

# I HEAR YOU, . . . I THINK?!

Demystifying Section 106 Review  
under the National Historic  
Preservation Act



# PANEL PARTICIPANTS



**KEVIN L. BAKER**  
Deputy General Counsel,  
Hydro

---

*25 years experience in natural resources*



**GARRET ROOT**  
Principal Cultural Resources Team  
Lead, Architectural History

---

*15 years in cultural resources management*



**ELIZABETH MOLLOY**  
FERC Tribal Liaison

---

*35+ years at FERC in its Hydroelectric Program*



**JULIA WOOD**  
Partner

---

*20+ years practicing federal energy regulatory law*



# PROGRAM OVERVIEW

1. Introduction to the National Historic Preservation Act
2. Then and Now: Implementing Section 106 on FERC Hydroelectric Projects
3. Overview of Federal Consultation
4. Perceived challenges in the Section 106 process
5. Panel Questions and Discussion



*Hoover Dam National Historic Landmark Designation, 1985*





# The National Historic Preservation Act, 1966

## PURPOSE

- *Encourages the federal government to preserve prehistoric and historic resources for present and future generations*
- *Does not mandate preservation of such resources*
  - Requires federal agencies to consider the impact of their actions on historic properties

## WHAT IT DID

- *Created the National Register of Historic Places*
  - Secretary of the Interior (NPS)
- *Encourages State and Local preservation programs*
  - Federal-State partnership
  - Federal –Tribal partnership
- *Established the Advisory Council on Historic Preservation*
  - Independent Federal Agency
  - Advises Congress and President
  - Reviews policies and programs for consistency
  - Encourages public interest in preservation



Advisory Council on  
Historic Preservation

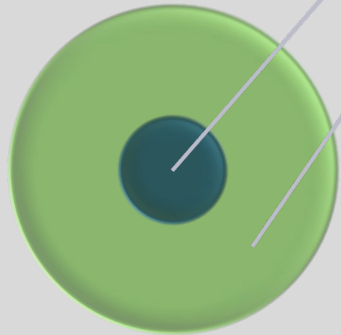




# How 106 Review Interacts with other Federal Regulations

## NEPA

A “major” Federal action that “significantly” effects the quality of the human environment

