

Pace Law Review

Volume 1
Issue 3 1981
Symposium on Historic Preservation Law

Article 24

April 1981

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Recommended Citation

John M. Fowler, *Federal Environmental Review Process*, 1 Pace L. Rev. 715 (1981)

DOI: <https://doi.org/10.58948/2331-3528.1719>

Available at: <https://digitalcommons.pace.edu/plr/vol1/iss3/24>

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Federal Environmental Review Process

JOHN M. FOWLER*

Prior to 1966, there were no protections for historic properties in federal law other than through federal ownership, usually by acquisition and inclusion into the National Park System. In 1966, Congress passed the National Historic Preservation Act,¹ which provided the first comprehensive federal consideration of the full range of cultural resources in the United States and introduced measures to enhance and protect these resources. The protective process, established in section 106 of the Act,² is based on direct regulation of the federal government's activities through the federal planning process, rather than on the police power.³ This distinction has important implications for the rights of private property owners whose properties are designated for National Register listing. Furthermore, this focus on federal actions limits the extent to which this federal protective process can affect private and public actions.

The National Historic Preservation Act established the current preservation review process, which consists of three elements. First, the National Register of Historic Places, based on the National Historic Landmarks list that originated in the 1935 Historic Sites Act,⁴ is the basic national inventory of cultural resources, including properties of national, state and local significance — about 15,000 listings, including about 1,500 districts. The criteria for listing on the Register have been interpreted expansively and many additional properties are eligible. This broad interpretation is one factor that makes the section 106 process, which applies to eligible properties, an effective environmental review tool. The scope of the Register is very broad, including residential and commercial districts, archeological sites, architectural masterpieces, bridges, railway lines, ships, and even diners and gas stations. In short, the Register embraces the full range of the nation's patrimony.

The second basic element of the preservation review process is the Advisory Council on Historic Preservation,⁵ an interde-

partmental cabinet level body, charged with advising the President and Congress on matters of historic preservation. The members of the Council include the heads of impact agencies, such as the Department of Transportation and the Department of Housing and Urban Development, the heads of major preservation program agencies, such as the Department of the Interior and the Smithsonian Institution, representatives of the nonfederal preservation community, and private citizens. The objective of establishing the Council as a public-private forum was to establish a public interest body whose members had experience in preservation and federal program needs and were thereby capable of balancing preservation with other needs.

The final element of the preservation review process, section 106, is the basic federal protective device for historic resources.⁶ The head of any federal agency that proposes to fund, carry out, or license an undertaking that will affect property on or eligible for the National Register must give the Advisory Council an opportunity to comment prior to approving the undertaking.⁷ Rather innocuous language, which had led many environmental lawyers to dismiss the Preservation Act as much less effective than the National Environmental Protection Act,⁸ has been turned into a fairly effective conflict resolution process when used to work out preservation problems both at the staff level in Washington and in the field.

The section 106 process is essentially an administrative process. The full Council membership generally meets quarterly.⁹ More than 2,000 cases come to the Council for comment each year. As a result, the focus is on staff review and resolution, and on working with the agency through the process set forth in the regulations.¹⁰ The regulations encourage public input and provide for consultation among the project agency, the State Historic Preservation Officer, and the Council staff. Usually, conflict between a federal project and an historic resource is resolved through a mutually agreed upon modification of the project. However, the resolution does not always result in the property's being saved. Sometimes the result is demolition, as the consulting parties agree that the project needs outweigh the preservation concerns. It is a process of weighing the public interest to find a solution that best accommodates preservation with project objectives wherever possible. The result of using this administra-

tive process is that only two or three of the 2,000 cases each year ever reach the full Council.

To trigger section 106, an undertaking must have federal involvement and affect property that is on or eligible for the Register. Each of these elements is crucial.

Identifying affected properties is a threshold consideration. Consulting the published list is required. However, the National Register is not close to being complete. Most of the historic resources that would meet the National Register criteria have not yet been evaluated. Agencies have a responsibility to identify properties that may be eligible for the Register.¹¹ Eligibility is ultimately determined by the Secretary of the Interior.¹² The task of gathering the data on potentially significant historic sites, in order to implement section 106, is a federal responsibility. Although the federal agency frequently tries to pass the responsibility to the State Historic Preservation Officer, the grant applicant, or someone else who is benefiting from the assistance, the ultimate legal responsibility is on the federal agency and cannot be delegated. One of the weak points of the administrative process is that there is no specific mandate in the law that agencies must identify potentially affected properties.

The second threshold element of section 106 application is a determination of which agencies are subject to its provisions. There must be a federal agency involvement. There is no responsibility on parties outside the federal government unless they are acting with federal approval or using federal money.¹³

The federal involvement may be direct, such as a dam built by the corps of engineers or an Interstate highway segment, or remote, such as a federal loan guarantee or an EPA permit. The crucial element is the federal involvement in supporting or approving the project.

