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# Bipartisan American Affordability and Jobs Act (BAAJA) of 2026: Analysis of National Historic Preservation Act Provisions

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SUMMARY

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# Bipartisan American Affordability and Jobs Act (BAAJA) of 2026: Analysis of National Historic Preservation Act Provisions

The Bipartisan American Affordability and Jobs Act of 2026 (BAAJA; S. 5653) was introduced on September 30, 2026. The bill, as introduced, contains seven titles within two divisions, which aim to reform certain federal environmental review and permitting processes to expedite a wide range of project types, with an emphasis on energy-related projects.

Some Members have shown sustained interest over several Congresses in amending the nation's permitting laws to increase energy production and expedite a variety of projects (e.g., transportation infrastructure, energy, data center development, ecological restoration, stormwater infrastructure). Some Members have introduced numerous permitting-reform-related bills, some of which have focused on specific environmental statutes with review or permitting provisions (e.g., the National Environmental Policy Act, Clean Water Act, Endangered Species Act, National Historic Preservation Act). Others have focused on specific project types (e.g., electricity transmission lines, natural gas pipelines, geothermal energy development), and some have included broader reforms to permitting and reviews across project types.

Areas of debate on previous legislative proposals have included whether reforms should target conventional or renewable forms of energy, whether amending bedrock environmental laws to shorten reviews may weaken environmental protections, and whether certain proposals may narrow the role of states in the review process and/or reduce opportunities for public input and judicial review.

BAAJA is the product of negotiations involving Members of the Senate Committee on Environment and Public Works and the Senate Committee on Energy and Natural Resources. In a majority press release announcing the introduction of the bill, the Senate Committee on Energy and Natural Resources asserted that the legislation "will strengthen American energy security by accelerating the permitting process for critical energy and mineral projects across the United States." A majority press release from the Senate Committee on Environment and Public Works stated that the agreement "will deliver cheaper energy, more jobs, and responsible growth across the United States."

This report analyzes the two provisions—Section 2301 and Section 2302—in BAAJA (Division B, Title III) specific to the National Historic Preservation Act (NHPA; 54 U.S.C. §§300101-307108). Section 2301 would first establish requirements for more frequent reviews of state historic preservation programs and tribal historic preservation programs for compliance with NHPA requirements, with penalties for noncompliance. The provision would also address and make changes to Section 106 of the NHPA, which provides directives to federal agencies on the consideration of potential impacts to historic properties. BAAJA would make a number of changes to this process, including narrowing the types of projects, programs, or activities subject to review; defining the types of effects to historic properties that may be considered "adverse"; creating deadlines for completion of Section 106 review; limiting the instances of judicial review; and directing when and how consultation with State Historic Preservation Officers, Tribal Historic Preservation Officers, and other applicable entities would be required during the review process. Section 2302 would make changes to authorized deposits to the Historic Preservation Fund and provide for the creation of new grant funding for tribal entities.

# Contents

Introduction ..... 1
Section 2301 – Historic Preservation ..... 2
Subsection (a) – Eligibility for Inclusion on National Register ..... 2
Subsection (b) – Program Evaluation ..... 3
Subsection (b)(1) – State Programs ..... 4
Subsection (b)(2) – Tribal Programs ..... 5
Subsection (c) – Effect of Undertaking on Historic Property ..... 5
"54 U.S.C. § 306108(a) – Definitions" ..... 6
"54 U.S.C. § 306108(b) Adverse Effect of the Undertaking" ..... 14
"54 U.S.C. § 306108(c) Consultation" ..... 14
"54 U.S.C. §306108(d) No Post-Deadline Requirement for Reinitiation" ..... 27
Subsection (d) – Conforming Amendment ..... 27
Section 2302 – Funding for the Historic Preservation Fund; Use and Availability; Grants for Tribal Historic Preservation Officers; Additional Funding ..... 28
Subsection (a) – Funding for Historic Preservation Fund ..... 28
Subsection (b) – Use and Availability ..... 28
Subsection (c) – Grants for Tribal Historic Preservation Officers ..... 29

## Contacts

Author Information ..... 30

# Introduction

The chairs and ranking members of the Senate Environment and Public Works Committee and the Senate Energy and Natural Resources Committee introduced S. 5653, the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA), on September 30, 2026. The bill, as introduced, contains seven titles within two divisions. The bill aims in part to revise certain federal environmental review and permitting processes to expedite a wide range of project types, with an emphasis on energy-related projects. In a majority press release announcing the introduction of the bill, the Senate Committee on Energy and Natural Resources asserted that the legislation "will strengthen American energy security by accelerating the permitting process for critical energy and mineral projects across the United States." A majority press release from the Senate Committee on Environment and Public Works stated that the agreement "will deliver cheaper energy, more jobs, and responsible growth across the United States."

BAAJA is organized according to two divisions:

- Division A—Committee on Environment and Public Works—has four titles: the National Environmental Policy Act of 1969 (NEPA), the Clean Water Act (CWA), the Endangered Species Act of 1973 (ESA), and Project Certainty.
- Division B—Committee on Energy and Natural Resources—has three titles: Electric Transmission, Energy Permitting, and Historic Preservation.

This CRS report provides an overview of Title III of Division B of BAAJA, which proposes various amendments to the National Historic Preservation Act (NHPA; 54 U.S.C. §§300101 et seq.), as amended. Enacted in 1966, the NHPA establishes the National Register of Historic Places (National Register) and the procedures by which historic properties are placed on the National Register, funds the National Trust for Historic Preservation, creates a grant program for state and tribal historic preservation, requires federal agencies to manage and preserve their historic properties, and creates a process for federal agencies to follow when their projects may affect a historic property.

This report provides an overview of the NHPA's current statutory and regulatory framework as well as the proposed changes outlined in BAAJA. Where feasible, potential implications resulting from such proposed amendments are discussed. In certain instances, discussions of the existing legal or policy context for certain proposed changes are also included. Although other divisions and titles within BAAJA contain proposals that, if enacted, may impact agency implementation of the NHPA or obligations under the law, those proposals are not discussed in this report.[1] In general, this product discusses provisions in BAAJA in the order in which they appear in the bill, as introduced. "Subsection (c) – Effect of Undertaking on Historic Property" is organized pursuant to the proposed changes as they would appear in Section 106 of the NHPA, codified at 54 U.S.C. §306108, were BAAJA to be enacted.

[1] For example, provisions in Division A of the Bipartisan American Affordability and Jobs Act of 2026 (BAAJA) pertaining to "Project Certainty" may have broad implications that could affect agency obligations under the NHPA. In addition, other sections of the bill (e.g., Section 2102—Reconductoring and Other Activities in Existing Rights-of-Way) would exempt certain categories of actions from review under NHPA Section 106. For additional discussion of these provisions and BAAJA more broadly, see CRS Report R49492, *Bipartisan American Affordability and Jobs Act (BAAJA) of 2026: Analysis of Clean Water Act Provisions*, by Laura Gatz et al., and CRS Insight IN12746, *The Bipartisan American Affordability and Jobs Act of 2026 and the Federal Energy Regulatory Commission's Backstop Siting Authority*, by Ashley J. Lawson.

# Section 2301 – Historic Preservation

## Subsection (a) – Eligibility for Inclusion on National Register

The NHPA establishes certain statutory requirements for federal agencies to engage in consultation when certain federal or federally assisted projects, programs, or activities affect specific types of historic properties. In particular, federal agencies must consult with any Indian tribe (Tribe) or Native Hawaiian Organization (NHO) that "attaches religious and cultural significance" to historic properties when carrying out their responsibilities pursuant to Section 106 of the NHPA.[2] As discussed in subsequent sections of this report, Section 106 of the NHPA requires federal agencies to "take into account" the effects their actions may have on historic properties.[3] This consultation obligation to Tribes and NHOs, for the purposes of an agency complying with Section 106, applies regardless of whether the potential property is located on or off tribal lands.

Whether or to what degree properties of religious or cultural importance to Tribes or NHOs are historic properties for the purposes of the NHPA and Section 106 has been an ongoing issue of interest for agencies, lawmakers, and other stakeholders.[4] In 1992, Congress amended the NHPA to clarify that properties of "traditional religious and cultural importance" to a Tribe or NHO may be considered historic properties eligible for inclusion on the National Register and therefore subject to review under Section 106.[5] To be eligible for inclusion, these sites must meet certain criteria as outlined in regulations promulgated by the National Park Service (NPS), the agency responsible for administering the National Register.[6] NPS has issued additional guidance establishing how these properties should be evaluated against National Register criteria in determining their eligibility.[7]

Subsection (a) of Section 2301 of BAAJA would amend 54 U.S.C. §302706 by defining the term *property of traditional religious or cultural importance*[8] to mean:

> [A]n identifiable geographic location or feature at which an event of continuing religious or cultural significance to a living community occurred, including any prehistoric or

[2] 54 U.S.C. §302706(b). For the National Historic Preservation Act's (NHPA's) definition of *Indian tribe* and *Native Hawaiian Organization*, see 54 U.S.C. §300309 and 54 U.S.C. §300314, respectively.

[3] 54 U.S.C. §306108.

[4] For a full discussion of the NHPA and its application to these sites, see CRS Report R48452, *Indigenous Sacred Sites: Overview and Issues for Congress*, coordinated by Mark K. DeSantis.

[5] P.L. 102-575, Title XL, §4006(a)(2), codified at 54 U.S.C. §302706.

[6] Criteria for inclusion on the National Register of Historic Places can be found at 36 C.F.R. §60.4.

[7] In 1990, NPS published *National Register Bulletin #38, Guidelines for Evaluating and Documenting Traditional Cultural Properties*, which addressed a specific place type referred to as a "traditional cultural property," or TCP. Although not exclusively, most properties of "traditional religious and cultural importance" have been categorized as TCPs. NPS has revised Bulletin #38 several times to address legislative changes and stakeholder concerns. Following its initial publication in 1990, the agency revised and reissued it in 1992 to address the amendments to the NHPA pertaining to places of traditional religious and cultural importance to Tribes and NHOs. Most recently, in January 2024, NPS issued a request for comments on an updated draft of the guidelines (89 *Federal Register* 4988), and in December 2024, NPS formally adopted its updated guidance entitled, "National Register Bulletin: Identifying, Evaluating, and Documenting Traditional Cultural Places." This guidance can be found at https://irma.nps.gov/DataStore/DownloadFile/713282.

[8] The proposed bill text also changes the provision from "property of traditional religious *and* cultural importance" to "property of traditional religious *or* cultural importance."

> historic district, site, building, structure, or object, and any existing artifacts or material remains at that district, site, building, structure, or object.

It is unclear whether or to what degree this definition would limit or expand the consideration of certain properties that are currently considered to be of religious and cultural significance to Tribes or NHOs. Current NPS guidance specifies that a "specific boundary description" is required for the purposes of nominating a site for listing on the National Register.[9] This requirement seems to align with the "identifiable geographic location or feature" standard that would apply under BAAJA. In addition, NPS guidance requires such properties to be "associated with and valued by a living community,"[10] which appears to align with the standard that would be established in BAAJA.[11] NPS guidance indicates that such properties demonstrate significance, in part, due to their "role in a community's traditional and *continuing* beliefs, customs, and practices," which appears to be similar to the language proposed in the bill.[12] Finally, the bill specifies that such properties must be where "an event … occurred." NPS guidance currently addresses how this criterion might be met if it is unclear or impossible to identify when a particular event took place,[13] but it is not clear whether BAAJA would be interpreted to impose stricter requirements for eligibility. In general, despite similarities between the proposed definition and existing NPS guidance, subsequent interpretations—either in future regulations, agency guidance, or court decisions—of certain terms used in this provision (e.g., "event," "continuing," "living community") could either narrow or expand the types of properties eligible for listing on the National Register and subject to Section 106 review.