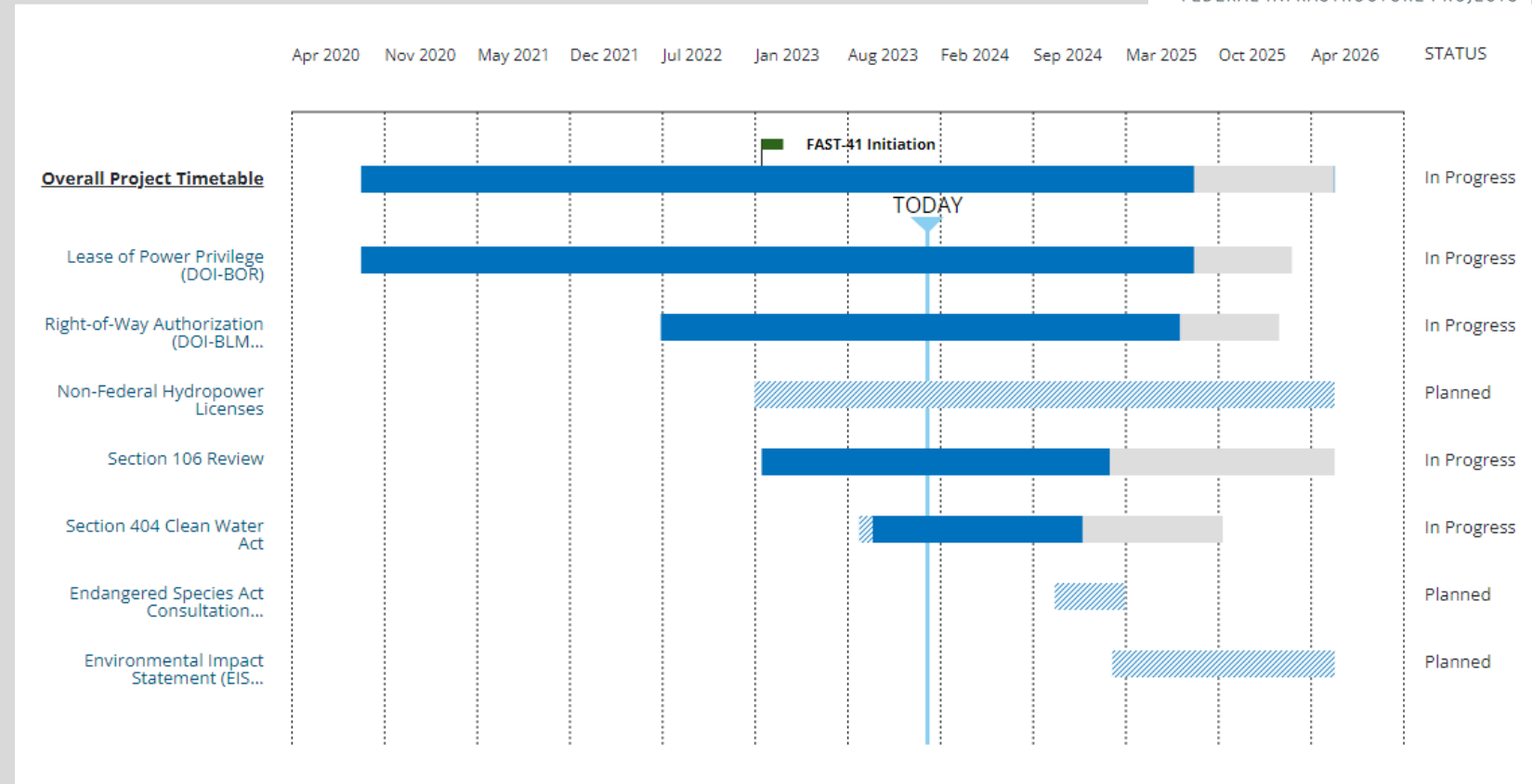


## NHPA

Any Federal undertaking

An official website of the United States government

**PERMITTING DASHBOARD**  
FEDERAL INFRASTRUCTURE PROJECTS



Seminole Pumped Storage Project, Rawlins, WY

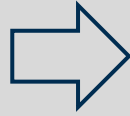
# How Section 106 Review Works

Initiation > Identification > Assessment > Resolution



## **Initiation**

- Is there an undertaking?
- Does it have the potential to affect historic properties?



## **Identification**

- Who are the consulting parties
- What is the Area of Potential Effects (APE)
- Are there historic properties located within the APE?



## **Assessment**

- Will the action cause an adverse effect on historic properties?



## **Resolution**

- Do the parties agree as to how adverse effects will be addressed?



# Key Takeaways for Implementing Section 106 Review

- 1) ***Understand that federal agencies are required to consider the effects on historic properties for projects they carry out, assist, fund, permit, license, or approve.***
  
- 2) ***Recognize it's complex and dynamic process that requires qualified people and expertise.***
  - The challenge is not in the process but in its application.
  - It requires more time and more expense than most projects anticipate.
  
- 3) ***Commit to conduct it in an organized manner that aims to include not exclude individuals, tribes, or other stakeholders.***
  - Engage early, cast a wide net, and document everything you do.

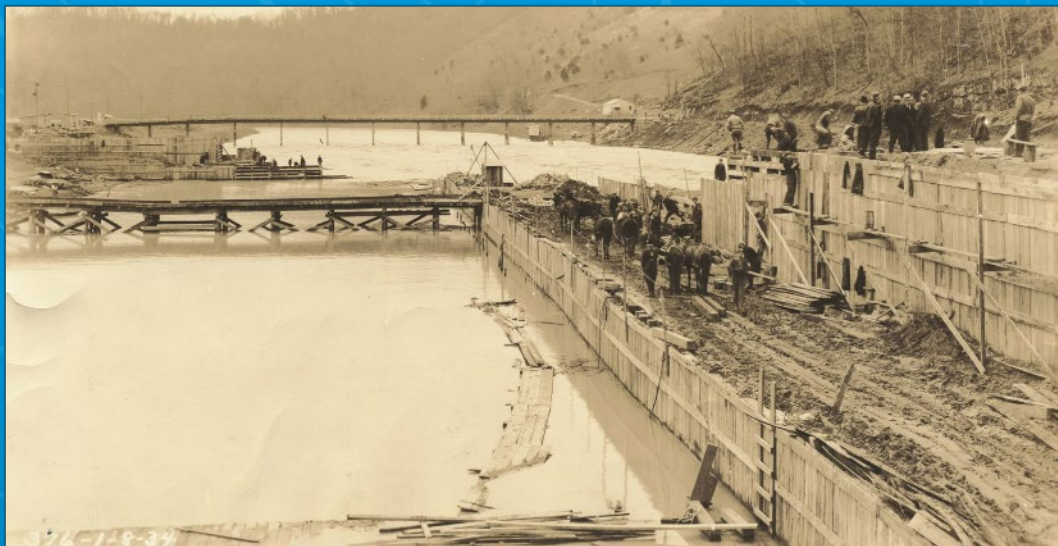


**SWCA**

**Then and Now: Implementing  
Section 106 on FERC Hydroelectric  
Projects**

3/14/2024





## Then and Now: Cultural Resources and Water Projects Before NHPA

- American Antiquities Act of 1906
- WPA Projects
- Historical Sites Act of 1935
- Flood Control Act of 1944
- Smithsonian Institution River Basin Studies 1945-1964

