

**A Proposal Fit for a “King”: Evaluating the Replacement of Section 106 of the
NRHP with NEPA**

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Abstract

In 1994, Thomas F. King considered the consequences should Section 106 of the National Historic Preservation Act (NHPA) be eliminated. King has recommended a proactive approach to simultaneously protecting historic preservation regulations while also reforming them, namely by jettisoning Section 106 of the National Historic Preservation Act (NHPA) for stronger provisions found within the National Environmental Policy Act (NEPA).

In this paper I evaluate King's proposal in the following areas. First, in general terms, the merits of the idea of replacing Section 106 with NEPA compliance are sound if considered from the perspective of the purposes of each Act. Second, some adjustments need to occur amongst practitioners of NEPA to make this a suitable replacement for the Section 106 process. Relatedly, short of amending NEPA or Council on Environmental Quality (CEQ) regulations, an adjustment to typical NEPA practices could vastly improve Section 106 compliance when performed in NEPA related cases, but will not address King's concerns about Section 106 policy and practice. Any alterations, from full acceptance of King's proposal to shifts in the ways Section 106 is incorporated into NEPA practices, will have a positive impact on the way historic preservation is performed in this country.

In 1994, Thomas F. King¹ considered the consequences should Section 106 of the National Historic Preservation Act (NHPA) be eliminated. While the impetus for his essay was a sense of anxiety expressed by the historic preservation community in the face of a newly elected, Republican dominated Congress under the leadership of Newt Gingrich, the ideas King presented remain relevant nearly two decades later as Congress once again seems poised, or at least willing, to cut programs deemed “unessential.” While historic preservation funding has long been an easy target for local, state, and national legislators looking for quick solutions to budgetary shortfalls, changes to historic preservation legislation at the national level have been somewhat more resilient. This does not mean, however, that sweeping changes to conservation or stewardship legislation is not outside the realm of possibilities, particularly as Congress addresses once again the spectre of a “fiscal cliff” and wrestles over alterations to related environmental compliance laws in the context of energy development and infrastructure. For these reasons alone a more proactive approach to retaining the gains made in managing one of our nation’s largest and most diverse suite of non-renewable resources seems warranted. King recommended just such a proactive approach to simultaneously protecting historic preservation regulations while also reforming them, namely by jettisoning provisions spelled out in Section 106 of the NHPA for stronger provisions within the National Environmental Policy Act (NEPA).

In this paper I evaluate King’s proposal in the following areas. First, in general terms, what are the merits of the idea of replacing Section 106 with NEPA compliance? Second, will some refitting or adjustments of NEPA need to occur to make this a suitable replacement for the Section 106 process? Relatedly, what policies, short of amending NEPA or Council on Environmental Quality (CEQ) regulations, could reach King’s same goal? Lastly, what might historic preservation “look like” after the transition to a NEPA-based review process?

Historical Context. The idea of hitching historic preservation policy to environmental protections is not without considerable history in the United States of America. Historic preservation policies have long been tied to environmental protection policies, movements, and sentiment. These can be credited for the drive to create the first federal regulations regarding historic preservation in this country in the middle to late nineteenth century, for example². While instances of local and private entities buying historic places for the purpose of protecting them began in the eighteenth century, it was not until the close of the subsequent century that federal efforts to preserve America’s vanishing natural landscape (and, by extension, prominent and

rapidly disappearing sites of Native American occupations) were undertaken. As the West was settled, archaeological and cultural resources were meeting the same fates as natural resources. Even as George Marsh published *Man and Nature* (1864), in which he argued for balancing exploitation with resource conservation and preservation, and Yellowstone National Park was established (1872), other like-minded individuals and groups founded the Archaeological Institute of America (AIA) (1879). One of their first endeavors was to send Adolph Bandelier to New Mexico to investigate the ruins of pueblos there, but he found many had been negatively impacted by looters and/or destroyed decades prior to his arrival. The loss of these sites and many others prompted local groups to preserve archaeological sites by buying them and limiting access to them. Additionally, in 1882, a few AIA members attempted to use their influence and clout to convince Congress to set aside areas with important cultural resources. The process of legislating heritage or historic resources protection took over two and a half decades. Ultimately, the American Anthropological Association (AAA) hired Edgar Lee Hewett, an administrator/lobbyist and archaeologist with an interest in pueblo sites, to head up a committee charged with writing antiquities legislation (1905). Hewett and others were to write a draft of what became the Antiquities Act of 1906 and subsequently signed into law by President Theodore Roosevelt.