One twist on this general rule involves block grants under the Housing and Community Development Act of 1974. Community development block grant recipients have been authorized to stand as federal agencies for environmental review requirements.¹⁴ The City, instead of the Department of Housing and Urban Development, has to obtain the comments of the Advisory Council. There are difficult problems policing 1,400 cities; but by law the cities have the full section 106 responsibility. Some apparently federal entities are not covered. Amtrak and

Conrail are not federal agencies. The Postal Service has been recognized as a federal agency for section 106 purposes since a NEPA suit a few years ago.¹⁵

Another threshold consideration is the kind of undertaking involved. The courts have been supportive of broad interpretation, so virtually any federal involvement in an activity will trigger section 106: federally funded public works programs, dams, highways, public buildings, loan guarantees, power plant licenses, and approval by the comptroller of the currency for location of branch banking facilities. The undertaking is subject to section 106 review if, in the funding or permitting process, a federal agency has discretionary authority to approve or disapprove the project. General revenue sharing programs are not subject to section 106; the money is federal, but the programs are administered with no discretion by the Treasury Department.

Another essential element of the preservation review process is the concept of adverse effect. Under section 106, any time there may be such an effect, the Council has to be afforded an opportunity to comment.¹⁶ "Adverse effect," as defined in the regulations, excludes trivial actions and includes destruction or alteration of property, alteration of the environment, such as construction of a highway in the vicinity of an historic site, introduction of incompatible visual, audible or atmospheric elements, or incompatible construction in a historic district, e.g., a Gettysburg tower in a traditionally rural scene.¹⁷ It is a very broad approach to the concept of environmental degradation of historic resources. These preceding elements are embodied in a process which requires the agency to work with the State Historic Preservation Officer to identify resources and evaluate effects.¹⁸ Many times, the State Historic Preservation Officer and the agency agree that there is no adverse effect, or they rework the project a little to eliminate adverse effect. There is a brief Council review, and that is the end of it; the project may proceed.

If there is an adverse effect, the Council initiates a consultation process among the agency, the State Historic Preservation Officer, and the Council staff.¹⁹ There is an opportunity for an on-site inspection and a public information meeting.²⁰ All alternatives are considered, and, hopefully, a resolution through project modification is made, resulting in a memorandum of agree-

ment. If that does not happen, the matter goes to the full Council, which then issues its comments to the head of the agency.²¹ Because those comments are purely advisory and the agency is under no legal obligation to follow the comments, it is generally more effective if the agency agrees to a course of action in a memorandum of agreement rather than taking the matter to the full Council.

There are several limitations on the process. First, it only applies to the federal establishment. There need to be complementary systems of state and local protection. Second, the Council's role is only advisory. Once the procedural requirements are met, the agency is free to do as it chooses. Third, the identification of historic resources in the country is only partially complete. The issue of what properties should be subjected to the section 106 process is a continual bone of contention when dealing with an agency and is the reason why most agencies are taken to court. It is the most difficult obstacle to an acceptable solution.

There are roles for the public; the most important role is that of watchdog. The Council staff of about 11 people is responsible for the whole country and for reviewing these 2,000 cases. Very often the Council will not hear about a federal threat to a historic resource unless someone informs the Council. So far, the threat of litigation has been adequate, in most cases, to bring an agency into compliance and to an agreement.

The second role for the public is to provide the information necessary for effective resolution under the administrative process. The Council needs input for consideration of alternatives and an understanding of all the impacts that a federal project may have in a community. To a large extent, the Council relies on the State Historic Preservation Officer and on people who are concerned about the historic resources of their state.

The third role for the public is one of support. The section 106 process can provide a forum for local preservationists to cultivate public opinion and to build the political support that a preservation decision may need. The required public information meeting forces public officials to take stands on issues. The publicity alerts citizens to proposed actions that will affect their communities and their environment.

Other federal laws, although secondary in importance to

section 106, have a bearing on historic preservation. One goal of national environmental policy, articulated in the National Environmental Policy Act, is to preserve important elements of the cultural heritage. This policy is implemented through the environmental impact statement process of section 102(2)(C),²² which requires agency analysis and public disclosure of the environmental impacts of federal projects.

In 1971, the policy of protection and enhancement of the cultural environment was articulated in Executive Order 11,593.²³ The Order became the basis for an expansion of the section 106 review process. The requirement that agencies give consideration to eligible properties was worked into the section 106 administrative process so that the same protection was extended to eligible properties as to properties on the National Register. Since the amendment in 1976 of section 106 to include eligible properties, the order has become less important as a legal basis for the environmental review process.

