



RECOMMENDATIONS OF THE PROGRAM COMMENT REVIEW PANEL September 22, 2021

Background

Program Comments are one of five categories of program alternatives available in the Section 106 regulations, “Protection of Historic Properties” (36 CFR Part 800) that offer federal agencies a way to tailor their historic preservation review procedures. Program Comments (36 CFR § 800.14(e)) allow the ACHP to issue comments on a program or class of undertakings in lieu of an agency undertaking Section 106 reviews on a case-by-case basis. The ACHP membership must vote to approve or decline to comment after a 45-day period following an agency’s submission of a formal request for a Program Comment.

Federal agencies have shown sustained interest in tailoring the Section 106 review process to their programs since program alternatives were first made available by the regulations issued in 1999. As of 2021, the ACHP has issued 16 Program Comments, five prototype Programmatic Agreements, two exemptions, one alternate procedure, and has signed approximately 20 nationwide Programmatic Agreements. Nine of these Program Comments were issued or amended within the last 10 years. The increasing use of these flexibilities to offer additional efficiencies and more targeted review efforts has led to the issuance of multiple Program Comments in recent years. Former ACHP Chairman Aimee Jorjani formed a panel of ACHP members to carry out a review of the development and use of Program Comments in November 2020. The panel was led by Expert Member Jay D. Vogt, and also included Tribal Member Reno Keoni Franklin and Anthony Costa, representing the Department of Veterans Affairs.

The panel considered the successes and challenges key stakeholders have had in developing and using Program Comments and worked with the ACHP staff to identify actions the agency can take to improve their use as a tool for Section 106 review efficiency. Specifically, the panel undertook its work with the following goals:

- (1) Improve the effectiveness of Program Comments as a tool for Section 106 review efficiency by examining the successes and challenges key stakeholders have had in developing and using Program Comments. Review recent feedback and solicit other input, as necessary, to refine how the ACHP assists federal agencies in using this program alternative.
- (2) Provide further guidance on the appropriate use of Program Comments as one of the five program alternatives available under the regulations.
- (3) Consider ways to engage ACHP members in the process prior to an agency making its formal request for a Program Comment.

In formulating these recommendations, panel members sought input from all ACHP members about their views and experiences in the development and implementation of Program Comments, including the most effective use of Program Comments, stakeholder involvement, and ACHP member participation in the

development process. The Federal Preservation Officer (FPO) Forum also shared information about the perception of the Program Comment development process among federal agencies. ACHP members discussed central issues the panel identified in its findings during their April 2021 business meeting. Finally, the panel received comments on draft recommendations from key stakeholders, including the National Conference of State Historic Preservation Officers (NCSHPO), National Association of Tribal Historic Preservation Officers (NATHPO), National Trust for Historic Preservation (NTHP), and FPOs.

The panel proposes the following recommendations to the ACHP vice chairman.

Recommendations

1. Expanding Guidance on the Development of Program Comments

The ACHP should issue revised and updated guidance on the development of program alternatives in general and Program Comments in particular. The information will serve as a basis for establishing shared expectations among federal agency staff, ACHP staff, ACHP members, and stakeholders for Program Comment development. The guidance should cover consultation best practices, timeline considerations, and recommendations for formal initiation and draft review. While variations in agency characteristics, program needs, stakeholder concerns, legislative mandates, and other aspects of individual development scenarios warrant tailoring recommended approaches, federal agencies should receive clear advice from staff about the extent to which their proposed development processes are implementing best practices. The ACHP should ensure that information about Program Comment development is widely available through the agency website and training programs and informs staff technical assistance.

- a. ACHP staff should update the Program Comment questions and answers and development flow chart on www.achp.gov.
- b. Prior to drafting revised and expanded ACHP guidance, staff should offer an opportunity for key stakeholders to provide input on and suggest examples of best practices from Program Comment development.
- c. ACHP staff should host question and answer sessions with FPOs and ACHP members when the updated guidance is posted.
- d. Updated guidance should include examples of best practices from the development processes for existing Program Comments.
- e. ACHP staff should develop an internal checklist of recommended preparatory steps from the updated guidance to use in assisting federal agencies with the formulation of Program Comment proposals.