The connection between historic preservation laws and environmental policies and concerns continued into the twentieth century. For example, the National Park Service Organic Act (1916) created the National Park Service (NPS) and charged the agency with, among other duties, studying and continually monitoring resources of national significance. The definition of "resources" soon came to include cultural resources as well. While many subsequent legislative acts focused on historic sites, buildings, and objects (ex., Historic Sites Act [1935]; National Historic Landmarks survey; National Trust for Historic Preservation [1949]), others had clearer ties to the recognized need to balance progress and development with avoiding or mitigating impacts to natural and cultural resources (ex., Archaeological and Historic Preservation Act 1960 [aka Reservoir Salvage Act, later Moss-Bennett Act, later Archaeological Recovery Act]).

Following the Second World War, an environmental movement mirroring that of Marsh's a century earlier was underway. Like Thoreau and Emerson before them, writers were again at the forefront of the movement. Rachel Carson's *Silent Spring* (1962) captured the spirit of the moment, with the villain this time being pollution instead of just development. One important

aspect of this environmental movement was the development of the idea of “nonrenewable” resources. The historic preservation community made great gains in deliberately redefining or resetting the perception of historic places as more than interesting relics or pieces of a common heritage, but as nonrenewable resources that could be lost just as permanently as clean air or water. Historic preservation issues were once again intimately tied to this new wave of environmental and social issues as urban renewal movements were reshaping historic areas, frequently by razing historic buildings. The demolition of the historic Penn Station in 1963 well illustrates the easy linkages being made at that time between the losses of the built environment and natural resources. A New York Times editorial perhaps said it best: “we will probably be judged not by the monuments we build but by those we have destroyed.”³ In the 1950s and 1960s, a series of bills were developed to make the federal government consider the effects of their activities on cultural resources (ex., Federal Highway Act [1956]). One might only look at the language of the Department of Transportation Act, Section 4(f) (1966) to observe the conflating of natural and cultural resources issues by federal agencies.

Sections 1 and 2 of the National Historic Preservation Act of 1966 formally laid out why the US government should be involved in historic preservation in a way that was only implied in the 1906 Antiquities Act. When the National Environmental Policy Act was passed in 1970, it also included language about the preservation of natural heritage, as well as historic and cultural resources. Both NHPA and NEPA seek to foster better considerations of the uses of non-renewable resources. Where these two pieces of legislation differ is in their purposes. While the latter is a tool for informed decision making, the former is largely couched in the language of preservation and commemoration.

An Overview of Section 106 of NHPA. The NHPA is comprised of several key features that seek to encourage the preservation and stewardship of historic resources through their productive use by present and future generations. The centerpiece of the Act is the establishment of the National Register of Historic Places (NRHP), a registry of “districts, sites, buildings, structures and objects significant in American history, architecture, archaeology, engineering, and culture.”⁴ Section 106 of the Act stipulates that federal agencies having direct or indirect jurisdiction over the permitting, funding, licensing, or oversight of an undertaking need to take into account the effect of the undertaking on resources listed on or eligible for listing on the register. Criteria for being eligible for listing on the National Register (NR) are spelled out in 36

CFR part 60⁵ and are remarkable for their simplicity and flexibility. How a particular resource meets one of the four criteria is typically negotiated by a cultural resource manager (an archaeologist or architectural historian meeting Secretary of the Interior professional qualification standards)⁶ making the recommendation and review staff in the employment of the State Historic Preservation Officer (SHPO). Outside of those states with proscribed research agenda or historical context documents, there is a tremendous amount of latitude afforded the cultural resource manager who typically sets the stage for how (i.e., under which research agenda/context) and whether (i.e., based on the judgment of the researcher) certain classes of resources will be evaluated for eligibility. How certain types of cultural resources have been inappropriately "written off" or, alternatively, redundantly "over-preserved," have been the subjects of debate for decades.⁷

King's Proposal Considered. With the convening of the 104th Congress in 1995, the US House of Representatives came under the control of the Republican Party for the first time in 46 years,⁸ essentially the period in which a tremendous amount of environmental and cultural resources protection legislation was passed and implemented. As Thomas King stated in his 2002⁹ reintroduction to his 1994 essay, even though the fears of the historic preservation community were never realized, namely, the dismantling of these protections and regulations, we missed a valuable opportunity to consider whether the project review process under Section 106 of NHPA was worth fighting for should a future Congress ever decide to reform resource compliance legislation.