## Subsection (b) – Program Evaluation

Subsection (b) of Section 2301 of BAAJA would amend two sections of the NHPA codified at 54 U.S.C. §302302 and 54 U.S.C. §302702. U.S.C. §302302 provides the Secretary of the Interior (Secretary) with authority to promulgate regulations for the establishment and certification of a State Historic Preservation Program that is responsible for conducting certain historic preservation activities under the law.[14] These activities may include surveys and inventories, nominations to the National Register, preservation education, community preservation planning, physical preservation of historic buildings, and Section 106 consultation.[15] The State Historic

[9] National Park Service (NPS), *National Register Bulletin: Identifying, Evaluating, and Documenting Traditional Cultural Places*, p. 84 (updated 2024), https://irma.nps.gov/DataStore/DownloadFile/713282 (hereinafter NPS, *Bulletin*).

[10] NPS, *Bulletin*, p. 19.

[11] NPS guidance provides a discussion of what does and does not constitute a "living community" in the context of a National Register TCP. NPS, *Bulletin*, pp. 13-16.

[12] Concerns have previously been raised that this guidance infers a requirement that such sites be in continuous *use* by a community to be eligible for listing on the National Register. For example, see American Cultural Resources Association (ACRA), "ACRA Comments on NPS Bulletin 38 Proposed Changes," May 4, 2023. NPS guidance specifies that "[a] place does not have to have been in continuous use by a community to retain its significance to that community." NPS, *Bulletin*, p. 16.

[13] NPS, *Bulletin*, p. 48. ("For many Indigenous peoples, such events have existed since time immemorial, meaning there is no collective memory of the event not ever having existed or occurred. As long as the events are rooted in the history of the community, and by tradition associated with the place, the association should be accepted.")

[14] 54 U.S.C. §302301. Within the Department of the Interior, NPS is the federal agency responsible for promulgating regulations implementing these provisions.

[15] 54 U.S.C. §302303.

Preservation Officer (SHPO) is the appointed official responsible for administering and managing the state program.[16]

The NHPA requires the Secretary, in consultation with the Advisory Council on Historic Preservation (ACHP),[17] to evaluate state programs "periodically, but not less than every 4 years" for consistency with their requirements under the law.[18] If the Secretary determines that a "major aspect" of the program is not consistent with the law, the Secretary has the authority to "disapprove the program and suspend in whole or in part any contracts or cooperative agreements" with the state and SHPO until the noncompliance is addressed.[19] In general, "[u]nless circumstances warrant immediate action,"[20] states are afforded the opportunity to correct deficiencies without disapproval or suspension "within a reasonable period of time."[21] The NHPA also authorizes—but does not require—the Secretary to "conduct periodic fiscal audits" of state programs "as needed."[22] State audit programs may, "[a]t the discretion of the Secretary," substitute for federal financial review for the purposes of this provision.[23] Implementing regulations specify that NPS will "[r]ely to the maximum extent feasible" on state financial systems for the purposes of these reviews.[24]

The NHPA also provides the Secretary with authority to promulgate regulations for the establishment and certification of a Tribal Historic Preservation Program in which Tribes—subject to certain requirements—assume all or part of the functions and responsibilities of a SHPO with respect to tribal land, including consultation responsibilities pursuant to Section 106 of the NHPA.[25] The Tribal Historic Preservation Officer (THPO) is the appointed official responsible for administering and managing the tribal program.[26]

## Subsection (b)(1) – State Programs

Subsection (b)(1) of BAAJA proposes to amend 54 U.S.C. §302302 by requiring the evaluations of state programs to occur not less than every *two* years rather than the current statutorily mandated *four* years. If found to be noncompliant, states would have two years to address

[16] Under NHPA, state historic preservation officers (SHPOs) for each state or territory are designated and appointed by the governor—or "the chief elected official"—of that state to administer the state's historic preservation program (54 U.S.C. §302301(1)).

[17] Created by NHPA, the Advisory Council on Historic Preservation (ACHP) is an independent agency consisting of 24 statutorily designated members representing federal, state, and tribal government, as well as experts in historic preservation and members of the public (54 U.S.C. §304101). Among its various responsibilities, ACHP serves as the federal policy advisor to the President and Congress on matters relating to historic preservation, recommending administrative and legislative improvements and providing guidance on interagency coordination. As discussed further in this report, the ACHP also oversees and is authorized to promulgate regulations implementing Section 106 review under the NHPA.

[18] 54 U.S.C. §302302(a). Implementing regulations for state programs can be found at 36 C.F.R. Part 61.

[19] 54 U.S.C. §302302(b).

[20] 36 C.F.R. §61.4(d)(3)(ii).

[21] 54 U.S.C. §302302(b).

[22] 54 U.S.C. §302302(d)(2).

[23] 54 U.S.C. §302302(d)(1).

[24] 36 C.F.R. §61.3(a)(3).

[25] 54 U.S.C. §302702. In order to be approved to assume such responsibilities, Tribes must submit a request to the Secretary and provide a program plan demonstrating how SHPO duties will be conducted. Once a program plan is completed and approved, an agreement between the Tribe and the Secretary of the Interior is executed and the THPO is approved.

[26] Under NHPA, THPOs are designated and appointed by the relevant Indian tribe's chief governing authority or as provided by a tribal ordinance (54 U.S.C. §302702(2)).

deficiencies and become compliant, or make "acceptable progress towards becoming" compliant, before the Secretary assumed all or part of the functions of the SHPO. In addition to the suspension of contracts and cooperative agreements, the new provision would provide for the suspension of any formula or competitive grants awarded through the Historic Preservation Fund (HPF) to the relevant State or SHPO, if disapproval were to occur. Subsection (b)(1) also would establish new requirements for state programs to be considered consistent with the law. Specifically, it would require SHPOs to "regularly comply with timelines for consultation, complete consultation expeditiously, … [and] meet required metrics" outlined in the NHPA (see "54 U.S.C. §306108(c)(5) – Timelines for Consultation" for more information on proposed NHPA consultation timelines). The bill does not define or provide additional guidance as to how these standards would be applied in evaluating state programs. Finally, the bill would require the Secretary to conduct fiscal audits of state programs "not less frequently than every 4 years."

### Subsection (b)(2) – Tribal Programs

Subsection (b)(2) would add a new subsection to 54 U.S.C. Subtitle III, Chapter 3027. The new subsection, 54 U.S.C. §302707, would apply comparable evaluation and financial audit requirements to tribal programs as those that are proposed in Subsection (b)(1) for state programs.[27] In addition, Subsection (b)(2) specifies that audits conducted under Section 5 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. §5305) would meet the fiscal audit requirements established in this subsection.[28]

## Subsection (c) – Effect of Undertaking on Historic Property

The NHPA created a process for federal agencies to follow when projects may affect certain historic resources. Among its provisions, the NHPA requires federal agencies to "take into account" the effects their actions may have on historic properties. This requirement is contained in Section 106 of the NHPA and thus, such reviews are generally known as *Section 106 reviews.* Specifically, Section 106 states:

> 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, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the [ACHP] a reasonable opportunity to comment with regard to the undertaking.[29]

The NHPA authorized the ACHP to oversee federal agencies' implementation of Section 106.[30] From this authority, the ACHP promulgated regulations for federal agency compliance with

[27] Although the review and audit provisions seem nearly identical between the state and tribal program provisions, some slight differences exist. For example, Subsection (b)(2) specifies that, not less than every four years, the Secretary shall conduct "periodic" fiscal audits of tribal programs. The term "periodic" is not included in Subsection (b)(1) in relation to state programs. It is not clear whether the inclusion of "periodic" in this provision would have a substantive effect on the regularity of audits between state and tribal programs.

[28] For more discussion of the Indian Self-Determination and Education Assistance Act, or ISDEAA, see CRS Report R48256, *Tribal Self-Determination Authorities: Overview and Issues for Congress*, coordinated by Mariel J. Murray.

[29] 54 U.S.C. §306108.

[30] 54 U.S.C. §304108(a). ("The Council may promulgate regulations as it considers necessary to govern the implementation of section 306108 of this title in its entirety.")

Section 106.[31] Section 106 regulations generally require agencies to follow a multi-step process: (1) initiation, in which the agency determines whether the action is an undertaking subject to review; (2) identification of historic properties in the APE; (3) assessment of whether the action would cause adverse effects to historic properties; and (4) resolution between parties on steps to address any adverse effects.[32] Throughout these steps, federal agencies must engage in *consultation* with various entities—such as the relevant SHPO or THPO—in making determinations such as whether historic properties have been identified and to craft potential solutions to avoid, minimize, or mitigate adverse effects on historic properties.[33] Generally considered to be the backbone of the Section 106 process, *consultation* is an interactive process that may occur at various points during a Section 106 review and requires an agency (or authorized applicant) to consider input from identified consulting entities.[34]

Subsection (c) of BAAJA would make significant changes to Section 106 of NHPA, codified at 54 U.S.C. §306108. Specifically, the bill would establish additional statutory directives to federal agencies for how and when consideration of historic properties should occur. This would include narrowing the types of projects, programs, or activities subject to review; defining the types of effects to historic properties that may be considered "adverse"; creating deadlines for completion of Section 106 reviews; limiting the instances of judicial review; and directing when and how consultation with SHPOs, THPOs, and other applicable entities would be required during the review process.

Due to the significant statutory additions to 54 U.S.C. §306108 proposed by Subsection (c), for the purposes of this section, analysis of BAAJA provisions is organized in accordance with how the proposed sections of codified law would appear, if enacted.

## "54 U.S.C. § 306108(a) – Definitions"

BAAJA would provide statutory definitions for certain terms and concepts for the purposes of reviews conducted pursuant to Section 106. In some instances, definitions may already exist in other provisions of the NHPA but the terms would be defined differently within the context of Section 106 (e.g., "undertaking"). These definitions would apply to Section 106 but, unless otherwise stated, the existing definitions in Chapter 3003 of Title 54 would govern the other portions of the NHPA codified in Title 54. In other instances, the proposed amendments would make changes and codify in statute terms or phrases currently defined in regulation (e.g., "area of potential effects"). Other terms or phrases (e.g., "made public") would be newly defined should BAAJA be enacted.

[31] Regulations implementing Section 106 can be found at 36 C.F.R. Part 800. For a full overview of the Section 106 process, see CRS Report R47543, *Historic Properties and Federal Responsibilities: An Introduction to Section 106 Reviews*, by Mark K. DeSantis.

[32] Section 106 implementing regulations outlining this process can be found at 36 C.F.R. Part 800. For further discussion of this process, see CRS Report R47543, *Historic Properties and Federal Responsibilities: An Introduction to Section 106 Reviews*, by Mark K. DeSantis.

[33] 36 C.F.R. §800.1(a).

[34] For example, see Advisory Council on Historic Preservation (ACHP), *Guidance on Assistance to Consulting Parties in the Section 106 Review Process*, November 28, 2018 ("Consultation is the heart of the Section 106 process."). Section 106 regulations define *consultation* as the "process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process" (36 C.F.R. §800.16(f)).

### *"54 U.S.C. §306108(a)(1) – Adverse Effect of the Undertaking"*

ACHP regulations provide criteria to agencies in determining what constitutes an "adverse effect" for the purposes of Section 106. Specifically, 36 C.F.R. §800.5 states that an adverse effect is when "an undertaking may alter, *directly* or *indirectly* [emphasis added], any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." Examples of adverse effects include, among others, "[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property's significant historic features."[35]

BAAJA would define *adverse effect of the undertaking* to mean "a consequence of an undertaking that—(i) is reasonably foreseeable; and (ii) *directly* [emphasis added] alters the characteristics of a historic property in a manner that would diminish the integrity of the location, design, setting, materials, workmanship, or association of the historic property." The bill goes on to specifically exclude certain effects from what would constitute an "adverse effect of the undertaking":

> (i) any visual, atmospheric, or audible element, unless the visual, atmospheric, or audible element would have a direct impact on a historic property that would significantly diminish the eligible characteristics of the historic property;
>
> (ii) any temporary alteration to a historic property that is limited to the time it takes to complete an undertaking; or
>
> (iii) any effect on a portion of the historic property other than an adverse effect to the character-defining features, such as contributing elements, cultural-use locations, or access points, that significantly contribute to the qualification of the property for inclusion on the National Register.