Section 4(f) of the Department of Transportation Act of 1966²⁴ applies only to the Department of Transportation but nevertheless is an important part of federal preservation law. The Secretary of Transportation must find that it is neither feasible nor prudent to avoid the use of an historic site before he approves a project that will use land from an historic site. The word "use" in section 4(f) differs from "effect," the much broader term in section 106 and section 4(f) generally has been applied only in cases of actual physical use of an historic site. Where a transportation project would use land from an historic site, the Supreme Court has interpreted the statutory "feasible and prudent" standard as a very rigorous test for the Secretary of Transportation to meet.²⁵

The Archaeological and Historic Preservation Act of 1974²⁶ instituted a system to mitigate adverse effects of federal projects on cultural resources. Any project agency that is going to undertake an action that will result in irreparable damage or loss of significant historic or archeological data must notify the Secretary of the Interior so that steps can be taken to preserve the data.²⁷ Federal project funds may be used to salvage archeological data.²⁸ The Secretary of the Interior may set standards for data recovery and mitigation.²⁹

It is worthwhile to compare these provisions with section

106. The section 106 process is a means for considering project impacts, weighing alternatives, and planning mitigation. The 1974 legislation provides an opportunity to get funding to carry out such mitigation and sets standards for these mitigation activities.

As to legislative reform, the proposed National Heritage Policy Act³⁰ would change the environmental review in several ways. First, the Act would establish a parallel natural areas program with a National Register of natural areas, places of ecologic, geologic, and wild and scenic significance. It would create a section 106-type review mechanism administered by a Council on Heritage Conservation, which would be a successor to the present Advisory Council. Secondly, it would set up a section 4(f) standard for nationally significant properties. This would apply to all agencies. Before any agency could take an action that would adversely affect, as opposed to use, a nationally significant Register property, the agency would have to determine that it was neither feasible nor prudent to use an alternative. This would apply court-developed doctrines on section 4(f) to the cultural area in a broad way. Finally, the Act would set some very specific federal agency responsibilities for identifying historic and natural properties in project planning and on land that the agency owns, one of the weakest points in the process.

The section 106 process has brought us a long way in sensitizing the federal government to preservation in its planning process. There are battles yet to be fought, and there are agencies that are not doing what they should do, but when I look back to what it was like a number of years ago when we were looking at 50 cases a year, and we were looking at them when the bulldozers were on-site, we have come a long way.

Federal Environmental Review Process

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1. National Historic Preservation Act of 1966, 16 U.S.C. §§ 470-470t (1976 & Supp. III 1979), *amended by* 16 U.S.C.A. §§ 470-470w-6 (West Pam. 1981).

2. *Id.* § 470f.

3. *Id.* § 470a (authorizing the establishment of programs of matching grants-in-aid).

4. Historic Sites, Buildings, and Antiquities Act of 1935, 16 U.S.C. §§ 461-467 (1976 & Supp. III 1979).

5. The Advisory Council on Historic Preservation was authorized by 16 U.S.C. §§ 470i-470t.

6. 16 U.S.C. § 470f.

7. *Id.*

8. National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1976 & Supp. III 1979).

9. 36 C.F.R. § 800.6(d) (1981).

10. *Id.* §§ 800.1-.15.
11. *Id.* §§ 800.1, .4.
12. 16 U.S.C. § 470a.
13. *Id.* § 470f.
14. *Wisconsin Heritages, Inc. v. Harris*, 460 F. Supp. 1120, 1126 (E.D. Wis. 1978) (control over funds sufficient to impose NEPA responsibility).
15. *Chelsea Neighborhood Ass'ns v. United States Postal Serv.* 516 F.2d 378, 386 (2d Cir. 1975) (Postal Service not exempt from NEPA requirements).
16. 16 U.S.C. § 470f.
17. 36 C.F.R. § 800.3(b) (1981) states that adverse effects may occur under conditions which include but are not limited to:
 - (1) Destruction or alteration of all or part of a property;
 - (2) Isolation from or alteration of the property's surrounding environment;
 - (3) Introduction of visual, audible, or atmospheric elements that are out of character with the property or alter its setting;
 - (4) Neglect of a property resulting in its deterioration or destruction;
 - (5) Transfer or sale of a property without adequate conditions or restrictions regarding preservation, maintenance, or use.
18. 36 C.F.R. § 800.5 (1981).
19. *Id.* §§ 800.4(d), 800.6(b).
20. *Id.* § 800.6(b)(2), (3).
21. *Id.* § 800.6(d).
22. 42 U.S.C. § 4332(2)(C).
23. Exec. Order No. 11,593, 3 C.F.R. 559 (1971-75 Comp.), *reprinted in* 16 U.S.C. app. § 470 (1976).
24. 49 U.S.C. § 1653 (1976).
25. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 411-13 (1971); *Stop H-3 Ass'n v. Coleman*, 533 F.2d 434 (9th Cir.), *cert. denied*, 429 U.S. 999 (1976).
26. Archaeological and Historic Preservation Act of 1974, 16 U.S.C. §§ 469-469h (1976 & Supp. III 1979).
27. *Id.* § 469a-1.
28. *Id.*
29. *Id.* §§ 469a-2, 469a-3.
30. National Heritage Policy Act of 1979, S. 1842, 96th Cong., 1st Sess., *proposed* Sept. 28, 1979.