Section 106 of the National Historic Preservation Act:

BACK TO BASICS

by Leslie E. Barras
with a foreword by Richard Moe

PART 1: SUMMARY REPORT

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THE NATIONAL TRUST FOR HISTORIC PRESERVATION (www.PreservationNation.org) is a non-profit membership organization bringing people together to protect, enhance and enjoy the places that matter to them. By saving the places where great moments from history—and the important moments of everyday life—took place, the National Trust for Historic Preservation helps revitalize neighborhoods and communities, spark economic development and promote environmental sustainability. With headquarters in Washington, DC, eight regional and field offices, 29 historic sites, and partner organizations in 50 states, territories, and the District of Columbia, the National Trust for Historic Preservation provides leadership, education, advocacy and resources to a national network of people, organizations and local communities committed to saving places, connecting us to our history and collectively shaping the future of America's stories.

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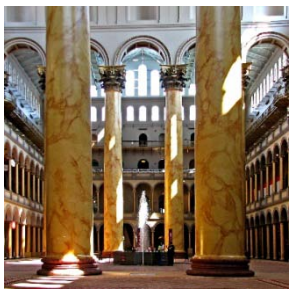
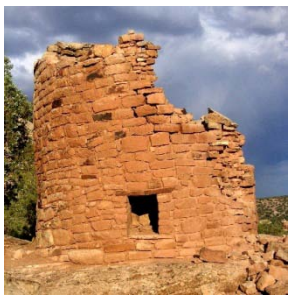




FOREWORD

By Richard Moe
President Emeritus, National Trust for Historic Preservation

In the midst of the rapid post-war economic expansion of the 1960s, Americans saw their country's historic buildings and sites disappearing at an unprecedented rate. Out of this rush towards urban renewal, the construction of the interstate highway system and the growth of suburbia, a forward-looking group of men and women identified government policy as both a primary cause and potential solution to this loss of our shared heritage.

Their call to arms, the 1966 report *With Heritage So Rich*, made an eloquent statement of the importance of preserving historic places as personal, community, and economic assets for the nation's present and future generations. The report also made a persuasive case that government institutions—particularly those of the federal government—need to exercise a strong leadership role in promoting the preservation of America's heritage as a fundamental national policy.

One of the direct results of this effort was the subsequent enactment of the National Historic Preservation Act, a law that is—hands down—*the* most important federal statute relating to the protection of America's historic places. Following the lead suggested by *With Heritage So Rich*, the NHPA sets out a strong statement of national policy to provide federal leadership in the preservation of America's historic places and cultural resources. Many of the nuts and bolts of the National Historic Preservation Act also follow from recommendations of the 1966 report: it authorizes the expansion of the National Register of Historic Places; creates a partnership relationship between the federal government, the states and tribes, local governments and the National Trust; sets out stewardship responsibilities for federal agencies for historic properties under their own jurisdiction and requires that they use historic buildings to the maximum extent possible; and establishes the independent federal Advisory Council on Historic Preservation to advise the president and Congress on matters relating to historic preservation, to encourage (with the National Trust) public participation in preservation, and to review and make recommendations regarding policies and programs of the various federal agencies that affect historic resources.

Federally-sponsored demolition of 4,500 units of historic public housing in New Orleans—left intact by Hurricane Katrina—took place despite Section 106. [NTHP]

A lynchpin in bringing many of these components together to ensure effective federal leadership in the saving of America's heritage is Section 106 of the National Historic Preservation Act—the focus of this report. Section 106 essentially requires federal agencies to stop, look, and consider the effects that their activities have on historic properties. While that requirement appears to be a simple review process, it has proved to be an extremely effective protective mechanism for historic and cultural resources under federal law.

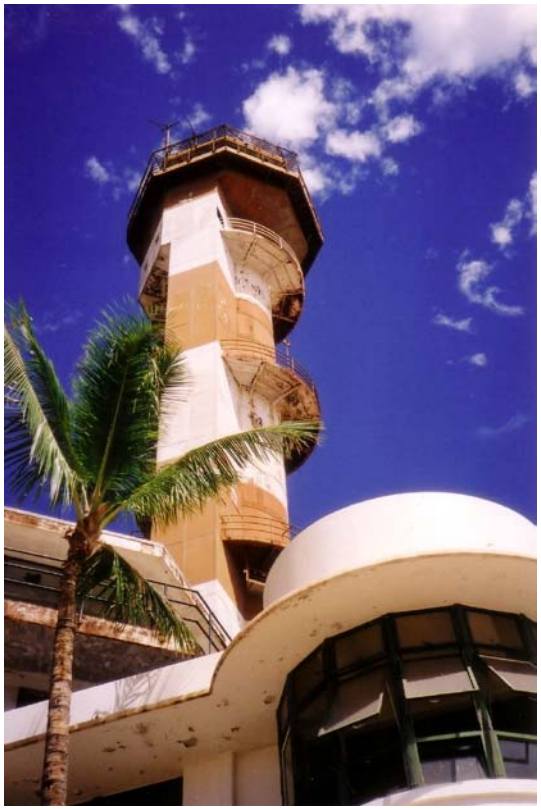
Unfortunately, the effectiveness of this cornerstone of federal preservation law has diminished over time. Consequently, this report—*Back to Basics*—is a wake-up call for all who care deeply about these unique places that define us as Americans.

In commissioning this report, the National Trust was primarily concerned about major federal undertakings where we felt the Section 106 process was failing, such as in New Orleans. Since the destruction of Hurricane Katrina, we have seen the demolition—with the Advisory Council's concurrence—of 4,500 units of historic public housing that were not seriously damaged in the resulting floods. More recently, the Section 106 process has led to approval of the unnecessary demolition of over 150 historic properties for two new hospitals in the city.

But the results of this study went much deeper than these high-profile, headline-grabbing Section 106 cases and identified numerous recommendations that will be extremely influential in improving the long-run effectiveness of this critical protective mechanism.

There is some irony in labeling Section 106 a "protective mechanism," since it is a legal requirement that is entirely procedural in character. In other words, it effectively requires only that agencies consider alternatives and modifications to their projects and programs in order to avoid, minimize, and mitigate adverse impacts on historic properties and to consider the views of others—notably the federal Advisory Council on Historic Preservation. But once they have met this threshold of review, agency officials are free to balance programmatic and preservation values as they believe appropriate. In no sense does the law mandate preservation as an outcome. At the same time, it is obvious that the statute is not neutral in its intent—it reflects and implements an unmistakable pro-preservation policy. Despite its procedural character, it is no coincidence that many thousands of historic places across the country have been protected from inappropriate federal, and federally funded or licensed, projects because of the Section 106 process; that is what the drafters intended. So long as the process is followed in good faith—and so long as agencies start the process while alternatives can still be considered—consultation often results in projects being modified, alternatives explored, mitigation measures established, and historic places saved.

Since the enactment of the NHPA, the National Trust for Historic Preservation has been an active participant in hundreds of Section 106 consultations. Through the years, we have seen many successes (preservation alternatives followed or significant mitigation successfully adopted), and many failures (preservation alternatives rejected or ignored). The National Trust has also played an important advocacy role in court, helping to enforce both Section 106 and the broader administrative process that supports it.



Planning for a major housing project at Pearl Harbor's Ford Island airfield—the heart of the Pearl Harbor National Historic Landmark District—was well underway before commencement of the Section 106 process, leaving little opportunity for significant reshaping of the project to mitigate the effects on the historic setting. [NTHP]

Although many federal agencies follow Section 106 in good faith, in recent years the National Trust has become concerned that, in some circumstances, agencies have not been giving serious consideration to real alternatives that would avoid or minimize harm to historic properties. The National Trust has seen these problems occur more frequently with certain federal agencies, where historic preservation is too often seen as an impediment to the agency's core mission. Often the problem can be attributed to an agency's failure to initiate Section 106 consultation at an early stage—in other words, compliance is deferred until after initial agency decisions have been made. In such cases, Section 106 consultation is little more than an exercise to identify minimal mitigation for projects that *could* have been planned to avoid significant impacts to historic resources in the first place.

The effectiveness of agency Section 106 compliance is not a new issue or concern for preservation advocates; however, the need for strong protection strategies coming out of the Section 106 consultation process is especially critical today, particularly given the enormous amount of infrastructure work being generated through economic stimulus and recovery funding. And other federal funding priorities—ranging from military base realignment to disaster assistance programs—will continue to place great pressure on Section 106 review at the state and local levels. As a result, the National Trust is concerned that the pressure to spend federal funds very quickly will lead to a tendency for agencies to "game" the system, that is, to make decisions first and go through the motions of Section 106 consultation as an afterthought. Thus, there is a strong need—both in the short term, as well as the longer term—for more effective and timely Section 106 compliance.

Finally, we have become increasingly concerned about the role of public involvement in Section 106 consultation—an issue that is central to the National Trust's mission, because our congressional charter emphasizes the importance of facilitating public participation in historic preservation. Over the past decade, the Advisory Council has scaled back its involvement in day-to-day Section 106 consultation and narrowed its participation to the more significant and complex cases. Enhanced public involvement had been viewed as a way to offset the Advi-

sory Council's more limited role in the Section 106 process. Unfortunately, the assumption that additional public participation could help to address a reduced Advisory Council role has not been reliable, since consulting parties and the public have not always been welcomed or effectively included by the federal agencies.

For all these reasons, the National Trust decided to commission an independent study to look specifically at the current state of Section 106 implementation and to make recommendations that might help to improve the process. For this effort, we asked Leslie Barras, a lawyer with extensive practical experience in federal environmental and preservation law, to research implementation practices, and in particular to interview and gain insight from other practitioners in the field—including current and former agency officials, state and tribal preservation officers, local preservation advocates, and consultants. *Section 106 of the National Historic Preservation Act: Back to Basics* is the result of that review.

Ms. Barras' findings and recommendations are her own, but the themes that she sets out in the attached report, we believe, are exactly on point. In one sense, the title she has chosen for her report, *Back to Basics*, says it all—that the core principles of Section 106, laid out with clarity in the Advisory Council rules, need to be reaffirmed and made the basis of federal practice:

> "The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties . . . . The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking."

Her key recommendations ring true to all of us who have worked for many years to ensure an effective Section 106 process. Section 106 *must* be at the core of the work of the Advisory Council on Historic Preservation. Earlier and broader integration of preservation values in federal agency planning is crucial if we are to move Section 106 from a perfunctory review to the role in establishing federal leadership in historic preservation that the law's authors intended. Public access to the Section 106 review process is a key component to finding alternatives that meet agency goals and protect our common heritage.

We hope this report will serve as a starting point for a re-examination of federal agency implementation of Section 106: a refining of practice and procedures to ensure more meaningful consideration of preservation values, a strengthening of performance and accountability standards, and an effort to better engage the public and other stakeholders in the process.

Despite its procedural character, the substantive effectiveness of Section 106 as a preservation tool has been demonstrated time and time again in practice; it is only appropriate that we explore every opportunity possible to ensure that this tool remains an effective means to protect America's heritage.

—Richard Moe, September 2010

INTRODUCTION

> The past is not the property of historians; it is a public possession. It belongs to anyone who is aware of it, and it grows by being shared. It sustains the whole society, which always needs the identity that only the past can give.
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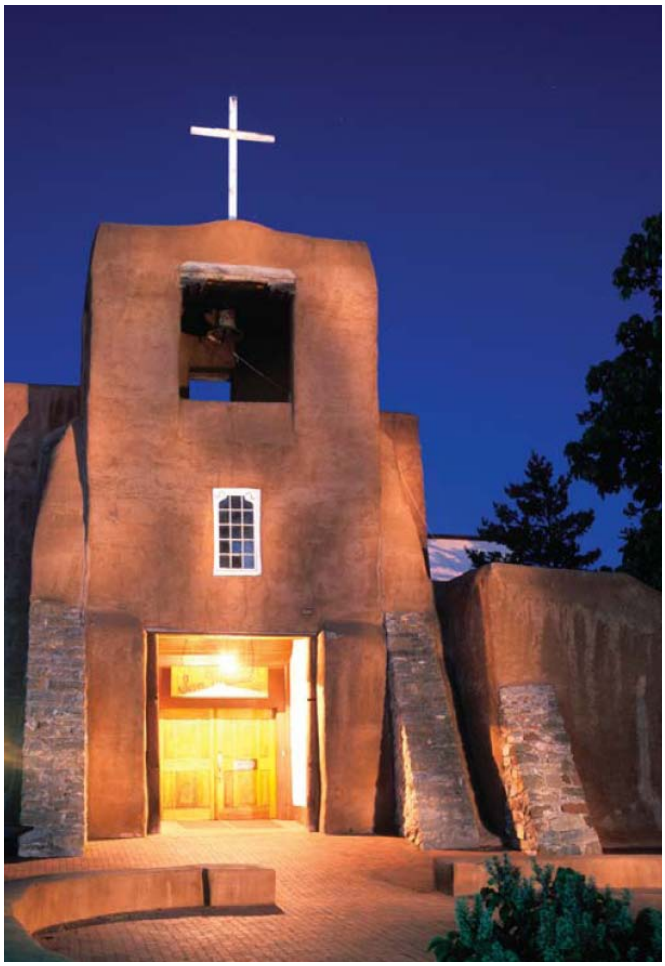
> — Walter Havighurst, quoted in *With Heritage So Rich*, 1966



BACK TO BASICS considers federal agency implementation of Section 106 of the National Historic Preservation Act of 1966, a paramount national policy directive regarding historic preservation. Comprising a remarkably spare 126 words in two sentences, 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.[1]

This basic procedural obligation—simply requiring federal agencies to consider the effects of their actions on historic sites and cultural resources, and obligating them to obtain outside views regarding those actions—stands as one of the most important aspects of federal historic preservation policy. The substantive impact of the law has resulted in the adaptive reuse of historic buildings, preservation of archaeological sites, and design of projects to blend in—rather than conflict—with historic landscapes. This report was commissioned to assess federal agency implementation of this important statutory obligation and to identify ways to improve current practices. Many agencies conscientiously meet their Section 106 obligations when planning for and carrying out programs and projects. Others, however, either comply with the requirements of Section 106 belatedly, when it is

difficult to give meaningful consideration to avoidance options or mitigation, or simply fail to comply with Section 106 altogether when carrying out individual projects.

Several recent evaluations of the national historic preservation program have included Section 106 as an element. These efforts include findings of the "Preserve America" summit sponsored by the Advisory Council on Historic Preservation in 2006; reports by the National Academy of Public Administration in 2007 and 2009; and three reports in 2009—two on federal real property management and the other a Preserve America "expert panel" report on structural improvements to the national historic preservation program.[2]

These seven key recommendations in *Back to Basics* were consciously developed to build on and extend these other recent analyses:

1. Federal agencies must endorse and compel compliance with Section 106.
2. Federal agencies need to ensure earlier and broader integration of preservation values in their planning processes.
3. The Advisory Council should vigorously assert Section 106 as its core mission.
4. Improvements are needed to increase consulting party access and public involvement in the Section 106 process.
5. State and tribal Section 106 programs should be supported by fees and full appropriation of proceeds in the national Historic Preservation Fund account.
6. Prior to further federal agency use of alternative approaches to comply with Section 106, the Advisory Council should establish standards to promote accountability for implementing these "program alternatives."
7. Section 106 stakeholders should pursue new ways of using technology, while improving and expanding existing uses.

This report differs from the other recent reports in two basic ways. Because it is solely devoted to Section 106, this study provides a more intensive evaluation of experiences and development of findings and recommended actions. Additionally, it is the first formal report commissioned by the National Trust for Historic Preservation on Section 106, a primary advocacy tool for the organization.

Today, as it has been since its enactment in 1966, Section 106 remains an imperfect but essential requirement for protecting the nation's historic properties. While it is well known as a *procedural* protection only, its legislative history and chronicles of the Advisory Council on Historic Preservation highlight the critical *substantive* importance of Section 106 as a protection tool at the federal level. It is no exaggeration to say that thousands of historic places across the country have been protected from the adverse effects of federal projects, or projects receiving federal permits, other types of formal approvals, or funding, as a result of Section 106.

When considering the number of federal and federally assisted projects reviewed within required Section 106 deadlines each year, and the relatively modest size of reviewing agency staff levels and budgets, this level of protection has come at a relatively small cost. On an annual basis, state historic preservation officers (SHPOs) and

tribal historic preservation officers (THPOs) report on their Section 106 project review workload to the National Park Service. (The roles of SHPOs and THPOs—who provide critical checks-and-balances in Section 106 implementation—are described in Section 2 of Part II of this report.) These reported numbers belie any generalizations from those regulated by Section 106 that the law impedes the work of government and business. From 2004 through 2008, for example, the states reviewed an annual average of 114,000 actions relating to federal or federally assisted projects. Approximately 85 percent of this Section 106 caseload resulted in "no historic properties affected" determinations, 13 percent in "no adverse effects" determinations, and 2 percent in a "memorandum of agreement" because particular projects caused adverse effects to historic properties, therefore requiring mitigation of those harms.[3]

As a relatively small agency with substantial responsibility under Section 106, the Advisory Council on Historic Preservation must itself efficiently and judiciously use the time and expertise of its professional staff and membership in commenting on Section 106 cases (the "members" are federal agency officials, individual presidential appointees, and other stakeholder positions identified to serve on the agency's board by the NHPA). Section 2 of Part II of this report includes an analysis of the Advisory Council's Section 106 workload over the decades, compiled from the agency's annual reports to the president and Congress. In summary, the staff's Section 106 caseload more than quadrupled from the late 1960s through the late 1990s, although declining by more than half from 2000 through the present. However, the current caseload is comprised of matters that tend to be more complex and significant. Since 2000, the Council caseload has been much more discretionary and within the Council's own control, as the revised regulations give the Council the option to choose whether or not to participate in individual Section 106 cases. The Advisory Council's staff participated in 3 percent of federal or federally assisted projects undertaken each year by the late 1990s and, more recently, approximately 1 percent. Formal comments by the members of the Advisory Council are issued in less than 0.01 percent of all projects undertaken yearly by federal agencies or with their support. Although direct involvement of the Council's staff and membership in projects is uncommon, because the rules implementing Section 106 have delegated the vast majority of Section 106 reviews to the SHPOs and THPOs, the expertise of the agency's professional staff and its members is nonetheless *very* important—and often pivotal—in the relatively few controversial, policy-setting, or complex cases that meet the criteria for the Council's review. The majority of the interviewees expressed a clear desire for greater Council involvement, and stronger Council advocacy for preservation values and outcomes in the Section 106 process.