Among the various changes proposed, BAAJA would remove reference to *indirect* effects from the definition. To what degree the removal of indirect effects would limit Section 106 review is unclear. The U.S. Court of Appeals for the D.C. Circuit (D.C. Circuit) has held that nonphysical (e.g., visual or auditory) changes in the area surrounding a historic property can be considered "direct" effects.[36] The D.C. Circuit interpreted the term "direct" in Section 110(f) of the NHPA to mean "free from extraneous influence" or "immediate" and "without any intervening influence."[37] Accordingly, visual changes to the surroundings of a historic property that had no impact of the physical structure of the property could be a "direct" effect so long as there was no intervening or extraneous influence on the way the changes affected the property.[38] The proposed definition would appear to include these kinds of nonphysical changes so long as they are "direct" and "significantly diminish" certain aspects of the property.

Current ACHP regulations specify that adverse effects "may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or

[35] 36 C.F.R. §800.5.

[36] See Nat'l Parks Conserv. Assoc. v. Semonite, 916 F.3d 1075, 1088-89 (D.C. Cir. 2019) (holding "direct" refers to the causation of adverse effects, not to its physical impact on a historic structure).

[37] Nat'l Parks Conserv. Assoc., 916 F.3d at 1088-89. When considering measures to avoid, minimize, or mitigate potential adverse effects, Section 110(f) of the NHPA establishes a higher standard of protection for national historic landmarks (NHLs) than for other historic properties. Whereas Section 106 of the NHPA only requires agencies to "take into account" an undertaking's effect on a historic property, Section 110(f) of the NHPA requires agencies, "to the maximum extent possible, [to] undertake such planning and actions as may be necessary to minimize harm" to an NHL. Such planning and actions must occur "prior to the approval of any Federal undertaking that may *directly* and adversely" affect any NHL (54 U.S.C. §306107).

[38] See Nat'l Parks Conserv. Assoc., 916 F.3d at 1088-89.

be cumulative."[39] (For more information on what constitutes a "reasonably foreseeable effect," see "54 U.S.C. §306108(a)(4) – Reasonably Foreseeable".) ACHP has previously considered these types of effects to be "indirect" in nature for the purposes of Section 106 review.[40] Given the removal of "indirect" from the definition in BAAJA, some reasonably foreseeable effects may be excluded from the scope of "adverse effect" to the extent they are considered "indirect." The bill would also remove "feeling" from the aspects of property integrity the agencies must consider.[41]

Consideration of "temporary alteration[s]" that are "limited to the time it takes to complete an undertaking" would also be excluded under the bill. Agencies have, in certain instances, interpreted adverse effects to include both temporary and permanent effects, with temporary effects often associated with construction-related projects (e.g., noise and vibration from machinery, temporary staging).[42] Such impacts are often considered within programmatic agreements or as part of a construction protection plan developed for an undertaking. In a 2024 federal district court case from Arizona, the court concluded that "[t]here is simply no exception in the NHPA for 'temporary' effects," when determining, in part, whether the Bureau of Land Management (BLM) was required to consider temporary visual and noise impacts as part of its Section 106 review for the Sandy Valley Exploration Project.[43]

### *"54 U.S.C. §306108(a)(2) – Area of Potential Effects"*

ACHP regulations define *area of potential effects* (or APE) to mean

> [the] geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.[44]

The APE is not synonymous with the geographic footprint of the project in question. Instead, the APE is intended to reflect the area where a project could affect historic properties, both "directly and indirectly."[45] As a result, an APE may include areas that are not contiguous with the project area and agencies may define different APEs for different kinds of effects.

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[39] 36 CFR §800.5(a)(1).

[40] ACHP, "Court Rules on Definitions; Informs Agencies on Determining Effects," June 10, 2019, https://www.achp.gov/news/court-rules-definitions-informs-agencies-determining-effects. ("'Indirect' effects to historic properties are those caused by the undertaking that are later in time or farther removed in distance but are still reasonably foreseeable").

[41] NPS criteria for evaluating properties for the National Register specify that integrity of "feeling" is one of the considerations made in assessing historic properties (36 C.F.R. §60.4). NPS issued guidance clarifying that "feeling" in this context is "a property's expression of the aesthetic or historic sense of a particular period of time" (NPS, *National Register Bulletin: How to Apply the National Register Criteria for Evaluation*, (revised 1995), p. 45, https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf.

[42] For example, see Letter from Jeffrey P. Reinbold, Superintendent, National Mall and Memorial Parks to David Maloney, State Historic Preservation Officer, District of Columbia Office of Planning, "Rehabilitate Tidal Basin and West Potomac Park Seawalls: Section 106 Consultation and Determination of Effect" December 9, 2022, https://parkplanning.nps.gov/showFile.cfm?sfid=622680&projectID=107662 ("During construction, full visitor access to the Tidal Basin and West Potomac Park would be restricted, resulting in temporary adverse effects.").

[43] Hualapai Indian Tribe v. Haaland, 755 F. Supp. 3d 1165, 1189 (D. Ariz. 2024). But see Cobble Hill Ass'n v. Adams, 470 F. Supp. 1077, 1090-91 (E.D.N.Y. 1979) ("NHPA was not enacted to review temporary effects resulting from maintenance efforts and repair programs").

[44] 36 C.F.R. §800.16(d).

[45] 36 C.F.R. §800.16(d).

BAAJA would define APE to mean "the area within which an undertaking may cause" an adverse effect, as adverse effect defined in the proposed legislation (see "54 U.S.C. §306108(a)(1) – Adverse Effect of the Undertaking"). The definition would exclude "any geographic area affected solely by a portion of a project, activity, or program that is not subject to Federal control or responsibility."

The proposed definition appears to limit the APE to a singular "area" and does not reflect the regulatory definition's reference to "areas."[46] In addition, BAAJA's exclusion of areas affected "solely" by project portions that are not "subject to Federal control or responsibility" may have implications for how APE determinations are made, if enacted. For example, with certain large-scale linear projects such as transmission lines or pipelines, only a portion of the proposed project may require federal approval (e.g., linear rights-of-way for crossings on federal land) or require a federal permit (e.g., U.S. Army Corps of Engineers (USACE) permits issued pursuant to the Clean Water Act). Whether federal agencies are required to consider the entirety of such projects when determining an APE or just the portions of the project for which the agency exercises direct jurisdiction has been subject to litigation and controversy under existing regulations.[47] The proposed BAAJA language may clarify the degree to which agencies must consider such projects; however, the bill does not further define what constitutes "subject to Federal control or responsibility." This term has been applied and interpreted in the context of NEPA for the purposes of determining whether NEPA applies to actions by nonfederal actors which are potentially subject to federal control and responsibility.[48] In the NEPA context, the phrase was applied where a nonfederal activity, such as a construction project, required some kind of federal approval that gave the federal agency actual control over the nonfederal activity.[49] The Supreme Court has made clear that NEPA does not require an agency to analyze effects caused by future or geographically distinct projects even if the future or geographically distinct projects could not have occurred without the completion of the proposed action.[50] It is unclear whether NEPA case law would be relevant for interpreting similar terms and concepts in BAAJA's NHPA provisions, were they to be enacted.

[46] Whether or to what degree this would impact how agencies would define APEs should BAAJA be enacted is not clear. For example, multiple areas of potential effects (APEs) may occur when an undertaking's footprint is not contiguous or in instances where multiple potential project sites have been identified. In addition, agencies sometimes distinguish between "physical" versus "non-physical" APEs (see Letter from Sara C. Bronin, Chair, ACHP to Tracy Stone-Manning, Director, BLM, October 17, 2024, https://www.achp.gov/sites/default/files/2024-10/LavaRidgeBLMLetter.pdf). Moreover, 1 U.S.C. §1 states, "unless context indicates otherwise, words importing the singular include and apply to several persons, parties, or things." It is not clear whether context of the bill indicates that "area" in the definition is intended to limit the APE to a single area.

[47] See Harrison v. United States Dep't of Army, No. 3:08CV–105–H, 2009 WL 3347109, at *1 (W.D. Ky. Oct. 14, 2009); Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs, 205 F.Supp.3d 4, 30-31 (D.D.C. 2016).

[48] 40 C.F.R. §1508.18 (repealed). Prior to their repeal, NEPA regulations specified that "major federal actions" (i.e., those actions to which NEPA applies) included activities regulated or approved by federal agencies like federal approvals of construction projects. Courts have held that the "federal responsibility or control" phrase referred to activities over which the federal government exercised "actual power or control." Sierra Club v. Hodel, 848 F.2d 1068, 1089 (10th Cir. 1988) ("The touchstone of major federal action, in the context of the case before us, is an agency's authority to influence significant nonfederal activity.")

[49] See *Hodel*, 848 at 1090; Sierra Club v. Babbit, 65 F.3d 1502, 1513 (9th Cir. 1995) (finding no federal control where the agency lacked the authority to "meaningfully influence" a nonfederal activity); Sugarloaf Citizens Ass'n v. FERC, 959 F.2d 508, 512 (4th Cir. 1992).

[50] Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 605 U.S. 168, 186-87 (2025).

### *"54 U.S.C. §306108(a)(3) – Made Public"*

Neither the NHPA nor the ACHP regulations provide a definition for the term "made public." However, ACHP regulations do require public involvement in agency decisionmaking. Specifically, agencies are required to "seek and consider views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, confidentiality concerns of private individuals and businesses, and the relationship of the Federal involvement to the undertaking."[51]

BAAJA would define *made public* to mean, "with respect to a final agency action, … that the final agency action is published in a single location on the primary website of the applicable Federal agency with—(A) hyperlinks to the final agency action prominently displayed on the website; and (B) the date of initial publication of the final agency action displayed and maintained on the website." For the purposes of Section 106 review, as proposed under BAAJA, there is no explicit requirement for agency actions to be "made public" as defined here. The only instance "made public" is used in Title III of BAAJA is in the judicial review provision. Making an agency action public as that term is defined here would trigger certain timelines for the filing of claims challenging such actions in federal court under the NHPA (see "54 U.S.C. §306108(c)(9) – Judicial Review" for more information). Because the timeline for judicial review is not triggered until an action is made public, failing to make an action public would delay the start of the time in which a plaintiff could file suit. When to start the clock for legal claims, accordingly, is up to the agency.

### *"54 U.S.C. §306108(a)(4) – Reasonably Foreseeable"*

As noted above, ACHP regulations specify that adverse effects "may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative."[52] Federally authorized or assisted transit/transportation projects are often cited as examples of undertakings that can result in such effects, typically in the form of anticipated development that may subsequently follow the construction of new access roads or other types of infrastructure.[53]

BAAJA uses the term "reasonably foreseeable" in defining what constitutes an "adverse effect" of an undertaking ("a consequence of an undertaking that—(i) is 'reasonably foreseeable'"). The bill would define *reasonably foreseeable* to mean "an effect of the undertaking that shares a reasonably close causal relationship to, and is proximately caused by, the undertaking being considered." The definition would exclude any adverse effect that is "speculative or attenuated from the undertaking" or "relating to an unrelated prior, separate existing, or potential future undertaking."

How agencies would determine what constitutes a "reasonably close causal relationship" or "speculative or attenuated" effects is unclear. Such terminology has been considered in the context of NEPA and various courts have weighed in on what types of effects may be considered in reviews conducted pursuant to that law. The Supreme Court has held on several occasions that NEPA provides federal agencies with discretion to draw a "manageable line" regarding whether to analyze environmental effects from other projects separate in time or place from the project at

[51] 36 C.F.R. §800.2(d)(1).

[52] 36 C.F.R. §800.5(a)(1).

[53] See Letter from National Trust for Historic Preservation to the Advisory Council on Historic Preservation, "Potential Updates to Section 106 Regulations, 36 C.F.R. Part 800," February 27, 2026.

hand.[54] The Court has also held that NEPA's focus is the "proposed action"—not future or geographically distinct projects.[55] "[W]hen the effects of an agency action arise from a separate project—for example, a possible future project or one that is geographically distinct from the project at hand—NEPA does not require the agency to evaluate the effects of that separate project."[56] Whether such case law would apply similarly in the context of interpreting Section 106 as amended by BAAJA is unclear. In addition, references to "cumulative" effects would be removed from the definition under BAAJA.

