

Hon. Aimee K. Jorjani
Chairman

Rick Gonzalez, AIA
Vice Chairman

John M. Fowler
Executive Director



November 19, 2020

The Honorable Richard Shelby
Chairman
Committee on Appropriations
U.S. Senate
Capitol Building, S-128
Washington, DC 20510

The Honorable Patrick Leahy
Vice Chairman
Committee on Appropriations
U.S. Senate
Capitol Building, S-128
Washington, DC 20510

Dear Senator Shelby and Senator Leahy:

As discussions resume on coronavirus relief legislation, the Advisory Council on Historic Preservation (ACHP) would like to bring to your attention an environmental review exemption for the Department of Health and Human Services (HHS) that has been proposed in the Coronavirus Response Additional Supplemental Appropriations Act (S. 4320). The bill would provide additional appropriations for the Public Health and Social Services emergency fund. The proposed exemption mirrors language included in the CARES Act (Pub. L. 116-136) that exempted the General Services Administration from the provisions of both the National Environmental Policy Act and the National Historic Preservation Act (NHPA). The ACHP expressed its concern regarding this exemption in correspondence to you dated April 17, 2020 (see attached). As the independent federal agency charged with advising the President and Congress on matters relating to historic preservation and as the agency charged with overseeing review under Section 106 of the NHPA, the ACHP believes that the proposed exemption in S. 4320 is not necessary.

One of the HHS funding amounts proposed by S. 4320 would equal \$8.085 billion, the bulk of which would go to the Health Resources and Services Administration (HRSA). For this funding, the bill includes the following provision:

Provided further, That funding made available under this paragraph in this Act shall not be subject to requirements under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 et seq.) or the National Historic Preservation Act of 1966.

The ACHP maintains a policy against such exemptions and has done so because the regulations that implement Section 106 of the NHPA, found at 36 C.F.R. Part 800, provide for a variety of tools to adapt the process to the needs of particular agency programs. They have been used effectively to address the concerns of agencies and stakeholders in a wide variety of federal programs.

In meeting the current challenge of the COVID-19 pandemic, there is the need to ensure that governmental response efforts move with the utmost speed. Fortunately, many of the HRSA expenditures that would be funded under the bill (such as those involving staffing, training, and capacity building) already would require no review under Section 106 of the NHPA beyond HRSA determining that they

have no potential to impact historic properties. Other activities (such as renovation or construction of health centers) would require further review; however, the Section 106 regulations at 36 C.F.R. §800.12(b)(2) provide an expedited process for emergency response actions.

This expedited process enables agencies to quickly and effectively respond to emergencies while still considering potential effects on historic properties. It has been used repeatedly in dealing with natural disasters. Agencies are allowed to use these expedited procedures for a 30-day period after the declaration of an emergency, as they are intended to govern only immediate emergency responses. However, with the unique circumstances of the current emergency, the ACHP has issued a blanket extension for all federal agencies to invoke the emergency provisions. The Section 106 regulations at 36 C.F.R. §800.12(a) also permit agencies to develop agency-specific procedures for taking historic properties into account during operations which respond to a disaster or emergency. The Federal Emergency Management Agency has created such procedures for its COVID-19 response undertakings.

The current blanket extension of the standard Section 106 emergency procedures and the option of developing HHS-specific emergency procedures negate the need for any legislative exemption from Section 106 for HHS and HRSA COVID-19-related projects. HHS and HRSA have been using the blanket extension of the Section 106 emergency procedures successfully since March. HRSA's applicants have submitted 63 projects, all of which were handled expeditiously as provided for under the emergency provisions.

One final note regarding the current situation: the ACHP maintains an active COVID-19 webpage that has regular updates on the Section 106 process and can be accessed at www.achp.gov/coronavirus.

Should you have any questions regarding this issue or the ACHP's COVID-19 response efforts, please contact me. The ACHP looks forward to working with you as future legislation advances to address the pandemic and its impacts. Historic preservation tools have proven their value as economic development drivers, and the ACHP has taken positions on some that are likely to be considered in future stimulus or economic recovery legislation. I would welcome the opportunity to share our ideas with you when the time comes.