Interviewees for this study generally regard the existing Section 106 statutory and regulatory framework as providing sufficient policy guidance for the program today. Indeed, a number of interviewees suggested that the Advisory Council should proceed very cautiously in evaluating further regulatory changes to its Section 106 implementing rules (currently codified at 36 Code of Federal Regulations Part 800). Past regulatory actions have consumed the small agency for years. Further, its caseload actually *increased* for a period of time after these regulatory revisions—particularly the 1986 revisions which were designed to extricate the agency from consultation in the overwhelming majority of cases.

While the statutory and regulatory framework of Section 106 remains sound, actual implementation of this important preservation tool suffers in several key respects. The title of this report—*Back to Basics*—was chosen to

call out two troubling patterns in Section 106 implementation that have developed over the past couple of decades. One of these involves federal agencies that recognize their responsibilities and ensure that their Section 106 paperwork is managed relatively well (examples include federal highway division offices in certain parts of the country whose Section 106 work is substantially carried out by state agencies under formal delegation). A consensus emerged among those interviewed for this report that these types of agencies need to become less "rote" in their approach and should exercise more critical thinking at the project planning stage about ways to avoid harming historic landscapes, sites, and buildings. On the other hand are the agencies for which Section 106 implementation or oversight needs to become *more* rote. These agencies include those whose mission does not routinely trigger Section 106, because, for example, they do not manage real property or build projects. They also include agencies that provide financial assistance, permits, or other approvals to tens of thousands of applicants each year, such as the Department of Housing and Urban Development (HUD) and the Army Corps of Engineers. In these latter cases, both applicants and the regional or local staff of the federal agencies do not often understand, or give only perfunctory attention to, their compliance responsibilities, based on the interviews for this study.

In both cases along the spectrum of Section 106 compliance, there is a compelling need for attention to and reinforcement of the basic purposes of the review and consultation process. Those goals are clearly spelled out by the Advisory Council on Historic Preservation in Subpart A of the agency's Part 800 rules ("Purposes and Participants"):

> The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties . . . . The agency official shall ensure that the section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.[4]

As one interviewee noted, the status of this portion of the regulations is too often treated by federal agency officials as if it were a nonbinding preamble. Emphasizing Subpart A would require federal agencies to recognize and compel their compliance responsibilities during planning, staffing, budgeting, and evaluating their performance, and would allow the Advisory Council to reassert Section 106 as its core mission. The first sentence in the quote above from the "Purposes" introduction to Subpart A also reminds nonfederal stakeholders that, even if the review and consultation process is conducted early, authentically, and with federal leadership, Section 106 is ultimately about balancing competing values and interests.

Part I of this report is intended to provide a summary overview of the key findings and recommendations resulting from this study. Part II, which can be read as a complete, stand-alone report, provides a more technical analysis and associated references. This more detailed assessment begins with a background review of the role of Section 106 (and the National Environmental Policy Act) in federal preservation policy, and continues by explaining the steps involved—and different participants—in the Section 106 process, leading to the recommendations summarized in Part I. It is worth noting that the report emphasizes findings and recommendations regarding federal agencies, including the Advisory Council, because they bear the bulk of Section 106 statutory responsibili-

ties. At the same time, the report also recognizes the important roles played by state and tribal preservation offices in the day-to-day implementation of Section 106, particularly by emphasizing the need for full and more reliable funding, including fees, of those programs. SHPO and THPO offices cumulatively provide Section 106 consultation input over 100,000 times a year. These roles resulted from amendments to the Section 106 rules beginning in the early 1980s which shifted such responsibilities from the Advisory Council to the states (and later, the tribes), with the overwhelming support of federal agencies and industry. As project review and consultation duties have, therefore, shifted more heavily to state and tribal programs, ensuring more funding of these essential preservation partners should be a priority.

Research leading to the preparation of this report included an extensive literature review spanning more than 40 years of the NHPA's history. Annual reports submitted to the president and Congress until fiscal year 2000 by the Advisory Council provide a useful long-range perspective on Section 106 implementation—including flaws, disappointments, and successes. Interviews yielded insights into current compliance issues, mostly from the perspective of SHPOs and their staff, THPOs, preservation advocates, cultural resource consultants, and current and former staff of the Advisory Council. Those interviews also provided a useful glimpse of what practitioners feel is especially innovative about Section 106 today—including (among other things) opportunities to consider traditional cultural properties, to identify newly National Register-eligible resources from the mid-20th century, and to use new mechanisms to engage the public with advances in World Wide Web technology and social media. On the other hand, the interviews also suggested that many practitioners have serious concerns today about the implementation of Section 106. These concerns include the absence of early federal agency planning, as well as the absence of direct involvement by federal agencies in consultations on individual projects; funding shortfalls for Section 106 review and implementation at all levels of government; and the Section 106 role of applicants for federal funding, permits, or other types of approvals. A number of these concerns—and opportunities—are detailed in this report.

The Section 106 consultation process involves hundreds of federal agencies and offices, thousands of federal programs, projects, and activities, and many thousands of individuals at all levels of government and within the private sector. Given the breadth of the law's application, and an implementation record spanning more than four decades, any attempt at assessment and analysis will have its limits. While recognizing those limits, this report is intended to identify areas in which the process might be improved, based in particular on the observations of practitioners who have worked in the field for many years. At the same time, the study's recommendations are not intended in any way to diminish the important and often heroic work of those individuals who strive daily to implement this essential law, including employees of federal agencies, the Advisory Council specifically, state and tribal preservation offices, and cultural resource professionals in the private sector.

KEY RECOMMENDATIONS

The core of Part I of this report, which follows, describes seven key recommendations resulting from the research and analysis described in more detail in Part II. These key recommendations correspond to the following categories: Federal Agencies, Planning, the Advisory Council on Historic Preservation, Public Participation, Funding, Program Alternatives, and Technology.

As will become apparent to the reader, the seven key recommendations and 31 sub-recommendations included in this report are not directed uniformly to a particular entity. Instead, depending on the nature of the issue in question, the recommendation may be best considered by, respectively, individual federal agencies, the president, the Advisory Council, Congress (particularly with respect to funding), and even to public interest organizations (including the National Trust). At the same time, the core themes reflected in this document are offered for the consideration of all those individuals, agencies, and entities that are responsible for helping to guide implementation of Section 106 of the National Historic Preservation Act.

RECOMMENDATION 1

Federal Agencies Must Endorse and Compel Compliance With Section 106

Almost five decades have passed since federal agencies were directed by Congress to support a national policy of historic preservation. That policy directive requires intentional planning to use federally owned historic properties in ways that maintain and promote their use, as well as considering ways to avoid harming historic properties when federal programs or projects are implemented. Other legislative or presidential directives have expanded or supplemented the core set of federal preservation responsibilities since 1966, but have not changed much of the basics of Section 106.

In terms of implementing the law, interviews for this report suggest that there are problems on two ends of the scale. On the one hand are the more sophisticated agencies that, at least as a matter of process, manage their paperwork well. A consensus emerged among those interviewed that these agencies need to become less "rote" and should exercise more critical thinking at the project planning stage about ways to use historic properties in a positive way and avoid harming historic landscapes and buildings. On the other hand are the agencies for which Section 106 implementation or oversight needs to become *more* rote. These agencies include those whose mission does not routinely trigger Section 106 reviews. They also include agencies that provide financial assistance, permits, or other formal approvals to tens of thousands of business applicants and local governments each year. In these cases, both the applicants and the local or regional staff of the federal agencies often do not understand or give only perfunctory attention to their compliance responsibilities.

The following recommendations are intended to focus the need for federal government leadership to endorse Section 106 as a responsibility and to compel compliance at all levels within their agencies—reinforcing agency responsibilities at the highest level, increasing oversight and enforcement over their representatives and delegates who carry out Section 106 on their behalf, and requiring greater public disclosure about all of these activities.

A PRESIDENTIAL MEMORANDUM SHOULD BE ISSUED REINFORCING FEDERAL AGENCY RESPONSIBILITIES UNDER THE NATIONAL HISTORIC PRESERVATION ACT AND REQUIRING REPORTING ON CURRENT COMPLIANCE.

There are many federal laws, and several key executive orders, that clearly and comprehensively describe federal agency responsibilities regarding historic properties. More laws are unnecessary, a point upon which almost all interviewees agreed. Executive orders, such as E.O. 11,593 (*Protection and enhancement of the cultural environment*) and E.O. 13,287 (*Preserve America*), have provided important policy guidance and expanded scope to the NHPA in key points during its history. Accordingly, a new presidential directive in the form of a memorandum targeted to the heads of federal agencies may help to address agency compliance responsibilities on a more detailed level. Therefore, this report recommends that policy emphasis on existing compliance responsibilities and a reporting directive should be issued through a presidential memorandum. Such a memorandum would reinforce the roles and responsibilities of federal agencies under Sections 106 and 110 of the NHPA, and Subpart A of the Advisory Council's Section 106 regulations, through a formal order to the heads of federal agencies, both the 15 executive departments and 65 independent agencies.

The first element of such a memorandum should be a strong policy statement identifying the existing laws, orders, and rules that commit the federal government to preserving the diverse tangible and intangible heritage of this country and that impose specific compliance responsibilities on federal agencies. A component of this statement should reiterate the administration's support of historic preservation values as a matter of national policy and a commitment to full executive branch compliance.

In addition, the recommended reporting directive to federal agencies should include specific requirements to report progress on inventorying historic properties (expanding current executive order requirements, as detailed in Section 3-1 of Part II of this report) and for quantifying their historic preservation staff capacity. Subsections 112(a)(1)(A) and (B) of the NHPA require that federal agencies ensure that the actions and qualifications of employees meet professional standards established by the Secretary of the Interior, in consultation with the Advisory Council and the federal Office of Personnel Management (OPM). The results of a review of federal employment data conducted during research for this report (see discussion that follows) warrant formal exploration regarding the deployment and adequacy of current historic preservation staffing levels.

Further, recent personnel data submitted by some federal agencies to the chair of the Council on Environmental Quality (CEQ) tends to confirm the impression of some interviewees that in-house environmental staff may be assigned historic preservation compliance duties in some agencies. Specific procedures for ensuring the appropriate professional credentials in procuring outsourced historic preservation services (i.e., those contracted outside the agency) should be included in the reporting directive as well.

The recommended reporting directive should also require agencies to demonstrate or develop and adopt specific procedures in three areas where this study finds weaknesses:

> (1) The duty of federal agencies to make independent findings and determinations during the Section 106 process, and to initiate government-to-government consultation with Indian tribes, when nonfederal parties have been formally authorized to initiate consultation—federal agencies should

also be asked to provide an updated list of such authorized parties or activities;

(2) Internal agency reviews of applicants that receive federal financial assistance or approvals for procedural compliance with the Advisory Council's Section 106 rules—federal agencies should also be required to report on the results of such reviews, including corrective measures taken for program deficiencies; and

(3) Preventing anticipatory demolition of historic properties by applicants for federal funding or approvals to avoid Section 106 review.

Finally, a presidential memorandum should consider instilling more managerial and line staff responsibility for historic preservation compliance through the performance evaluation process for individual employees. Federal agencies are already instructed to evaluate historic preservation staff on how well they perform their duties. This recommendation proposes to systematically extend such reviews to other positions filled by employees who are responsible for federal lands or buildings or for issuing funds or approvals to business applicants or local governments. These individuals, thus, bear some responsibility for Section 106 compliance, including consideration of historic property reuse and retention during project planning and development of alternatives.

THE SECRETARY OF THE INTERIOR AND ADVISORY COUNCIL CHAIR SHOULD CONSULT WITH FEDERAL AGENCIES ON THE ADEQUACY OF HISTORIC PRESERVATION STAFF CAPACITY.

Section 112(a) of the NHPA directs federal agencies to protect historic properties by ensuring that the staff they employ in this regard meet certain professional qualifications established by the OPM and the Department of the Interior.

During the research for this report, a uniform classification system that readily identifies the historic preservation staffing levels of federal agencies was sought. None was found. However, a detailed and documented review of federal employment data for 6 of the 7 historic preservation disciplines identified in Section 112 of the NHPA, conducted for this study, raises substantial questions regarding the sufficiency of staffing for historic preservation program implementation, including Section 106. At the very least, the numbers warrant additional detailed review.

Research results presented in Section 3-2 of Part II of this report provide a relative indication of federal agency preservation staff levels, at a total count of 4,421 historic preservation professionals employed within the 15 executive departments (e.g., Transportation, Energy, Justice, HUD). However, the data—which does not include the 65 independent federal agencies—is likely to be too imprecise to draw firm conclusions and requires more examination through the federal agency reporting directive recommended above.

This total number of 4,421 preservation professional employees was further evaluated in the detailed review presented in Part II of this report to analyze staffing among individual agencies that make up the 15 large executive departments. The more specific numbers identified in this inquiry shore up perceptions of interviewees, and are consistent with the Advisory Council's yearly reports of activities from 1969 to the present, regarding agencies that at least appear to be staffed sufficiently to carry out their responsibilities, as well as those that are associated with chronic Section 106 implementation problems.

In particular, the following agencies may not be internally staffed at a level that supports their responsibilities under the NHPA, based on the OPM data that was reviewed: HUD, the Office of Surface Mining Reclamation Enforcement (OSM) and the Minerals Management Service (Department of the Interior), Federal Emergency Management Agency (FEMA) (Department of Homeland Security), the Rural Utilities Service (Department of Agriculture), the Economic Development Administration (EDA) (Department of Commerce), the Bureau of Prisons (Department of Justice), the Department of Education, the Federal Deposit Insurance Corporation, the Federal Highway Administration (FHWA), the Federal Transit Administration, and the Federal Railroad Administration (Department of Transportation).

Other agencies appear to be staffed to some extent but not at levels that appear sufficient based on the scope of their mission or real property portfolio, including the Environmental Protection Agency (EPA) and Departments of Energy and Veterans Affairs (VA). Although some or much of the day-to-day preservation work may be outsourced or contracted outside these agencies (there is no clear tracking system for the public to identify and monitor outsourced preservation work, however), some in-house capacity is nevertheless essential to ensure that the services and work products of these consultants meet professional standards.

FEDERAL AGENCIES THAT OVERSEE OR DELEGATE SECTION 106 COMPLIANCE TO NONFEDERAL APPLICANTS FOR PROJECT FUNDING OR APPROVALS SHOULD IMPLEMENT ROBUST MANAGEMENT SYSTEMS TO ENSURE PROCEDURAL COMPLIANCE WITH THE LAW.

Section 106 applies when a federal agency carries out projects and activities directly, but also applies to federal agencies that exercise *indirect* jurisdiction over programs or projects that have the potential to affect historic properties. This type of activity occurs in two ways: (1) when federal agencies oversee nonfederal parties that are legally authorized to fully carry out Section 106 themselves (e.g., HUD); and (2) when agencies provide funding or issue permits and other types of approvals to business applicants and local governments. Neither the NHPA nor the Advisory Council's Section 106 rules authorize a waiver of the requirements when a federal agency exercises indirect, as opposed to direct, jurisdiction over a project. The law and rules apply in both circumstances.

Every nonfederal preservation stakeholder interviewed for this study emphatically commented that most federal agencies are largely absent from, or have abdicated responsibility for, the Section 106 process in cases involving federal assistance or permits. By far, the majority of examples given involved agency programs that fund housing, infrastructure, or economic development projects, or federal agencies that directly issue environmental permits (particularly permits to dredge and fill wetlands and other Clean Water permits issued by the Army Corps of Engineers). The applicants for these federal benefits are the immediate focus of much of the frustration expressed in the interview process because in most cases Section 106 implementation has been formally—or more commonly—informally delegated to them by the fed-

eral agencies. (See Section 2 of Part II of this report for an overview explanation of the diversity and magnitude of parties that are "applicants.")

In the case of housing and community development programs, states, local governments, and other HUD funding recipients are directly and fully responsible for Section 106 compliance—instead of HUD—under "delegated" authority of federal housing laws. HUD, however, bears responsibility for ensuring that these parties comply with the procedures of Section 106.

In addition, changes to the Advisory Council's Part 800 rules in 1999 and 2000 allow federal agencies to notify SHPOs and THPOs that the agencies authorize certain nonfederal applicants to *initiate* Section 106 consultation. A common experience among SHPO staff interviewees is that rather than simply allowing applicants to *initiate* consultation, federal agencies now expect these nonfederal parties to assume lead authority for carrying out Section 106 responsibilities. This practice of informally delegating Section 106 responsibility also greatly concerns tribal representatives because of the clear mandate for direct federal government-to-government relations and consultation under the NHPA.