### *"54 U.S.C. §306108(a)(5) – State Historic Preservation Officer"*

BAAJA would define the term "State Historic Preservation Officer" in manner that generally reflects the current definition for the term in regulations promulgated by the ACHP at 36 C.F.R. §800.16(v).

### *"54 U.S.C. §306108(a)(6) – Tribal Historic Preservation Officer"*

BAAJA would define the term "Tribal Historic Preservation Officer" in manner that generally reflects the current definition for the term in regulations promulgated by the ACHP at 36 C.F.R. §800.16(w).

### *"54 U.S.C. §306108(a)(7) – Undertaking"*

The NHPA defines the term "undertaking" at 54 U.S.C. §300320 to mean:

> a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including—(1) those carried out by or on behalf of the Federal agency; (2) those carried out with Federal financial assistance; (3) those requiring a Federal permit, license, or approval; and (4) those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.

Various court decisions have narrowed the application of the term "undertaking" for the purposes of review under Section 106.[57] As a result, the ACHP has promulgated a regulatory definition for the term "undertaking"[58] that largely aligns with the definition at 54 U.S.C. §300320; however, the regulatory definition omits the fourth category of undertakings outlined in that provision—specifically, "those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency."[59] That provision was held not to apply to the term "undertaking" in Section 106 because "undertaking" in Section 106 only applied to those undertakings that were

[54] *Public Citizen*, 541 U.S. at 767; Seven Cnty. Infrastructure Coal. v. Eagle Cnty., 605 U.S. 168, 182 (2025).

[55] *Seven Cnty.*, 605 U.S. at 186-87 (holding Surface Transportation Board was not required to evaluate the potential for increased upstream drilling or the potential increase of downstream oil refining when reviewing an 88-mile rail spur to connect oil producing regions to the national rail system).

[56] *Seven Cnty.*, 605 U.S. at 186-87.

[57] Specifically, language in Section 106 specifying that review requirements only apply to federal agencies with "direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking," or "authority to license any undertaking" has been interpreted to narrow the application of the term "undertaking" found in 54 U.S.C. §300320 for Section 106 purposes. For example, see Sheridan Kalorama Historical Ass'n v. Christopher, 49 F.3d 750, 755 (D.C. Cir. 1995) and *National Mining Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003). In the latter case, the D.C. Circuit considered whether state-issued permits issued pursuant to federally delegated programs were undertakings subject to Section 106 review.

[58] 36 CFR 800.16(y).

[59] ACHP, "Protection of Historic Properties," 69 *Federal Register* 40544, July 26, 2004.

"Federal or federally assisted" or over which a federal agency has the "authority to license."[60] Courts have held federal permitting programs delegated to state administration (e.g., certain mining, clean water, and clean air permits) do not qualify as "federally assisted" or subject to a federal license and therefore fall outside of the term "undertaking" as it used in Section 106.[61]

BAAJA would add a new statutory definition for "undertaking" for the purposes of Section 106 review. The bill would define "undertaking" to mean "a project, activity, or program that—(i) requires a Federal permit, license, or approval; and (ii) is subject to substantial Federal control and responsibility." As discussed above, BAAJA would similarly limit the APE for an undertaking to exclude geographic areas affected solely by portions of a project, activity, or program not "subject to Federal control or responsibility." This provision uses similar language but places an additional qualifier of "substantial" control and responsibility. To what extent "substantial" would limit the undertakings covered by Section 106 is not specified in BAAJA. Some projects with limited federal involvement that would otherwise be within "Federal control or responsibility" may be excluded, but the exact contours of the term as modified by "substantial" would be left to administrative and judicial interpretation.

BAAJA also excludes nine different categories of actions from the definition of "undertaking" for the purposes of Section 106 review. These exclusions are listed below with a subsequent discussion of potential implications and changes from existing statutory or regulatory standards for select exclusions.

> (i) any portion of a project, activity, or program over which a Federal agency does not exercise substantial control or responsibility over the outcome;
>
> (ii) a project, activity, or program for which the only Federal involvement is a loan, loan guarantee, grant (including a capitalization grant), cost-share award, or other form of financial assistance that is not for the primary purpose of historic preservation;
>
> (iii) a project, activity, or program that consists of minor restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, structure hardening, provision of handicapped access, or other similar minor projects that do not diminish the integrity of a historic property;
>
> (iv) a project, activity, or program that is a survey or work completed to conduct consultations;
>
> (v) a project, activity, or program that—
>
> (I) is any alteration to a historic property that is necessary for public safety; and
>
> (II) does not diminish the integrity of the historic property;
>
> (vi) an activity or decision that is non-discretionary and made in accordance with the statutory authority of the Federal agency;
>
> (vii) any—
>
> (I) renewal of a special use permit on the expiration of the special use permit if no substantive changes are made from the original special use permit; or

[60] Sheridan Kalorama Hist. Ass'n v. Christopher, 49 F.3d 750, 755 (D.C. Cir. 1995); Nat'l Mining Assoc. v. Fowler, 324 F.3d 752, 758-59 (D.C. Cir. 2003).

[61] *Fowler*, 324 F.3d at 758-59; Menominee Indian Tribe v. EPA, 360 F. Supp. 3d 847, 855-56 (E.D. Wis. 2018); Consol. Coal Co. v. NPS, No. 2:00-cv-2120 2006 WL 8456726, at *2 (W.D. Pa. Feb. 17, 2006).

(II) transfer of ownership of a special use permit;

(viii) the implementation of, or any act or omission under, a memorandum of agreement, programmatic agreement, or other instrument executed in connection with compliance with this section, after the date on which a determination has been made under subsection (c); or

(ix) the continuation, operation, maintenance, or post-approval implementation of a project, activity, or program after the determination has been made under subsection (c), except that a subsequent discrete decision of a Federal agency to amend or materially modify a determination made under subsection (c) is itself an undertaking, to the extent provided in this section.

How some of these exclusions would be interpreted and applied to potential federal projects, activities, or programs may depend on case-specific factors or be open to subsequent interpretation. For example, the first exclusion applies the "substantial control or responsibility" threshold to the federal government's role in determining "the outcome" of any portion of a project, activity or program, but does not further elaborate on how that test would be applied. BAAJA does not specify whether "the outcome" refers to instances where the federal government influences the conception, design, or implementation of a final project, or whether it applies to projects wherein federal approval is necessary in order for projects to move forward.[62]

The second exclusion appears to remove a category of actions currently covered by the NHPA and its implementing regulations—namely, projects, activities, or programs "carried out with Federal financial assistance."[63] BAAJA would remove this category of projects from review, unless the purpose of such assistance is for the primary purpose of historic preservation. This provision would appear to impact whether or how certain projects using federal funds would be evaluated. Such examples of excluded projects could include transportation projects funded through federal highway funds, Department of Housing and Urban Development Community Development Block Grant projects, and certain projects funded through the Federal Emergency Management Agency's Public Assistance program.[64]

With regard to the third exclusion, implementing regulations for Section 106 also specify that "adverse effects" include "[a]lteration of a property, including restoration, rehabilitation, repair, maintenance, stabilization, hazardous material remediation, and provision of handicapped access,

[62] For example, consider a large-scale, linear pipeline for which the only federal nexus may be a permit issued by the U.S. Army Corps of Engineers (USACE) covering a portion of the project that crosses waters under the Corps' jurisdiction. In such a scenario, the Corps may have little to no role in project's final design or implementation, but authorization from the USACE is necessary for the project to move forward and be completed. It is unclear whether USACE exerts "substantial control or responsibility" over "the outcome" in such a scenario. This question, as well as USACE's regulatory program and its compliance with Section 106 more broadly, has been the subject of disagreements between the agency, the ACHP, Tribes, and other stakeholders. In particular, concerns have been raised regarding how USACE determines the APE (or "permit area," as it is referred to in the agency's alternate compliance procedures found in Appendix C of the agency's Clean Water Act permitting regulations). USACE defines "permit area" to include "those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures." Stakeholders have argued that this definition is overly limited and not in line with ACHP regulations. See e.g., ACHP, "Improving Tribal Consultation in Infrastructure Projects," p. 13, https://www.achp.gov/sites/default/files/2019-08/ImprovingTribalConsultationinInfrastructureProjects5-24-17-2.pdf. On February 9, 2024, USACE published a proposed rule to remove Appendix C and remove references to Appendix C in its regulations for the regulatory program (89 *Federal Register* 9079). As of September 2026, USACE had taken no further action with regard to the proposed rule, and USACE's regulatory program continued to follow Appendix C procedures for compliance with Section 106 requirements. For a more in-depth discussion of Appendix C, see CRS Report R48093, *Federal-Tribal Consultation: Background and Issues for Congress*, coordinated by Mariel J. Murray.

[63] 54 U.S.C. §300320 and 36 C.F.R. §800.16(y).

[64] Such projects would only be excluded if no other federal approval or involvement was required to move forward.

that is not consistent with the Secretary's standards for the treatment of historic properties [36 C.F.R. Part 68] and applicable guidelines."[65] In practice, agencies often consider routine maintenance and other habitual/regular activities through Programmatic Agreements and other Program Alternatives, which allow for streamlined compliance procedures (for more information, see "54 U.S.C. §306108(c)(7) – Programmatic Agreements"). BAAJA would exclude such activities and "similar minor projects" from review under Section 106 but does not define what constitutes "minor" in this context. To be considered exempt, the provision would require that such activities not "diminish the integrity" of a property but would not require that such activities be conducted consistent with the Secretary's standards for the treatment of historic properties.[66] BAAJA does not specify how or through what process agencies would determine whether or not an activity would "diminish the integrity" of a property.

### "54 U.S.C. § 306108(b) Adverse Effect of the Undertaking"

Section 106 currently requires federal agencies "having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking" to take into account the effect of that undertaking on any historic property.[67] BAAJA would amend this provision to remove "indirect" jurisdiction in addition to providing a definition of *adverse effect of the undertaking*. For additional discussion on the potential implications of this amendment, see the proposed definition of "adverse effect of the undertaking" at "54 U.S.C. §306108(a)(1) – Adverse Effect of the Undertaking" as well as the discussion pertaining to BAAJA's usage of the phrase "subject to Federal control or responsibility" in the context of "54 U.S.C. §306108(a)(2) – Area of Potential Effects".

### "54 U.S.C. § 306108(c) Consultation"

As discussed previously in this report, throughout the Section 106 process, federal agencies are required to engage in consultation with various entities—including SHPOs and THPOs—to consider input in agency decisionmaking and determinations. ACHP regulations define *consultation* to be the "process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process."[68] The regulations do not prescribe exactly how the consultation process must proceed, nor do they set an expected timeline for resolution of consultative interactions. As a result, the specific consultation process may differ from project to project. For an overview of Section 106 and current consultation requirements, see CRS Report R47543, *Historic Properties and Federal Responsibilities: An Introduction to Section 106 Reviews*, by Mark K. DeSantis.

BAAJA proposes significant changes to how and when consultation may occur during Section 106 reviews. Among its provisions, the proposed bill would limit when federal agencies are required to consult with SHPOs, THPOs, and other entities; establish timelines and deadlines for resolving consultation; and limit instances where judicial review is available.

[65] 36 C.F.R. §800.5(a)(2)(ii).

[66] NPS regulations establish the standards for the treatment of historic properties which are used by NPS and SHPOs and their staff "in planning, undertaking and supervising grant-assisted projects for preservation, rehabilitation, restoration and reconstruction" (36 C.F.R. §68.2).

[67] 54 U.S.C. §306108.

[68] 36 C.F.R. §800.16(f).

### *"54 U.S.C. §306108(c)(1) – In General"*

ACHP regulations generally limit an agency's consideration of historic properties to those located "within the area of potential effects."[69] Agencies, through the consultation process, may consider additional properties outside the APE but are not required to do so.

BAAJA would specify that agency responsibilities pertaining to Section 106 review are limited to properties located within the APE. As noted above in "54 U.S.C. §306108(a)(2) – Area of Potential Effects" and below in "54 U.S.C. §306108(c)(2) – Initiation and Report", BAAJA would make changes to how agencies determine and define the APE for a given undertaking.

