

**Testimony of the Society for American Archaeology  
Before the National Parks Subcommittee of the  
US House of Representatives Committee on Resources  
Concerning proposed amendments to the  
National Historic Preservation Act**

**April 21, 2005**

The Society for American Archaeology (SAA) appreciates this opportunity to submit testimony to the National Parks Subcommittee concerning proposed amendments to the National Historic Preservation Act (NHPA) of 1966, as amended (16 U.S.C. 470).

SAA is an international organization that, since its founding in 1934, has been dedicated to research about and interpretation and protection of the archaeological record of the Americas. With a membership of more than 7,000, SAA has members in all 50 states as well as many other nations around the world. The Society represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. Our government and private sector members work daily with the NHPA in their efforts to manage and conserve the archaeological heritage of the American people.

The NHPA is the cornerstone legislation for preserving the historic, prehistoric, and traditional cultural places loved and revered by the people of this Nation. NHPA was passed in 1966 because Congress recognized [in Section 1 of the law] that “the spirit and direction of the Nation are founded upon and reflected in its historic heritage,” and that “historic properties significant to the Nation’s heritage are being lost and substantially altered, often inadvertently, with increasing frequency.” Congress went on to assert in this first section of the NHPA that “the preservation of this irreplaceable heritage is in the public interest so that its vital legacy of cultural, educational, aesthetic, inspirational, economic, and energy benefits will be maintained and enriched for future generations of Americans.”

These statements ring as true today with the American people as they did 40 years ago. In 1999, a coalition of archaeological organizations, including SAA, commissioned a poll among the American public, conducted by Harris Interactive, Inc. This nationwide study revealed that 98% of those polled supported the statement that there should be laws to protect prehistoric and historic archaeological sites. Any proposals to amend NHPA must give serious consideration to the deep sense of connection that Americans of every persuasion feel toward our historic places.

**Comments on Sections 2, 3, and 5-7 of the “National Historic Preservation Act Amendments of 2005”**

SAA’s primary concerns about the amendments proposed in the “National Historic Preservation Act Amendments of 2005” have to do with Section 4, *Consideration of Effect of Federal Undertakings*, but we do have brief comments on the other sections of the draft bill that we would like to present first:

- Sections 2 and 3 address specific situations that, although rare, do arise occasionally. Given the rarity of these situations, legislative remedies may not be warranted. Stronger guidance from the National Park Service should be sufficient to prevent future problems. For example, NPS could amend the regulation governing the Certified Local Governments (CLG) program, 36 CFR Part 61.6, to require that CLGs either not tie local regulation to National Register eligibility or provide procedures for due process.

- SAA strongly supports Section 5, the extension of the term of the Historic Preservation Fund (HPF). The extraordinary amount of historic preservation work accomplished by State and Tribal Historic Preservation Offices and Certified Local Governments using HPF funds, and the amount of money leveraged every year by HPF dollars through matching funds, partnerships, and volunteer contributions, make this a remarkably productive and successful program.
- SAA also supports the provision in Section 6 authorizing appropriations for the Advisory Council on Historic Preservation through 2012. SAA has no comment at this time on the other provisions of Section 6 and the provisions of Section 7.

#### **Comments on Section 4 of the “National Historic Preservation Act Amendments of 2005”**

Section 4 of “National Historic Preservation Act Amendments of 2005” would amend the language of Section 106 of NHPA so that where it now says that Federal agencies must take into account the effects of their undertakings on properties “included in or eligible for inclusion in the National Register [of Historic Places]” it would read instead “included in or determined by the Secretary to be eligible for inclusion in the National Register.”

The Section 106 process, as the Advisory Council’s regulation (36 CFR part 800) says, “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.” This view of the purpose of Section 106 closely reflects the policy established by Congress in Section 2 of NHPA:

It shall be the policy of the Federal Government . . . in partnership with the States, local governments, Indian tribes, and private organizations and individuals to . . . foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.

Federal agencies are required by NHPA to have procedures for compliance with Section 106 that provide a process for identifying historic properties and evaluating their eligibility for listing in the National Register. The law further requires that agencies’ procedures for Section 106 include consultation with State Historic Preservation Officers (SHPOs), local governments, Indian tribes, and others to develop agreements about how the agency will take into account any adverse effects on properties listed on or found through the Section 106 process to be eligible for listing on the National Register.