The research for this report sought to understand and identify specific areas that might improve Section 106 compliance when federal agencies oversee nonfederal parties or projects. After a more detailed review in Section 3-3 of Part II of this report, this study concludes that there are no clearly identifiable problems with the laws related to Section 106 or its implementing rules. Legal requirements regarding federal agency duties in indirect jurisdiction cases are sufficiently clear.

One identified problem, however, is that many federal agencies lack formal procedures and criteria describing the responsibilities and necessary qualifications of their nonfederal applicants in the Section 106 process.

The first part of this problem occurs when federal agency information to applicants obscures Section 106 by treating the law as subsumed by the broader environmental review under NEPA, rather than as an independent legal requirement. A key example of this issue is HUD programs, which fund tens of thousands of state and local projects run by offices with insufficient cultural resource staff that often experience high turnover as well. These funding recipients are directly responsible for environmental and Section 106 reviews. In its oversight role to ensure procedural compliance with these laws, HUD has understandably tried to standardize, summarize, and distill information to facilitate the compliance programs of numerous different state and local governments and businesses.

However, neither HUD's environmental regulations, nor its important *Request for Release of Funds and Certification* form, independently address Section 106 compliance. Particularly in urban areas, *the* most likely resources affected by HUD-supported activities are historic properties, rather than natural resources such as drinking water or wild and scenic rivers. Nonetheless, the NHPA is buried in obscure references found in subsections of HUD's environmental regulations, as well as the important funding release form that contains a legal certification of compliance with NEPA. Unless and until the agency explicitly delineates and impresses upon its applicants the requirements for compliance with Section 106, as the agency does regarding NEPA, preservation issues will not be adequately addressed by HUD applicants. To hold out even a remote possibility that this outcome can be achieved, Section 106 must be independently addressed in federal agency regulations and other information and reporting systems.

The second part of the problem in full or partial delegation of Section 106 responsibilities to nonfederal applicants occurs in instances where federal agencies either have no formal structure in place whatsoever to explain Section 106 responsibilities whatsoever, or the information they provide to applicants is inconsistent with the Advisory Council's Section 106 rules. As reported in Section 3-3, an example in this regard is the funding programs of the Department of Commerce and two of its associated agencies. These programs typically fund projects that may directly harm historic properties, but also can also cause substantial "indirect and cumulative effects" by facilitating land or coastal development that impacts such resources (e.g., EDA's economic development projects, and coastal zone grants awarded by the National Oceanic and Atmospheric Administration). Applicants for these funding programs are already predisposed to avoid Section 106 review and consultation for the indirect and cumulative effects of their projects, according to many of those interviewed for this report.

Finally, federal agencies may lack sufficient internal management controls to ensure procedural compliance with Section 106. Three areas were identified in particular: (1) explicit procedures have not been developed by federal agencies to ensure the professional qualifications of nonfederal parties that are authorized to directly carry out Section 106; (2) explicit procedures have not been developed by federal agencies describing how they make independent findings and determinations during the consultation process or pursuant to programmatic agreements when they have legitimately delegated some responsibilities to consultants or applicants; and (3) systematic internal monitoring, auditing, and enforcement of Section 106 responsibilities and commitments among applicants for financial assistance or permitting are simply not carried out.

Federal agency monitoring, auditing, and enforcement of Section 106 responsibilities in cases involving nonfederal projects offers one of the most promising avenues for improvements in the law's requirement to "consider" historic properties in indirect jurisdiction cases—if such systems are fully developed and implemented. In one case, reported in the Advisory Council's 1985 annual report, HUD's threat to withhold funding when city officials in Pennsylvania would not fully comply with Section 106 brought about a change in the city's position in favor of compliance. More recently, HUD's Office of Inspector General recommended that a city in Puerto Rico be required to return federal funds for willful noncompliance with Section 106 (intentional demolition of a historic house of worship) during a waterfront redevelopment project. That case, in 2000, came to the auditor's attention based on the public's complaints.

For now, however, there does not appear to be any systematic program for such reviews, at least among the federal agency programs surveyed for this report. One possible mechanism to support the development of such systems may be through Office of Management and Budget (OMB) Circular A-133, which requires federal agency program audits of local and state units of government, Indian tribes, and nonprofit organizations that spend $500,000 or more of federal funds in a year. Currently, Section 106 compliance is completely omitted from every audit instruction relating to federal construction funding programs, even though NEPA is included in some instructions. The Advisory Council should inform OMB of the need to add Section 106 compliance as an element of the "special test" reviews for federal agency funding programs as a necessary update to the circular's supplemental instructions and as an independent audit evaluation factor, separate from NEPA.

SPECIAL RESPONSIVE STRATEGIES SHOULD BE DEVELOPED TO ADDRESS THE CHALLENGES OF SECTION 106 COMPLIANCE WHEN NONFEDERAL PARTIES RECEIVE PROJECT FUNDING OR APPROVALS AS A RESULT OF MASSIVE ECONOMIC OR DISASTER RECOVERY INITIATIVES.

A recurring theme in the Advisory Council's yearly reports to the president and Congress since 1969 is the challenge in balancing a quick federal response to economic downturns and natural disasters with consideration of historic properties, mandated by Section 106. Over the years, the Council has implemented models of rapid response solutions, including training, program alternatives, and, in the late 1980s, an innovative historic property identification and acquisition partnering arrangement with the states and nonprofit organizations, in order to facilitate Section 106 compliance during implementation of these episodic programs. These responsive solutions should continue to be explored in concert with federal agencies and other preservation stakeholders.

As the most recent example of the types of federal initiatives that pose challenges in Section 106, comparing the levels of stimulus funding between the last significant federal job creation bill—the Emergency Jobs Act of 1983—and the American Recovery and Reinvestment Act (ARRA) of 2009 gives credence to the level of anxiety among interviewees regarding Section 106 compliance. The 1983 jobs creation legislation had a $9 billion price tag distributed over 77 federal programs and activities—which corresponds to $19.5 billion in 2009 dollars.

By contrast, the ARRA, signed into law on February 17, 2009, has a $787 billion price tag. Of this total, *$275 billion* (over 14 times the size of the 1983 stimulus program) was designated to be directly distributed to applicants, including $60 billion for general infrastructure (including technology), $85 billion for competitive grant awards, $75 billion for education (including buildings), $8 billion for housing, and $37 billion for highways and transit projects. By June 2010, about 43 percent of this $275 billion had been received by states, local governments, and businesses, based on the federal government's ARRA website. Federal agencies must commit by Sept. 30, 2010 to disburse the remaining $156 billion of project funds. However, since the actual funds can be spent after this general obligation date, there is still a massive workload of Section 106 reviews for stimulus projects.

The importance of Section 106 compliance for ARRA funds (and other comparable federal initiatives) was emphasized during the interviews for this study. SHPO offices reported that, even during routine federal government spending periods, the lack of competency for Section 106 implementation among HUD funding recipients, other applicants for federal funding and permits, and congressional earmark recipients is high. As a result, SHPO staffs perform basic tasks of historic property identification and evaluation that should be completed by federal agencies or their applicants.

The challenge is made even greater because some applicants view Section 106 and environmental reviews as a hindrance. Consideration of indirect and cumulative effects in many cases is entirely missing. Most applicants "start from a narrow landscape," in the words of one interviewee, and avoid addressing such impacts. Tribal historic preservation officers are especially concerned about omitting the crucial government-to-government consultation that is a mandated federal agency responsibility.

Being a small federal agency has provided certain advantages for the Advisory Council in the past, in

that it can be nimble and quick when needed. For example, the agency initiated an innovative and quick response to the Resolution Trust Corporation's (RTC) disposition of real property of failed savings and loan associations from the late 1980s through early 1990s. Over 10,000 properties in RTC's portfolio were inventoried in a little over a year by SHPOs' staff and nonprofit organizations under subcontract to the Advisory Council, with funding provided by the RTC; of these properties, 1,100 or so were determined to be National Register-eligible. Other examples of creative solutions to facilitate Section 106 reviews during challenging times, identified in Section 3-4 of Part II of this report, include the Council's successful efforts to secure additional funding for Gulf Coast SHPOs after Hurricane Katrina, and the California SHPO's designation of an experienced cultural resource consultant to serve as the SHPO representative during preservation reviews following the 1994 earthquake in the Los Angeles area.

The training and program alternatives that the Council has initiated in response to ARRA are welcomed by interviewees for this report. On the other hand, the continuing caseload, in their view, requires the involvement of any and all willing participants (under the supervision of qualified preservation professionals, as needed), as has been accomplished in the past.

GOVERNMENT PERFORMANCE AND ACCOUNTABILITY REPORTS SHOULD MORE SPECIFICALLY AND PROMINENTLY IDENTIFY PROGRESS MADE AND IMPROVEMENTS NEEDED IN FEDERAL PRESERVATION PROGRAMS.

This recommendation supports the use of government performance and accountability reports (PARs) to expand federal agency reporting on implementation of Sections 106 and 110 of the NHPA. Further, Section 3-5 of Part II of this report identifies specific preservation performance tracking goals for these annual reports and suggests that the OMB, Federal Financial Accounting Standards Board, and preservation stakeholders develop a technical release or guide on federal agency disclosure of preservation compliance in the prominent "management discussion and analysis" section of each PAR report.

Federal agencies issue PARs each year, which combine program and financial analysis mandates from the Government Performance and Results Act of 1993, Chief Financial Officers Act of 1990, and related laws. In an attempt to empower taxpayers to more readily understand the specific activities of each agency and how successful they were in meeting their program goals, PARs include information and data intended to improve accountability for agency performance. Each agency, therefore, has to collect millions of pieces of information from their headquarters in Washington, DC, as well as regional and field offices and operating sites (e.g., national laboratories, military installations).

These reports also include auditable financial statements, which adhere to many of the same accounting standards that apply to private businesses.

A recent welcome direction in PAR reporting is an amendment to the *Statement of Federal Financial Accounting Standards* 29 (*SFFAS* 29), which requires that federal agencies identify the numbers of heritage assets and stewardship lands under their jurisdiction or control in an explanatory note to their balance sheets. "Heritage assets" includes properties that are listed or eligible for listing in the National Register. This new reporting requirement began with FY 2009 PARs.

At the same time, practical use of *SFFAS* 29 information by preservation advocates is hindered by lack of clarity in how such assets are defined and "counted," the absence of any easy way to compare the number of

reported heritage assets and stewardship lands to an agency's overall progress in inventorying historic properties and landscapes, and the location of the data in an obscure financial footnote.

In a related and also welcome direction, a federal real property database has been established pursuant to E.O. 13,327 (*Federal real property asset management*), issued in 2004. Federal agencies are required to record in the database each building or property, whether it has been surveyed to determine its historic significance, and its National Register-status (listed, not eligible, eligible).

However, the detailed federal real property database is not accessible to the public. Summary reports of the database issued by the General Services Administration (GSA) provide only a top-level overview and exclude any reference to historic status or attributes. The usefulness of information from the database and associated summaries is further hindered by significant exceptions in the presidential directive that established the requirement. Fifty six of the 65 independent federal agencies are exempted from the order (including the U.S. Postal Service, the Smithsonian Institution, the Federal Reserve, and the Presidio Trust), and the order excludes national parks, forests, and wildlife refuges, as well as land reserved or dedicated for military purposes, Indian trust purposes, or reasons of national security, foreign policy, or public safety.

The following example illustrates some limitations of these recent initiatives. The FY 2009 balance sheet *SFFAS* 29 note for NASA identifies 12 heritage buildings and structures, for an agency with a $17.78 billion budget and over 18,000 employees. Eighty-nine additional buildings and structures are identified in the note as "multi-use" heritage assets. To provide a comparison that is missing in this balance sheet, one has to look separately at the most current federal real property database summary. That summary identifies a total of 4,719 NASA buildings and structures.

Comparing these independent reports suggests that slightly over 2 percent of all of NASA's buildings are historic (101 out of 4,719), and raises questions regarding the extent to which surveys have been completed for all of the agency's buildings. (Further, there are 19 NASA National Historic Landmarks, identified as a result of a congressionally mandated theme study in 1984. The PAR does not clearly identify where these structures or buildings are included in the heritage asset data.) For a young agency like NASA, the comparison also calls into question how the agency plans to evaluate buildings approaching 50 years of age (and thus possibly newly eligible for the National Register). This illustrative exercise, along with other examples in Section 3-5 of Part II of this report involving the Departments of Agriculture and Defense, highlights potential limitations of these recent heritage reporting initiatives, in terms of fully informing the public on overall progress in implementing federal agency preservation programs.

As a second element of this recommendation, federal agencies are required to disclose and discuss in narrative form "known and contingent material liabilities" as part of their PARs. This analysis appears in the prominent section on management's discussion and analysis of the PAR report, not in the balance sheet itself or appended as an obscure financial footnote. The OMB, Federal Financial Accounting Standards Advisory Board, and preservation stakeholders should develop a technical release or guide on federal agency disclosure of compliance with preservation laws in the prominent section on management's discussion and analysis of PAR reports.

Part II of this report also identifies specific preservation measurements ("performance metrics") recom-

mended for reporting in annual PARs, such as: (1) identifying historic properties in NEPA documentation, including such properties affected by alternatives not selected; (2) quantifying the professional resources of agency programs through routine reporting of staff qualifications; (3) website posting of Section 106 agreement documents to facilitate public involvement; and (4) tracking the number of Section 106 appeals to the Advisory Council as a measure of consensus outcomes in consultations.

Interviewees for this report generally agreed that setting federal agency preservation goals and measuring whether they are met would be useful. At the same time, the logistics of doing so seemed impossible or impractical to many interviewees, concerns shared in a January 2009 report of the National Academy of Public Administration. As noted above, however, federal agencies routinely identify and compile cumulative performance data from thousands of field and regional offices for PAR purposes. Demolitions of abandoned or vacant houses across the country, for example, are individually counted in HUD's performance reporting, although not specifically for historic preservation purposes. As another example, the Maritime Administration monitors the number of contracts awarded to dismantle and scrap aging merchant vessels (FY 2008 goal=10; actual=21). Neither agency likely intended to report on the goal and their accomplishments as a way to assess their federal preservation program performance. Both measurements, nevertheless, reflect agency practices that permanently destroyed properties and objects, some of which were undoubtedly historic.

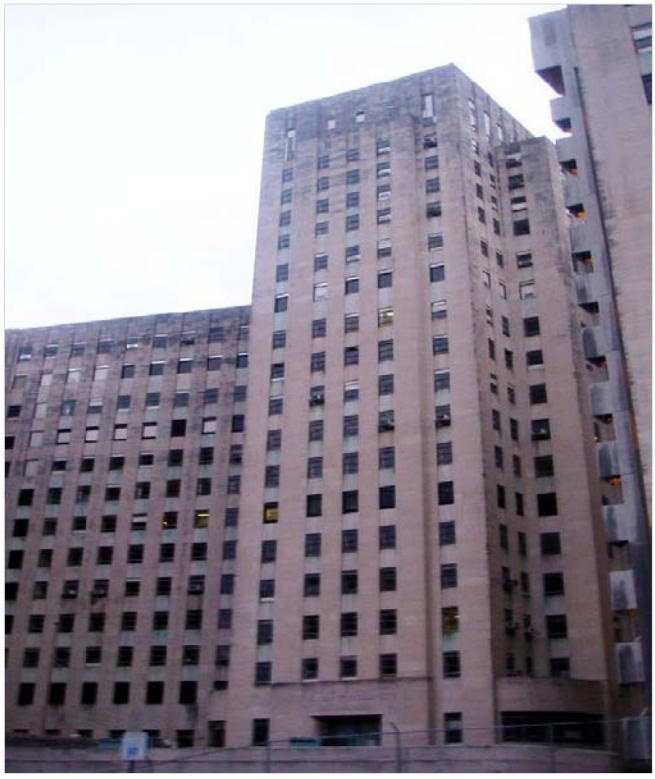
Another concern expressed among interviewees was that measuring federal agency performance through setting and tracking numerical preservation goals could invite questionable practices, similar to manipulating accounting data. On the other hand, historic preservation could be promoted by requiring federal agency staff at all levels to spend more time thinking about what they are actually doing to build their preservation program and consider historic properties, even if the data quality is imperfect at times. Some interviewees responded that tracking some types of numerical metrics would compare to counting "snail darters" (of Tellico Dam, Tennessee, litigation fame). However, this tiny invertebrate inculcated federal agency compliance with the Endangered Species Act.

RECOMMENDATION 2

Federal Agencies Need to Ensure Earlier and Broader Integration of Preservation Values in Their Planning Processes

By all measures there is no dearth of planning by the federal government. Agencies adopt management plans, resource plans, strategic plans, long-range plans, short-range plans, and even plans to make plans. Where there is a void, however, as reported by practically every person interviewed for this report, is the lack of critical thinking *during the planning process* about early strategies to identify historic properties and to develop alternatives, once project evaluation is underway, that incorporate historic properties in a positive way or that avoid and minimize harm to these properties. Instead, consideration of historic properties is too often conducted well down the path of project refinement, not the early planning stage, when key decisions have already been made. Today, the overwhelming experience of the National Trust, tribal officials, state historic preservation agency staff, cultural resource consultants, and the public is that all too often Section 106 has become "back-end loaded," focusing solely on mitigating harmful impacts from predetermined project site locations, design layouts, or infrastructure corridors.

