



THE STATE  
of **ALASKA**  
GOVERNOR MIKE DUNLEAVY

Department of Natural Resources

DIVISION OF PARKS AND OUTDOOR RECREATION  
Office of History & Archaeology

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October 9, 2024

Sara C. Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington DC 20001  
[Program\\_alternatives@achp.gov](mailto:Program_alternatives@achp.gov)

Subject: ACHP Draft Program Comment on Accessible, Climate-Resilient, Connected Communities

Dear Chair Bronin:

Thank you for the opportunity to review and comment on the proposed *Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities* (Program Comment). Our office supports the use of Program Comments as program alternatives and appreciates the extraordinary efforts to develop one to address the nationwide needs for affordable housing and clean energy alternatives. Overall, our office supports the comments made by NCSHPO. Additionally, we offer the following comments:

It is our understanding that the Program Comment is intended to assist underfunded SHPOs and THPOs with the incoming workload stemming from recent infrastructure investment bills by reducing the number of undertakings that will require compliance with Section 106 of the National Historic Preservation Act. We appreciate the ACHP's effort to aid SHPOs and THPOs and applaud your outreach to Federal Historic Preservation Officers (FHPOs) to identify undertakings or actions with minimal potential to affect historic properties. However, we believe this approach will undermine our long-standing advocacy and education efforts to federal agencies or their delegates about Section 106 and the importance of consultation. We suggest shifting the national conversation to first address systemic understaffing and underfunding of all cultural resource programs (SHPOs, THPOs, and federal agencies) before exempting broad categories of undertakings from Section 106 review.

We generally are concerned about the approach to exempt projects from consideration under Section 106 based on their purpose once constructed, especially when there are already effective tools in place to assist agencies with routine project types, including over fifty programmatic agreements executed with our office. While the Program Comment could assist agencies that do not have an applicable Programmatic Agreement, most agencies with routine projects that have a low potential to effect historic properties have agreements in place to streamline project delivery while defining alternative ways to consult on programs and projects. This win-win is not retained in the Program Comment as the current draft does not include consultation opportunities for

consulting parties nor means for consulting parties to review undertakings that occurred in their community or have affected resources important to them. Effective Section 106 is more than the number of projects delivered. At minimum, federal agencies using the Program Comment need to have an annual reporting effort to consulting parties (SHPOs, THPOs, and the general public) with sufficient detail to demonstrate due diligence, which is paired with a means to ensure accountability if an agency, region, district, or office are not appropriately applying the Program Comment.

We also recommend revising the text of the Program Comment to provide additional detail and improve clarity in these areas:

- The Program Comment is large and cumbersome in order to capture all the undertakings and types of activities currently included in its scope. We recommend either focusing on a smaller subset of activities or dividing the undertakings among several Program Comments. This will enable cleaner documents and shorter processes that federal agencies will be able to implement in a way that will also consider effects to historic properties.
- The types of activities or undertakings that can use the Program Comment are insufficiently defined or conditioned to prevent unintended application. The activities listed in Appendixes A-1, A-2, B-1, and B-2 are broad or not clearly defined by the Program Comment. Identification of historic properties as outlined in the Program Comment is insufficient to adequately assess the effects these types of projects could have on historic properties, especially archaeological resources. Experience has shown that the expertise of SHPOs/THPOs, tribes, and other consulting parties are essential to assist federal agency staff to carry out the identification of historic properties and recognize contributing properties or essential characteristics, especially in a state as large as Alaska when so little has been systematically surveyed.
- It is unclear what problem the terms *qualified authority* or *qualified authorities* is seeking to resolve. The new terminology will increase confusion among agencies and the public due to their similarity to the Secretary of the Interior's (SOI) *Professional Qualification Standards* and will likely compromise the established practice of requiring SOI qualified professionals or those with special expertise consistent with 36 CFR 800.2(a)(1) and 36 CFR 800.2(c)(2)(ii)(D), respectively.
- AK SHPO is concerned that the inclusion of removal and/or replacing trees in Appendix A-1 1.c.iii will result in adverse effects to properties of cultural and traditional significance to tribes as well as designed landscapes. Alaska has over 200 federally recognized tribes with a rich history woven into our vast and varied natural environment. This exemption has a high probability of adversely affecting Culturally Modified Trees, Traditional Cultural Properties, and ancestral archaeological sites. Many of these resources are still being identified and are only brought to light during meaningful

consultation at a project level, which will not be required under the Program Comment. As such, we recommend incorporating text to trigger this consultation and ensure adequate identification efforts will occur, which may require government to government consultation and implementing Section 304 due to the sensitive nature of these property types.