### *"54 U.S.C. §306108(c)(2) – Initiation and Report"*

#### Initiation

Current regulations require the agency to "determine whether the proposed Federal action is an undertaking … and, if so, whether it is a type of activity that has the potential to cause effects on historic properties."[70] The regulations do not define when a particular project, activity, or program is to be considered "proposed" for the purposes of this provision, nor do they place any timelines on an agency to make a determination whether such a proposed action constitutes an "undertaking."

BAAJA would require federal agencies to make a determination of whether the proposed project, activity, or program is to be considered an undertaking "[n]ot later than 30 days after the date of receipt of a request for review of a proposed project, activity, or program." For both nonfederal projects with some federal nexus and for projects entirely federal in nature, it is unclear who or what entity is responsible for submitting a request for review, thereby triggering the 30-day determination window. BAAJA does not include a notification requirement that would start the Section 106 process. Similarly, BAAJA does not elaborate on what a "request for review" entails for the purposes of this provision or how failure to submit such a request would potentially impact an agency's obligations under Section 106, the timeline for completion, and subsequent agency responsibilities.

#### Program Alternatives

During the initiation stage, current regulations provide for agencies to determine whether a proposed undertaking is subject to a program alternative established under 36 C.F.R. §800.14. (For more information on program alternatives, see "54 U.S.C. §306108(c)(7) – Programmatic Agreements".) If an undertaking is governed by such an alternative, the regulations require the agency to follow the program alternative.[71]

BAAJA would similarly specify that determination of whether a proposed undertaking is governed by a program alternative would occur during this stage of review. However, BAAJA states that agencies "*may* follow the applicable program alternative" [emphasis added], thereby appearing to make such a determination discretionary. BAAJA does not speak to whether or how program alternatives currently in place (e.g., signed programmatic agreements between agencies

[69] 36 C.F.R. §800.4.

[70] 36 C.F.R. §800.3(a).

[71] 36 C.F.R. §800.3(a)(2). ("If the review of the undertaking is governed by a Federal agency program alternative established under §800.14 or a programmatic agreement in existence before January 11, 2001, the agency official *shall follow* the program alternative.")

and SHPOs or THPOs) would govern an agency's Section 106 compliance should BAAJA be enacted.[72]

**Consulting Parties**

At the initiation phase in which agencies determine whether or not a proposed federal action constitutes an undertaking, current regulations require agencies to then "determine the appropriate SHPO(s) or THPO(s) to be involved in the section 106 process"[73] and—in consultation with the SHPO/THPO—"identify any other parties entitled to be consulting parties."[74] For certain undertakings (e.g., those occurring on tribal lands), the regulations specify which entities are required to be invited as a consulting party.[75] In addition, regulations specify that the ACHP may enter the Section 106 process if it determines that its involvement is necessary to ensure compliance with the agency regulations and the NHPA.[76] The regulations also require agencies to consider written requests from individuals and organizations to participate as consulting parties.[77] The agencies are also required to consult with the SHPO/THPO to "plan for involving the public in the section 106 process."[78]

BAAJA does not specify when or how agencies would be required to identify potential consulting parties. The bill would require or authorize agencies to undertake certain actions with "applicable" SHPOs, THPOs, and other entities, but does not provide further detail as to the process by which such entities would be identified. Although the bill would provide for certain agency decisions to be made public (see "54 U.S.C. §306108(a)(3) – Made Public"), it would not provide for any required public involvement during the review process. Despite this, it is unclear whether enactment of BAAJA would result in or require a change to the current regulatory requirements for agencies to involve the public, as the NHPA, as amended, is similarly silent on these matters with regards to Section 106 review.

**Identification and Assessment**

Current regulations require agencies, in consultation with the SHPO/THPO, to determine and document the APE and identify any historic properties within the APE.[79] Regulations require agencies to "make a reasonable and good faith effort" to identify historic properties, but do not define how that requirement may be met.[80] If historic properties are identified, agencies are then required to consult with the SHPO/THPO to determine whether potential effects to historic properties are adverse in nature.[81]

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[72] For example, programmatic agreements between agencies and SHPOs and THPOs (and other applicable entities) generally have a specified duration for which the agreement is binding. Should BAAJA be enacted, it is unclear whether or how an agency would be required to fulfill the terms of that agreement through the specified expiration date.

[73] 36 C.F.R. §800.3(c).

[74] 36 C.F.R. §800.3(f).

[75] 36 C.F.R. §800.2(c)(2)(i).

[76] 36 C.F.R. §800.2(b).

[77] 36 C.F.R. §800.3(f)(3).

[78] 36 C.F.R. §800.3(e).

[79] 36 C.F.R. §800.4(a). Agencies must also consult with any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the APE.

[80] 36 C.F.R. §800.4(b)(1). Agencies are directed to consider factors such as "past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects."

[81] 36 C.F.R. §800.5(a). Agencies must also consult with any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the APE.

Upon determination that an action constitutes an undertaking, BAAJA would require agencies to establish the APE and identify and determine any historic properties within the APE. Prior to making such determinations, BAAJA would require agencies to "seek, discuss, as appropriate, and incorporate, as applicable, information from each applicable State Historic Preservation Officer, Tribal Historic Preservation Officer, Indian tribe, or Native Hawaiian organization, local government, and project, activity or program applicant." Such information would be required to be submitted not later than 30 days after the date on which the agency submits a request for such information. Although agencies must seek this information for the purposes of determining the APE and identifying historic properties, BAAJA would not require agencies to consult with SHPOs, THPOs, or other relevant entities. Instead, the bill would specify that agencies "may consult" at this stage in making such determinations.

BAAJA also would direct agencies to determine whether the undertaking has the potential to cause adverse effects within the APE at this stage of the process. The bill is silent on whether or to what degree SHPOs, THPOs, or other relevant entities would have a role in making a determination at this phase.

**Documentation and Reporting**

Not every federal undertaking results in an agency finding that the project, activity, or program has the potential to cause adverse effects to historic properties. Current regulations authorize federal agencies—in consultation with SHPOs/THPOs—to determine (1) there are no historic properties within the APE, or there are historic properties present but the undertaking will have no effect upon them; or (2) the effects to historic properties will not be adverse in nature.[82] If an agency makes such a determination, the agency must provide documentation to the SHPOs/THPOs explaining that finding.[83] In both instances, the SHPO/THPO then has 30 days to either concur or disagree with the findings.[84] If they concur or fail to respond in the time frame, the agency's responsibilities under Section 106 are fulfilled. If they disagree, the agency is required to either consult with the relevant party to resolve the disagreement or forward the finding and supporting documentation to the ACHP for comment.[85] In both instances, the ACHP has 30 days to review and provide comment, at which point the agency must "take into account the Council's opinion."[86] If, after doing so, the agency's initial determination is unchanged, the agency must prepare a summary justifying that decision, after which the agency's responsibilities under Section 106 are fulfilled.

BAAJA would provide that if an agency determines that there are no historic properties present or a proposed undertaking will not result in adverse effects to historic properties, the agency's responsibilities under Section 106 are complete. The bill would not require additional documentation from the agency, nor would it require the agency to notify the relevant SHPO/THPO or the ACHP of such a determination. If an agency determines that a proposed undertaking will result in adverse effects, BAAJA would require the agency to complete and submit to the applicable entities (e.g., SHPO, THPO, NHO) for review a "report" that documents various such findings. BAAJA would require the report to include information related to the APE, identified historic properties, potential adverse effects, as well as "prudent and feasible measures"

[82] 36 C.F.R. §800.4(b) and 36 C.F.R. §800.5(a).

[83] Standards for this documentation can be found at 36 C.F.R. §800.11(d) for identification of historic properties; and 36 C.F.R. §800.11(e) for findings of no adverse effects.

[84] 36 C.F.R. §800.4(d) and 36 C.F.R. §800.5(c).

[85] 36 C.F.R. §800.4(d)(1)(ii) and 36 C.F.R. §800.5(c)(2)(i).

[86] 36 C.F.R. §800.4(d)(1)(iv)(B) and 36 C.F.R. §800.5(c)(3)(ii)(A).

to "avoid, minimize, or mitigate" such adverse effects.[87] BAAJA does not define "prudent and feasible" for the purposes of this provision. BAAJA would also authorize agencies to document when an agency has determined not to require such prudent and feasible measures because "other considerations outweigh the consideration of historic preservation as to any or all adverse effects of the undertaking." The report must be submitted no later than 60 days after the date on which the agency determines whether the proposed project, activity, or program is to be considered an undertaking.

### *"54 U.S.C. §306108(c)(3) – Determination"*

If an agency—in consultation with SHPOs, THPOs, or other applicable parties—determines that a federal undertaking may cause adverse effects to a historic property, the agency then is directed to develop and evaluate measures to avoid, minimize, or mitigate any adverse effects on historic properties.[88] Similar to other stages of the Section 106 process, agencies do this in consultation with SHPOs, THPOs, and other consulting parties. Current regulations do not specify a timeline or place deadlines on the duration of this process. If the relevant parties agree on a solution, they are directed to enter into a memorandum of agreement (MOA). The MOA "govern[s] the undertaking and all of its parts," including how the agency plans to address adverse effects.[89] According to the ACHP, the "vast majority" of federal undertakings that affect a historic property result in an MOA or other agreement between the agency and the consulting parties.[90] However, in instances where the parties are unable to reach agreement, the alternative is terminating consultation. If the agency terminates consultation, "the head of the agency or an Assistant Secretary or other officer with major department-wide or agency-wide responsibilities" must submit its findings for termination to the ACHP for comment, at which point the ACHP has 45 days to respond to the decision and provide comments.[91] The head of the federal agency is then required to "take into account the Council's comments in reaching a final decision on the undertaking" but is not required to revise its initial decision based on ACHP comments.[92] The head of the agency must prepare a summary that contains the rationale for the decision and evidence of consideration of the ACHP's comments. This summary is then provided to the ACHP and all consulting parties and made available to the public.[93] Section 110(l) of the NHPA prohibits the head of the agency from delegating the responsibility to document a decision in the event an agreement between parties is not reached.[94]

As discussed above, if an agency determines that a proposed undertaking will result in adverse effects, BAAJA would require the agency to complete and submit a "report" that documents various such findings to the applicable entities (e.g., SHPO, THPO) for review. Within 90 days of submission of the report discussed above, BAAJA would require agencies, in consultation with relevant entities, to (1) make a determination that the adverse effects of the undertaking would not

[87] BAAJA would prohibit inclusion in the report of measures that "are not prudent" or would occur outside the APE, unless the relevant applicant has submitted a written request for alternate mitigation measures. Requests from SHPOs, THPOs, or other entities are not provided for in this provision.

[88] 36 C.F.R. §800.6(a).

[89] 54 U.S.C. §306114 and 36 C.F.R. §800.6(c).

[90] ACHP, "Guidance on Agreement Documents: Failure to Agree," https://www.achp.gov/failure_to_agree.

[91] 36 C.F.R. §800.7(a)(1) and 36 C.F.R. §800.7(c)(2).

[92] 36 C.F.R. §800.7(c)(4).

[93] 36 C.F.R. §800.7(c)(4).

[94] 54 U.S.C. §306114. The prohibition on delegation for the purposes of official determinations has been seen by some stakeholders as an incentive for agencies to resolve potential disagreements through consultation rather than moving to termination.

diminish the integrity of the historic property so as to make it ineligible for listing on the National Register; (2) make a determination that other considerations outweigh the historic preservation concerns raised by potential adverse effects;[95] or (3) enter into an agreement with the applicable entity or entities that describes how the adverse effects would be avoided, minimized, or mitigated. If an agreement is not reached within 90 days, agencies must engage applicable entities in a 60-day consultation period. If no agreement is reached at the end of this period, BAAJA would require the agency to request comments from the ACHP. The ACHP would have 45 days to submit comments to the relevant agency. The head of the federal agency then would have 30 days to make a final determination on the undertaking that "demonstrates how the formal advisory comments were considered." The bill also would authorize the head of the agency to delegate an agency official to make such a determination. BAAJA would not require additional documentation nor notification of the ACHP, consulting parties, or the public.