This recommendation promotes the integration or coordination of Section 106 compliance in environmental reviews and environmental management systems for certain federal agencies; encourages the Advisory Council to be more active in commenting on NEPA documentation; suggests disincentive measures to address agencies that are dilatory in initiating Section 106 compliance; urges preservation advocates to participate in agency planning and advisory committees; and highlights the need to expand awareness of Section 106 by the media and among other stakeholders that do not traditionally participate in Section 106 reviews. This section also addresses concepts to improve planning methodology for archaeological investigations during Section 106 reviews for interstate projects. The goal is to encourage federal agencies to then undertake archaeological surveys more proactively in the future, bolstered by the strategic lessons learned from more effective field testing and data management models developed through these project examples.



IN MANY CASES, CONSIDERATION OF HISTORIC PROPERTIES COULD BE IMPROVED THROUGH BETTER COORDINATION OR INTEGRATION WITH NATIONAL ENVIRONMENTAL POLICY ACT COMPLIANCE.

Over four decades ago, Congress enacted the NHPA, followed by NEPA, which together require federal agencies to identify and consider environmental and cultural resources in a broad, interdisciplinary, and integrated fashion when planning for and conducting their own projects and reviewing plans for nonfederal projects they fund or approve (see Section 1 of Part II of this report for more background on these two laws).

This planning recommendation supports two concepts to improve meaningful consideration of historic properties in federal planning processes: (1) adherence to the specific *coordination* milestones in environmental and historic property reviews identified below from a Preserve America expert panel report issued in 2009 under the auspices of the Advisory Council; and (2) increased use of the authorized (but seldom employed) formal "substitution" process adopted by the Advisory Council in 1999 for full *integration* of Section 106 compliance in NEPA documents and reviews.

In 2009, an expert panel, convened by the Council to identify structural improvements needed in the national historic preservation program, recommended a simple set of clear *coordination* milestones between Section 106 and the stages of NEPA documentation:

(1) *Before* a draft environmental assessment (EA) or EIS is finished or issued, the following three stages of Section 106 review should occur: consultation should be initiated, geographic areas where project impacts could occur ("areas of potential effects" [APE] in Section 106 terminology) should be identified, as well as historic properties within the APE; and impacts to these historic properties should be identified in consultation with Section 106 stakeholders; and

(2) Commitments to minimize predicted harmful impacts to historic properties should be negotiated and documented *before* the final NEPA decision document is issued (i.e., before issuing any categorical exclusion document, EA, Finding of No Significant Impact [FONSI], or final EIS/record of decision [ROD]).

These coordination milestones were intended by the panel to be followed regardless of whether agencies comply with NEPA and Section 106 on separate tracks (most common) or whether agencies follow the formal NEPA substitution process for Section 106, now authorized by the Advisory Council. To promote the expert panel's recommendations in practice, this report proposes including these specific coordination milestones in construction project management software products (described in the technology recommendations below) to help solidify recognition of the requirements of Section 106 among federal agency managers, engineering consultants, and other parties. Systematic failure to respect these important coordination milestones could justify imposition of the possible sanctions identified below in this recommendation.

In 1999 and 2000, the Advisory Council adopted 36 C.F.R. §800.8(c) which authorizes a formal NEPA substitution path for federal agencies to fully *integrate* Section 106 into their natural and cultural resource planning processes. This outcome has not been substantially realized, however. Only 28 NEPA substitution notices in total have been submitted to the Council from FY 1999 through FY 2007, based on the agency's yearly reports to the president and Congress. Section 4-1 of Part II of this report identifies possible reasons for this trend based on experiences of some interviewees.

Interviewees for this report did generally agree that federal agencies are relatively more proficient in complying with NEPA than Section 106. Opinions varied substantially, however, on the advisability of using the formal NEPA substitution rule as a way to fully integrate consideration of historic properties in agency planning. Professional concerns were also expressed during the interviews with regard to cultural resource professionals' unfamiliarity with NEPA or the fear that Section 106 would be "whittled down" in the formal substitution process.

However, given the limited substantive consideration of preservation values currently afforded in the NEPA process even by some proficient federal agencies, applicants, and consultants, Section 106 is often "whittled down" and belated in any event under the status quo. On the other hand, if substitution is correctly implemented based on compliance with the requirements in the Council's rules, specific models of implementation, and following the coordination milestones of the Preserve America expert panel report, consideration of historic properties in carrying out projects *could* be improved, and could be much more influential in shaping early decisions about alternatives.

Barriers to better NHPA-NEPA coordination and integration appear to be founded primarily on past institutional practices and mind-set differences between career environmental and cultural resource professionals alike. In particular, some professionals may tend to compartmentalize their work and embrace the regulatory process and resources with which they are most familiar, thereby diminishing a more holistic evaluation of projects, alternatives, and impacts. The public, on the other hand, does not make narrow or legalistic distinctions when considering the historic properties and landscapes—and associated environmental features—they value and want to protect.

While guidance to integrate and coordinate Section 106 and NEPA would be helpful (and is being jointly developed by the Advisory Council and the CEQ), potential users interviewed for this report indicated that abstract guidance, or guidance that simply restates the regulations, would not be helpful in their evaluation of whether to use the NEPA substitution rule. In addition to the NEPA coordination and integration guidance jointly underway, this report suggests that representative projects from various federal agencies be cooperatively selected with the Advisory Council's and CEQ's input; the mechanics of implementation for both an EA and EIS should be mapped out in project management plans and consciously tracked and checked along the way; and an after-the-fact review of lessons learned should be developed to guide other similar projects. However, a project selected to develop a model for coordination and integration in this recommended manner should not be chosen from a federal program area known for significant Section 106 implementation problems (e.g., housing—see Section 3-3 of Part II of this report). Instead, one or more appropriate projects should be identified based on Advisory Council and CEQ experiences with agencies that have a solid track record for complying with both NEPA and Section 106.

As a small, but important, first step, in the practical use of NEPA integration documents in individual projects, federal agencies, their consultants, or applicants should provide Section 106-relevant information contained in NEPA documents to state and tribal review offices in a format that facilitates review by SHPO and THPO staff (e.g., identifies the sections in a 300-pg. EIS upon which staff should focus their attention). Cultural resource information in NEPA documents should also be provided in a format that supports data entry requirements for state and tribal electronic databases. Additionally, training may need to be provided to SHPO (and Advisory Council) staff

that may be unfamiliar with the mechanics of NEPA and associated documentation. Some gray areas of legal interpretation regarding the formal NEPA substitution option should also be addressed through opinion letters or guidance issued by the Advisory Council (Section 4-1 of Part II of this report identifies specific questions that may need to be resolved to further the use of this option).

THE ADVISORY COUNCIL SHOULD BE MORE ACTIVE IN FULFILLING ITS COMMENTING RESPONSIBILITIES UNDER THE NATIONAL ENVIRONMENTAL POLICY ACT.

Part of the interagency coordination and cooperation mandate of NEPA requires that federal agencies "consult with and obtain the comments of any (other) Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved" in an EIS and that agencies "shall comment on (EISs) within their jurisdiction, expertise, or authority." The Advisory Council has independent power under the NHPA to review federal agency activities and information for consistency with the NHPA. This independent authority is broad enough to including commenting on *any* type of NEPA document, including EAs and categorical exclusions (the latter is intended to be used in NEPA reviews for projects with minor or no impacts).

Yet, the Advisory Council rarely submits comments as a federal expert agency during the NEPA scoping process for EISs (where important issues are identified early in the study) or in response to draft or final NEPA documents. This omission represents a significant missed opportunity for positive preservation outcomes. Many federal agencies have a more ingrained history of planning for projects and analyzing their impacts through NEPA than through Section 106; as a result, it may be more effective to address the agencies in the regulatory framework with which they are most familiar or comfortable. Additionally, participating more actively in EIS scoping opportunities and commenting on NEPA documents would present a forum for the Advisory Council to raise the consciousness of other federal agencies and prod them to plan for Section 106 consultation and to coordinate NEPA and Section 106 at a much earlier point in the review process than would otherwise be the case.

This recommendation does not suggest that the Advisory Council immerse itself in the 200 to 300 EISs currently issued each year, or the 50,000 EAs that the CEQ estimates are prepared annually. Rather, this report suggests that the Council and the EPA jointly work on opportunities for select Council input into NEPA cases that pose significant impacts or policy implications relating to historic properties or integration of NEPA and Section 106 (see the recommendation below on imposing sanctions on inadequate NEPA documentation, in which the EPA's role in these environmental reviews is described).

Identified ways in which the Advisory Council's role could be facilitated in this regard include: (1) establishing a formal or informal staffing arrangement between the Advisory Council and EPA by assigning a point of contact at the Advisory Council to answer questions from EPA's regional NEPA review offices; (2) seeking early and informal referral to the Advisory Council from regional EPA office NEPA staff of cases that defer or do not adequately consider impacts on historic properties; and (3) temporarily assigning an Advisory Council Section 106 caseworker to the NEPA Compliance Division in EPA headquarters to review draft NEPA documents on a short-term, periodic basis.

ENVIRONMENTAL MANAGEMENT SYSTEMS SHOULD BE EXPANDED TO ENCOMPASS CULTURAL RESOURCES, INCLUDING SECTION 106 IMPLEMENTATION.

Within the past 15 years, the principles of quality management traditionally applied to manufacturing processes have been extended to business and government environmental programs required to protect air, water, and land. Standard 14001 of the International Organization for Standardization (ISO 14001), adopted in 1996, established a voluntary framework for these "environmental management systems" (EMS). This study of Section 106 recommends that agencies expand their required EMS programs to evaluate and improve cultural resource compliance in an earlier and more systematic fashion with the involvement of key federal managers.

The EMS model is an elaboration of the "plan-do-act-check" quality management cycle, with an emphasis on improving regulatory compliance through routine internal reviews and manager-level commitments to remedy any problems found through these reviews. A presidential executive order issued in 2000 directed federal agencies to improve environmental compliance by developing their own EMS and to include key federal agency officials in their implementation; the Interior Department's 1998 guidelines for federal preservation programs encourage the use of management systems "to ensure that historic preservation issues are considered in [federal agency] decision-making."

It would be very useful for federal agencies to adapt EMS commitments for internal audits or compliance evaluations to include Section 106. Experienced cultural resource consultants interviewed for this report could not identify ***any*** example of a federal agency EMS being used to evaluate Section 106 compliance, even though they are used at times to assess NEPA compliance. As an environmental professional with over 20 years of experience working for federal agencies, the author of this report can identify only ***one*** federal facility that has conducted a cultural resource compliance review as part of its internal EMS assessment program. Strengthening consulting party relationships as a result of the review significantly facilitated a subsequent Section 106 consultation for a major, time-sensitive project. In its annual reports, the Advisory Council has identified only one instance of a federal agency conducting an internal cultural resource audit (the U.S. Forest Service, in 1987, because of a lawsuit), which subsequently increased the frequency of the forest agency's Section 106 reviews and consultation. The Advisory Council attributed the increase to an enhanced recognition among employees of this compliance duty as a result of the assessment.

Implementation of Section 106 will continue to be relegated to a collateral or extraneous function for some agencies in the absence of a systematic internal assessment that reaches key federal managers. Such managers include the Senior Policy Officials who are designated as the "responsible official" for purposes of their federal agency's preservation responsibilities under the 2003 Preserve America presidential executive order, as well as Federal Preservation Officers which each agency is required to appoint pursuant to the NHPA. Expansion of the required EMS would provide an available and familiar framework to improve cultural resource compliance performance within federal agencies.

SANCTIONS SHOULD BE IMPOSED ON FEDERAL AGENCIES THAT MISUSE ENVIRONMENTAL REVIEWS AND PREVENT MEANINGFUL SECTION 106 COMPLIANCE.

As explained above in this recommendation, a Preserve America expert panel recently identified discrete Section 106 compliance milestones that must be achieved before certain steps in the NEPA process for projects, in order to avoid thwarting the meaningful consideration of alternatives to avoid and minimize harm to historic properties. When federal agencies or nonfederal parties systematically fail to follow the panel's coordination milestones in NEPA review timetables, such omissions should be penalized by EPA by lowering the project's NEPA rating in the process described below and/or by the Council's suspension of approved program alternatives to Section 106 compliance.

EPA fulfills two roles in reviewing NEPA documents. First, as an expert agency, it critiques EIS (and, at times, EA) analyses of impacts to air, water, wetlands, and other natural resources. Secondly, the agency exercises a less well-recognized but, nonetheless, mandatory duty under the Clean Air Act in which it "rates" the severity of impacts from projects and the adequacy of NEPA documents and analyses.

Ratings are not limited to a review of environmental impacts or air quality. The agency's review and rating jurisdiction extends to all resources affecting the quality of the human environment through the Clean Air Act's reference to NEPA's national policy, which includes cultural resources, a subset of which is historic properties. In practice, the EPA grades only project impacts studied in an EIS, although it is not exclusively limited to these documents by the Clean Air Act.

This review authority provides a possible way for the Advisory Council, EPA, and CEQ to collaborate on strengthening consideration of historic properties and coordination of NEPA and Section 106. Further, the rating process—and the possible sanctions that follow—does not have to be limited to EISs. Preservation and environmental practitioners report an increasing trend in which federal agencies use less-documented EAs in lieu of full EISs for actions that significantly impact the environment. Reasons for this uniformly observed trend may be that EAs do not require that the lead federal agency conduct early "scoping" (identifying issues or concerns) with other agencies, do not require issuance of a draft document for agency and public review, and entail much less opportunity for public involvement overall. For these reasons, this recommendation for sanctions includes actions processed with NEPA EAs as well as full impact statements.

Options for EPA to lower a formal project rating in response to a NEPA review that hinders or prevents meaningful compliance with Section 106 include: (1) assigning a lower "grade" to the NEPA document in response to Section 106 compliance concerns; (2) designating an EIS or EA as "inadequate" and unsuitable for public review and comment until revised; or (3) designating an EIS or EA as "environmentally unsatisfactory" for potential historic property impacts not adequately addressed or foreclosed from consideration due to dilatory Section 106 compliance. An "environmentally unsatisfactory" grade automatically triggers project referral to the CEQ for formal consideration and comment, and is not limited to EISs. The downside to project sponsors of a lowered NEPA rating can take the form of project delays—and associated costs—and negative publicity.

The Advisory Council should also consider a set of sanctions over which it has direct control—using its commenting authority under §800.9(a) and (b) of its rules to directly criticize agencies that have improper-

ly failed to meaningfully consider historic properties in project implementation. The other sanction that should be considered for significant misuse of NEPA in a way that forecloses meaningful consideration of historic properties is the Advisory Council's suspension of project-related program alternatives, particularly programmatic agreements, or withdrawal of approved program comments (see the discussion of program alternatives in another recommendation below).

Assigning a lower rating or suspending a program alternative should depend on factors such as the recurring nature of federal agency Section 106 compliance problems, the significance of the resources, and scope/severity of impacts. A progressive system of invoking all of these sanctions could also be instituted by the EPA and the Advisory Council.

INTERSTATE PROJECTS PROVIDE AN OPPORTUNITY TO PLAN FOR STRATEGIC AND CONSISTENT WAYS TO IDENTIFY AND EVALUATE ARCHAEOLOGICAL SITES.

A theme emerged during several interviews of archaeologists for this study, which was generally expressed as a concern that there are few opportunities or incentives for consultants (who perform the bulk of archaeological investigations during Section 106 reviews) to recommend or implement possible improvements in the methodology for planning and carrying out archaeological surveys and for evaluating and reporting on the results. This report therefore recommends a specific model of experimentation with federal-level planning for archaeological survey, identification, and evaluation work for illustrative types of interstate projects (e.g., pipelines, highways, electric power lines), with due consideration of input from Indian tribes and states, to improve ways to identify and evaluate archaeological sites.

To a large extent, there should already be ongoing opportunities to improve investigation strategies and interpretation of results through systematic identification of sites carried out in the comprehensive federal agency preservation programs required under Section 110(a) of the NHPA. Few such systematic programs are being conducted, however. The proposal in this recommendation could benefit business sponsors of the selected interstate projects through planning for more consistent and possibly less resource-intensive archaeological investigations. However, a key objective is to achieve a broader benefit to the public by encouraging federal agencies to then undertake Section 110 surveys more proactively in the future, enhanced by the strategic lessons learned from more effective field testing and data management models developed through these Section 106 experimentation cases.

Archaeologists work to reveal the subsurface through successive phases of terrestrial or aquatic field work, with increasing levels of intensity and corresponding costs. Archaeology is also a scientific endeavor with significant legal consequences in the Section 106 review process, because impacts to prehistoric or historic archaeological sites must be evaluated (as they must be for any historic building or structure), and harmful impacts similarly require attempts to avoid or minimize damage to these sites. Decisions regarding how a "reasonable and good faith" effort to identify sites is accomplished when designing field testing strategies in three dimensions, and how the findings are evaluated for the purpose of assigning National-Register eligibility determinations to sites, therefore serve as the crux of many conflicts in Section 106 project reviews, especially when the impacted area may stretch

over hundreds, if not tens of thousands, of acres of land.

