specifically declined to recognize constructive use in the case of airport noise impacts on historic neighborhoods, where the average noise levels were less than


\textsuperscript{330} These cases are beyond the scope of this report. See 23 C.F.R. § 771.135(p) (1994).

\textsuperscript{331} Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784 (9th Cir. 1983).

\textsuperscript{332} Ferris v. Secretary of the United States Dep’t of Transp., No. 89-C-779-C (W.D. Wis. 1990) (removal of lens in lighthouse constituted use).


\textsuperscript{334} Id.
65 weighted average day and night sound level measurements (Ldn).\textsuperscript{335} One early court decision rejected arguments that secondary impacts such as noise, air pollution, land-use alteration, blasting damage, and property value diminution would amount to a constructive use of historic buildings.\textsuperscript{336} Further, one court has upheld a Federal Highway Administration (FHWA) regulation exempting archeological sites from Section 4(f) by allowing impacts on them to be mitigated by excavation first pursuant to Section 106 and then determined to be no longer in existence and, therefore, not “used.”\textsuperscript{337}

The meaning of the term “historic site” was discussed in a case involving a FHWA proposal to aid the construction of a highway through the Moanalua Valley in Hawaii.\textsuperscript{338} FHWA decided that the valley was not a historic site. It based its decision on a State board’s finding that the valley was of marginal significance, disregarding both the Secretary of the Interior’s determination that the valley might be eligible for the National Register and the Council’s conclusion that the valley possessed historic significance. The court held that a property did not have to be listed in the National Register to be a historic site under Section 4(f), that a property likely to meet the National Register criteria is sufficient.\textsuperscript{339} Indeed, 4(f) applies to historic sites of national, State, or local significance.\textsuperscript{340} Furthermore, the Federal determination of eligibility took precedence over the State board’s finding and thus triggered Section 4(f).

Agencies must determine whether historic sites are involved prior to approval of the project\textsuperscript{341} and early enough in the process that alternatives to the project are still possible.\textsuperscript{342} In one case, plaintiffs alleged that a Section 4(f) statement was made too early in the process, but the court found the timing of the statement adequate because the agency had begun consideration of the alternative in question by the time the statement was prepared.\textsuperscript{343} Moreover, the statement called for continual review of the alternative. No formal determination of


\textsuperscript{336} Nashvillians Against I-440 v. Lewis, 524 F. Supp. 962 (M.D. Tenn. 1981) (court held that the claimed harm must be to the historic value or quality of the properties).


\textsuperscript{338} Stop H-3 Ass'n v. Coleman, 533 F.2d 434 (9th Cir.), cert. denied, 429 U.S. 999 (1976).

\textsuperscript{339} But see Nashvillians Against I-440 v. Lewis, 524 F. Supp. 962 (M.D. Tenn. 1981) (compliance with § 4(f) not required for every property within the scope of § 106 of NHPA).

\textsuperscript{340} 49 U.S.C. § 303(c) (1994).


\textsuperscript{342} Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784 (9th Cir. 1983).

eligibility from the Secretary of the Interior is required. In one case, the court of appeals upheld Federal regulations that exempted FHWA from Section 4(f) compliance where the historic resources—archaeological sites—were important for the data they contained, not for their location. Section 4(f) did not apply, even though the property had been listed in the National Register.

C. Other Statutes

1. Historical and Archeological Data Preservation Act of 1974 (HADPA) and Archeological Resources Protection Act of 1979 (ARPA)

HADPA provides for the preservation of historical and archeological data that might otherwise be lost as the result of alterations to the terrain caused by a Federal or federally licensed activity or program. To carry out the purposes of the act, HADPA allows for the transfer of up to one percent of the appropriations for the project to the Secretary of the Interior. Unlike Section 106, which mandates consideration of historic properties during Federal agency planning, HADPA guides the implementation of mitigation measures once an agency decision is reached.

ARPA is designed to protect archeological resources on Federal and Indian lands and to encourage the exchange of information pertaining to such properties between the Federal Government and the archeological community. ARPA strengthens its predecessor HADPA by providing specific permit procedures that all persons, including private applicants as well as State and Federal agencies, must follow prior to excavating or removing any archeological resource on Federal or Indian lands. Unlike NHPA, ARPA provides both civil and criminal penalties for failure to comply with the act. ARPA does contain a confidentiality provision similar to NHPA.