# Then and Now: Overview of Section 106 of the NHPA

- New York's Pennsylvania Station spurs preservation movement
- President Lyndon Johnson's Great Society
- National Historic Preservation Act, signed October 15, 1966
- Section 106 of the NHPA established a process for Federal agencies to consider the effects of project on Historic Properties

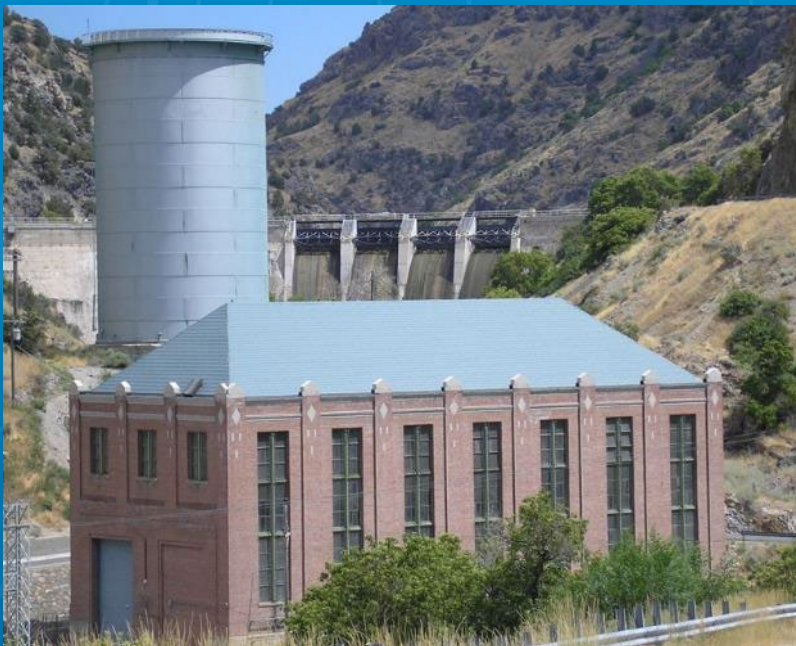
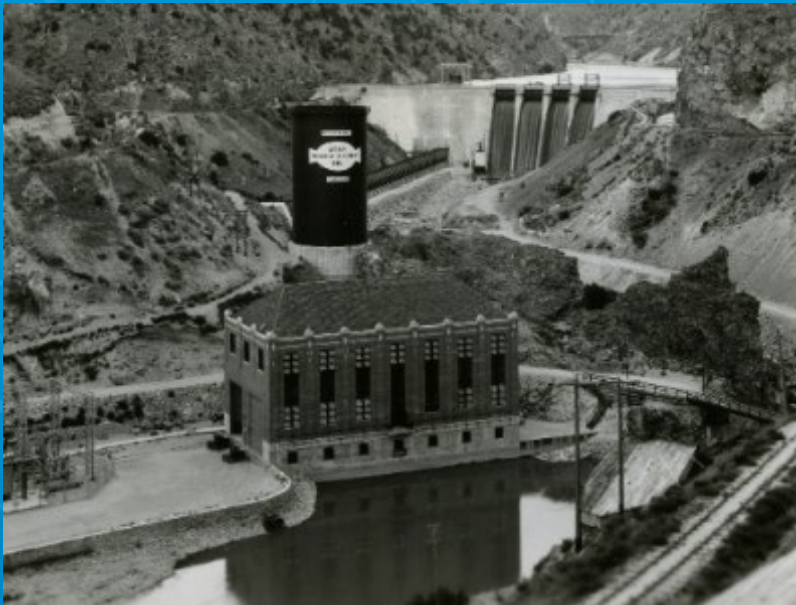




## Then and Now: Section 106 Within the FERC Regulatory Nexus



- Implementation of the act under Federal agencies varies.
- Federal Energy Regulatory Commission NHPA
- Development of Implementing Guidelines for Section 106
- Cultural Resources Management Plan (CRMP)
- Historic Properties Management Plans (HPMP)