A fundamental dilemma is that more than 90 percent of the archaeological investigations conducted in this country are carried out to comply with Section 106 reviews for particular projects, as opposed to NHPA Section 110 surveys, or through surveys sponsored by states or local governments. Section 106 is driven by project budgets, deadlines, and sometimes intractable positions among stakeholders, all of which are not necessarily conducive to designing and implementing strategic scientific research priorities. Representation of preservation interests on federal advisory committees and use of federal agency performance and accountability reports—elsewhere addressed in this report—could promote decoupling project-initiated archaeological surveys in favor of proactive Section 110 surveys, at least for the federal land management agencies.

Nonetheless, as a practical matter, archaeological investigations are likely to continue to be motivated primarily by reactive forces rather than proactive efforts at resource identification. This situation is even more challenging with respect to federally licensed, permitted, or funded projects that are carried out by nonfederal parties. Archaeology will always suffer to a large extent in these cases because the scientific endeavor is so incompatible with commercial development interests.

When archaeological investigations are carried out during Section 106 project reviews, the methodology for field work, data documentation, reporting, and evaluation of results is primarily established by each state since there is no national standard for archaeological investigations. However, specifications for survey work vary from state to state in areas such as the extent of coverage of systematic shovel testing of soil or the space between paths walked in a field to visually scan for evidence of artifacts. There are different interpretations from state to state regarding the definition of a "site" (thus, requiring boundary delineation and possible Section 106 review) versus an "isolated find" (which does not require further Section 106 review). Collection and disposition of the material generated from shovel testing or more extensive excavation create management issues because state standards for treatment of excavated materials also vary. Recovered materials, if returned to a federal agency, are subject to exacting curatorial standards for federally owned and administered archaeological collections and, therefore, pose an additional layer of cost and resource management requirements.

These details are not simply a matter of fine-tuning but can pose significant cost implications when considering large projects that may involve tens or hundreds of thousands of acres of land or that cross several state boundaries. Typically, permit applicants (who are the business sponsors for the project) pay for this work, and understandably question the state-by-state variability of archaeological investigation approaches for these types of projects.

Under the recommended approach (Section 4-5 of Part II of this report) which proposes planning for more consistent and strategic archaeological investigations in interstate projects, first, a lead federal agency would hire a cultural resource consultant independent from the applicant or sponsor proposing the interstate project. This lead consultant would be tasked to develop: (1) a research design and survey strategy that synthesizes and evaluates background literature (including historic contexts), available data, tribal input, and state priorities for archaeological investigation; and (2) a field testing approach that relies on predictive modeling to prioritize fieldwork in direct impact areas within the right-of-way of the project. The re-

sulting survey strategy and criteria for evaluating the results would be consistently applied during the investigation, regardless of the location along the corridor in which the fieldwork was conducted.

The lead consultant would not conduct the fieldwork (instead, the consultant conducting the fieldwork would be directly hired by the applicant proposing the interstate project). Rather, the lead firm would be retained by the federal agency for peer review and "value analysis" of the field archaeology firm's implementation of the survey strategy and evaluation of results. The federal agency's consultant would also have authority to make ongoing and timely recommendations to modify the plan of investigation being carried out by the field archaeologists, as site conditions warrant. Dividing the roles and responsibilities between two different consultants is a purposeful strategy in this recommendation to introduce a competitive dynamic to invigorate creative thinking about strategic investigations. There is a practical dynamic as well—by elevating the research design to a federal planning-level exercise, the field investigators are somewhat relieved of the responsibility to establish work plans that respond to each state review office along the interstate corridor, each with possibly differing standards.

To save costs in carrying out the field work, survey methods would rely on real-time digital recordation of field observations, measurements, and decisions, which could lessen the need for paper notes, forms, and subsequent production of bulky reports. Where appropriate, surveys would emphasize the use of equipment, such as ground-penetrating radar, in lieu of shovel or other intrusive testing of ground and subsurface conditions, as warranted by the probability of findings in direct impact areas and other relevant factors that support a less-intensive level of effort.

This overall recommendation is borrowed in part from models ultimately leading to significant changes and cost reductions in environmental geology fieldwork during the 1990s.

EARLIER CONSIDERATION OF PRESERVATION VALUES SHOULD BE PROMOTED THROUGH INCREASING PRESERVATION ADVOCATES' PARTICIPATION IN AGENCY ADVISORY COMMITTEES.

There are over 1,000 advisory committees that make program or project recommendations to 49 federal agencies, and whose membership includes representatives of multiple stakeholder interest groups. Many of these advisory committees have no preservation interests represented—even though the committees deal with issues that are relevant to the preservation community. Based on a review of the federal advisory committee public database for FY 2009, agencies with no current preservation representation on their advisory committees include the Departments of Defense, Commerce, Energy, and Transportation; the VA; and the Bureau of Reclamation (within the Department of the Interior).

Preservation advocates should ensure that their perspective is maintained on relevant committees, especially at the local or regional level. These members can serve as invaluable eyes and ears regarding agency land use and construction project planning that may affect historic properties. The other reason to promote preservation representation on these committees is the opportunity to build relationships with local federal agency staff and other stakeholders. State and tribal preservation officers uniformly report that positive preservation solutions are more likely to occur when they invest time with federal agency staff or state agencies authorized to exercise delegated Section 106

responsibilities. Even better preservation outcomes are achieved when these relationships are first built apart from the Section 106 process for individual projects.

In Section 4-6 of Part II of this report, this recommendation further suggests that preservation advocates explore opportunities for involvement in local advisory committees and associated processes that are mandated by federal law, including those related to housing, coastal development, transportation, and water and sewer infrastructure.

OUTREACH TO GROUPS NOT TRADITIONALLY FAMILIAR WITH SECTION 106 SHOULD BE FURTHER EXPANDED, INCLUDING DEVELOPMENT INTERESTS AND THE MEDIA.

Both the Advisory Council and key nonfederal Section 106 stakeholders (e.g., the National Trust, National Conference of State Historic Preservation Officers, National Association of Tribal Historic Preservation Officers) should continue to expand opportunities for education and relationship building among organizations affiliated with development. Candidate organizations include the National Association of Development Organizations, Air and Waste Management Association, American Public Works Association, and engineering students (e.g., National Association of Student Engineering Councils). The goal is not to "convert" these organizations. Instead, the benefit of receiving such outreach, from these groups' perspective, is to: (1) educate and train their members in ways that will increase their effectiveness in planning and implementing projects; and (2) minimize schedule, budget, and legal risks associated with poor planning and project development that fails to consider historic properties.

Media interests should also be better cultivated. Reporting on Section 106, if it occurs at all, is typically staffed in large urban market areas by an environmental or land use reporter. They know NEPA, but are generally not familiar with Section 106. For example, opportunities should be sought by preservation professionals to speak at the annual conference of the Society for Environmental Journalists. Journalist members report on the environment, energy, natural resources, and climate change—all of which impact historic properties and landscapes and often relate to Section 106 implementation.

The National Trust and the Advisory Council should also pursue opportunities to provide Section 106 training and education specifically for federal judges.

RECOMMENDATION 3

The Advisory Council Should Vigorously Assert Section 106 as its Core Mission

Congress created the Advisory Council on Historic Preservation in 1966 as an expert watchdog over other federal agencies' implementation of their Section 106 responsibilities, and to provide its expertise to these agencies, the president, Congress, state and local governments, and the public. The Council's Section 106 regulations establish mandatory requirements for how historic properties are identified and reviewed in federal or federally assisted actions, who is involved in the process, and the circumstances in which the Council itself will become directly involved in individual cases. As an independent federal agency, the Advisory Council is composed of a "membership" body, established in the NHPA, as well as professional and administrative staff. There are 23 Advisory Council members, whose role is similar to that of a board of directors, and 36 full-time equivalent staff positions within the agency. Based on the agency's fiscal year (FY) 2010 budget report, this staffing level includes eight professional staff members and three professional managers who primarily focus on Section 106 reviews and compliance. In addition to these regular employees, eight temporary employees, called "liaison" staff members, provide some level of Section 106 compliance services for certain federal agencies that fund their positions within the Advisory Council.

Based on the interviews conducted for this report, there are realistic expectations of the Advisory Council among the state and tribal historic preservation officers, nonprofit groups, members of the public, and cultural resource consultants. When interviewees were asked to describe the role of the Advisory Council, answers included protecting the Section 106 process, interpreting its Section 106 rules, and balancing multiple interests when the agency becomes directly involved in project reviews (with a thumb on the preservation side of the scale). Interviewees respect the Council's past work and current capabilities. The majority of those interviewed, however, raised significant concerns regarding whether the Council is effectively asserting its core role in Section 106. Some of the specific issues cited by interviewees included the Council's closure of its western office in FY 2006, the limited availability of Council staff to provide on-site assistance desired by stakeholders, a general perception that the Council focuses too much on helping agencies streamline their procedural obligations, and a common perception that the Council's attention in recent years to the Preserve America initiative has detracted from the agency's "check and balance" role in

Section 106 cases. Preservation professionals, SHPOS and their staff, and members of the public interviewed for this study called for the Council to more vigorously assert Section 106 as its core mission and thereby demonstrate the strong leadership role envisioned by Congress. Interviewees felt this leadership role should reflect a renewed emphasis on advocating and promoting preservation outcomes in consultations on projects.

ADVISORY COUNCIL MEMBERS SHOULD INCREASE THEIR DIRECT INVOLVEMENT IN STRATEGIC SECTION 106 CASES.

The ability of the Advisory Council's membership to influence federal agencies through its power of moral persuasion has been tangibly demonstrated over the decades. In the past—indeed from the inception of the Section 106 process—the serious possibility that a specific matter may be elevated to the full Council (which currently includes high-level officials from 10 federal agencies) has often motivated low- to mid-level federal agency managers to resolve project conflicts at their level of the organization, without the need to involve the highest officials of their agencies. Further, the Council membership's formal statements regarding the sufficiency of the process for considering impacts to historic properties, as well as commenting on substantive impacts of particular projects, are viewed with authority by federal courts who sometimes are asked by plaintiffs to review specific projects.

While the membership's power has always been selectively applied to cases that present strategic policy or implementation issues, given the sheer volume of federal actions each year, the authoritative role of the members themselves in Section 106 matters has varied over the years, and should be increased as part of the Advisory Council's assertion of Section 106 as its core mission. The Council's budget justification reports for FY 2000-FY 2002 state that the membership had decided to focus and increase its role in high-profile and policy-setting Section 106 cases after adoption of the 1999 regulatory amendments. Although the BJRs for the succeeding decade do not emphasize this goal, the Council should consider a renewed commitment to this policy. For example, two recent formal actions of the membership—one in October 2008, which declined to endorse the Army Corps of Engineers' concept for revisions to its Section 106 procedures, and the other in April 2010 when formal comments on a proposed wind energy project in Nantucket Sound were issued—represent the type of vigorous actions that have been a hallmark of the agency's leadership.

Section 5-1 of Part II of this report explains the types of Section 106 commenting authority that may be exercised by the Council membership. Based on the agency's annual reports of activities, the membership body formally commented on approximately 167 cases from FY 1968 through FY 2008. Council-initiated terminations have not been discussed in the agency's annual reports since the late 1990s, although this fact may reflect a policy shift by the Council toward deferring termination decisions to the SHPOs and the other federal agencies.

THE AGENCY'S ROLE IN "PRESERVE AMERICA" SHOULD BE REDEFINED.

Unveiled in 2003, "Preserve America" has two facets (a presidential executive order and a White House initiative) that collectively promote productive use of historic properties and bestow recognition, awards, and grants. This new initiative has provided helpful publicity and discrete funding support for preservation activities, particularly at the community level, benefits that are not at issue in this discussion. However, significant concerns were aired during inter-

views for this study that the Advisory Council's weighty Section 106 regulatory work has been overshadowed by the Preserve America initiative as it has developed. This shift in the Council's focus and work appears to be reflected in the Council's own reports on budget and staff impacts, presented in more detail in Section 5-2 of Part II of this report.

The dominance of Preserve America in the Advisory Council's work since 2003 is apparent in its budget justification reports and budget increases in travel, "branding," and communications. At the same time as the Council's Preserve America's activities have increased, it appears that the agency's core Section 106 staffing levels have decreased, or at the least been shifted to agency "liaison" staff. The FY 2004 through FY 2010 budget reports reflect Section 106 caseworker positions at the lowest numbers since the Advisory Council's detailed reporting of staffing levels began in its FY 1985 annual report (from a high of 13 in the 1990s to 8 in the current budget report, although 7 positions are shown on the Council's website). The core Section 106 caseworkers are in-house historic preservation specialists and program analysts, as distinguished from the temporary "liaison" positions established through funding contracts between the Advisory Council and certain federal agencies (discussed below). (Historical and current Council staffing levels are identified in Appendix 5-2 of Part II of this report.)

The Council's staff leadership has emphatically stated that staffing and support for Section 106 compliance has not been adversely affected by the Council's involvement in Preserve America, and that any shift in resources over the past several years primarily reflects a more limited role assigned to Council staff due to changes in the Section 106 regulations. Regardless of the reasons for this shift in resources, many of those interviewed for this report expressed concern that the Council's increased involvement in Preserve America has detracted from its programmatic focus on Section 106, and that staffing and support for Section 106 compliance should be strengthened, even if that were to mean a diminished involvement in the Preserve America initiative.

Suggestions presented in Part II of this report for redefining the Council's Preserve America involvement include seeking cooperative agreements or understandings with other federal agencies or nonprofit organizations to share or delegate certain responsibilities for the initiative.

THE ADVISORY COUNCIL SHOULD CONSIDER REOPENING A WESTERN OFFICE.

In the past, the Advisory Council's western office has played an essential role in the Council's complex Section 106 work, and has helped the agency maintain an effective national presence. For over 30 years, a professional staff of 4 to 5 individuals in the Council's Denver office delivered Section 106 expertise and assistance to the western states, Alaska, and Hawaii. The Denver office was closed in the first quarter of FY 2006, abolishing four senior positions, and the funds were reprogrammed to add six junior positions in the D.C. office.

Between FY 2004 and FY 2009, the Council's overall budget increased from $3,951,000 to $5,498,000, an increase of 39 percent. The two largest components of the increase were a 138.6 percent increase in travel and a 140.6 percent increase in "rent, communications, and miscellaneous." During the same period, however, experienced core mission staffing levels declined with the closure of the Denver office, although additional junior staff positions were added in Washington, D.C.

At the time, a number of reasons were cited to support these changes, including the changing nature of the Council's Section 106 casework under revised regulations, the need to enhance the Council's ability to develop guidance and other services for Section 106 users, the need to better use existing resources, and the need to better position the agency to promote Preserve America initiatives.

While recognizing the Council's prerogative to shift resources to enhance efficiency and address identified needs, the closure of the agency's western office was sorely felt in the field, at least according to a broad range of interviewees for this report (including state and tribal historic preservation officers, the public, preservation advocates, and cultural resource consultants). Accessibility is a relative concept in the west and the far-flung 49th and 50th states. Although many interviewees expressed appreciation for the efforts of the agency's caseworkers and managers to provide compliance assistance from Washington, DC, they also indicated that access to the Advisory Council's expertise would be improved if the Council's staff was located within the same or proximate time zones or a half- to one-day flight or drive from these dispersed constituents.

A western office may not necessarily need to be located in Denver again. Any evaluation of a western site should consider expanded reaches of commercial air service and proximity to major metropolitan areas in the west and midwest; tribal and state Section 106 staffing capacity; and regional office locations of the major federal land management agencies.

CHECKS AND BALANCES ARE NEEDED TO REDUCE CONFLICT-OF-INTEREST CONCERNS WHEN THE ADVISORY COUNCIL'S "LIAISON" STAFF PARTICIPATE IN SECTION 106 REVIEWS FOR THEIR FUNDING AGENCIES' PROJECTS.

In 1997, a "liaison" position first appeared in the Advisory Council's Section 106 caseworker staff list in the agency's annual report to the president and Congress. Liaison positions have increased from approximately 1 or 2 in the late 1990s to 7 or 8 since 2005, and the number currently stands at 8. These positions are filled by temporary employees funded by individual federal agencies through renewable interagency contracts with the Advisory Council. Federal agencies that currently fund positions for individuals working in the Council's office in DC include the Bureau of Land Management, the Army, the Energy Department, GSA, FEMA, FHWA, and the VA. The Department of Agriculture and HUD have funded liaison positions in the past.

Previously, the Council had expressed concerns to Congress regarding such arrangements. One primary concern at the time (1996) was a practical and policy problem—still present today—that such funding or reimbursement agreements could strip the agency of certainty in its own budget and program planning, and in setting its own priorities.

Another strong concern identified by the Advisory Council in 1996 related to liaison responsibility for "individual [Section 106] case reviews and related consultation assistance provided [by staff], those process-driven agreements that deal with specific complex or lengthy projects, or other Council actions that comprise the Council's 'comment' on a given situation to meet Section 106 requirements." These objections were based on the Council's conclusion that its

Section 106 responsibilities are nondiscretionary (i.e., are required by law) and that such funding arrangements with "regulated" federal agencies could create conflict-of-interest concerns. On the other hand, activities such as training federal agency staff and assisting with general program compliance did not appear to create these types of conflicts, according to the Council.

The expansion of such interagency agreements from 2003 to the present, notwithstanding the Council's concerns as expressed to Congress, appears to have provided external funding for the Advisory Council to maintain, at least on paper, the semblance of past Section 106 staff levels during the same time that the Preserve America initiative ramped up. In reality, however, permanent historic preservation specialist and program analyst positions dedicated to Section 106 reviews have declined by almost 40 percent since the early 2000s.