346 The act is also known as the “Archeological Recovery Act” or the “Moss-Bennett Act.”


2. Native American Graves Protection and Repatriation Act of 1990 (NAGPRA)

NAGPRA requires Federal agencies and museums to inventory their holdings of Native American cultural items and return such items to Indian tribes and other Native American groups. The definition of “Indian tribe” in NAGPRA has been interpreted to include an Indian group or community of Indians that the Secretary does not acknowledge as an Indian tribe. However, this decision was reached prior to promulgation of NAGPRA regulations which generally define “Indian tribe” as those recognized by the Secretary of Interior. The act also provides that any intentional excavation and removal of Native American human remains and other cultural items from Federal or tribal lands be conducted only with a permit issued pursuant to the Archeological Resources Protection Act and after consulting with the appropriate tribe. If an inadvertent discovery is made of Native American remains or objects in connection with an activity on Federal or tribal lands, the activity must cease in the area of the discovery, a reasonable effort must be made to protect the items discovered before resuming activity, and the appropriate Federal agency or tribal authority must be notified. Activities may resume 30 days after receiving certification of notification from the appropriate Federal agency or tribal authority. NAGPRA requirements may overlay Section 106 when undertakings occur on Federal or tribal lands.


AIRFA protects the rights of Native Americans to exercise their traditional religions by ensuring access to sites, use and possession of sacred objects, and the freedom to worship through ceremonials and traditional rites. The intent of AIRFA has been interpreted as ensuring that Native Americans obtain First Amendment protection, but not to grant them rights in excess of the First Amendment. Because such sites may be eligible


355 Federal lands are defined in NAGPRA as “lands which are controlled or owned by the United States.” 25 U.S.C. § 3001(5) (1994). At least one court has declined to interpret “control” broadly and found that NAGPRA did not apply where the degree of Federal involvement was limited to issuance of a permit. Abenaki Nation of Missisquoi v. Hughes, 805 F. Supp. 234 (D. Vt. 1992), aff’d, 990 F.2d 729 (2d Cir. 1993).

356 25 U.S.C. § 3002(c) (1994). If the items are on tribal land then consent of the tribe must be obtained prior to excavations.


for inclusion in the National Register, any effects that may occur, as a result of providing access to them, may trigger Section 106 review under NHPA.360

IX. Procedural Questions in Litigating Preservation Cases

Defendants in historic preservation cases occasionally raise procedural questions in defending agency decisionmaking against claims that agencies have violated NHPA and other historic preservation laws. Among these are the issues of jurisdiction, standing, laches, ripeness, mootness, and the scope of judicial review.

A. Jurisdiction

The question of a court’s jurisdiction to hear a matter has two aspects. First, the court must determine whether it has personal jurisdiction over the defendants named in the suit. Although it is clear that a Federal court may assume jurisdiction over Federal agencies, the court must inquire further when non-Federal defendants are involved. Federal courts have assumed jurisdiction over non-Federal defendants when they are named with Federal defendants or the non-Federal parties have taken advantage of benefits conferred by Federal law or are otherwise associated with a Federal agency.361 Most of these non-Federal parties are applicants for permits, licenses, or financial assistance. Plaintiffs most often bring suit against the Federal defendant, alleging violation of Section 106 and other Federal laws to enjoin the non-Federal defendant from taking the threatening action. Other courts, however, have found that they lack jurisdiction to enjoin non-Federal parties despite their association with a Federal agency.362 An individual or group claiming an interest in the property which is the subject of the suit, or whose claim or defense shares a common question of law or fact with a claim or defense

360 ARLNF was augmented by the Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb(b) (1994), which established statutory standards for free exercise rights “substantially burdened” by Federal, State, and local agency actions, and allowed plaintiffs to bring causes of action for violations of the act.


in the suit, may be allowed to intervene pursuant to Rule 24 of the Federal Rules of Civil Procedure. If the court permits the non-party to intervene, it can fully litigate the merits of the suit.

The second question for the court to determine is whether it has subject matter jurisdiction. Most suits that allege violations of NHPA base jurisdiction on 28 U.S.C. § 1331, which grants jurisdiction to Federal district courts in civil actions arising under the laws of United States. This grant of jurisdiction can, however, be preempted or limited by other statutes. Jurisdiction can also be premised on the judicial review provisions of the Administrative Procedure Act (APA). The defense of sovereign immunity does not preclude jurisdiction in cases involving NHPA violations. When the parties to a dispute have claims other than those involving historic preservation, they may be heard under 28 U.S.C. § 1367, which gives the court discretion to exercise


364 Section 1331 also grants courts jurisdiction to hear cases involving State law if the outcome depends upon construction of Federal law. Preservation League v. Lake Placid Land Corp., No. 92-CV-148 (N.D.N.Y. Feb. 9, 1993) (citing Smith v. Kansas City Title & Trust, 255 U.S. 180, (1921)).