Sincerely,



Aimee K. Jorjani
Chairman

Attachment

Hon. Aimee K. Jorjani
Chairman

Leonard A. Forsman
Vice Chairman

John M. Fowler
Executive Director



April 17, 2020

The Honorable Richard Shelby
Chairman
Committee on Appropriations
U.S. Senate
Capitol Building, S-128
Washington, DC 20510

The Honorable Patrick Leahy
Ranking Minority Member
Committee on Appropriations
U.S. Senate
Capitol Building, S-128
Washington, DC 20510

Dear Senator Shelby and Senator Leahy:

As discussions proceed on various emergency, stimulus, and recovery efforts, I would like to bring to your attention an environmental review exemption that was included in the CARES Act (Pub. L. 116-136). The CARES Act included an exemption for the General Services Administration (GSA) from the provisions of both the National Environmental Policy Act and the National Historic Preservation Act (NHPA). As the independent federal agency charged with advising the President and Congress on matters relating to historic preservation and as the agency charged with overseeing the Section 106 regulations, the ACHP wishes to provide the following information to you should any similar provisions be proposed in future COVID-19 stimulus or recovery legislation.

Title V of Division B of the CARES Act includes the following provision:

Provided further, That no action taken by the Administrator to acquire real property and interests in real property or to improve real property in response to coronavirus shall be deemed a Federal action or undertaking and subject to review under the National Environmental Policy Act of 1969, as amended (42 U.S.C. 4321 et seq.), or the National Historic Preservation Act of 1966, as amended (54 U.S.C. 9 300101 et seq.), respectively.

This applies to \$275,000,000 of authorized expenditures for GSA “to remain available until expended, to prevent, prepare for, and respond to coronavirus, domestically or internationally.” Whether the exemption applies only to immediate “response” activities is unclear.

The ACHP maintains a policy against such exemptions and has done so because the regulations that implement Section 106 of the NHPA, found at 36 C.F.R. Part 800, provide for a variety of tools to adapt the process to the needs of particular agency programs. They have been used effectively to address the concerns of agencies and stakeholders in a wide variety of federal programs.

In meeting the current challenge of the COVID-19 pandemic, there is the need to ensure that governmental response efforts move with the utmost speed. Fortunately, the Section 106 regulations at 36 C.F.R. §800.12(b)(2) provide an expedited process for emergency response actions. These provisions allow federal agencies to notify State Historic Preservation Officers, Tribal Historic Preservation Officers, the ACHP, and others about emergency undertakings and provide a seven-day timeframe for advisory

ADVISORY COUNCIL ON HISTORIC PRESERVATION

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comments. That period can be shortened even further if the agency determines that circumstances warrant it, and there is no obligation for the agency to wait for comments.

The Section 106 regulations permit an agency to use these expedited procedures for a 30-day period after the declaration of an emergency, as they are intended to govern only immediate emergency responses. However, with the unique circumstances of the current emergency, the ACHP has issued a blanket extension for all federal agencies to invoke the emergency provisions through May 29, 2020. (See attached.) Depending on circumstances, the end date of the blanket extension may be further deferred. This is done by action of the ACHP's Executive Director without notice and comment or other procedural requirements.

This process enables agencies to quickly and effectively respond to emergencies while still considering potential effects on historic properties. It has been used repeatedly in dealing with natural disasters. In sum, having this tool readily available negates the need for any legislative exemption from Section 106 for emergency response situations.

As I mentioned earlier, the ACHP is concerned that the GSA exemption may go beyond immediate response actions to the emergency given the inclusion of the terms "prevent" and "prepare for" regarding coronavirus threats in the future. Again, we believe the tools available in the Section 106 regulations adequately equip us to address these longer-term actions without resorting to legislative exemptions.

One final note regarding the current situation: the ACHP maintains an active COVID-19 webpage that has regular updates the Section 106 process and can be accessed at www.achp.gov/coronavirus.