As a policy matter, it is debatable whether regulated federal agencies should fund Section 106 direct-review services within the Council. Members of the public and nonprofit groups interviewed for this report strongly perceive that the Advisory Council's primary statutory mission to watch over Section 106 compliance is compromised by these agreements. Nonetheless, if the practical realities are such that liaison positions are tasked to directly participate in their funding agencies' Section 106 cases, then interagency contracts need to include consistent terms and conditions that impose administrative and supervisory checks and balances. Specific contractual protections in the public's interest include requiring that liaison staff hiring decisions and performance evaluations be made solely by the Advisory Council, not by the funding agency or jointly with the Council. Further, a couple of recent agreements *require* liaison positions to support their funding agencies' public relations programs and project timetables—conditions that raise legitimate concerns about maintaining impartiality in Section 106 reviews—and, for that reason, should be prohibited in contracts to fund liaison positions.

THERE IS A COMPELLING NEED FOR TIMELY AND CONCRETE SECTION 106 ADVICE FROM THE ADVISORY COUNCIL; OPINION LETTERS ARE ONE POSSIBLE SOLUTION.

From the start, Congress expected the Advisory Council to serve as an expert resource for the president, the legislature itself, federal agencies, and the public. The agency has issued at least 35 policy or guidance documents since the early 1980s relating to Section 106 implementation. Issuing guidance is not as simple as putting the federal agency pen to paper, however. A series of restrictions and protocols has been developed over the years by the OMB relating to how information is collected and guidance is issued by federal agencies, including the Advisory Council. These requirements are based on principles of openness, transparency, and inclusion—all good goals—but the procedural requirements can make it difficult as a practical matter for a federal agency to provide timely guidance on newly emerging issues or project proposals.

One approach to providing insightful and timely guidance on specific problems has been developed by other federal agencies through the use of advisory opinions or interpretive letters in response to written requests.

Investigatory letters or opinions issued in response to questions involving fact-specific determinations about a matter or case is generally not included within the scope of OMB instructions requiring formal notice and prior review procedures for information collection and

issuance of guidance. The OMB's instructions also exclude from formal notice and review procedures documents that relate to the use, operation, or control of a government facility or internal documents solely directed to another federal agency. It is likely that Section 106 opinion letters would not be subject to these formal administrative procedures based on the existing exemptions. Filling the Advisory Council's long-vacant general counsel position may be required in order to ensure timely responses if opinion letters curry favor among Section 106 stakeholders.

Posting such opinion letters and related documents on the Advisory Council's website (discussed in the technology recommendation below) would also better help align agency practices with current presidential policies on public access to federal government information—just starting by posting the entire body of Council comments and other written statements already issued in individual Section 106 case reviews on the website would be helpful, and should not necessarily require increased staffing resources. During preparation of this report, the agency provided many requested documents for review, and explained a new document management system that is now in place. However, the Council was unable to provide certain types of important documents, including the records of Council comments and federal agency responses regarding consulting party appeals of "no adverse effect" determinations under 2004 changes to the Section 106 rules. These changes in the rules required the Advisory Council to build a record to facilitate public access to information on Section 106 appeals, in exchange for lessening the Advisory Council's involvement in many project reviews. However, it is difficult to access some of this information, thereby undermining the policy intent of the rules.

FACILITATED NEGOTIATIONS SHOULD BE CONDUCTED MORE OFTEN IN CONTROVERSIAL SECTION 106 CASES, AND TRAINING IN CONFLICT RESOLUTION SKILLS SHOULD BE PROVIDED TO THE ADVISORY COUNCIL'S STAFF.

Independent, third-party conflict resolution assistance should be explored more frequently by federal agencies to help in disputed Section 106 consultations that involve multiple stakeholders. The Advisory Council has encouraged federal agencies to do so in the past. For example, in late 2008, the membership commented formally to the Interior Department on the Bureau of Land Management's failure to connect its alternative dispute resolution process with Section 106 consultation with respect to a controversial firearms shooting range in Arizona. During the research for this report, only one case was identified from the Advisory Council's annual reports in which formal mediation by an independent agent was conducted during Section 106 consultation. However, that example (the Stillwater Bridge between Minnesota and Wisconsin) provides a useful illustration of the value of formal mediation at the administrative stage of complex and contentious Section 106 cases (see Section 5-6 of Part II of this report for more information on this example).

Only a relatively small universe of federal actions that are subject to Section 106 reviews become highly controversial. Nevertheless, federal agencies should be encouraged to weigh the following factors in considering outside assistance in these types of projects: the cost of conflict resolution services during consultation in light of the overall cost of the project (which can exceed $1 billion for many large construction projects), the cost and time associated with litigation that can

possibly be avoided through effective assistance, and the benefit to avoiding or minimizing lasting community mistrust or hostility against the agency. A comparison of two controversial hydroelectric dam relicensing projects—one project (1998 to 2009) that ended in litigation at a high cost to the federal government, and another that was effectively facilitated in the early 2000s to a consensus outcome during the initial stage of Section 106 consultation—is also presented in Section 5-6.

As a key stakeholder in the consultation process, the Advisory Council encourages and assists participants in Section 106 reviews to try to reach consensus solutions, a function that is appropriate especially because of the agency's extensive knowledge base of past practices that effectively identified project alternatives and measures that positively adapted historic properties to meet federal needs or that minimized or avoided harming such properties. In order to facilitate the Council's work in this regard, this recommendation suggests that the Section 106 caseworker and managerial staff be provided an opportunity for training in conflict resolution skills.

Helping to resolve disputes is not necessarily an innate skill. Strengthening an understanding of different styles of learning and communication; diversity of all types; effective questioning and discernment practices; and recognizing issues and promoting common interests are types of conflict resolution skills that could be enhanced through formal, structured training. This element of the recommendation is not meant to propel the Advisory Council staff into formal facilitation or mediation roles, nor does it imply any particular areas of improvement for staff and management. Instead, the proposal is intended to provide the staff more tools to effectively participate in the high-profile cases in which the Council elects to become involved.

EXPANSION OF BASIC AND ADVANCED SECTION 106 TRAINING SHOULD BE FACILITATED BY THE ADVISORY COUNCIL.

The Advisory Council offers regularly scheduled basic and advanced training by seasoned agency staff. Such programs are valued and welcomed by practitioners. Based on the experience of SHPOs interviewed for this study, federal agencies that commit to assigning qualified staff to Section 106 compliance duties, and then provide ongoing opportunities to enhance their knowledge of best practices, are more successful in Section 106 implementation than those that do not. However, very few of the nationwide programmatic agreements require federal agency staff training, as one example of a needed measure. Given the significant practical benefits of training, the Advisory Council should promote that federal agencies provide expanded learning opportunities (from a variety of sources) for qualified staff as a standard condition of every Section 106 agreement document and particularly for program alternatives to Section 106 implementation. These standard requirements should also promote general Section 106 awareness training for federal agency employees, as well as nonfederal applicants, who are not directly responsible for compliance, but who supervise or otherwise oversee staff that manages projects subject to Section 106 reviews.

At the same time, the Advisory Council's current approach to training depends heavily on a traditional model in which Section 106 staff takes time away from their casework in order to conduct the training live at intensive one- or two-day sessions in about a dozen cities around the country during the course of a year. The cost of travel often makes such training prohibitive for key stakeholders such as tribal, state, and local governments. The Council should explore leveraging its staff's expertise more broadly through the ex-

panded use of web-based training, which can be accessed at any time without the need to travel. More initiative in delivering on-demand training this way would also conserve professional staff time and travel budgets for the critical face-to-face consultations which occur when the Council participates directly in high-profile or complex cases. Although a web-based training format prevents the live question-and-answer dialogue that is often useful, this potential downside could be somewhat mitigated if preservation stakeholders use the option of requesting opinion letters from the agency, as recommended above.

RECOMMENDATION 4

Improvements are Needed to Increase Consulting Party Access and Public Involvement in the Section 106 Process

The vitality and effectiveness of Section 106 depends on active and engaged preservation advocates and members of the public. During the Section 106 process for a project, interested groups and individuals can ask the lead federal agency for the opportunity to participate as a "consulting party," entitled to be included in discussions with the agency about alternatives and mitigation, or they can provide their views on the project through opportunities to speak at a public forum or submit written comments. As the concept of "consultation" has developed through Section 106 rulemaking and the Interior Department's guidance on federal preservation programs, serving as a consulting party in the Section 106 process can provide one of *the* most empowering avenues for individuals and groups to positively impact federal decision making on plans and projects, if federal agencies fully adhere to the meaning of consultation—seeking, discussing, and exchanging ideas, and trying to reach an agreement on project alternatives, their impacts, and ways to avoid or minimize such impacts. Consultation, as additionally described by the Interior Department, is not "simply providing information" or sending paperwork to consulting parties and asking for written comments in response.

A key finding of this study is that many federal agencies and nonfederal stakeholders have reduced direct contacts with preservation groups and interested individuals, and thus fail to expressly encourage and promote their participation in Section 106, either by formally serving as consulting parties or providing comments as members of the public. These efforts—required by the Advisory Council's Section 106 rules—must be reinvigorated. One important premise of major changes to the Section 106 regulations in 1999 and 2000 was to enhance and invigorate consulting party and public involvement, in part to counterbalance the Council's intention to remove itself from the vast majority of individual Section 106 reviews. Based on the interviews of preservationists for this study, the Council's policy intention to strengthen consulting party and public involvement in Section 106 has not proven to be effective. Also, the practical, on-the-ground consequences of a January 2009 presidential directive to federal agencies to create an "unprecedented level" of openness, transparency, and public participation and collaboration is not yet clear when applied to Section

106 reviews. These are issues of critical importance to the National Trust because of the Trust's congressional charter and its mission to "facilitate public participation" in historic preservation.

Section 106 is a regulatory process that can seem overwhelming to individual preservation advocates and local preservation groups, especially in high-profile, controversial cases. Experienced practitioners who lead Section 106 consultations on specific projects should always provide instructive information about the process from the very start so that individuals and groups who participate as consulting parties know what to expect in terms of consultation steps, the roles and responsibilities of stakeholders in the review process, and an overall tentative timeline. Additional recommendations regarding public involvement include the following: (1) expanding and strengthening the Section 106 knowledge of the National Trust's statewide and local preservation partners, and the importance of their involvement; (2) reinstituting the use of public participation models of inclusive community involvement; (3) holding federal agencies and applicants accountable, through specific recommended measures, for notifying consulting parties and the public about project changes that impact historic properties after Section 106 reviews have taken place, and for progress in meeting commitments made in consultation processes; and (4) actively soliciting consulting party and public feedback on their experience in Section 106 reviews to identify methods of improving the process.

FEDERAL AGENCIES SHOULD HONOR THE REQUIREMENT TO DIRECTLY "INVITE" CONSULTING PARTIES TO PARTICIPATE.

Sections 800.2(a)(4) and 800.3(f) of the Advisory Council's regulations specifically require federal agencies (or their authorized representatives), at the initiation of Section 106 review, to identify parties that are entitled to participate in consultation on a project as consulting parties and then directly "invite" them to participate. Among those entitled to participate are individuals and organizations that are concerned about the project's impacts on historic properties. Unfortunately, the interview process used for this report identified very limited examples in which federal agencies or their authorized representatives (for example, some state departments of transportation) directly *invited* preservation advocacy groups and interested individuals to be engaged as consulting parties during reviews of federal or federally assisted projects.

When they do occur, "invitations" are commonly irregular and indirect, such as *Federal Register* announcements and legal notices in newspapers. These perfunctory notices do not typically reach local individuals and organizations that are likely to be interested in how a project affects historic properties. Federal agencies and applicants for federal funding or permit approvals need to be more proactive in identifying and *inviting* by letter, or other direct means, individuals and local and statewide groups to serve as consulting parties, as required by the Section 106 rules. Further, SHPOs and THPOs are supposed to be asked by federal agencies and their representatives to help identify potentially interested parties entitled to be invited to consultation. Some, not all, state and tribal offices reinforce federal agency responsibility to invite interested stakeholders to participate in individual reviews by formally requesting that agencies identify and submit documentation of whom they have contacted in this regard, a helpful practice that should be more widely followed.

CONSULTING PARTIES SHOULD BE PROVIDED A TENTATIVE PLAN OF ACTION OR ROADMAP FOR CONSULTATION.

The Interior Department's guidance on federal preservation programs directs agencies to explain to members of the public any rules, processes, or schedules that apply to consultation. Regardless of experience level, several preservation advocates interviewed for this report noted that there is little explanation or discussion of the basics of consultation during individual project reviews, and that standard practice varies widely among agencies. In their view, "the basics" include the definition of "consultation" (and its emphasis on trying to reach consensus during deliberations), the roles/responsibilities of each of the participants (including the Advisory Council's staff, when the agency participates), a tentative outline of the project and consultation schedule, specific work products or documents they will be asked to review, and their options for dispute resolution, including the underutilized appeal process adopted in the 2004 revisions to the Advisory Council's Section 106 rules.

Further, in order to promote a better understanding among consulting parties and the public regarding the identification of individuals actually authorized to make determinations and decisions in Section 106, consultants should clarify at the outset whom they work for, the name and contact information for their direct client contact, that they are acting as a technical expert for their client, and that the client (most often a federal agency) is responsible for all decisions in the consultation process, including commitments made in agreement documents.

THE SECTION 106 ADVOCACY CAPACITY OF THE NATIONAL TRUST'S STATEWIDE AND LOCAL PRESERVATION PARTNERS REQUIRES STRENGTHENING.

The National Trust currently produces a number of technical publications and offers training opportunities to boost the capability and capacity of statewide and local preservation organizations, including publications specifically targeted at helping such groups engage as policy advocates at the national and grassroots levels. This recommendation encourages the Trust, possibly in collaboration with the Advisory Council, to consider producing similar guidance specifically targeted to encouraging these preservation stakeholders to become effective advocates as consulting parties in the Section 106 process.

During the interviews for this study, several SHPOs and their review staff expressed concerns that statewide and local preservation advocacy groups are absent from many Section 106 consultations, and are not involved in helping to monitor project MOAs and program alternatives. There are several barriers to such preservation advocacy at the state or local level, especially a lack of staff resources, because Section 106 consultation can be intensive, time-consuming, and costly (since travel is often required) for a volunteer advocacy group. While some statewide and local preservation organizations are active and effective participants in the Section 106 process, the concerns raised during interviews for this report suggest that additional support would be helpful in encouraging these organizations to participate as consulting parties at a more frequent and more effective level.

THE USE OF PUBLIC PARTICIPATION MODELS OF INCLUSIVENESS HAS LANGUISHED AND NEEDS TO BE RESURRECTED.

Sections 800.2(d) and 800.3(e) of the Advisory Council's regulations reflect a strong policy in favor of early public participation in Section 106 reviews. Federal agencies must plan to notify and involve the public, whose views, in the express language of the Council, "are essential to informed Federal decisionmaking in the Section 106 process."

Community wisdom exists, and is an often an untapped resource in both environmental and historic preservation reviews of projects. People may not recognize the name of—or even care about—the Advisory Council, the National Trust, or federal agencies. However, they *do* know their neighborhood, borough, city, pueblo, parish, or favorite place at a level of detail gleaned only by serving as a constant participant in life. They know, for example, the consequences to the environment when a developer dams a stream or fills a sinkhole, thus affecting the movement of water, or destroys farm fields, thus displacing wildlife. They know the places of looters, or where a pivot on a historic swing bridge snags, or how sound from a train or truck travels up a hollow or across an open body of water.

Based on the experiences of interviewees for this study, little effort is invested in encouraging early public participation when planning for federal and federally assisted projects. A second theme expressed by many of the interviewees is that programs to involve the public in historic preservation must begin before individual projects ever reach the stage of Section 106 reviews. Several SHPOs in particular emphatically commented that it is more effective to create an active interest in preservation among the public by first increasing their access to places where they can experience history, such as involving the community in work to survey architectural features of buildings or to help with an archaeological dig. Once the interest is created, community participation in regulatory processes, like Section 106, is more likely to follow.

Another theme raised in comments by interviewees is that better insights are needed into specific *techniques* of public participation in Section 106. Insightful models of inclusive public involvement developed over the past 15 years—including guidance with respect to federal historic preservation programs, environmental justice projects, and civic engagement in archaeology—should be updated and applied in Section 106 reviews.

These types of engagement programs are not difficult to carry out and are not expensive when considering the substantial costs of many large infrastructure projects. Alternative techniques for reaching out to the public on grounds and terms more familiar to everyday people are, however, unfamiliar territory to most bureaucracies and businesses where the values of control, a common technical language, efficiency, and unemotional dialogue rule (in varying degrees). Project delays can occur when managers are inattentive to, or intentionally avoid, early and direct interaction with locally affected members of the public. At a minimum, prudent risk management requires a thoughtful effort to attempt to engage the local community proactively.

There is one caution about techniques of public engagement based on the experiences of some of the preservation advocates interviewed for this study. Federal agencies and their representatives should not orchestrate public information and participation in ways that override preservation principles (e.g., making design decisions by broad popular "vote" rather than basing decisions on standards of historic character and compatibility).

FEDERAL AGENCIES AND APPLICANTS FOR FEDERAL FUNDING OR APPROVALS SHOULD BE MORE RESPONSIBLE TO THE PUBLIC FOR PROJECT CHANGES AND COMMITMENTS MADE IN SECTION 106 REVIEWS.