supplemental jurisdiction over claims arising from the “same case or controversy” as the claim conferring jurisdiction to the court.\footnote{\textsuperscript{368}}

**B. Standing**

To maintain a suit in any court, plaintiffs must have standing. This necessity, which has its roots in the case or controversy provision of the United States Constitution,\footnote{\textsuperscript{369}} requires that plaintiffs allege injury to an interest personal to them that is within the zone of interests protected by the statutes at issue. Although early opinions dismissed actions to enforce NHPA for lack of standing on grounds that plaintiffs had shown no real interest because none of them owned or had legal control over the historic properties in question,\footnote{\textsuperscript{370}} or because of faulty complaints,\footnote{\textsuperscript{371}} later cases have allowed standing more liberally, finding plaintiffs had demonstrated a real interest in the case through their involvement in the administrative process.\footnote{\textsuperscript{372}}

The first requirement, injury-in-fact, is not limited to economic injury.\footnote{\textsuperscript{373}} Plaintiffs need not show ownership of the property involved, but may base standing on the threatened demolition of a historic building.\footnote{\textsuperscript{374}}


\footnote{\textsuperscript{369}}U.S. Const. Art. III, § 2, cl. 1. Article III standing requires that plaintiffs allege that 1) they have suffered an injury in fact; 2) the injury is fairly traceable to the action of the defendant, and 3) the injury will likely be redressed by a favorable decision. \textit{See North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MHP (N.D. Cal. Oct. 6, 1992) (citing Lujan v. Defenders of Wildlife, 112 S. Ct. 2130, 2136 (1992)).}


\footnote{\textsuperscript{373}}\textit{Neighborhood Dev. Corp. v. Advisory Council on Historic Preservation, 632 F.2d 21 (6th Cir. 1980).}

aesthetic, architectural, environmental, or historic values; or injury to plaintiff's enjoyment or use of the property. Injury common to the public at large does not defeat standing, as long as plaintiff alleges a concrete and particularized legal interest. Plaintiffs alleging such injury are within the zone of interests protected by NHPA and other historic preservation statutes.

Standing has been granted to residents of towns in which an affected historic property was located, particularly where the plaintiffs resided near the property, and to organizations composed of members who


379 Benton Franklin Riverfront Trailway & Bridge Comm. v. Lewis, 701 F.2d 784 (9th Cir. 1983).


were residents or users of the affected property, as long as injury is alleged.\textsuperscript{386} Organizations that allege only a general public interest in a property without further allegations of use and injury have been denied standing.\textsuperscript{387} In suits brought by individuals and organizations, courts have denied standing to plaintiff organizations but granted standing to plaintiff individuals, finding their interests as individuals different from the interests of the group.\textsuperscript{388} Similarly, a court recognized the right of members of a tribe to sue as individuals, even though the tribe as a whole was barred from suit due to a settlement agreement.\textsuperscript{389} A State has been held to have standing to represent the interests of its citizens.\textsuperscript{390}

Whether plaintiffs have standing under the "private attorney general" doctrine is not clear. One court held that plaintiffs who had not engaged sufficiently in the administrative process did not have the requisite special interest in the controversy to have standing.\textsuperscript{391} Another court, however, allowed standing under this doctrine on the ground that plaintiffs had demonstrated injury to the public interest.\textsuperscript{392}

Standing to enforce a Memorandum of Agreement executed under the Council's regulations or a memorandum of understanding made between an agency and a State regarding the treatment of historic properties has been treated differently. Earlier, courts generally concluded that plaintiffs who were not parties to these agreements lacked the necessary privity of contract to maintain an action to enforce the agreement's terms.\textsuperscript{393} However, later cases alleging violations of an MOA indicate that citizen organizations have standing to challenge

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\textsuperscript{387}Sierra Club v. Morton, 405 U.S. 727 (1972).


compliance with such agreements. Additionally, because the Council’s regulations require an agency to return to the Council for further comments if the agency cannot implement an MOA, failure to comply with the terms of the MOA may put the agency in violation of Section 106, a claim clearly actionable.

C. Laches

Under the doctrine of laches, plaintiffs are barred from maintaining their lawsuits if they have unreasonably delayed in bringing the action and their delay would cause prejudice to defendants if the suit was allowed to go forward. In environmental cases, including those concerning historic preservation, defendants carry an especially heavy burden in attempting to convince the court that laches should apply.