Should you have any questions regarding this issue or the ACHP's COVID-19 response efforts, please contact me. The ACHP looks forward to working with you as future legislation advances to address the pandemic and its impacts. Historic preservation tools have proven their value as economic development drivers, and the ACHP has taken positions on some that are likely to be considered in future stimulus or economic recovery legislation. I would welcome the opportunity to share our ideas with you when the time comes.

Sincerely,



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BLANKET EXTENSION REGARDING SECTION 106 REVIEW OF UNDERTAKINGS RESPONDING TO COVID-19 EMERGENCY AND DISASTER DECLARATIONS

April 3, 2020

The regulations implementing Section 106 of the National Historic Preservation Act (Section 106), at 36 C.F.R. 800.12, provide for special procedures that may be used by federal agencies to comply with Section 106 regarding undertakings that respond to a disaster or emergency declared by the President, a tribal government, or the governor of a state, or which respond to other immediate threats to life or property. Those procedures may be used for undertakings that will be implemented within 30 days after the declaration. However, that time period can be extended by the Advisory Council on Historic Preservation (ACHP).

Pursuant to 36 C.F.R. 800.12(d), the ACHP has extended, until May 29, 2020, that time period for all federal agencies regarding undertakings that respond to the following emergencies and disaster declarations on the outbreak of coronavirus disease (COVID-19):

- National emergency declared by President Trump on March 13, 2020 under 501(b) of the Stafford Disaster Relief and Emergency Assistance Act (42 USC 5121-5207) and the National Emergencies Act (50 U.S.C. 1601 et seq.); and
- All COVID-19 emergencies or disaster declarations that (a) have already been issued by the President, a tribal government, or the governor of a state, or (b) may be issued by any of them while this extension is in place.

This extension applies to state or local government officials that serve as the agency official for Section 106 compliance in place of the relevant federal agency.

Again, the Section 106 emergency procedures under 36 C.F.R. 800.12 can only be used for undertakings that respond to COVID-19 emergencies or disaster declarations. Such undertakings may include projects such as new construction or adaptation of existing buildings for COVID-19 testing, treatment, or quarantining; creation of COVID-19 temporary facilities; and development of infrastructure specifically built to serve COVID-19 facilities and services.

The emergency procedures under 36 C.F.R. 800.12 give federal agencies two options for handling the mentioned types of undertakings that respond to a declared emergency or disaster:

- (a) follow an existing agreement regarding such emergencies or disasters, including a Programmatic Agreement, approved by the ACHP; or, absent such an agreement,
- (b) follow a very shortened process whereby they notify the ACHP, the relevant State or Tribal Historic Preservation Officer (SHPO/THPO), Indian tribe, and Native Hawaiian organization (NHO) prior to the undertaking, and afford them an opportunity to comment within seven days of

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notification (or a shorter period if circumstances do not permit seven days).

For more comprehensive information and guidance on Section 106 Emergency Procedures, please look here: <https://www.achp.gov/digital-library-section-106-landing/role-section-106-disaster-response-frequently-asked-questions>.

The pausing of certain Section 106 deadlines under limited circumstances related to COVID-19 announced in the following link does not apply to reviews of undertakings under 36 C.F.R. 800.12 that respond to a disaster or emergency declared by the President, a tribal government, or the governor of a state, or which respond to other immediate threats to life or property: <https://www.achp.gov/digital-library-section-106-landing/section-106-and-coronavirus-impacts>.

Finally, we want to strongly encourage agencies that believe they will be using the emergency procedures under 36 C.F.R. 800.12 to proactively reach out to the SHPO/THPO, Indian tribes, and NHOs with whom they typically work to assess their availability during this time. Many of their offices are closed or operating under significant restrictions due to COVID-19. Knowing their availability ahead of time will better ensure that, when the shortened emergency process is used, it meets its goal of informed agency decisions regarding historic properties.

The ACHP is taking this action to extend the use of its emergency provisions in light of the nature of the COVID-19 pandemic in the United States which, unlike other types of emergencies or disasters, is an event that is expected to continue over a period well beyond 30 days from the national emergency declaration mentioned above. Depending on developments regarding COVID-19, the ACHP may decide to further lengthen this extension.



John M. Fowler
Executive Director