2. Encouraging Early Coordination for the Development of Program Comments

The development of program alternatives works best when federal agencies select a program alternative with a clear articulation of what they want to accomplish with the alternative, how it might function as a tool for Section 106 efficiency, and what steps are required and recommended for creating such an alternative. Investing time in planning for Program Comment development can improve predictability and certainty for the requesting agency and facilitate meaningful input from stakeholders. Agencies are encouraged to conduct outreach to stakeholders during development of Program Comment proposals consistent with the intent and meaning of consultation in the Section 106 process as defined in 36 CFR 800.16(f).

- a. Agencies are recommended to consult with ACHP staff early in the consideration of a program alternative to clarify the agency's goals and confirm that a Program Comment will meet the agency's needs. Federal agency and ACHP staff should establish shared expectations about estimated development timelines and responsibilities for consultation.
- b. Federal agencies should be encouraged to develop a goal statement and explanation of need for a Program Comment as the first step in the development process. The statement should explain the anticipated benefits to the agency and the likely effects on historic properties. The statement can be used to introduce the agency's goals and proposed approach to stakeholders.
- c. Once a federal agency decides to develop a Program Comment, the agency should be encouraged to formulate a development plan outlining timing, outreach, and consultation strategies incorporating ACHP guidance and staff advice. The ACHP staff will outline how the ACHP can assist the agency in stakeholder outreach during development of a Program Comment outline or preliminary plan, how ACHP members will be informed during the development process and once a request is submitted, and how the ACHP will approach meeting its responsibilities for State Historic Preservation Officer (SHPO)/ Tribal Historic Preservation Officer (THPO) and tribal consultation following receipt of the agency request as required by the regulations.
- d. While submission of materials before a formal request for a Program Comment is not required by regulation, federal agencies are encouraged to share an outline or preliminary plan with the ACHP for review. The outline or preliminary plan should explain the category of undertakings to be covered by the Program Comment, the likely effects on historic properties, and the steps the agency will take to ensure the effects are taken into account. ACHP staff will offer advice to agencies in the preparation of such materials prior to the optional review process described in 3.b. below. Offering an opportunity for the ACHP staff to provide comments that are informed by member concerns on the content and approach planned for a Program Comment can greatly assist the agency in preparing a formal request that is more likely to receive favorable consideration from the membership.

3. Communicating with ACHP Members About Program Comment Development

ACHP members should be informed regularly about proposed Program Comments and the course of the development process so they can provide input to staff as the Program Comment takes shape.

- a. Key points where member updates or information should be furnished by staff include the following:
 - i. Notification that a federal agency intends to develop a Program Comment.
 - ii. Brief updates on progress in the drafting or development process as part of regular ACHP communications with members, such as at the time of business or committee meetings.
 - iii. Once an agency formally requests a Program Comment, a packet of materials to support members' consideration of the request, including the information specified in 36 CFR 800.14(e)(1) and (f)(2), the Program Comment draft, and background on the outreach and consultation process that supported the agency's development of the approach.

- b. The ACHP will encourage federal agencies to share an outline or preliminary plan for a proposed Program Comment with ACHP staff for review prior to the agency making a formal request (see 2.d. above). If so, staff will review the outline/plan and develop recommendations for further improvements. ACHP members will be offered an opportunity to provide input on the staff analysis. Staff will incorporate member questions and concerns in finalizing ACHP comments to the agency on the outline/plan. Members are encouraged to identify substantive issues or questions during such an opportunity so that their concerns can be taken into account in ACHP staff recommendations provided to the agency.
- c. The ACHP Chairman should be briefed when an agency communicates its intention to develop a Program Comment, once an outline or preliminary plan is prepared, and when the formal request is received.
- d. The ACHP carries out its responsibilities for consultation with SHPOs/THPOs and Indian tribes and Native Hawaiian organizations about proposed Program Comments per the regulations [36 CFR 800.14(e)(2-3)] following receipt of an agency request.