The length of the delay involved has varied considerably from case to case. A delay of two months was held to be too long in one case, while a delay of eight years was considered reasonable in another. Whether a delay is reasonable may depend on plaintiffs’ efforts to solve their problems out of court. When plaintiffs have been diligent in making their views known to the agency, the defense of laches generally is not allowed. Laches begins to run from the time it becomes reasonably clear to plaintiffs that further efforts to achieve their goals would be fruitless, not from the date on which the Federal decision was made or the demolition of a building was

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first discussed. In one case, the court decided that the onset of the NHPA review process, rather than the date of permit issuance, was the appropriate date from which to measure laches. The court explained that if the plaintiff had participated in the NHPA review process, many of the deficiencies alleged in the suit could have been corrected.

The test for determining the application of laches involves a balancing of the prejudice to the defendants and the benefit to the public that would result from the suit. When the buildings in question remained standing and the public interest in preservation could still be safeguarded, courts have rejected the laches defense.

In some cases, courts have dismissed lawsuits because their maintenance would cause undue prejudice to defendants. In one case, defendants had spent a considerable sum of money to acquire properties, foreclosed the opportunity to explore alternative sites, and begun demolition of the historic property. The court denied injunctive relief, holding that the plaintiffs' suit, coupled with their delay in bringing the action, unduly prejudiced the defendant. Under other circumstances, even the expenditure of a great deal of time and money has not justified dismissal, particularly when the expenditure represented only a small percentage of the total to be spent and would not have been lost by further delay and no construction had begun. Even where construction is substantially complete, courts have acknowledged that a suit may still be allowed. Additionally, where defendants continued construction while aware of plaintiffs concerns and failing to address them, a court is less

400Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994); Save the Courthouse Comm. v. Lynn, 408 F. Supp. 1323 (S.D.N.Y. 1975).

401Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994).

402Id.


409See Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994).
likely to find undue prejudice to defendants. Courts may also examine defendants’ actions to determine if their conduct precluded notice and an opportunity for the public to make its concerns known earlier.

D. Ripeness and Mootness

When a suit is brought before an agency has had time to complete any historic review requirements, a court will dismiss it for lack of ripeness or failure to exhaust administrative remedies. In at least one case, the court allowed an action even though plaintiffs had not exhausted their administrative remedies because the court determined that pursuit of the administrative remedies would be futile and application of the exhaustion rule would bar consideration of a decision with wide-ranging effects on the public interest. In another case, the court rejected defendants’ claim that the case should be dismissed and the agency be allowed to continue through the administrative process because the agency was willing to reopen consultation with the SHPO and Council: the court noted that the agency had not been willing to cooperate until the lawsuit was filed. When a suit is brought but the agency eliminates the historic review defects during the pendency of the action, a court will dismiss the case as moot. Cases have also been dismissed as moot when the Federal involvement ceases and the court determines that it can no longer grant plaintiffs redress. However, if there is still an opportunity to impact a project, even if a project is near completion and a permit already issued, courts will deny a motion to dismiss based on mootness.

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411 Id. But see Apache Survival Coalition v. United States, 21 F.3d 895 (9th Cir. 1994) (court barred plaintiff’s claim due to laches after finding that Forest Service provided ample opportunities for plaintiff to voice concerns).


413 Sierra Club v. Watt, No. CV-83-5878 A WI (C.D. Cal. Nov. 18, 1983), aff’d sub. nom. Sierra Club v. Clark, 774 F.2d 1406 (9th Cir. 1985).


417 El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991) (court rejected mootness claim after finding that the damage done by defendants could be reversed and the site salvaged). See also Vieux Carre Property Owners, Residents & Asso’s v. Brown, No. 87-3700 (E.D. Ia. Sept. 21, 1987), aff’d in part, rev’d in part, 875 F.2d 453 (5th Cir. 1989).
E. Scope and Standard of Review

When a court accepts jurisdiction of a controversy, it generally limits the scope of its review to the administrative record in existence. Because this is so, courts hold that agencies should create a detailed record of their consideration of the effects of their undertakings on historic properties. Under certain circumstances, courts will allow plaintiffs to supplement the agency record.

When a court renders a decision on Federal agency compliance with NHPA, the court usually applies the “arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law” standard of review of the Administrative Procedure Act. Some courts have found an implied private right of action through the attorneys’ fees section of NHPA, but those decisions fail to clearly indicate what standard of review a court should apply.

1989), cert. denied, 493 U.S. 1020 (1990), on remand, No. 87-3700 (E.D. La. Aug. 15, 1990), aff’d in part, rev’d in part, 948 F.2d 1436 (5th Cir. 1991), on remand, No. 87-3700 (E.D. La. Mar. 15, 1993), aff’d, 40 F.3d 112 (5th Cir. 1994), reh’g en banc denied, 49 F.3d 730 (5th Cir. 1995) (courts addressed mootness claim several times at various stages of proceeding).