## Then and Now: Implementation of HPMPs

- Complete cultural resources tasks as noted in licensing regulations
- Have a well-documented consultation record
- Complete Technical Studies with concurrence
- Rely on FERC Guidance Documents
- Write a PA that works for you and is flexible
- Set meaningful milestones





# FERC Section 106 and Tribal Consultation

---

Liz Molloy, Tribal Liaison, Federal Energy Regulatory Commission

March 14, 2024



# Section 106 of the National Historic Preservation Act

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally-assisted undertaking in any state and the head of any Federal Department or independent agency having authority to license any undertaking shall, prior to the approval of any Federal funds on the undertaking or prior to the issuance of any license, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register of Historic Places. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation a reasonable opportunity to comment with regard to such undertaking.



# Non-Federal Representative

**36 CFR 800.2(a)(3) *Use of contractors.*** Consistent with applicable conflict of interest laws, the agency official may use the services of applicants, consultants, or designees to prepare information, analyses and recommendations under this part. The agency official remains legally responsible for all required findings and determinations. If a document or study is prepared by a non-Federal party, the agency official is responsible for ensuring that its content meets applicable standards and guidelines.



# The Different Roles of Applicant and FERC

## Applicant (the Project Proponent)

- Gathers information
- Engages with potential consulting parties
- Proposes APE
- Identifies potential effects
- Proposes mitigation measures
- Prepares draft HPMP
- **Files application**
- Implements terms of license
- Implements approved HPMP
- Ensures staff continues to engage

## FERC (the decision maker)

- Reviews information
- Consults with potentially affected Tribes
- Determines APE
- Determines potential effects
- Recommends mitigation measures in EA/EIS
- Consults with SHPO/THPO/(Advisory Council)
- Prepares/signs Programmatic Agreement (MOA)
- Acts on application
- Includes requirements in license (if issued)
- Ensures licensee implements HPMP





# The Different Roles of FERC and other Federal Agencies

## FERC

## Other Federal Agencies

(Corps, Forest Service, FWS)

- All agencies different
- Have different missions/different information needs/different processes
- FERC does not control the processes of other agencies
- Other agencies can rely on FERC's process or do their own



# NHPA and Tribes

- [Section 302702](#) states that a THPO may step in for SHPO with respect to federal actions on tribal land.
- [Section 300309](#) states that Indian Tribe means federally recognized Indian Tribe
- [Section 300319](#) states that Tribal land means all land within the exterior boundary of any Indian reservation and all dependent Indian communities [e.g., Pueblos].
- [Section 302706](#) states that an agency shall consult with any Tribe that attaches religious and cultural significance to a property when determining effect of undertaking pursuant to Section 306108.



# Tribal Engagement/Consultation

## Applicant

- Engage
  - Listen
    - Incorporate
      - Report

## FERC

- Consult
  - Consider
    - Address
      - Require



# Addressing Challenges in the Section 106 Process

Julia Wood





# Serving as FERC's Non-Federal Representative

Designation allows applicant to work directly with SHPO / THPO to:

Perform cultural  
resource  
surveys/studies

Determine APE

Identify eligible  
properties

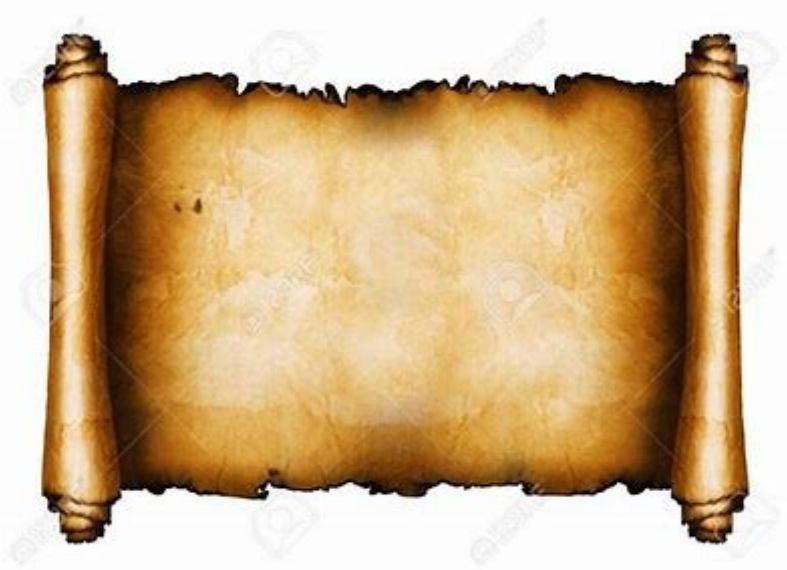
Determine adverse  
effects

Draft MOA/PA to  
memorialize  
proposed mitigation



Challenge: effectively working with agencies, Tribes, and other stakeholders that do not recognize the role of non-federal representative