The requirement for identification of historic properties and evaluation of their eligibility to the National Register is a critical component of the Section 106 process. In order for Federal agencies to consider the effects of their actions on historic properties during planning, they need to know what properties are located within the general area. Because of the vast size of the United States and the depth and richness of our historic and prehistoric record, the great majority of our historic heritage consists of properties that have not even been recorded yet, much less evaluated for their eligibility to the National Register. Currently, agencies determine which properties within the area of a project are eligible to the National Register and must, therefore, be considered in planning by going through a process called a “consensus determination of eligibility.” In a consensus determination, if the agency and the SHPO or Tribal Historic Preservation Officer (THPO) agree about the eligibility of a property, then *for the purposes of Section 106* the property is treated as eligible or not eligible, as the case may be.

This is not the same as a formal determination of eligibility from the Keeper of the National Register; a consensus determination is used only for the purposes of Section 106 decision making. A consensus determination that a property is eligible simply means that the Federal agency must consider the effects of its undertakings on that property. It does not mean that the undertaking cannot proceed or that the property must be preserved.

The proposed amendment would eliminate the consensus determination of eligibility. The only way that Federal agencies would be able to meet the statutory requirement to evaluate the eligibility of properties identified during Section 106 compliance would be to request a formal determination of eligibility from the Secretary, that is, from the Keeper of the National Register.

SAA is certainly in favor of efforts to ensure that Federal agencies only consider effects of their undertakings on historic properties that are truly important. In our experience, however, the consensus determination process works reasonably well to balance the needs of Federal undertakings with historic preservation concerns while keeping projects moving quickly. The proposed elimination of consensus determinations and requirements for formal determinations of eligibility from the National Register, on the other hand, would have serious unintended consequences.

This requirement would:

- *Eliminate local control over decisions about the significance of historic places.* Under the current process, which requires SHPO concurrence with agency determinations of eligibility, the people of a state have a strong voice in decisions about which historic places will be considered in Section 106 reviews. Likewise on tribal land, the requirement for THPO concurrence gives the people of the tribe a strong voice in determining which historic places receive consideration in the Section 106 process. The proposed amendment to Section 106 would shift all decision making to Washington, and although there would undoubtedly be opportunities for input from the states and tribes, that is not the same as having the authority to concur or not concur at the local level.
- *Significantly increase the expense of historic property identification efforts.* The level of detail and documentation accepted by agencies and SHPOs/THPOs for the purpose of consensus determinations is generally substantially less than the level of detail and documentation required by the National Register for a formal determination of eligibility.
- *Completely overwhelm the ability of the National Register of Historic Places to respond to requests for determinations of eligibility.* The Register has a very small staff and every year tens of thousands of historic properties that may be affected by Section 106 undertakings must be evaluated for eligibility.
- *Create catastrophic delays for development projects funded or approved by Federal agencies.* Currently, thousands of Federal undertakings move quickly through the Section 106 review process every year. The combination of greatly increased documentation requirements and enormous backlogs of requests for determinations from the National Register would bring the process to a near standstill for highways, mining projects, oil and gas development, and nearly every other category of Federally funded or approved project.
- *Require inappropriate levels of disclosure of sensitive information about places of traditional religious and cultural significance to Native Americans.* Under the current practice of consensus determinations of eligibility, Federal agencies and Indian tribes have considerable flexibility when the agency is evaluating the eligibility of historic properties of traditional cultural and religious significance. A requirement for formal determinations of eligibility for all Section 106 properties would significantly expand the need for disclosure and dissemination of highly sensitive information about traditional cultural properties.

The result of the proposed amendment to Section 106 of the NHPA would be a reversal of the current trend toward streamlining of environmental compliance. It would provide no additional protection to our Nation's prehistoric and historic heritage, eliminate local control over decision making, and place a huge burden of costs and delays on Federal agencies and private industry.

The Society for American Archaeology strongly urges the National Parks Subcommittee not to include Section 4 in the proposed amendments to the National Historic Preservation Act.