Analysis of the discussion draft of
"National Historic Preservation Act Amendments of 2005"

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The discussion draft of proposed amendments to the NHPA comes from the National Parks Subcommittee of the House Resources Committee. It contains six substantive sections.

Content of the proposed amendments

Section 2 deals with cases where a property owner (or majority of property owners) objects to a National Register or National Historic Landmark nomination. It would eliminate the current practice in which the Keeper of the National Register reviews the nomination and determines whether the property is eligible, even though it cannot be listed on the Register or designated as an NHL because of the property owner objection.

Section 3 would require that certified local governments which intend to use National Register eligibility (as opposed to listing) as the trigger for requirements under a local ordinance must provide specific "due process" hearings for property owners. This is intended to address a problem that SHPOs and the National Trust always warn local governments about: owners can opt out of having their properties registered; they can't currently opt out of having their properties found eligible. If eligibility to the Register restricts their use of their private property – which can only happen if restrictions in a local ordinance are tied to eligibility – this is a violation of due process. As this proposed amendment indicates, the problem lies not with National Register eligibility per se, but with inappropriate use of eligibility determinations as a trigger for local regulatory requirements.

Section 4 would eliminate the current practice whereby Federal agencies rely on "consensus" determinations of eligibility reached through consultation between the agency and the SHPO or THPO to evaluate historic properties for the purposes of Section 106 of the NHPA. Instead, all determinations of eligibility for Section 106 undertakings would have to be made by the Keeper of the National Register.

Sections 5 through 7 deal with reauthorizing the Historic Preservation Fund and the Advisory Council on Historic Preservation, as well as a number of membership and housekeeping issues specific to the Advisory Council.

Analysis of the proposed amendment to Section 106

This amendment would, as noted above, eliminate the current practice of "consensus" determinations of eligibility and require that all Section 106 determinations of eligibility be made by the Keeper of the National Register. This would not eliminate the

requirement that Federal agencies identify and evaluate the National Register eligibility of historic properties that may be affected by their Section 106 undertakings. This requirement appears in Section 110(a)(2)(E)(ii) of NHPA.

What this amendment *would* do:

- *significantly increase the expense of cultural resource identification work* The level of detail and documentation accepted by agencies and SHPOs/THPOs for the purpose of consensus determinations is generally substantially less than the level of detail and documentation required by the National Register for a formal determination of eligibility
- *completely overwhelm the ability of the National Register of Historic Places to respond to requests for determinations of eligibility* The Register has a very small staff and every year tens of thousands of historic properties that may be affected by Section 106 undertakings must be evaluated for eligibility.
- *create catastrophic delays for development projects funded or approved by Federal agencies* Currently, thousands of Federal undertakings move quickly through the Section 106 review process every year. The combination of greatly increased documentation requirements and enormous backlogs of requests for determinations from the National Register would bring the process to a near standstill for highways, mining projects, oil and gas development, and nearly every other category of Federally funded or approved project.
- *require inappropriate levels of disclosure of sensitive information about places of traditional religious and cultural significance to Native Americans* Under the current practice of consensus determinations of eligibility, Federal agencies and Indian tribes have considerable flexibility when the agency is evaluating the eligibility of historic properties of traditional cultural and religious significance. A requirement for formal determinations of eligibility for Section 106 properties would significantly expand the need for disclosure and dissemination of highly sensitive information about traditional cultural properties.

This proposal to eliminate consensus determinations of eligibility and require formal determinations from the National Register for all Section 106 undertakings would be a reversal of the current trend toward streamlining of environmental compliance. It would provide no additional protection to our nation's historic heritage while placing a huge burden of costs and delays on Federal agencies and private industry.