King's critiques of the NHPA and Section 106 in particular are well known to his readers.¹⁰ These can be summarized as follows. First, the role of the SHPO in the Section 106 process has evolved from one of necessary consultation with the few functional experts on cultural resources in government to an over-consulted group asked to weigh in on decisions made by agencies having their own in-house experts with a better grasp on their agency's particular needs, goals, resources, and authorities. Second, King¹¹ argues that the Advisory Council, once charged with an active role in advising agencies and other government entities as to guidelines for drafting and implementing historic preservation policies and reviewing their procedures and programs, has become a "rubber stamp" for SHPOs who have essentially taken over these duties. Third, King believes that the organization of Section 106 compliance around the concept of eligibility for listing on the NRHP has created more problems than it has solved,

primarily because the NR is a means to commemorate properties more than it is a planning or decision-making tool.

It is in this latter critique that King's proposal to replace Section 106 with the NEPA review process gains the greatest traction. At the heart of both of these pieces of legislation is the stated goal of taking into account or considering the actions of the Federal government on an assortment of resources and communities. What is needed in these considerations is a deliberate, well-documented, and transparent process of amassing the data necessary for a decision-maker to make a supportable and justifiable decision. By focusing the Section 106 process on whether a given cultural resource is eligible for the NR before considering whether a given endeavor will affect that resource is to place an unnecessary step into the equation. In theory, initial project reviews conducted by SHPOs at the request of various agencies should prevent any unnecessary evaluations of cultural resources for projects that will have no adverse effect on cultural resources. Regardless, where an adverse effect is possible and identified by the SHPO in their review, consulting cultural resource managers, whether contracted by the client or agency or performed in-house by agency staff, begin their work by first identifying as much of the historical and cultural landscape as warranted given the anticipated impact(s) of the proposed undertaking, and then evaluating whether any of these myriad of resource types are potentially eligible for listing on the NRHP. Only then does the cultural resource manager consider whether the proposed undertaking will have an adverse effect on significant resources. Following these field and analytical stages, the SHPO is once again consulted as to whether they agree with the assessments and recommendations. If further action is necessary to mitigate an adverse effect on a significant resource, SHPO can prescribe a solution (ex., avoidance or data recovery), ideally in consultation with the cultural resource manager and the client/agency.

The results of this particular decision making process are arguably mixed. From the perspective of identifying cultural resources in all their forms over large and diverse areas of the country, the NHPA might be considered to be a resounding success. One can go state-by-state and examine site files and documents (as directed in Section 101 of NHPA) related to Section 106 compliance projects and see the numbers of resources recorded by county, totals of acres surveyed, and built environments mapped and documented. However, once a resource has been determined to be ineligible for listing on the NR that resource is no longer considered to be "significant" and is no longer given consideration during future decision-making deliberations.

To put it another way, the flexibility allowed in the application of the NR criteria outlined above can, if the person making the argument for or against significance fails to foresee the research potential of a given resource, doom that site to almost certain destruction, even if the initial undertaking triggering the Section 106 review does not ultimately adversely impact the resource.

King’s proposal to replace Section 106 with NEPA, then, has a number of appealing features, particularly if considered from the perspective of the purposes of each Act. As a decision-making tool, NEPA has particular strengths that are not mirrored in NHPA. First, as King¹² also notes, the NEPA review process, whether eventually generating an Environmental Impact Statement (EIS), Environmental Assessment (EA), programmatic agreement (PA), or other document, considers the effects of the action or undertaking at hand on the various resources and communities potentially affected in the present moment and reasonably foreseeable future. There is no consideration of the permanent or even longer-term status of the resource, nor is there a permanent label of significance (or insignificance) assigned to the resource. Should a future, unforeseen project threaten this suite of resources in a different way, the evaluation made under the previous decision-making process should not unduly influence whether the resource is given consideration during the new decision-making process.