Standard measures should be adopted by federal agencies themselves and imposed on all nonfederal applicants for federal assistance or approvals to promote accountability for project changes and follow-through on commitments after Section 106 reviews are completed and funds are awarded or permits issued. Although projects are supposed to be reopened under the NHPA (and NEPA) when certain project changes occur, suggested measures to strengthen recognition of this requirement among all stakeholders, as well as promote implementation of all mitigation commitments, include the following:

(1) Federal agencies should further the public's access to information, beyond the minimum requirements in the Section 106 and NEPA rules, by posting historic preservation and environmental commitments in accessible public repositories (e.g., libraries, websites) and recording such commitments in the real property records of the locale where the project is proposed to be built;

(2) Agencies should post copies of all studies or reports required as a result of Section 106 and NEPA reviews in the same repositories, as well as directly provide copies to all nongovernmental consulting parties that participated in the consultation process;

(3) As a way to promote recognition of the Section 106 rules requiring that consultation be reopened for project changes made after Section 106 reviews are finished, applicants should be required to submit sworn certifications which affirm that their projects were built in substantial compliance with plans in place during the Section 106 and NEPA administrative processes (and identifying any substantial deviations from these initial plans). This type of "truth, accuracy, and completeness" certification is widely required of applicants after environmental reviews are completed, and before projects are put into operation, to guard against the scenario in which as-built projects cause substantially new and harmful impacts that were not analyzed during the pre-construction environmental review process. Sworn certifications should also be required for implementation of cultural resource mitigation commitments in Section 106 agreement documents.

(4) Federal agencies should also actively and aggressively implement their audit programs to specifically monitor compliance with, and hold applicants accountable for, the accuracy of the certifications proposed above, as well as other legal commitments in permits, licenses, and grant agreements. Action on the recommended sworn certifications in (3) must be accompanied by at least *some* federal enforcement under the Fraud and False Statements Act—as is done when sworn statements in environmental documents are discovered to have been made falsely or fraudulently—in order that individuals who sign such statements have a reasonable belief that they might actually be held accountable for their actions and, therefore, will take such statements more seriously.

Additionally, although the Advisory Council once suggested that it is not empowered to take corrective action when a Section 106 agreement is violated, the agency should reevaluate this position, because it is not in reality as powerless as it has suggested, and should consider options such as suspending or terminating MOAs or applicable program alternatives, or at least exercising formal commenting authority.

In general, applicants want predictability from regulators, but they crave flexibility in designing and implementing their projects. Funding availability, market

conditions, and other similar factors at times promote intentional attempts to avoid finite project definition during federally required review processes. These factors often lead to inefficient and wasteful use of time and money by federal agencies and preservation advocates alike, for example, if a project has no near-term chance to be built because funding has not been committed. Further, because of funding or time lags, project design changes may occur in ways that pose new or unexamined impacts on historic properties and environmental resources.

While project changes between the planning and implementation stages are common—and in some cases beneficial for a variety of reasons—those changes may affect historic properties in a manner that was not addressed in the original project review process. Yet, interviews conducted for this report suggest that there is little evidence of project reviews being reopened in such cases, except in rare examples involving highly visible and controversial projects that are covered by the media. The typical land development project, or related infrastructure construction project, is seldom re-evaluated for project changes or implementation of required mitigation, according to interviewees. In addition, in the case of long-term multi-year projects, such as highways and bridges, there is a danger that the "institutional memory" of the commitments made in Section 106 and NEPA documents may be lost, particularly as participants scatter and documentation is archived. For all of these reasons, federal agencies and applicants should be more accountable to consulting parties and the public after initial Section 106 and NEPA reviews are completed.

CONSULTING PARTY AND PUBLIC FEEDBACK ON THEIR EXPERIENCE IN SECTION 106 REVIEWS NEEDS TO BE ACTIVELY SOLICITED.

Most of the information and data compiled by federal agencies, including the Advisory Council, and SHPOs/THPOs to measure the effectiveness of the Section 106 process (also referred to as "performance metrics") consist of the number of projects reviewed, and agreement documents or program alternatives adopted, during each year. These kinds of metrics—which measure the quantity or volume of workloads—are useful when federal agencies, the states, and tribes develop their budgets, and their respective legislative bodies consider these budget proposals. Numerical measures have also been used to highlight the potential for chronic problems in Section 106 implementation. For a number of years, for example, the Advisory Council reported annually to the president and Congress the number and percentage of cases, separated by each federal agency, that were elevated to the Council's membership panel for formal comment. The Departments of Interior, Transportation, and HUD collectively comprised the majority of such cases from FY 1974 through FY 1991.

Raw numbers, however, reflect quantity rather than quality, and do not account for the complexity of particular cases, or single actions of an agency that can have a lasting and devastating impact on historic properties. Also, annual workload numbers do not measure the extent of participation by stakeholders and what participants thought about the quality of the process or the outcomes. Such feedback from consult-

ing parties and the public can serve a useful purpose in improving the Section 106 process and outcomes if it is timely, specific, and provided to federal agency Senior Policy Officials and their staff and the Advisory Council. Indeed, the Advisory Council has successfully used a survey at least once before to request feedback on the Section 106 process. In the early 1990s, the Council issued a questionnaire to 1,200 stakeholders—and received a remarkable 35 percent response rate within one month, which was used to guide subsequent regulatory revisions to the Section 106 rules.

In the interviews for this report, some stakeholders reflecting on their Section 106 consultation experience felt that the process effectively reached broad consensus among all parties, often with creative compromise. Others came away from the Section 106 experience (most notably those involving housing development, disaster recovery projects, road projects, and Army Corps of Engineers' permits) feeling highly frustrated and that Section 106 consultation is a charade. Feedback from consulting parties could help the Council and agencies alike to find ways to reduce public dissatisfaction in future consultations.

Many agencies already have existing policies, requirements, and tools to quantitatively capture feedback and lessons learned in their compliance programs. These measures should be extended to Section 106 implementation. The use of accessible and cost-effective advances in web-based surveys—or simply using e-mail questionnaires—should also be highly encouraged as a way for federal agencies and the Advisory Council to seek electronic feedback from nongovernmental consulting parties, e.g., as a consultation follow-up to gauge "customer satisfaction" from this underserved constituency.

RECOMMENDATION 5

State and Tribal Section 106 Programs Should Be Supported by Fees and Full Appropriation of Proceeds in the National Historic Preservation Fund Account

There were no state or tribal historic preservation officers when the NHPA was enacted in 1966. The U.S. Department of the Interior quickly asked governors to identify state offices to receive the historic preservation grant funding provided in the 1966 act, but formal recognition of SHPOs under federal law did not occur until the 1980 amendments to the NHPA. Section 106 reviews of federal projects affecting reservations and ancestral or cultural lands of Indian tribes are reported in the Advisory Council's documents dating back to the late 1960s; however, THPOs were not formally recognized under federal law until the 1992 amendments to the NHPA.

Beginning in the mid 1980s and continuing through the late 1990s, revisions to the Advisory Council's Section 106 rules pulled the Council back from most Section 106 cases and thrust the SHPOs and, later, the THPOs into the primary role of reviewing an extensive number of federal and federally supported projects each year. Federal agencies and industry welcomed these changes. There is also a benefit to local communities when state or tribal staff, who are geographically closer to projects, review the identification of historic properties and landscapes that may be impacted, negotiate ways to avoid or mitigate those impacts, and connect federal agencies or applicants with people and groups that are likely to be interested in participating in Section 106 consultation.

In the absence of SHPO and THPO participation in the Section 106 program, the Advisory Council would be responsible for consulting with federal agencies or applicants in over 100,000 projects each year under the express language of the statute and the Part 800 rules. Given the critical nature of state and tribal participation, the federal statutory and regulatory mandates associated with state and tribal preservation programs, and the desire of federal agencies and industry to delegate the Advisory Council's role in Section 106 over the decades, it is essential that state and tribal Section 106 programs be fully funded and staffed to

carry out this important work. This recommendation encourages SHPOs and THPOs to analyze their own authority to collect user fees from federal agencies and applicants to fund all parts of state and tribal preservation programs that support their Section 106 review responsibilities. Full congressional appropriation of the proceeds in the Historic Preservation Fund account of the U.S. Treasury is further recommended. This account contains annual deposits from leasing the federal government's offshore mineral interests to businesses for oil and gas exploration and production. Although the receipts deposited each year equal the maximum amount authorized by Congress for this account, the legislature has never approved disbursing the full amount of these funds to support state and tribal preservation partners during the annual federal budget process.

THE AUTHORITY OF STATES AND TRIBES TO ASSESS FEES TO SUPPORT THEIR SECTION 106 REVIEW RESPONSIBILITIES SHOULD BE SERIOUSLY EXPLORED.

In the 20th anniversary report on the NHPA, the Advisory Council recognized that, as its role in Section 106 reviews becomes more decentralized and delegated to the states, "it is inevitable that the question of paying for the services arises." The Council predicted that the debate over who should pay for Section 106 reviews "will undoubtedly sharpen." In the face of severely declining finances—and substantially incomplete allocation of proceeds from the national fund for historic preservation—interested states or tribes should evaluate their own authority as a matter of state or tribal law to systematically assess user fees (also commonly referred to as service fees) to support their Section 106 responsibilities and mandates, as they have with respect to fees that support their environmental review programs. Further, the EPA has supported state, tribal, and local fees as a policy matter to ensure adequate implementation of federal air, water, and land protection programs as the responsibilities have shifted to these governments. On the other hand, the Advisory Council's initial analysis of user fees, in 2001, seems based on a very cautious and narrow reading of the agency's own Section 106 rules. This report recommends that the result of the 2001 analysis should be reevaluated on broader legal and policy grounds.

State environmental and natural resource agencies employ staff and invest in equipment to perform multiple functions in carrying out air, water, and waste permit programs and associated plan reviews under authority of EPA. (Tribes often are responsible for both environmental and historic preservation programs.) The EPA establishes performance requirements and standards for these programs, and audits program performance. Inadequate performance and/or budget allocations have resulted in EPA's temporary suspension or revocation of delegated program elements (in a recent example, in June 2010, the agency rejected a major air quality permitting program implemented under delegation to the state of Texas). Regulated industries, including federal agencies, dislike these sanctions because often the regional EPA offices then directly step into the environmental review role for projects.

Although Congress authorized EPA to support these delegated programs through grants, annual appropriations through the federal budget process do not always reach the level of grant funding needs and cannot, therefore, be completely relied upon by states, tribes, and local governments. As a result, a system has evolved that largely relies on user fees to support state and local environmental review programs, including staff time for permit and plan reviews, determination requests, training, public education, monitoring, enforcement, and administrative over-

head. Such user or service fees (examples of which are provided in Section 7-1 of Part II of this report) can often be imposed through administrative rules, rather than require legislative action. These charges apply to all types of regulated industry, and generally apply to federal facilities as well. Environmental fees are widely recognized as a "cost of doing business" and are completely separate from the cost to federal agencies and businesses of hiring their own consultants to collect required information and prepare permit applications or compliance plans.

The Advisory Council's 2001 memorandum on fees was issued in response to a "growing concern about the practice of charging fees from Federal agencies or their applicants for their participation in the Section 106 process." The specific practice identified in the analysis was requests by Indian tribes "to be compensated for activities connected to the Section 106 process." The memorandum concluded that tribes can "ask" for fees if they are "treated" by a federal agency or applicant as a "consultant" (by conducting survey work, for example) or seek reimbursement for travel; otherwise, there are no legal mandates under the NHPA and the Section 106 rules for fee payment, according to the analysis.

A broader view of this issue, if the Advisory Council reconsidered fee assessment, could instead focus on whether there are any federal barriers if the tribes or states determine that, in order to support their historic preservation programs approved by the Department of the Interior under the NHPA, they need to impose user fees as a necessary and appropriate mechanism to support the costs of state and tribal review and consultation roles. If states and tribes do exercise these responsibilities as a required, not discretionary, function—which appears to be the case, at least based on a recent Interior Department audit of Hawaii's preservation program, including the "mandated activities" of Section 106 review and compliance—then states and tribes are obligated to perform to certain levels by federal mandate. As a consequence, SHPOs and THPOs, as essential preservation partners, should determine how best to financially distribute the costs of their required roles among all stakeholders.

Any further evaluation of a widespread fee structure for Section 106 reviews should also address whether Congress has waived the federal government's "sovereign immunity" from state requirements. Under the legal concept of sovereign immunity, the federal government is not subject to certain liabilities or requirements of state laws, among other matters, unless the U.S. Congress has directed otherwise. Congress can either specifically waive sovereign immunity in a law, or language in a law can be interpreted by courts as implying a waiver. In this regard, it is worth noting that Section 110(g) of the NHPA (*Preservation activities as an eligible project cost*) appears to expressly waive federal agency immunity regarding Section 106 user fees through its recognition that project costs may include federal agency monies paid to states "to be used in carrying out . . . preservation responsibilities of the Federal agency under this Act . . . ." Sovereign immunity does not apply to nongovernmental parties; therefore, fees can clearly be charged to private applicants for federal funding or permits.

Finally, many SHPO offices employ "liaison" staff, similar to the Advisory Council liaison positions described elsewhere in this report. Most of these staff positions are directly funded by state departments of transportation or housing and community development agencies to conduct Section 106 reviews for the federal funds managed by these agencies. These arrangements, therefore, often create the same conflict-of-interest concerns among the public that exist for the Advisory Council's liaison positions. Section 106 user fees could support state preservation agency staffing

levels in a more predictable and consistent way, while at the same time eliminating concerns about the potential for partiality in project reviews. Environmental review fees can be reliably estimated for budget purposes. Once collected, these fees are typically deposited into the general revenue fund of the pollution control agency. The proceeds can then be directly apportioned by agency directors and their boards or commissions according to federally required, overall program priorities. In contrast, there is no certainty in funding staff liaison positions; payments are made by a "regulated" state agency that can impose its own project and staffing priorities for Section 106 reviews and may elect to withhold or discontinue funding arrangements at any time.

CONGRESS SHOULD FULLY APPROPRIATE THE PROCEEDS IN THE NATIONAL HISTORIC PRESERVATION FUND ACCOUNT.

The Minerals Management Service, a bureau of the Department of the Interior that manages the Outer Continental Shelf program, touts itself as "one of the largest revenue generators for the Federal government" because of the receipts it collects from industry for offshore leases. Each year, the agency deposits $150 million of royalty payments into the U.S. Treasury Historic Preservation Fund account from leasing 43 million acres within the Outer Continental Shelf of the Atlantic Ocean and Gulf of Mexico for oil and gas exploration and production, possibly to be expanded by another 167 million acres in the future as a result of a presidential proclamation in early 2010. This royalty deposit sets aside funds, which the Interior Department is authorized to use to support state and tribal preservation programs, up to the maximum amount authorized by Congress through the NHPA.

Congressional authorization does not equate to actual appropriations when the federal budget is approved each year, however. The Historic Preservation Fund was established by Congress in 1977 to provide a matching grant program to the states (and later the tribes) for implementation of their preservation programs. Unfortunately, Congress has never approved disbursing even the majority of the fully authorized amount from the proceeds in the Fund account; on average over the past 20 years, only 25 to 50 percent of the maximum authorized amount of $150 million has been appropriated for use in the grant program.

Data developed by the National Conference of State Historic Preservation Officers has shown in the past that federal support of state preservation programs is more cost-effective than the federal government's assumption of the work, another reason for full appropriation of the Fund account to support state (and tribal) Section 106 review activities.

Federal mandates on SHPOs and THPOs continue to escalate, particularly as a result of special legislation like ARRA, 14 times the size of the last significant jobs creation bill. At the same time, state and tribal budgets have suffered dramatically during the recent and ongoing financial crisis. State and tribal funding has been slashed for functions carried out to fulfill responsibilities delegated by the Advisory Council, and staffing for many offices has been cut severely. Congress should support full appropriation of the proceeds in the Historic Preservation Fund account of the U.S. Treasury to help these essential preservation partners.

RECOMMENDATION 6

Prior to Further Federal Agency Use of Alternative Approaches to Comply with Section 106, the Advisory Council Should Establish Standards to Promote Accountability in Implementing These "Program Alternatives"

Further federal agency use of alternative ways to comply with Section 106, categories of which are authorized as "program alternatives" in the Advisory Council's Section 106 rules, should be limited until standard terms and conditions that promote accountability for implementation are established and systematically imposed. Suggested standards include facilitating public access to agreement documents used in alternative procedures (through website posting), requiring federal agencies and their nonfederal representatives to ensure qualified staffing and adequate funding to carry out the alternative approach, reporting on implementation on a routine basis and making such reports easier for the public to access, and monitoring performance through internal reviews and, periodically, outside audits. Further, as needed, there are sanctions that can be imposed by the Advisory Council for noncompliance with requirements of alternative approaches—including terminating approval of an agency's use of a program alternative.

Regulations by nature invite exceptions and alternatives to implementation. Such is the case with the Advisory Council's Section 106 rules, although they are among the most flexible and least prescriptive of federal agency regulations. Soon after promulgation of the initial rules in 1974, the federal land management agencies (e.g., National Park Service) promoted using a "programmatic memorandum of agreement" to tailor the step-by-step review process of the rules for routine individual projects and activities that posed minor to no effects on historic properties. Nineteen "programmatic agreements" (a phrase that replaced "programmatic MOAs") between the Advisory Council and other federal agencies have been executed on a national level of coverage (i.e., apply to the specified activities of the signatory agencies when carried out throughout the nation) since this option was formally authorized in the 1970s. However, there is no comprehensive list of the number of programmatic agreements in effect at the state or local level of coverage.