- The inclusion of transportation projects in the Program Comment is problematic due to the increased risk of inadvertent discoveries and adverse effects to archaeological resources due to the scale and nature of such projects. The Program Comment does not provide the necessary safeguards to identify and evaluate these resources afforded in the standard Section 106 review or pursuant to Programmatic Agreements. Furthermore, the use of the Program Comment excludes consultation with tribes and local communities that could assist in avoiding these sites during the project development phase. The transportation needs of Alaska are unique and Alaska SHPO currently has several transportation related agreement documents in place the address these concerns.
- Revise Section II.C.1 to clarify whether dispute resolution will be carried out under the terms of the original agreement document or the Program Comment.

Our office supports efforts to improve Section 106 and consultation among the parties, but we do not support the Program Comment in its current form. We recommend providing for annual reporting to increase transparency in the federal decision-making process, incorporating consultation points with tribes and other consulting parties, and revising the text to align with the Secretary of Interior Standards.

Historic preservation and climate friendly initiatives are fundamentally compatible objectives. Architect and sustainability expert Carl Elefante famously said, “The greenest building is the one that is already built.” As preservationists, we support the inclusion of environmentally friendly adaptations to existing building stock and infrastructure. We look forward to working with the Advisory Council on Historic Preservation to address these concerns and develop a mutually beneficial agreement that promotes the ACHP Climate Change Policy adopted in 2023 and meets the requirements of the National Historic Preservation Act of 1966.

Sincerely,



For  
Judith E Bittner  
State Historic Preservation Officer

Cc: Erik Hein, NCSHPO



# ALABAMA HISTORICAL COMMISSION

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October 1, 2024

The Honorable Sarah C. Bronin  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

RE: Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities

Dear Chair Bronin:

We appreciate the ability to comment upon the Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities prior to consideration by the full Advisory Council on Historic Preservation. As Program Comments provide federal agencies alternative methods to comply with their responsibilities under Section 106 of the National Historic Preservation Act (54 U.S.C. 306108, as codified in 36 C.F.R. Part 800), often with limited or no consultation with State Historic Preservation Officer, we are extremely concerned about the particular stipulations involved in this draft document.

In terms of the current Program Comment draft, our office strongly agrees in principle with the stated goals of this Program Comment, which include, "...fostering conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations." That said, we have serious concerns about this draft Program Comment, which would seemingly eliminate the need for the identification of historic properties for the designated undertakings, allow for the separation of portions of federal undertakings that meet the criteria of the draft Program Comment and not allow for comment upon cumulative effects, and largely place the decision of applicability on either untrained agency officials or their delegates.

We fully support the comments already provided to your office by the National Council of State Historic Preservation Officers. We have also attached specific comments regarding the draft Program Comment to this letter. If you have questions or concerns regarding our comments, we would be happy to discuss with your office.

Sincerely,

Lee Anne Hewett  
Deputy State Historic Preservation Officer

LAW/CM/EDS/eds



Proposed Program Comment on Accessible, Climate-resilient, and Connected Communities, Draft 08/08/2024  
Alabama Historical Commission (AHC) – Alabama State Historic Preservation Office – Comments 10/01/24

The AHC agrees with all points outlined in NCSHPO's *Key Observations* of the proposed Program Comment (PC).

Justification

The need for the PC is unclear. The ACHP does not provide documentation of how the Section 106 review process has failed federal agencies in carrying out the prioritized activities identified in the PC. The Justification makes no argument for developing the PC other than to enable a federal agency's *preferred approach* for having certain undertakings reviewed, which is to bypass SHPO consultation. It is also incorrect to suggest that the prioritized activities have less potential to affect historic properties than other undertakings.

Alternative Compliance

The vast array of activities allowed to circumvent Section 106 consultation is too comprehensive and will result in significant impacts to historic resources. Appendices are cumbersome, as evidenced by the Flowchart. There is a place for a clear, concise list of undertakings for these prioritized activities that can be excluded from Section 106 review.

Qualified Authorities

There is uncertainty about the expertise and objectivity of qualified professionals that are employed or contracted by federal agencies to make determinations of eligibility of affected resources and determinations of effect for undertakings.

Determinations of Eligibility

Not required - determining eligibility for the NRHP is fundamental to this process and basic due diligence for federal undertakings.