Additionally, replacing Section 106 with NEPA review would remove the inherent responsibilities for procuring, owning, protecting, maintaining, or otherwise becoming a permanent caretaker for cultural resources identified as significant in the course of a project evaluation. Under Section 106, if a site is identified and found to be potentially eligible or eligible for listing on the NR (i.e., is “significant”), the client is often assigned the duties of preserving the resource in perpetuity (ex., through restrictive covenants) or funding a data recovery project to off-set the loss of information due to impacts to the resource. If a significant resource is located on federal property and is not subsequently subjected to a data recovery project, Section 110 of NHPA stipulates that the associated agency “shall assume responsibility” for its preservation (including maintaining and actively using the resource, where feasible), and have the resource listed on the NR through their historic preservation program. This has the potential to unduly influence the decision-maker and/or cultural resource manager, either by 1) delaying or canceling projects that might burden the agency with additional cultural resources to manage, leading to the inability to perform or support the agency’s mission; or 2) encouraging justifications for recommendations of NR ineligibility for borderline, redundant, or as-of-yet

underestimated resources, or 3) over-using data recovery projects unsupported by viable research agendas as a means of removing (permanently) cultural resources from federal properties and therefore future project reviews.

Implications for NEPA Practitioners. At first blush, many of the foreseeable and necessary adjustments following a move to NEPA reviews instead of Section 106 compliance would need to be made to the ways that NEPA practitioners evaluate or consider cultural resources. At present, NEPA practitioners rely on the Section 106 process to both identify potential resources (resources likely only identified as such during scoping exercises) and evaluate the potential impacts of the project on those cultural resources deemed significant. The results are a lack of understanding of what cultural resources might be in an area of potential effect (APE) at the outset of the NEPA process, and a filtered view of the results as only those resources meeting NR criteria have the potential to be considered by the decision-maker. This latter scenario is a best-case example. More typically, it is assumed that if a significant resource is going to be adversely affected by an undertaking, data recovery will be performed to mitigate the adverse effect.¹³ One might easily argue that cultural resources are not given the same consideration during the NEPA process as other nonrenewable resources. For example, it is unlikely that NEPA documents with "results of studies pending" for endangered plant or wildlife species would be as casually considered adequate or complete as those currently approved without the Section 106 process completed. Likewise, NEPA and NHPA practitioners alike need to find more creative solutions to mitigating the adverse effects of a project beyond blindly relying upon data recovery.

From a practical standpoint, King¹⁴ argues that agencies are perhaps better at NEPA compliance than they are at Section 106, in spite of their similarly long experiences with both. This is perhaps partially because of the reliance on outside expertise to handle the Section 106 compliance during NEPA reviews. I suspect this continued reliance on outside consultants, SHPO, and other agencies¹⁵ has been the result of language in NEPA deferring to the Section 106 process for issues involving cultural resources. NEPA practitioners seem to be conditioned to look outside of their own teams, agencies, and consultants for cultural resources specialists, and the result is a practice of including information from these outside sources as a way to meet NEPA requirements, but not adequately integrating these findings and recommendations into the full decision-making process.

While some adjustments need to occur amongst practitioners of NEPA to make this a suitable replacement for the Section 106 process, these will only serve to better inform the decision-maker and better integrate cultural resources into typical NEPA reviews. Relatedly, short of amending NEPA or Council on Environmental Quality (CEQ) regulations, an adjustment to typical NEPA practices achievable through education and guidance could vastly improve Section 106 compliance when performed in NEPA related cases, even if falling short of King's concerns about Section 106 policy and practice.

Policy Changes: How Feasible? One considerable hurdle to implementing the replacement of Section 106 with NEPA review is how to legislate the change. As King¹⁶ supposed, proposed changes to Section 106 will not likely be sweeping or comprehensive, but will come in the form of erosions of features of the NHPA like the reliance on the NR or in the appropriations needed to sufficiently staff the Advisory Council. While I am only familiar with the legislative process through my experiences with fighting changes to historic preservation regulations at the state level, it is my opinion that only an ambitious proposal to implement a total replacement of Section 106 with NEPA review will make King's proposal a reality. This might be done by a Senator or Representative convinced that making this change will streamline agency reviews (always a preferred outcome of legislative efforts regarding regulation reforms). This might also be initiated by the President for similar reasons.