In 1999 and 2000, amendments to the Section 106 rules added further options for alternative ways to implementing the step-by-step procedures of Section 106 for

projects or activities: program comments (nine are currently in effect, including disposal of historic naval ships and service craft, and technical guidance on certain repairs to historic federal buildings), exempted categories of projects (two are currently in effect, one for the interstate highway system, the other for natural gas pipelines), alternate procedures (one is currently in effect that can be used by individual Army installations, at their option), and standard treatments (none have been approved to date). Opportunities are provided in the rules for upfront consultation from multiple stakeholders (including SHPOs/THPOs) when these options are proposed to be used for a specific category of programs or projects, or type of historic property. However, interviewees reported that concerned stakeholders, such as local or statewide preservation groups, often do not provide input when program alternatives of statewide or nationwide applicability are negotiated, because they are not directly made aware of the opportunity to do so.

The Advisory Council's agreement or authorization for a federal agency to use a program alternative is essentially the Council's one-time "comment" on the covered activity, project, or program. As a practical matter, these alternatives generally provide for categorical treatment of certain types of historic resources or projects, instead of following the step-by-step process of consulting with the SHPOs/THPOs and other consulting parties on the area of potential effects, historic properties within this area, impacts to these properties, and mitigation of harmful impacts.

Conceptually, program alternatives are a legitimate way to improve administrative and professional efficiency when federal agencies (or their nonfederal representatives) follow the NHPA's mandate to "consider" the effects of their projects on historic properties. One state department of transportation estimates a total savings of $480,000 to $540,000 annually in streamlined review of minor road projects through execution of a programmatic agreement. Exempting certain types of Cold War-era family housing on military bases from Section 106 altogether through a "program comment" alternative was estimated to have saved the Army $5.5 million in avoided Section 106 reviews. Further, such agreements or approvals for alternative compliance approaches can reduce the workload on state and tribal review offices to sift through thousands of projects that pose only minor effects. A SHPO interviewee reported that programmatic agreements have freed up at least three full-time positions, thus allowing for staff to focus on more substantial reviews.

At the same time, significant concerns about program alternatives were raised in the interview process for this study, in response to questions about the practical consequences of agreements and approvals to comply with Section 106 in alternative ways. The interview questions in this regard focused in particular on how the public can be assured that such alternatives are fully and correctly carried out. Most of the reported experiences and concerns focused on programmatic agreements (PAs) because they are the oldest program alternative and by far the most widely used. Part of the concern when evaluating how the public can be assured that PA documents are fully and correctly carried out is that it is difficult even to verify how many PAs are currently in effect. The Advisory Council's website list of 19 PAs (including programmatic MOAs), executed since 1975, includes only those that apply to certain federal agencies on a nationwide basis, and does not include PAs that have been executed between the Advisory Council and federal agencies or individual federal operating facilities, as well as states and local governments.

When asked during interviews, SHPOs and their staff reported a wide variation in the ability to readily iden-

tify PAs in effect in their states. Some interviewees indicated that their office has almost no ability to produce a comprehensive list or copies of all such agreements, while others reported that they maintain a set of binders with paper copies collected over the years. Based on the Advisory Council's annual reports of its activities, and the states' annual Historic Preservation Fund reporting to the National Park Service, it appears that several thousand PAs may exist (see Appendix 2-2 of Part II of this report). Further, the legal validity of PAs signed before major changes to the Section 106 rules in 1986, 1999, 2000, and 2004 is questionable since these documents may be inconsistent with current regulatory requirements. For example, as reported by the National Trust, the Department of Defense continues to adhere to an outdated 1986 programmatic MOA that allows the demolition of World War II temporary buildings without Section 106 review, regardless of their historic significance (which often increases with the passage of time as the surviving buildings become more rare).

Programmatic agreements are often disfavored by the public as giving too much unscrutinized authority to individual agencies, a concern that appears warranted in many cases because there does not appear to be any systematic monitoring of their implementation after these agreements are signed. While some PAs require reporting of activities—usually once per year—it is not clear that any review of these reports happens systematically at the federal level, including whether they are even submitted as required. State historic preservation officers and their staff reported very mixed experiences with the success of federal and nonfederal agency reporting under PAs. Some agencies and their representatives dutifully report their activities, particularly those that use consultants to collect information and write the report, but others miss up to 50 percent of their reporting requirements, based on one particular example. In another state, SHPO staff members conduct field audits of PA implementation, but can only review about 10 percent of these agreements each year due to budget restrictions on travel.

Although program alternatives provide agencies with the procedural tools to avoid the time and costs of detailed Section 106 reviews for specific types of historic properties or projects, further federal agency use of these alternatives (particularly PAs) should be severely limited until standard terms and conditions are adopted to strengthen accountability for implementation. In addition, actual monitoring and implementation of these requirements should be the responsibility of federal agencies or their authorized representatives, instead of the Advisory Council, THPOs, SHPOs, or the public.

RECOMMENDATION 7

Section 106 Stakeholders Should Pursue New Ways of Using Technology, While Improving and Expanding Existing Uses

Technology is an important tool in the national historic preservation program. One of the earliest instances of employing technology to support preservation occurred in the 1960s when the National Park Service collaborated with International Business Machines (IBM) to modify the nomination form for the National Register of Historic Places. The outcome of this effort enabled machines to process data from the completed forms. The first reference in an Advisory Council's annual report to the use of a computer database for recording historic properties occurred in 1988, in relation to a system developed by the Army Corps of Engineers Construction Engineering Research Laboratory.

Each of the Section 106 stakeholder agencies and groups now uses technology in some way in the review and consultation process. Improvements in administering the Section 106 review programs of SHPOs, for example, are facilitated by using websites which are often replete with instructions, forms, and contacts and, increasingly, databases and geographic information systems. Federal employees or consultants who oversee large construction projects, especially "megaprojects" exceeding $1 billion in cost, rely on complex project management software to ensure that key milestones are met. Public interest groups are themselves adept at deploying technology, setting up advocacy websites or using webcams to participate in Section 106 consultations.

"WEB 2.0" TECHNOLOGY SHOULD BE HARNESSED TO ENHANCE IMPLEMENTATION OF THE NATIONAL HISTORIC PRESERVATION ACT.

The Internet offers a vast, quick, and inexpensive opportunity to involve significant numbers of the public in one of *the* most important preservation activities—identifying historic properties—and to improve Section 106 information about community resources, as well as improving information collected for environmental reviews conducted under NEPA. "This Place Matters," a website feature of the National Trust, provides a good example of how "Web 2.0" technology—Internet applications that promote information sharing among individual users, particularly through the expanded use of social media technology—can be used to encourage any Internet user to identify historic or community interest buildings, objects, structures, and natural resources in an on-line format. This kind of

community-generated list of "places that matter" could be used to augment the National Register of Historic Places, the existing formal recognition system for historic places which is operated by the National Park Service.

An emphasis on the importance of the public's recognition of historic properties and their involvement in preservation efforts dates back to enactment of the NHPA. At that time, promoters of a national policy on preservation recognized that a more widespread appreciation of history must be based on its relevance to contemporary personal and economic needs and broader community values. As the groundwork was laid in the mid-1960s for a new national preservation law, a collective sense emerged among decision makers that preservation protections should be expanded beyond properties and places identified as historic under traditional approaches.

The growth in the last several years of Web 2.0 technology provides a remarkable opportunity to enhance and expand this early vision of the role of the public in the work of historic preservation at the grassroots level. This type of technology lends itself, in particular, to: (1) expanding the universe of places identified as historic (which may, in turn, be eligible for listing in the National Register); and (2) increasing public awareness of specific federal or federally assisted projects affecting historic properties (therefore increasing public interest in the processes that afford public participation through Section 106).

While "nominating" historic places through social web media cannot serve as a direct substitute for the National Register, information collected and developed in this manner by grassroots groups and local governments could, if well promoted and well organized, enhance the National Register. In the spirit of its designation as a Preserve America community, for example, the city of Austin, which will host the National Trust's annual conference in October 2010, is collaborating with the University of Texas to develop a moderated page on the city's website where individuals can input data on historic properties, associated architectural features, and their connections to past events and people.

One or more databases or lists developed in this manner by preservation advocates could further serve as a resource for Section 106 users (planners, consultants, federal agencies) to identify potential historic resources in communities. The goal of this collective "Wiki Register" would be to alert planners and project proponents of the potential for an eligible historic property to be affected by their activities. The burden would then shift to reviewers to undertake further research on their own, consult with the nominator, local groups, THPOs or SHPOs, and so on.

Of course, judgments regarding the National Register-eligibility of inventoried properties must be based on professional standards, which serve as the check and balance in the regulatory process outlined in the Advisory Council's Section rules. However, even if a property is not National Register-eligible, and thus not subject to Section 106, it might be recognized and analyzed within the broader scope of NEPA review as a natural, aesthetic, cultural, or social resource.

PROJECT MANAGEMENT SOFTWARE NEEDS TO INCLUDE SECTION 106 COMPLIANCE MILESTONES TO HELP EARLY AND COORDINATED CONSIDERATION OF HISTORIC PROPERTIES IN CONSTRUCTION PROJECTS.

Initiative should be taken to modify the major project management software products used to plan, schedule, budget, and execute construction projects to explicitly incorporate deadlines and tracking milestones

relating to Section 106 compliance. Most existing software products feature environmental review compliance steps and deadlines under NEPA, but lack corresponding milestones for activities required in the Section 106 process.

The Advisory Council and other preservation stakeholders could provide guidance to major vendors of software developed for different industrial or government construction activity areas (e.g., transportation, hospitals, land development) to identify the appropriate timelines and ranges of hours estimated to complete Section 106 compliance steps. The guidance should include, but not be limited to, the steps of Indian tribal consultation, public outreach, historic property identification, and mitigation implementation. Guidance developed in this manner should also include specific instructions on coordination and integration between Section 106 and NEPA, such as the milestone recommendations in the Preserve America expert panel report of 2009, to prevent or minimize foreclosure of historic property consideration before key project deadlines have taken place.

THE ADVISORY COUNCIL SHOULD ESTABLISH DEEPER CONTENT ON ITS WEBSITE FOR SECTION 106 PRACTITIONERS, CONSIDER ESTABLISHING A COMPLIANCE-ORIENTED WEBSITE NAME FOR INEXPERIENCED SECTION 106 STAKEHOLDERS, AND OFFER A TARGETED SECTION 106 LINK FOR THE PUBLIC ON ITS HOMEPAGE.

The Advisory Council's website (<www.achp.gov>) was first posted in the 1995 to 1996 timeframe and was then brought in-house for management in 1999. Interviewee comments regarding the usefulness of the agency's website varied significantly, although most individuals agreed that listing staff members of the Office of Federal Agency Programs (OFAP, which is where the Section 106 staff is located in the Council) by their assigned federal agency is very helpful.

One readily apparent gap in the Advisory Council's current website, compared to other federal agencies, is access to the entire body of the Council's expert knowledge and experience. The current website features many useful resources, including Section 106 guidance documents of general applicability, the agency's quarterly digests of actions on high-profile projects that provide up-to-date snapshots of the key issues and outcomes in these cases, and the summaries of historic preservation lawsuits across the nation. However, the Council has, for more than 40 years, issued letters, memoranda, interpretations, pronouncements, agreement documents, and regulatory preambles. The agency's *Reports to the President and Congress of the United States* and *Budget Justification Reports* contain a wealth of information. Even major programmatic agreements that encompass federal programs carried out at a state or regional level are not currently available on the Council's website.

Posting this body of documentation on the Council's website would immensely help Section 106 stakeholders. This affirmative disclosure also would help to reduce the burden of responding to potential requests for extensive records production under the Freedom of Information Act, and is consistent with openness and transparency directives of the current presidential administration.

The second aspect of this recommendation relates to improving Section 106 recognition and awareness among businesses and local governments who apply for federal funding or approvals, especially in funding programs administered through HUD and permits issued by the Army Corps of Engineers. Based on the interviews for this study, SHPO offices report that many of these applicants understand—or at least rec-

ognize—that they have legal requirements to secure environmental permits or to conduct environmental reviews, but do not understand that Section 106 is also a legal requirement and that it is separate from environmental reviews.

One recommended mechanism to increase applicants' awareness of Section 106 responsibilities could possibly be promoted by the Advisory Council's registration of a separate compliance-oriented domain name (such as <www.106compliance.gov>). The intent of this recommendation is not to promote a separate Section 106 website for applicants. The word "compliance" in the domain name is purposefully suggested. Many applicants may not be familiar with Section 106, but they do understand that they can be held accountable under federal grant programs for any activity identified as "compliance" and, therefore, they are more likely to take the review process seriously if "compliance" is emphasized at every opportunity. Upon accessing the domain name on the Internet, a user would be forwarded to the Advisory Council's website at <www.achp.gov>. The new domain name could be used by federal funding or permitting agencies on applicant forms and required certifications for grants and release of funds, as well as these agencies' websites, to more clearly direct their nonfederal applicants to the Advisory Council's resources regarding Section 106 requirements.

Further, the Advisory Council's homepage could be modified to provide a direct link for this audience once accessing the compliance-oriented domain name directs applicants to <www.achp.gov>. This link would facilitate their access to simplified Section 106 flowcharts, photos of example historic property types, the Council's policy on affordable housing and historic preservation, and similar information.

The third aspect of this recommendation suggests establishing a direct, prominent, and inviting link on the homepage of <www.achp.gov> to promote immediate public access to Section 106 content. Many federal agencies now have direct links on their website homepages specifically for "the public" and that are clearly separate from links for businesses or regulated industry. These links provide a clear portal for the public to directly and immediately access information targeted to them, rather than require that individuals use a more complicated search function or know detailed regulatory language.

Elements of the Advisory Council's current website that should be provided through this "public" portal include the *Citizen's Guide to Section 106 Review* and the OFAP staff listing. Content directly provided in the "public" section could also include links to the formal National Register, a list of each federal agency's Senior Policy Official, Senior Real Property Officer, and Federal Preservation Officer with their direct contact information, and a list of the THPO and SHPO offices, with website links. Links to the user-promoted "Wiki Register" (as suggested above) could also possibly be provided. The Council's website does include a list of federal, state, and tribal contacts, but the information is provided in a section of the website that is separate from the "Working with Section 106" content. Interviewee feedback is that the connection between Section 106 and this other type of helpful information, found in various places in the agency's website, is not always clear to the public. Consolidating such information—or at least providing links at the public's webpage—could, therefore, facilitate use of the Internet to more easily access the resources provided by the Advisory Council.

METROPOLITAN AND REGIONAL TRANSPORTATION PLANNING ORGANIZATIONS NEED ACCESS TO DIGITIZED CULTURAL RESOURCE INFORMATION.

Long-range transportation planning in urban areas begins at metropolitan planning organizations (MPOs). The decision makers for each road, bridge, or transit project consist of transportation technical and policy committees comprised of representatives of local governments; state departments of transportation; FHWA division offices; airport, transit, and port authorities; and economic development interests.

Very few MPOs currently integrate their geographic information systems (GISs) (mostly layered with land use, environmental, and demographic data) with cultural resource GISs, based on the interviews for this report. The majority of SHPO GISs were developed through state departments of transportation and/or the FHWA. The FHWA and Advisory Council should, therefore, facilitate discussions with the National Association of MPOs on ways to link these state and regional agencies and their resources.

Notes to Part I

1. 16 U.S.C. §470f. Section 106 has been amended once, in 1976; prior to that date, the law only applied to properties actually listed in the National Register. The 1976 amendment added the phrase "or eligible for inclusion in" the National Register of Historic Places, substantially expanding the universe of historic properties embraced by the planning and review process.
2. Advisory Council on Historic Preservation, *The Preserve America Summit, Charting a Future Course for the National Historic Preservation Program* (Aug. 2007); National Academy of Public Administration, *Back to the Future: A Review of the National Historic Preservation Program* (Dec. 2007) and *Towards More Meaningful Performance Measures for Historic Preservation* (Jan. 2009); Advisory Council on Historic Preservation, *In a Spirit of Stewardship: A Report on Federal Historic Property Management*. *The Preserve America Executive Order Report to the President* (Feb. 15, 2009); *Recommendations to Improve the Structure of the Federal Historic Preservation Program* (Feb. 20, 2009) (commonly referred to as the "*Preserve America expert panel report"*); *National Historic Property Inventory Initiative, Building Capacity to Preserve and Protect our Cultural Heritage,* prepared by Daniel Shosky et al., SWCA Environmental Consultants (Broomfield, CO: May 13, 2009).
3. John W. Renaud, U.S. Department of the Interior, National Park Service, e-mail message to author, June 28, 2009. The counting principles that apply to annual reporting result in one federal or federally assisted project (a Section 106 "undertaking") generating multiple review "actions" by the SHPO and THPO offices. For example, a federally funded road project is one undertaking, but if the identification process results in five properties being declared as not eligible for the National Register of Historic Places and five properties being declared as National Register-eligible, then 10 review actions are reflected in the identification columns of the report's database. This data reporting approach is a reasonable and appropriate way to reflect the level of required scrutiny of a professional staff reviewer in a tribal or state review office. These numbers in the annual reports of the states and tribes also highlight the enormous amount of cultural resource literature and work that is invested in reviewing projects that should be captured through hard copy or digital repositories for future Section 106 users.
4. 36 C.F.R. §800.1(a) and (c).

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