## Section 106: Implementation During License Term



- HPMP developed at licensing guides protection of – and resolution of adverse effects to – historic properties during license term
- Challenge: avoiding having the HPMP become a static document



# Section 106 and Emergency Situations

- Action agency must notify ACHP, SHPO, and THPO of undertakings in emergency situations
  - Applies to undertakings implemented within 30 days of disaster / emergency declaration
  - Immediate rescue / salvage operations conducted to preserve life or property exempt from Section 106
- Challenge: determining what constitutes an emergency and implementing the process during or after an emergency





# Q & A

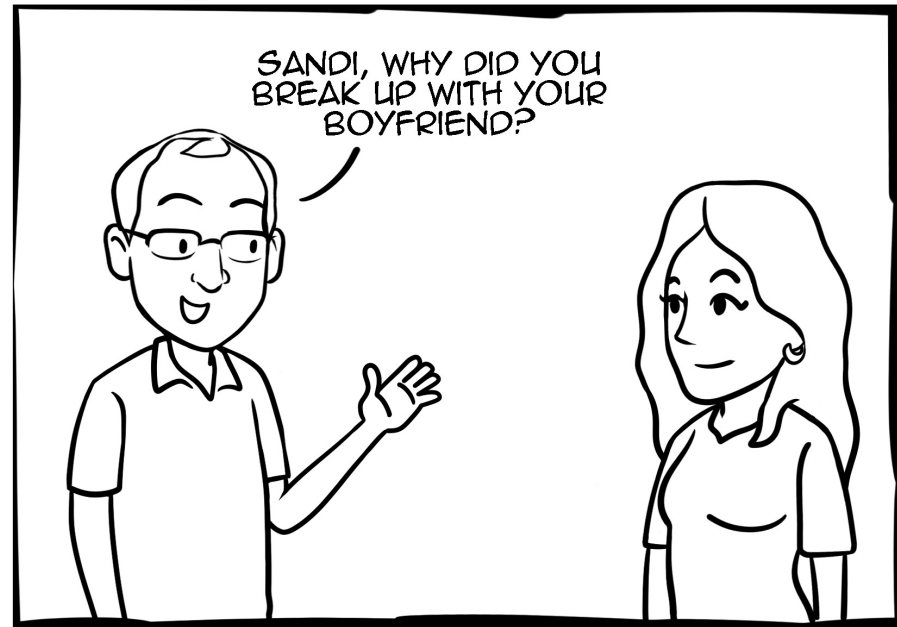


Mount Rushmore National Memorial, August 10, 1927



# Single Slices

## RELATIONSHIP LISTENING





A night sky photograph showing the Milky Way galaxy in a dark, clear sky. The galaxy's bright core and spiral arms are visible, stretching across the upper two-thirds of the frame. In the lower center, the dark silhouette of Devil's Tower National Monument is visible against the horizon. The foreground shows a dark, silhouetted landscape with some trees and a dirt road.

# Miscellaneous

Devil's Tower National Monument, September 24, 1906



# Program Alternatives

## Examples of Existing Program Alternatives:

1. Military Housing
2. Department of Defense Ammunition Storage Facilities
3. Disposal of Navy Vessels
4. Projects Affecting Post-1945 Bridges
5. Positive Train Control
6. Wireless Communication Facilities
7. Veteran Affairs Program for Vacant and Underutilized Properties



*Golden Gate Bridge Moveable Barrier Project, 2012*



DEPARTMENT OF TRANSPORTATION  
DIVISION OF ENVIRONMENTAL ANALYSIS  
P. O. BOX 942874 MS 27  
SACRAMENTO, CA 94274-0001  
PHONE (916) 653-7136  
FAX (916) 653-7757  
TTY 711  
www.dot.ca.gov



Flex your power!  
Be energy efficient!

