

National Register of Historic Places and to afford the Advisory Council on Historic Preservation ("ACHP") a reasonable opportunity to comment on such undertakings. The regulations implementing section 106 are codified at 36 CFR part 800 (2001) ("Section 106 regulations").

On September 18, 2001, the Federal district court for the District of Columbia ("district court") upheld the section 106 regulations against several challenges. *National Mining Ass'n v. Slater* (Civil Action No. 00-288) and *Cellular Telecommunications and Internet Ass'n v. Slater* (Civil Action No. 01-00404) (Judge Ellen S. Huvelle). Nevertheless, the district court invalidated portions of two subsections of the section 106 regulations insofar as they allowed the ACHP to reverse a Federal agency's findings of "No Historic Properties Affected" (§ 800.4(d)(2)) and "No Adverse Effects" (§ 800.5(c)(3)). See *National Mining Ass'n v. Slater*, 167 F. Supp. 2d 265 (D.D.C. 2001); and *Id.* (D.D.C. Oct. 18, 2001) (order clarifying extent of original order regarding Section 800.4(d)(2) of the section 106 regulations).

Prior to the district court decision, an objection by the ACHP or the State Historic Preservation Officer/Tribal Historic Preservation Officer ("SHPO/THPO") to a "No Historic Properties Affected" finding forced the Federal agency to proceed to the next step in the process, where it would assess whether the effects were adverse. An ACHP objection to a "No Adverse Effect" finding required the Federal agency to proceed to the next step in the process, where it would attempt to resolve the adverse effects.

On appeal by the National Mining Association, the D.C. Circuit Court of Appeals ("D.C. Circuit") ruled that section 106 does not apply to undertakings that are merely subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency, and remanded to the district court. *National Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003). On September 4, 2003, the district court issued an order declaring §§ 800.3(a) and 800.16(y) invalid to the extent that they applied section 106 to the mentioned undertakings, and remanding the matter to the ACHP.

The ACHP is now proposing amendments to the mentioned subsections so that they comport with the court rulings, while still being consistent with the purpose of helping Federal agencies avoid proceeding with a project under an erroneous determination that the project would not affect or adversely affect historic

properties, and still triggering section 106 compliance responsibilities for Federal agencies when they approve or fund State-delegated programs.

A related amendment would clarify that even if a SHPO/THPO concur in a "No Adverse Effect" finding, the ACHP and any consulting party still have until the end of the 30 day review period to file an objection. Such objections would require the Federal agency to either resolve the objection or submit the dispute to the ACHP for its non-binding opinion.

Finally, the ACHP is also taking the opportunity to amend its regulations to clarify that the ACHP can propose an exemption to the section 106 process on its own initiative, rather than needing a Federal agency to make such a proposal.

## **II. Amendments Regarding ACHP Review of "No Historic Properties Affected" and "No Adverse Effect" Determinations**

As stated above, the district court held that the asserted power of the ACHP to reverse Federal agency determinations of "No Historic Properties Affected" and "No Adverse Effect" exceeded the ACHP's legal authority under the National Historic Preservation Act.

The proposed amendments would still require a Federal agency that makes such findings and that receives a timely objection to submit the findings to the ACHP for the specified review period. Within that period, the ACHP would then be able to give its opinion on the matter to the agency official and, if it believed the issues warranted, to the head of the agency. The agency official, or the head of the agency, as appropriate, would take into account the opinion and provide the ACHP with a summary of the final decision that contains the rationale for the decision and evidence of consideration of the ACHP's opinion. However, the Federal agency would not be forced to abide by the ACHP's opinion on the matter.

The amendments also change the time period, from 15 days to 30 days, for the ACHP to issue its opinion regarding "No Adverse Effect" findings. This additional time is deemed necessary since the ACHP opinions may now be addressed to the head of the agency, and would therefore more likely be ultimately formulated by ACHP members, as opposed to such tasks being mostly delegated to the staff. Such formulation of opinions by ACHP members is expected to require more time considering that these ACHP members are Special Government Employees who reside in different areas

of the country and whose primary employment lies outside the ACHP.

## **III. Amendment Regarding the Applicability of Section 106 to Undertakings That Are Merely Subject to State or Local Regulation Administered Pursuant to a Delegation or Approval by a Federal Agency**

As explained above, the D.C. Circuit held that section 106 does not apply to undertakings that are merely subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. Accordingly, the proposed amendment removes those types of undertakings from the definition of the term "undertaking" on § 800.16(y).

Formerly, an individual project would trigger section 106 due to its regulation by a State or local agency (through such things as permitting) pursuant to Federally-delegated programs such as those under the Surface Mining Control and Reclamation Act, 30 U.S.C. 1201 *et seq.* Under the proposed amendment, such State regulation would not, by itself, trigger section 106 for those projects.

Nevertheless, it is the opinion of the ACHP that the Federal agency approval and/or funding of such State-delegated programs does require section 106 compliance by the Federal agency, as such programs are "undertakings" receiving Federal approval and/or Federal funding. Accordingly, Federal agencies would need to comply with their section 106 responsibilities regarding such programs before an approval and/or funding decision on them. For existing programs, this could occur during renewal or periodic assessment of such programs.

Due to the inherent difficulties in prospectively foreseeing the effects of such programs on historic properties at the time of the program approval and/or funding, the ACHP believes that section 106 compliance in those situations will be pursuant to a program alternative per 36 CFR 800.14. For example, that section of the regulations provides that "Programmatic Agreements" may be used when " \* \* \* effects on historic properties cannot be fully determined prior to approval of an undertaking; [or] \* \* \* when nonfederal parties are delegated major decisionmaking responsibilities \* \* \* " 36 CFR 800.14(b)(1). The ACHP stands ready to pursue such alternatives with the relevant Federal agencies.