**Multiple Determinations**

At present, NHPA regulations do not explicitly limit what is known as project "segmentation."[96] Segmentation occurs when a single project or multiple closely related projects are broken up into small pieces and permitted and evaluated separately, potentially obscuring the project's or projects' full impact on historic properties. Nonetheless, the ACHP has issued comments that indicate that it believes that segmentation violates the NHPA.[97] For instance, in comments submitted to the USACE in 2020, the ACHP stated that the USACE was engaged in segmenting a single project that required multiple USACE permits by evaluating the impact on historic properties separately for each permit, not for the project as a whole.[98] The comments stated: "The ACHP acknowledges that at times, a federal agency may have limited jurisdiction over a small portion of a larger undertaking. However, in such cases, the federal agency remains responsible for considering the effects of the larger undertaking on historic properties beyond areas of its specific jurisdiction."[99]

Section 306108(c)(2) as amended by BAAJA would appear to affirmatively authorize project segmentation under certain circumstances. Where an undertaking "involves multiple corridors or large land areas," the federal agency would be able to issue multiple determinations for a single undertaking "in a phased process."

## *"54 U.S.C. §306108(c)(4) – Lead Federal Agency"*

Current ACHP regulations authorize, but do not require, the designation of a lead federal agency to oversee compliance with Section 106 in instances where more than one agency may be

[95] BAAJA would specify that such a determination is "in the sole discretion of the Federal official."

[96] Courts disagree over whether segmentation is prohibited under the NHPA. Compare Quechan Indian Tribe v. Dep't of Interior, 547 F. Supp. 2d 1033, 1047 (D. Ariz. 2008) (finding nothing in the NHPA or NHPA regulations that prohibits segmentation of a project), with Mashak v. Jewell, 149 F. Supp. 3d 11, 30-31 (D.D.C. 2016) (recognizing projects cannot be segmented under the NHPA but ultimately finding the project was not improperly segmented). The concept of project segmentation and the development of judicial limits on its use are more closely associated with legal challenges to compliance with NEPA. See, e.g., O'Reilly v. U.S. Army Corps of Eng'rs, 477 F.3d 225, 236 (5th Cir. 2007) (setting out a four-part test to determine whether a project has been improperly segmented under NEPA).

[97] Letter from Jamie Loichinger, Assistant Director, ACHP, to David B. Olson, U.S. Army Corps of Engineers (Nov. 16, 2020).

[98] Letter from Jamie Loichinger, Assistant Director, ACHP, to David B. Olson, U.S. Army Corps of Engineers (Nov. 16, 2020).

[99] Letter from Jamie Loichinger, Assistant Director, ACHP, to David B. Olson, U.S. Army Corps of Engineers (Nov. 16, 2020).

involved in an undertaking.[100] If no lead agency is designated, each agency remains individually responsible for compliance with Section 106.

BAAJA would require the designation of a lead federal agency within 15 days of an agency receiving "notice of a proposed undertaking." BAAJA does not specify how such notification would be conveyed to the agency or what constitutes "notice" for the purposes of this provision. If no lead agency were designated within 15 days, BAAJA would require the Secretary of the Interior to designate a lead agency.[101] In instances wherein a lead federal agency has been designated for the purposes of complying with NEPA, that agency would be required to serve as the lead agency for the purposes of Section 106 as well, unless the agencies involved determine collectively that another agency is better suited to carry out the NHPA duties.

### *"54 U.S.C. §306108(c)(5) – Timelines for Consultation"*

Current ACHP regulations do not establish when Section 106 consultation must begin (see "54 U.S.C. §306108(c)(2) – Initiation and Report"). Once Section 106 consultation is initiated, federal agencies are required to make certain determinations or findings at various stages of the review process and provide SHPOs and THPOs the opportunity to concur or object based on the documentation provided.[102] The regulations generally require SHPOs and THPOs to respond within 30 days of receipt of such determinations or findings.[103] If a SHPO or THPO fails to respond during this window, the agency is authorized to proceed to the next step in the process based on the finding or determination, or consult with the ACHP in lieu of the SHPO/THPO[104]. If a SHPO/THPO re-enters the Section 106 process at a later date, the agency official is not required to reconsider previous findings or determinations; however, consultation with the relevant SHPO/THPO at subsequent stages of the review process is still required.[105] Although current regulations specify certain timelines at certain points in the review process, as discussed above, neither the NHPA nor the current regulations impose timelines around consultation and the review process more broadly.

BAAJA would establish certain initiation triggers and completion deadlines for any consultation resulting from Section 106 reviews provided for under the bill.[106] Specifically, BAAJA would tie "any consultation with respect to the project, activity, or program" to the review process conducted pursuant to NEPA, if such an undertaking requires the preparation of an environmental document under that law.[107] BAAJA would require agencies to initiate Section 106 review no later than the date on which environmental review is initiated and to complete any review process

[100] 36 C.F.R. §800.2(a)(2).

[101] The NHPA defines "Secretary" to mean "the Secretary acting through the Director" 54 U.S.C. §300316. "Director" in this instance is generally understood to be the Director of the National Park Service (P.L. 102-575, title XL, §4019(a)(9), Oct. 30, 1992, 106 Stat. 4764).

[102] For example, an agency's finding of "no historic properties affected" or its finding of "no adverse effect to historic properties."

[103] 36 C.F.R. §800.4(d)(1)(iv)(A) and 36 C.F.R. §800.5(c)(3)(i).

[104] See generally 36 C.F.R. §800.3(c)(4) and 36 C.F.R. §800.5(c)(1).

[105] 36 C.F.R. §800.3(c)(4).

[106] As discussed in the section "54 U.S.C. §306108(c)(2) – Initiation and Report", BAAJA would require federal agencies to make a determination of whether the proposed project, activity, or program is to be considered an undertaking "not later than 30 days after the date of receipt of a request for review of a proposed project, activity, or program."

[107] If an undertaking is not subject to a NEPA review, these initiation and completion requirements would not apply to the NHPA process. The NHPA process, however, would still be subject to various timelines in other portions of BAAJA.

no later than the date on which an environmental document under that law is required to be completed.[108]

If the consultation process is not completed by the deadline for the completion of the relevant environmental document under NEPA, BAAJA would require that the head of the relevant SHPO or THPO devote 50% of each work week to completing the NHPA process.[109] The requirement would also apply to any federal official in the Senior Executive Service with supervisory authority over employees at a federal agency with consultation responsibilities. It is not clear from BAAJA whether missing the NEPA deadline, but ultimately completing the NHPA process through the devotion of extra staff time, would be considered inconsistent with the statute under the program audit provisions discussed above (see "Subsection (b) – Program Evaluation"). The audit provisions could be interpreted to allow completion of the NHPA process pursuant to the NHPA because completing via this section would still be complying with the statute even if a deadline were missed.

BAAJA would create a new cause of action for a project proponent to sue an agency in federal district court to enforce the completion of the NHPA process concurrently with the NEPA process. Under the bill, where a court finds that the agency failed to comply with this deadline, the court could issue an injunction—a court order directing the agency to take action—to "give effect" to the deadline provision. This provision of BAAJA also would direct a court to retain jurisdiction over the case after it issued its order to the agency to ensure that the agency complied with the order.

BAAJA also would limit an agency's obligations to consult with or consider objections from SHPOs, THPOs, or other consulting parties if they failed to respond within 30 days of receiving a "request for review of any report or finding." As discussed above, BAAJA would require an agency to "seek, discuss, as appropriate, and incorporate, as applicable" information from applicable SHPOs, THPOs, and other entities prior to determining the APE and identifying historic properties. The bill also would require an agency, in instances where it is determined there will be adverse effects associated with an undertaking, to submit a "report" to applicable SHPOs, THPOs, and other entities for review. Although BAAJA would establish a 90-day window for consultation following the submission of this report, this provision appears to authorize agencies to move forward with issuing determinations related to undertakings if the applicable SHPOs, THPOs, or other entities did not provide an initial response within a more limited 30-day window. The bill would require an agency to provide a response to the applicable entities if, within the 30-day window, they offered "substantive objections" to certain findings or information contained in the report. If such objections were not "substantive" in nature, the agency could move forward with issuing a determination. The bill does not provide additional context for how an objection may be deemed "substantive" in nature. Whether an objection is "substantive" will likely be left to agencies and the courts to define. In addition, it is unclear how

[108] BAAJA would make significant statutory changes to agency requirements pursuant to NEPA, including the preparation of environmental documents. BAAJA, S. 5653, §§1101-1110. A discussion of those changes is outside the purview of this report.

[109] BAAJA provides no additional funds to carry out this remedial measure. Requiring state officials to facilitate a federal program under the penalty of losing federal funding may raise federalism concerns rooted in several constitutional doctrines, including constitutional limits on Congress's powers under the Spending Clause and limits imposed on the federal government's powers under the 10th Amendment. *See* Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17, 25 (1981); Printz v. United States, 521 U.S. 898 (1997). For a fuller discussion of these topics, see CRS Report R46827, *Federal Funding Conditions: Constitutional Limits from the Spending Clause and Related Legal Doctrines*, by Victoria L. Killion.

this 30-day window interacts with other consultation and response timelines established elsewhere in the bill.

### *"54 U.S.C. §306108(c)(6) – Coordination with NEPA"*

Current regulations and ACHP implementing guidance encourage federal agencies to use their broad environmental review process, carried out under NEPA, as an "umbrella" compliance process.[110] However, compliance with reviews required under NEPA does not substitute for an agency's compliance with the requirements under Section 106.

BAAJA would allow agencies to use draft documents prepared as part of an environmental review conducted under NEPA to comply with the Section 106 requirements as proposed in BAAJA.[111] Specifically, BAAJA would allow agencies to submit such documents to comply with the reporting requirements outlined above. Agencies would be required to provide notice of their "intent to use the environmental document for such purposes" to the applicable SHPO, THPO, or other consulting entities.

### *"54 U.S.C. §306108(c)(7) – Programmatic Agreements"*

Current regulations authorize—but do not require—federal agencies to work with the ACHP to establish alternative methods for meeting their obligations under Section 106, known as "program alternatives."[112] Program alternatives allow federal agencies to work with the ACHP and SHPOs and THPOs to tailor the Section 106 process to meet their needs. The most commonly used program alternative is a programmatic agreement (PA). PAs allow agencies to negotiate agreements with the ACHP to govern Section 106 compliance for an individual agency program, complex project, or group of related undertakings.[113] PAs are typically developed in consultation with the relevant SHPOs, THPOs, and other entities depending on the type of activities, programs, or geographic region(s) covered by the PA.[114]

BAAJA would require federal agencies to consult with the ACHP to develop and implement PAs that covered certain specified categories of undertakings. The bill would separately authorize—but not require—SHPOs and THPOs to develop and implement PAs "within their applicable jurisdiction" to govern similar categories of undertakings. In instances where an agency and a SHPO or THPO each have a PA governing the same category of undertaking, BAAJA would require the SHPO or THPO PA to apply. Given that PAs typically operate as formal agreements negotiated *between* a federal agency and SHPOs, THPOs, and other applicable entities to govern an alternative compliance procedure for Section 106, it is unclear how this provision would be implemented. BAAJA appears to provide for PAs to be established independently by both an agency and a SHPO or THPO but does not expand on whether or how an agreement would be implemented for the purposes of meeting consultation requirements established elsewhere in the bill.

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[110] Regulations for the coordination of the Section 106 Process with NEPA can be found at 36 C.F.R. §800.8. Discussion of NEPA as an "umbrella" compliance process can be found at ACHP, "Integrating NEPA and Section 106," https://www.achp.gov/integrating_nepa_106.

[111] BAAJA specifies that any draft environmental document submitted under this provision must include the required components discussed at "54 U.S.C. §306108(c)(2) – Initiation and Report".

[112] 36 C.F.R. §800.14.

[113] 36 C.F.R. §800.14(b).

[114] For PAs covering projects or programs on tribal lands, federal regulations require the THPO, Indian tribe, or a designated representative of the tribe to be a signatory to the agreement for it to take effect (36 C.F.R. §800.14(b)(2)(iii)).