November 3, 2011

Mr. M. Wayne Donaldson, FAIA  
State Historic Preservation Officer  
Office of Historic Preservation  
1725 23<sup>rd</sup> Street, Suite 100  
Sacramento, CA 95816

04-SF  
Local Assistance  
STPL-6003 (037)

Dear Mr. Donaldson:

Subject: Finding of **No Adverse Effect** Without Standard Conditions for the Golden Gate Bridge Moveable Median Barrier Project, San Francisco County

The California Department of Transportation (Caltrans) is continuing consultation with the State Historic Preservation Officer (SHPO) for the above referenced project. This consultation is being undertaken in accordance with the January 1, 2004 Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, the California State Historic Preservation Officer, and the California Department of Transportation Regarding Compliance with Section 106 of the National Historic Preservation Act, as it Pertains to the Administration of the Federally-Aided Highway Program in California (PA). We are consulting with you under Stipulation X.B.1 of the PA, which requires consultation with the SHPO regarding findings of no adverse effect **without** standard conditions.

Caltrans is continuing this consultation as the NEPA lead agency under the provisions of the *Memorandum of Understanding (MOU) between the Federal Highway Administration and the California Department of Transportation Concerning the State of California's Participation in the Surface Transportation Project Delivery Pilot Program*, which became effective on July 1, 2007. The MOU was signed pursuant to Section 6005 of the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users, which allows the Secretary of Transportation to assign, and the State of California to assume, responsibility for FHWA's responsibilities under NEPA as well as consultation and coordination responsibilities under other Federal environmental laws. As this project is covered by the Pilot Program MOU, FHWA has assigned, and Caltrans has assumed, FHWA responsibility for environmental review, consultation, and coordination on this project. Please direct all future correspondence on this project to Caltrans.

Enclosed is a Finding of Effect report for the Golden Gate Bridge Moveable Median Barrier project. The Golden Gate Bridge (Bridge 27-0052) is eligible for listing on the National Register of Historic

"Caltrans improves mobility across California"

STATE OF CALIFORNIA – THE NATURAL RESOURCES AGENCY

EDMUND G. BROWN, JR., Governor

OFFICE OF HISTORIC PRESERVATION  
DEPARTMENT OF PARKS AND RECREATION

1725 23<sup>rd</sup> Street, Suite 100  
SACRAMENTO, CA 95816-7100  
(916) 445-7000 Fax: (916) 445-7053  
calshpo@parks.ca.gov  
www.ohp.parks.ca.gov



December 13, 2011

Reply To: FHWA111007A

Anmarie Medin, Chief  
Cultural Studies Office  
Division of Environmental Analysis  
PO Box 942874  
Sacramento, CA 94274-0001

Re: Finding of Effect for the Proposed Golden Gate Bridge Moveable Median Barrier Project, San Francisco County, CA

Dear Ms. Medin:

Thank you for consulting with me about the subject undertaking in accordance with the Programmatic Agreement Among the Federal Highway Administration, the Advisory Council on Historic Preservation, the California State Historic Preservation Officer, and the California Department of Transportation Regarding Compliance with Section 106 of the National Historic Preservation Act, as it Pertains to the Administration of the Federal-Aid Highway Program in California (PA).

Caltrans has determined that the proposed undertaking will have no adverse effect on the Golden Gate Bridge, a property previously determined eligible for the National Register of Historic Places (NRHP). Based on review of the submitted documentation, I concur.

Thank you for considering historic properties during project planning. If you have any questions, please contact Natalie Lindquist of my staff at (916) 445-7014 or email at [nlindquist@parks.ca.gov](mailto:nlindquist@parks.ca.gov).

Sincerely,

Milford Wayne Donaldson, FAIA  
State Historic Preservation Officer



# The “Do’s and Don’ts” of Section 106 Review

- I. Do understand federal agencies are required to consider the effects on historic properties of projects they carry out, assist, fund, permit, license, or approve.
- II. Do have a working knowledge of NHPA terms and agency roles and responsibilities.
- III. Do engage with federal agencies on informing the public about the undertaking and its potential effects to historic properties.
- IV. Do be respectful of government-to-government consultations.
- V. Do develop an administrative record and be diligent in following the process.
- VI. Do work with SHPOs and THPOs early so they can collaborate on the identification of historic properties and inform the development of areas of potential effects.
- VII. Do not expedite Section 106 review in a manner that exclude or limit the involvement of consulting parties.

## THE CHALLENGE IS NOT IN THE PROCESS BUT IN ITS APPLICATION

The Chicago Manual of Style recommends:  
“**dos and don’ts.**”

The Associated Press recommends:  
“**do's and don't's.**”

Eats, Shoots & Leaves recommends:  
“**do's and don't's.**”