The danger, however, is in bringing attention to critiques of NHPA outlined by King and summarized above. If NHPA came under too much scrutiny, there is always the danger of a dismantling of some or the entire Act in a less than controlled fashion. Additionally, care must be given to preserve those parts of the NHPA that serve to protect significant cultural resources. I would hazard to guess that many in the historic preservation community would not like to see the NR program jettisoned, as its commemorative aspects have long been a popular way to engage the public in historic preservation and educational endeavors. Likewise, the considerable efforts currently undertaken by the government to inventory, actively manage, and utilize their historic resources as stipulated under Section 110 will need to be carefully reviewed for any unforeseen conflicts or loopholes a shift to NEPA review might produce. Any legislative efforts will need to emphasize that the proposed change is intended to more fully consider cultural resources in the NEPA process, thereby producing better decisions about the effects of federal actions on all of the resources stipulated by the Act and CEQ guidance.

An alternative to King’s proposal, though, has been raised in this paper. That is simply to better inform and guide NEPA and NHPA practitioners of ways to better initiate and conduct Section 106 reviews under existing NEPA reviews. Regardless of which path is chosen, any alterations, from full acceptance of King’s proposal to shifts in the ways Section 106 is incorporated into current NEPA practices, will have a positive impact on the way historic preservation is performed in this country.

¹ King, Thomas F. (2004). *Thinking about cultural resource management: Essays from the edge*. AltaMira Press. Walnut Creek, California.

² Thompson, Raymond H. (2005) Edgar Lee Hewett and the political process. Retrieved from <http://www.nps.gov/archeology/pubs/antiq/index.htm>

³ New York Architecture (2012) Retrieved from <http://www.nyc-architecture.com/GON/GON004.htm>

⁴ 16 USC 470 et seq.

⁵ 36 CFR 60 Retrieved from <http://www.ecfr.gov/cgi-bin/retrieveECFR?gp=&SID=e02cccb898d0e7314cb6e20e99a3f8d0&r=PART&n=36y1.0.1.1.26>

⁶ 36 CFR 61 Retrieved from http://www.cr.nps.gov/local-law/arch_stnds_9.htm

⁷ Austin, Robert J. (2002). Beyond technology and function: Evaluating the research significance of lithic scatter sites. In *Thinking about significance*, edited by R. J. Austin, J. S. Hoffman, and G. R. Ballo, pp. 153-185. Florida Archaeological Council, Inc., Papers and Proceedings, Special Publication Series No. 1. Riverview, Florida.; Seibert, Erika M. (2002). The National Register and archaeological significance in the 21st century. In *Thinking about significance*, edited by R. J. Austin, J. S. Hoffman, and G. R. Ballo, pp. 37-51. Florida Archaeological Council, Inc., Papers and Proceedings, Special Publication Series No. 1. Riverview, Florida.

⁸ http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm;
http://artandhistory.house.gov/house_history/index.aspx

⁹ King 2004

¹⁰ King 2004; King, Thomas F. (2008). *Cultural resource laws and practice*. 3rd ed. AltaMira Press. Walnut Creek, California.; <http://crmplus.blogspot.com/>

¹¹ King 2004:56

¹² King 2004:60-61

¹³ I might only point to an example presented by Mr. John Page in “Accounting for Cumulative Effects in the NEPA Process” (June 22, 2012). In the case study, the NEPA documents for an extensive road project west of Chicago were “complete” and yet had as placeholders in results tables under historic resources like “review pending.” The decisions about whether and where to build the roads were finished before the Section 106 process was completed, the implication being that whatever cultural resources might be located in the preferred alternative could be taken care of through other means.

In another case, NEPA documentation was being completed for a proposed higher-speed rail project in the State of Florida. As the representative of one of two cultural resources consultants on this project, I was a participant in a number of documented conversations with representatives of the NEPA consultant, SHPO, FHWA, and FDOT, the subject of which involved how any potential significant resources we might identify would be “mitigated” once the preferred alternative was selected. These two somewhat anecdotal cases are indicative of a wide-spread disconnect between NEPA and NHPA practitioners. These cases also illustrate how cultural resources are not being given proper consideration in the NEPA process and how flawed the Section 106 process can be.

¹⁴ King 2004:60-61

¹⁵ For example, NPS cultural resource managers still rely heavily on funds generated through the assistance of other agencies as allowed through Section 7 of the Archaeological Recovery Act (aka Moss Bennett Act).

¹⁶ King 2004:63