419 Ely v. Velde (Ely I), 451 F.2d 1130 (4th Cir. 1971).

420 See National Trust for Historic Preservation v. Blanck, Civ. Action No. 94-1091 (PLF) (D.D.C. Sept. 13, 1996); Citizens for the Scenic Severn River v. Skinner, 802 F. Supp. 1325 (D. Md. 1991) (court acknowledged that evidence outside the administrative record may be considered to explain the record or to determine whether appropriate factors were considered).

where a private right of action is found. The D.C. Circuit, in a 1996 decision, declined to find a private right of action under NHPA.

F. Remedies

In most preservation cases, the remedy sought has been a temporary restraining order and a permanent or preliminary injunction against the Federal activity or Federal funding. In other cases, the remedy sought has

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22Bearhead Corp. v. Erickson, 923 F.2d 1011 (3d Cir. 1991); Baywater Neighborhood Assoc. v. Tricarico, 879 F.2d 165 (5th Cir. 1989); cert. denied, 494 U.S. 1004 (1990); Vieux Carre Property Owners, Residents and Assocs. v. Brown, 875 F.2d 453 (5th Cir. 1989); cert. denied, 493 U.S. 1020 (1990) (even though court found implied private right of action, it still reviewed the Federal agency action under the APA standard of review); North Oakland Voters Alliance v. City of Oakland, No. C-92-0743 MJP (N.D. Cal. Oct. 6, 1992).


26Preliminary injunctions granted in El Rancho La Comunidad v. United States, No. 90-113 (D.N.M. May 21, 1991); Attakai v. United States, 746 F. Supp. 1395 (D. Ariz. 1990); Ferris v. Secretary of the United States Dept't of Transp., No. 89-C-779-C (W.D. Wis. 1989); Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985); Fill the Pool
been review of agency decisions.\textsuperscript{427} In the past, the courts have displayed some creativity in fashioning remedies.


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In one case, an appellate court remanded the case to the district court for selection of a remedy.428 The State grant recipient could implement the project without compliance with the National Historic Preservation Act if it reimbursed the Federal Government for the money received for the project; could reapply for the Federal money knowing that the Federal agency must comply with NHPA; or could abandon the project altogether. If the State were to decline these alternatives, the court directed the district court to enter an injunction.

Courts have also directed agencies not to disturb historic resources even though they declined to issue injunctions.429

X. Conclusion

In the 30 years since the passage of the National Historic Preservation Act, court decisions have focused on the application of NHPA to Federal agency projects, programs, and activities. Courts will examine the degree and nature of Federal involvement in a project in order to determine whether an undertaking exists as defined by NHPA. The Federal involvement must be such that the Federal agency has enough control over the project to influence its outcome. Courts increasingly focus on whether the Federal agency approval was a prerequisite to the project or merely a nonbinding recommendation, in establishing the applicability of NHPA. There is still a difference among the courts as to how to interpret the definition of an “undertaking” in NHPA and the exact


428Ely v. Velde (Ely II), 497 F.2d 252 (4th Cir. 1974).

nature of the license, approval, permit, or assistance to which it refers. Generally, though, the courts’ inquiry focuses on the ability of the Federal agency to influence the project.

When courts find that Federal agencies have a duty to comply with NHPA, they have recognized the value of Section 106 of NHPA as a “stop, look, and listen” procedural provision. Courts often compare NHPA to NEPA and apply the same analysis when rendering opinions on compliance with both statutes, although many courts acknowledge that the threshold for triggering NEPA is higher than NHPA. Courts have required adherence to Section 106 and the Advisory Council on Historic Preservation’s implementing regulations in varying degrees. Some courts require strict adherence to the procedures, while others look beyond the Federal agency’s procedural flaws and examine the efforts made by the agency to mitigate the effects of the project on the historic property, ruling in favor of Federal agencies if they substantially comply with Section 106 and its implementing regulations. Unless agencies have been arbitrary or capricious, abused their discretion, or otherwise failed to act in accordance with the law, courts tend to uphold the agencies’ procedural compliance.

As the Council moves to new regulations, the principles of Section 106 that have evolved over 30 years will continue to guide both the administrative process and judicial interpretation of NHPA. Courts will continue to define the “edges” of the application of Section 106, but it remains to be seen whether the tendency to draw the boundaries conservatively will continue in light of any new regulations.