### *"54 U.S.C. §306108(c)(8) – Qualified Historic Preservation Officers"*

As discussed above (see "Subsection (b) – Program Evaluation"), the NHPA establishes certain requirements for state programs to be approved for the purposes of carrying out certain responsibilities under the law, including consultation pursuant to Section 106. Specifically, the law requires state programs to employ or appoint "such professionally qualified staff as may be necessary."[115] Implementing regulations require that state program staff include a professionally qualified architectural historian, historian, and archeologist.[116] To be "qualified" for these purposes, the regulations specify that staff must meet the Secretary of the Interior Professional Qualifications Standards, which establish minimum educational and professional experience standards for certain historic preservation disciplines.[117] In 2002, NPS proposed regulations to establish similar qualification standards for tribal programs, with certain modifications and additional flexibilities to take into account their "unique cultural settings, smaller workloads, more limited program scopes, and limited funding" as compared to state programs.[118] These regulations were not finalized.

BAAJA would require the Secretary of the Interior to collaborate with THPOs, tribal leaders, and relevant nonprofit organizations to develop "standard requirements" for THPOs. Such requirements would be required to reflect the "traditional knowledge, expertise, and access to traditional cultural leaders required for a successful tribal historic preservation program."

### *"54 U.S.C. §306108(c)(9) – Judicial Review"*

Under current law, Sections 701-706 of the Administrative Procedure Act (APA) govern legal challenges to agency compliance with the NHPA.[119] NHPA suits brought pursuant to the APA are subject to a six-year statute of limitations.[120] These suits are brought in the federal district courts (trial courts).[121] Where a court finds legal deficiencies in the agency's compliance with the NHPA, the court may vacate (i.e., nullify), remand (with or without vacatur), or preliminarily or permanently enjoin (i.e., stop) an agency action or in circumstances stop or limit the activities of a project proponent.[122] Courts have the discretion to choose one or multiple of these remedies that best address the specific case before it.[123]

To bring a claim under the APA, a plaintiff need only be "adversely affected or aggrieved" by a final agency action.[124] Separately, Article III of the Constitution limits the federal courts' jurisdiction to plaintiffs who have suffered a concrete and particularized injury that is fairly traceable to the conduct of the defendant and likely to be redressed by a favorable court decision.[125] Neither the APA nor the NHPA currently limits suits challenging compliance with the

[115] 54 U.S.C. §302301(1).

[116] 36 C.F.R. §61.4(e)(1).

[117] See Department of the Interior, "The Secretary of the Interior Professional Qualifications Standards," https://www.doi.gov/pam/asset-management/historic-preservation/PQS.

[118] 67 *Federal Register* 52532.

[119] 5 U.S.C. §§701-706; see also Karst Env't Educ. & Prot. v. EPA, 475 F.3d 1291, 1295-96 (D.C. Cir. 2007).

[120] 28 U.S.C. §2401(a).

[121] 5 U.S.C. §704.

[122] 5 U.S.C. §§705, 706.

[123] See CRS Legal Sidebar LSB11357, *"Set Aside" and Vacatur Under the Administrative Procedure Act*, by Benjamin M. Barczewski.

[124] 5 U.S.C. §704.

[125] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

NHPA to those who participated in the comment process.[126] For claims challenging compliance with the NHPA, the APA provides for original jurisdiction in the federal district courts.[127] Venue is determined by Section 1391 of Title 28 of the *U.S. Code*, but as a practical matter a case brought pursuant to the APA can be brought in the district courts of Washington, D.C., or the district or districts in which an agency action causes a legal harm.

The judicial review provisions of the NHPA portion of BAAJA would work a significant change to judicial review of NHPA claims. BAAJA would limit the remedies available after a court has determined the agency violated the NHPA to remand without vacatur only. Allowing only remand without vacatur would remove the ability of a court to vacate (i.e., nullify) an agency action or stop an agency action with an injunction. A plaintiff's only available remedy under BAAJA for violations of the NHPA would be an order from a court instructing the agency to address whatever legal deficiencies the court identified in its decision. In the meantime, the agency action and any construction premised on the agency action could continue. Even a total refusal to engage in the NHPA process likely would not be a basis for enjoining or vacating the federal undertaking. Conversely, while this section of BAAJA would limit remedies for violations of the NHPA, it would not limit them for violations of other statutes. It is possible that were a plaintiff to allege violations of the NHPA in addition to some other statute (e.g., the Endangered Species Act), a court may still be able to vacate or enjoin the undertaking if the court found that the agency violated that other statute.

Whether violations of the APA's "contrary to law" or "arbitrary and capricious" standards would qualify for the exception to the limitation on remedies remains unclear. Section 706 of the APA specifies several bases on which a reviewing court shall "hold unlawful and set aside agency action, findings, and conclusions"; many of these bases refer back to the statute that underlies the action an agency took and that specifies the procedures the agency is required to observe to take that action.[128] For example, the APA permits courts to vacate agency action that is "contrary to law,"[129] but the law in question is often some other statute. In the NHPA context, a claim that an agency failed to comply with the procedures of the NHPA could satisfy the APA's "contrary to law" standard and accordingly permit a court to vacate the agency action. The limits on judicial review in BAAJA, however, would appear to bar vacatur in this circumstance.

The APA's Section 706's direction to courts to vacate agency action that is "arbitrary and capricious" could potentially permit a court to vacate or enjoin agency action that fits this description.[130] Agencies can violate this standard by either taking unreasonable action or failing to explain their action reasonably.[131] As a practical matter, agencies often attempt to conform their actions to avoid being found to have acted in an "arbitrary and capricious" manner. In this way, the APA's standard could be seen to impose a reasonableness standard on agency action despite the fact that by its own terms the APA's arbitrary and capricious standard is a direction to courts on how to review agency action rather than a direction to agencies to act reasonably. It is possible, although unlikely, that in a case where a court finds that an agency action taken as a part of the NHPA process was arbitrary and capricious, a court might find that the APA violation falls

[126] 5 U.S.C. §§702, 704.

[127] 5 U.S.C. §§702, 704.

[128] See 5 U.S.C. §706(2).

[129] 5 U.S.C. §706(2).

[130] 5 U.S.C. §706(2)(A). More precisely, Section 706 directs courts to vacate agency action that is arbitrary or capricious.

[131] FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021).

within the scope of the exception to the limits on remedies for violations of the NHPA and could vacate or enjoin that undertaking.

BAAJA would also bar the availability of preliminary injunctions for potential violations of the NHPA, but not for potential violations of other federal laws.[132] The bill would otherwise codify the judicially created standard for issuing a preliminary injunction, which requires a plaintiff to show that it is likely to succeed on the merits of its claims, faces irreparable harm, the balance of equities favors the injunction, and the injunction is in the public interest.[133]

Under BAAJA, the duration of a preliminary injunction also would be limited to the time the court finds is reasonably necessary to take the agency to cure any legal deficiencies identified in the court's determination of the likelihood the plaintiff will succeed on its non-NHPA-related legal claims and only long enough to prevent any irreparable harm to the plaintiff. Under current law, preliminary injunctions last until the final resolution of the case on the merits unless an intervening court order stays or dissolves the injunction.[134] It is unclear how this duration requirement could be implemented given that at the preliminary injunction stage of litigation, a court has not conclusively determined that the agency in fact did violate the law. Moreover, there is no mechanism for a court to preliminarily remand the agency action to the agency. Both the ultimate legality of the agency action and the ability to remand to the agency to cure any legal deficiencies are only determined at the end of the litigation, not while the litigation is proceeding.

BAAJA would also limit who could bring suit claiming violations of the NHPA. In order to bring a claim, under the bill, plaintiffs would be required to file their suit within 150 days after the approval of the federal undertaking being made public or the notification of the relevant SHPO or THPO, whichever is later (see "54 U.S.C. §306108(a)(3) – Made Public"). Plaintiffs would have to have first submitted a comment during a public comment period to the extent there was one, and their comment would have to have been substantive, unique, and sufficiently detailed to put the federal agency on notice as to the issue for which the plaintiffs seek review, and any future legal challenge would be required to be based on the same subject matter as the comment. The consultation procedures in BAAJA, however, would not provide for public comment during the NHPA process. With no public comment required, this provision may not apply to plaintiffs challenging an agency's compliance with the NHPA process.[135]

In addition, under the bill, a plaintiff would have to have suffered or be in danger of imminently suffering a direct harm from the federal undertaking. Exactly what kind of harm would qualify as a "direct harm" is not further defined in the bill. BAAJA does not indicate whether the "direct harm" language would add a new limit to a plaintiff's ability to bring a claim under the NHPA or restates the current constitutional standing requirement.

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[132] See the discussion above regarding violations of the APA.

[133] See Winter v. NRDC, 555 U.S. 7 (2008). The bill would add "substantial" to the requirement to demonstrate a likelihood of success on the merits. The seminal Supreme Court case laying out the four-step test to secure a preliminary injunction does not use "substantial." *Winter*, 555 U.S. at 20. Nonetheless, some lower courts have adopted that term. See Kan. Judicial Watch v. Stout, 653 F.3d 1230, 1233 n.2 (10th Cir. 2011); Bloedorn v. Grube, 631 F.3d 1218 (11th Cir. 2011). It is not clear whether these courts are applying a more stringent standard than the one required by the Supreme Court in *Winter*.

[134] 33 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE: JUDICIAL REVIEW OF AGENCY ACTION §2947 (2d ed. 2023).

[135] While BAAJA would not require a public comment process, the ACHP could issue regulations directing federal agencies to engage in a public comment process. See 54 U.S.C. §304108 (authorizing the ACHP to issue regulations to govern the Section 106 process). Individual agencies could also decide to provide for a public comment period during their Section 106 reviews. In either case, the addition of a public comment period would have to comply with the statutory deadlines for review in BAAJA.

The "direct harm" limitation and the commenting requirement would not apply to SHPOs, THPOs, local governments, NHOs, or Indian Tribes so long as they provided a detailed comment during the consultation process and their subsequent legal claim was related to the comment.

BAAJA would direct all NHPA claims to the federal courts of appeals, as well as claims based on other statutes related to the same federal undertaking. The bill does not include a venue provision identifying which court or courts of appeals among the 13 federal courts of appeals would be the proper court in which to bring claims. Also, it is likely that sweeping related claims under different statutes into the federal courts of appeals would also subject those claims to the duration limits in the preliminary injunction provisions of BAAJA. If it is the case that the preliminary injunction limitations in BAAJA do apply, preliminary injunctions issued for likely violations of statutes other than the NHPA may be limited in their duration as discussed above.

BAAJA also would direct the reviewing court to give "substantial deference" to the agency in its review of whether an undertaking complies with the NHPA and would prohibit the court from substituting its judgement for that of the agency. This language largely codifies current Supreme Court precedent on the meaning of the arbitrary and capricious review standard generally, and judicial review of compliance with NEPA in particular.[136] The arbitrary and capricious standard of review applies to a court's review of an agency's exercise of any policymaking discretion delegated to it by statute.[137] In practice, this standard often applies to an agency's application of law to the facts it gathered in its administrative process. The arbitrary and capricious standard does not apply to agency interpretations of law, which after the Supreme Court's decision in *Loper Bright Enterprises v. Raimondo* must be reviewed without deference to the agency's interpretation.[138]

### *"54 U.S.C. §306108(c)(10) – Challenges to Programmatic Agreements"*

This provision would limit legal challenges to PAs to parties to those agreements. It also would strip the federal courts of jurisdiction over any legal challenge related to the implementation of a PA brought by a plaintiff not a party to the PA. It is not clear how this provision would be implemented given BAAJA's amendments to 54 U.S.C. §306108(c)(7) – Programmatic Agreements. In those amendments, both federal agencies and SHPOs and THPOs appear to gain

[136] See Seven Cnty. Infrastructure Coal. v. Eagle Ctny., 605 U.S. 168, 183 (2025) ("When assessing significant environmental effects and feasible alternatives for purposes of NEPA, an agency will invariably make a series of fact-dependent, context-specific, and policy-laden choices about the depth and breadth of its inquiry—and also about the length, content, and level of detail of the resulting [environmental impact statement] Courts should afford *substantial deference* and should not micromanage those agency choices so long as they fall within a broad zone of reasonableness." (emphasis added)); Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983) ("The scope of review under the 'arbitrary and capricious' standard is narrow and *a court is not to substitute its judgment for that of the agency*." (emphasis added)); FCC v. Prometheus Radio Project, 592 U.S. 414, 423 (2021) ("The APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. *Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency*. A court simply ensures that the agency has acted within *a zone of reasonableness* and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." (emphasis added)).

