800.16(y). Second, for non-CX actions, and CX projects that constitute "undertakings," the BLM can rely on its NEPA procedures to fulfill Section 106's requirements but only if, among other things, the BLM "[i]dentif[ies] historic properties and assess[es] the effects of the [action] on such properties," "involves the public," and "[d]evelop[s] in consultation with identified consulting parties alternatives and proposed measures that might avoid, minimize or mitigate any adverse effects of the [project] on historic properties." *Id.* § 800.8(c). If the agency's approach to NEPA does not meet those requirements, they must be provided separately to comply with NHPA.

Several elements of the proposed CX reduce the threshold of public involvement below that required by NHPA, preventing the BLM from using its NEPA process to comply with NHPA and requiring the agency to provide public participation opportunities beyond those contemplated in the proposed CX. Projects that are up to 5,000 acres in size are almost guaranteed to intersect historic properties in many parts of the country requiring the BLM to "seek public comment and input" under NHPA. *Id*. § 800.2(d)((2). Because the agency's NEPA regulations would not provide that opportunity, the agency would have to provide other opportunities for public engagement, diminishing any supposed efficiency gains achieved by excluding the projects from public review under NEPA. Failure to involve the public in those circumstances would violate NHPA.

The use of "Determinations of NEPA Adequacy" also creates problems for NHPA compliance. Courts have upheld BLM's use of DNAs for Section 106 purposes but only where the DNA independently fulfilled the agency's NHPA obligations. *See Summit Lake Paiute Tribe of Nevada v. U.S. Bureau of Land Mgmt*., 496 F. App'x 712 (9th Cir. 2012). Use of DNAs does not allow agencies to escape their Section 106 responsibilities.

Finally, NHPA regulations require the BLM to consider an action's likely effects on historic properties when determining whether to prepare an environmental impact statement. *See* 36 C.F.R. § 800.8. That is precisely that type of question that is appropriately considered in an EA. Even if the agency chooses not to complete an EA, with the hope that it can utilize a CX, it must consider a project's effects on historic properties *before* making that decision. As a result, the agency must have some idea of the effect of its actions on historic properties before deciding to use a CX. This is not an efficiency gain – the agency will have to consider that same questions either before signaling its intent to use a CX or while preparing an EA. Failure to do so would violate both NEPA and the NHPA.

X. The Proposed CX is a "Major rule" for Purposes of the Congressional Review Act (CRA).

The Federal Register notice opening the proposed rule for public comment does not indicate whether the proposed CX is a major rule for the purposes of the Congressional Review Act, 5 U.S.C. § 801 et seq. Given the environmental and socioeconomic impacts likely caused by this rule, we believe the proposed rule would qualify as a "major" rule. 5 U.S.C. § 804. We remind the BLM that the CRA applies to both major and non-major rules, and that the agency has a statutory obligation to submit the final rule to congress for review.[136]

[136] *Id.*