[137] *State Farm*, 463 U.S. at 43; see also Loper Bright Enters. v. Raimondo 603 U.S. 369, 395 (2024) ("When the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. The court fulfills that role by recognizing constitutional delegations, 'fix[ing] the boundaries of [the] delegated authority,' and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries.").

[138] 603 U.S. 369, 395 (2024) ("The APA, in short, incorporates the traditional understanding of the judicial function, under which courts must exercise independent judgment in determining the meaning of statutory provisions"); see also CRS Report R48320, *Loper Bright Enterprises v. Raimondo and the Future of Agency Interpretations of Law*, by Benjamin M. Barczewski.

the ability to issue PAs unilaterally, without the agreement of another party. With the possibility that a PA may have no parties to the agreement, it appears that legal challenges to those PAs would be entirely unavailable for any person.

### "54 U.S.C. §306108(d) No Post-Deadline Requirement for Reinitiation"

For the purposes of the NHPA and Section 106, a "historic property" includes properties that are both already listed on, or *eligible for listing* on, the National Register.[139] Current regulations specify that after identifying the APE for a particular undertaking, agencies are required to identify any historic properties located in the APE, in consultation with the SHPO or THPO. For properties not already listed on the National Register, this identification process often includes conducting cultural resource surveys within the APE, evaluating primary research and past studies, and consulting with SHPOs and THPOs. When disagreements occur regarding whether a potential property should be considered "historic" for the purposes of Section 106, current regulations specify that the agency "shall obtain a determination of eligibility" from the Secretary pursuant to regulations outlining National Register criteria.[140] In addition, ACHP regulations provide for certain agency requirements in the event that historic properties are discovered or unanticipated effects on historic properties are found after Section 106 review is completed.[141]

The BAAJA provision would specify that any "identification of a property for, nomination of a property to, or listing of a property on the National Register," which occurs after an agency's initiation of Section 106, would not require the agency to "delay, reopen, supplement, or otherwise modify the review or consultation process under this section." As discussed above, the proposed bill would require agencies to identify any historic properties within an APE following a determination that a proposed project, activity, or program is an undertaking. Agencies are required to "seek, discuss, as appropriate, and incorporate, as applicable" information from SHPOs, THPOs, and other entities, if such information is provided within 30 days of the request from the agency; consultation at this stage of the review would not be required.[142] Although this provision does not preclude the subsequent identification of historic properties after this window, it appears to limit the agency's responsibility to consider potential effects to such properties. In addition, subsequent discoveries or identification of historic properties would not trigger additional consultation with relevant parties.

## Subsection (d) – Conforming Amendment

As discussed above, Section 110(l) prohibits the head of the agency from delegating the responsibility to document a decision for the purposes of Section 106 review (see "54 U.S.C. §306108(c)(3) – Determination"). BAAJA would authorize such delegation to occur. This provision conforms with that new authority provided in BAAJA by striking the prohibition on delegation found in Section 110(l), codified at 54 U.S.C. §306114.

[139] 54 U.S.C. §300308. The NHPA was amended in 1976 to include properties "eligible for inclusion on" the National Register (P.L. 94-422).

[140] 36 C.F.R. §800.4(c)(2).

[141] 36 CFR §800.13. For example, in instances where the agency has not yet approved the undertaking or if construction has not commenced, the agency is required to undergo consultation with the relevant consulting parties.

[142] Specifically, the bill states that agency officials "may consult" with relevant parties for the purposes of establishing the area of potential effects or identifying historic properties.

# Section 2302 – Funding for the Historic Preservation Fund; Use and Availability; Grants for Tribal Historic Preservation Officers; Additional Funding

The HPF—administered by NPS—is the primary source of funding for federal preservation awards to states, tribes, local governments, and nonprofit organizations. Although federal funding for historic preservation was available under the 1966 NHPA and subsequent amendments in 1970 and 1973, Congress did not officially establish the HPF to carry out the activities specified in NHPA until 1976.[143]

The HPF typically funds historic preservation activities in two ways: (1) formula-based apportionment grants and (2) competitive grant programs.[144] Historically, most HPF appropriated funds have been used to provide formula-based matching grants-in-aid to SHPOs and THPOs and sub-grants to certified local governments (CLGs). Congress also has provided appropriations for additional competitive grant programs that fund specific historic preservation activities.[145]

## Subsection (a) – Funding for Historic Preservation Fund

Pursuant to the NHPA, the HPF is authorized to receive deposits of $150 million annually.[146] Deposits to the fund are generally sourced from revenue generated by outer continental shelf (OCS) oil and gas receipts.[147] In 2016, Congress reauthorized deposits of $150 million annually into the HPF for FY2017 through FY2023.[148] Since FY2023, extensions of HPF's authorization of deposits have generally occurred on an annual basis. Most recently, the HPF was reauthorized at $150 million per year through FY2026.[149]

Section 2302(a) of BAAJA would amend 54 U.S.C. §303102 by authorizing to be appropriated deposits of $200 million annually for FY2027 through FY2036 to the HPF. It appears that deposits into the HPF would no longer be mandatory appropriations, as the bill does not identify a dedicated funding source for deposits to the HPF. As a result, unless otherwise specified in subsequent laws, it appears that appropriations made to the HPF would derive from the General Fund of the U.S. Treasury starting in FY2027.

## Subsection (b) – Use and Availability

Although deposits into the HPF are mandatory, the funding is available for expenditure only to the extent appropriated by Congress.[150] Since the HPF's establishment, annual appropriations

[143] P.L. 94-422, Title II, §201(4), September 28, 1976, 90 Stat. 1320.

[144] Congress has, at times, also provided funding for certain individual projects in annual appropriations laws as community project funding/congressionally directed spending (sometimes referred to as "earmarks"). For example, in FY2023, Congress appropriated $29.12 million for 56 historic preservation projects across the country.

[145] For example, see NPS, "Competitive Grants," https://www.nps.gov/subjects/historicpreservationfund/project-grants.htm.

[146] 54 U.S.C. §303102.

[147] In addition to revenue generated by OCS oil and gas receipts, 54 U.S.C. §303102 also authorizes deposits to the HPF be derived from oil and gas royalties from leases in the naval petroleum reserves (10 U.S.C. §8733), "or both." In practice, deposits to the HPF have been derived solely from OCS oil and gas receipts.

[148] P.L. 114-289, Title VIII, §802, December 26, 2016, 130 Stat. 1494.

[149] P.L. 119-74, Div. C, Title I, §121, January 23, 2026, 140 Stat. 124.

[150] 54 U.S.C. §303103.

from the account have typically been less than the deposited amount. Until FY2022, Congress had never appropriated the full annual deposit of $150 million for the fund in a single fiscal year (not counting emergency supplemental appropriations); however, appropriations have generally increased over the past decade and in certain years have exceeded the annual deposit.[151] Recent estimates place the unobligated balance for the HPF at $3.4 billion.[152]

BAAJA would amend 54 U.S.C. §303103 by making any deposits for FY2027 and subsequent years available "without further appropriation or fiscal year limitation," starting in FY2028. It is not specified whether BAAJA would affect the availability for appropriation of the accrued unobligated balance in the HPF.[153]

## Subsection (c) – Grants for Tribal Historic Preservation Officers

Since FY1996, NPS has awarded annual formula-based grants to THPOs. Eligibility for grants under the THPO grant program is limited to federally recognized Tribes that have signed agreements with NPS designating them as having an approved THPO.[154] For reference, in 1996, the first year of the program, 12 tribes had approved THPOs. Since then, the number of approved THPOs has increased, and as of January 2026, there were 235 approved THPOs.[155] Over the last decade, grants-in-aid for THPOs have risen by 71% after adjusting for inflation;[156] however, whether this increase is adequate to keep pace with the increase in authorized THPOs has been debated.[157]

Section 2302(c) of BAAJA would amend 54 U.S.C. §302703 by directing the creation of a new competitive grant program for THPOs. Grants would be made available for the purposes of developing an "online database" to maintain records related to THPO activities including determinations, findings, agreements, and supporting documents for the purposes of Section 106 compliance. In addition, funds would be for the establishment of a "comprehensive list of

[151] Some Members and stakeholders have raised concerns about the adequacy of funding for certain HPF programs, particularly grants-in-aid to SHPOs and THPOs. Proponents of increased funding have asserted that funding levels have not kept pace with the increase in SHPO and THPO federally delegated responsibilities, including Section 106 project reviews. Others, including some Members, have objected to the proposed increases in authorized funding amounts because of broader concerns regarding the federal deficit. See, U.S. Congress, House Committee on Natural Resources, Subcommittee on Federal Lands, Legislative Hearing on H.R. 6589, 117th Cong., 2nd sess., April 28, 2022. For a more in-depth discussion of the Historic Preservation Fund (HPF) and its funding, see CRS Report R45800, *The Federal Role in Historic Preservation: An Overview*, by Mark K. DeSantis.

[152] NPS, "Historic Preservation Fund Apportionment Update," at https://www.nps.gov/articles/000/apportionment-update.htm. This estimate is based on data from FY2022.

[153] Under the current statutory framework, in instances where the authorization for deposits to the HPF has lapsed or was not reauthorized, appropriations from the HPF have continued. Annual funding is drawn from the unobligated balance that may be spent down even in the absence of authorized deposits to the HPF.

[154] THPO grant-in-aid funding has been of concern to some Members and stakeholders, particularly because of the increase in authorized THPOs for federally recognized tribes since the start of the program. See Letter from Representatives Grijalva, Kamlager-Dove, Beyer, Leger Fernández, Stansbury, and Magaziner, U.S. Congress, to Hon. Deb Haaland, Secretary of the Interior, February 7, 2024, https://democrats-naturalresources.house.gov/imo/media/doc/2024-02-07_moc_letter_to_sechaalandrequestingthposfundingincrease.pdf.

[155] Ira L. Matt, National Association of Tribal Historic Preservation Officers, Statement for the Record before the House Appropriations Committee, Fiscal Year 2027 Interior, Environment, and Related Agencies Appropriations, U.S. House of Representatives, March 8, 2026, https://docs.house.gov/meetings/AP/AP06/20260318/119061/HHRG-119-AP06-Wstate-MattI-20260318.pdf.

[156] For an overview of NPS appropriations, see CRS Report R42757, *National Park Service (NPS) Appropriations: Ten-Year Trends*, by Laura B. Comay.

[157] See National Association of Tribal Historic Preservation Officers, "THPO Funding," https://www.nathpo.org/thpo-funding/.

properties of traditional religious or cultural importance" (see "Subsection (a) – Eligibility for Inclusion on National Register" for the amended definition of this term provided in BAAJA). The provision also would direct THPOs to coordinate with federal agencies and SHPOs to establish a system in which the database would be accessible "relevant Federal officials and State Historic Preservation Officers" for the purposes of Section 106 consultation. The provision specifies that grant recipients are not required to disclose information "to the public about the location, character, or ownership" of the properties included in the database.[158] Grant recipients would be required to submit a report describing the use of funds and status of the development of the database "not later than 90 days" after the end of the fiscal year in which the funds were awarded. The provision would authorize to be appropriated $20 million annually for FY2027-FY2030 for the grant program.

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[158] Some federal agencies and Tribes have raised concerns pertaining to the sharing of information related to location, use, and importance of sacred sites during the Section 106 process and federal decisionmaking more generally. For a variety of reasons, some groups have been hesitant to share such information with the federal government or formally document such information without assurances that such information is not made publicly available. For further discussion and background on this issue, see CRS Report R48317, *Indigenous Knowledge and Data: Overview and Issues for Congress*, coordinated by Mariel J. Murray; and CRS Report R48452, *Indigenous Sacred Sites: Overview and Issues for Congress*, coordinated by Mark K. DeSantis.