Dispute Resolution

The Dispute process simply goes through the motions, ultimately allowing the federal agency to state what they deem a satisfactory resolution and then carry out the undertaking. Further, if no consultation takes place ahead of the undertaking, as this PC envisions, it is impossible for any entity to know about a project until it is actually happening (or complete) in a community. Even then, SHPOs would likely remain unaware unless notified by a local entity. Filing disputes with a federal agency after work begins would not likely lead to a satisfactory resolution for the objecting party.

Duration

The Duration of the agreement through 2044 seems excessive.

Reporting

Federal agency annual reports to ACHP should be made available to membership (SHPOs, in particular) immediately after receipt for the duration of the agreement. Reporting to membership should occur more than every three years, should not be issued as a summary, which removes specific information about undertakings, and they should be written (not oral).

Alternative Compliance 1

Appendix A-1 Housing - Activities Not Requiring Further Review

1.a. and 1.b. If 1.a. addresses elements less than 45 years old, how does "installation" apply to those circumstances? Is this intended to mean *installation of new elements* on the housing site? Also, use of the phrase "character-defining feature of a historic property" in 1.a. is confusing since this section is for elements less than 45 years old. This phrase should only be used in 1.b. for any element. Also, if federal agencies are not required to use qualified authorities, how does the federal

agency determine if something is a character-defining feature? Not all federal agency officials may understand what constitutes 'previously disturbed ground.'

2.a. The timeframe for determining eligibility is excessive - "determined to not be a historic property within the preceding ten years." Work on secondary elevations can constitute an adverse effect - "non-primary façade of a historic building." The federal agency can claim ignorance - "or on the non-primary façade of a building whose eligibility for inclusion in the National Register is not known." Finally, buildings 75-years-old or older may be surrounded by archaeological deposits unrelated to the National Register eligibility of the structure itself.

2.b. This section inexplicably allows in-kind replacement of major character-defining features like doors, windows, roofs, siding, etc., for ANY building without review. This could adversely affect historic buildings.

2.e. There are potential adverse effects for visible roof-mounted solar panels within these parameters.

2.g. Abatement should not involve the permanent removal or replacement of windows on secondary elevations either.

3.e. This section under Building Interior describes exterior areas including right-of-way, ground, and façade (matches Building Exterior 2.g.).

4.d. This section allows work to historic housing if considered an emergency situation and can include abatement of hazardous materials - removing and/or replacing (lead-painted) historic windows and doors could be labeled an emergency situation and could be an adverse effect.

5.e. Who will hold and enforce these covenants? These have become burdensome for many SHPOs.

#### Appendix B-1 Climate-Smart Building - Activities Not Requiring Further Review

1.a. If this section is for elements less than 45 years old, how does "installation" apply to those circumstances? Is this intended to mean *installation of new elements* on the building site? Also, if this is for elements less than 45 years old, why does it state "and not including replacement or removal of any element that is a *character-defining feature of a historic property*"? Also, if federal agencies are not required to use qualified authorities, how are they able to determine that a property is historic and what the character-defining features may be?

1.b. Replacement, even in-kind, of *historic* fencing, lighting, fountains, curbs, steps, retaining wall, etc. can have an adverse effect.

1.c. Special care should be taken to note the presence of potential pre-contact stone mounds in certain areas.

1.d.i. Some above ground utilities may be eligible for the National Register under Criteria A and C.

2.a. The timeframe for determining eligibility is excessive - "determined to not be a historic property within the preceding ten years." Work on secondary elevations can constitute an adverse effect - "non-primary façade of a historic building." The federal agency can claim ignorance - "or on the non-primary façade of a building whose eligibility for inclusion in the National Register is not known."

2.b. This section inexplicably allows in-kind replacement of major character-defining features like doors, windows, roofs, siding, etc., for ANY building without further review. This could adversely affect historic buildings.

2.e. There are potential adverse effects for visible roof-mounted solar panels within these parameters.

#### Appendix C-1 Climate-Friendly Transportation - Activities Not Requiring Further Review

1.a. Covering historic ground surface materials (such as bricks or cobblestones) and replacing historic curbs (such as granite) could have adverse effects. Non-traditional sidewalk materials, new ramps and railings, and raised crosswalks can have adverse effects on historic districts.

2.b. The design and quantity of new streetlights and transit shelters can affect historic districts.

#### Alternative Compliance 2

#### Appendix A-2 Housing - Activities Not Requiring Further Review After Satisfaction of Conditions, Exclusions, or Requirements

1.a. If this section is for elements less or older than 45 years old, how does "installation" apply to those circumstances? Is this intended to mean *installation of new elements* on the housing site? Also, there is uncertainty about the expertise and

objectivity of qualified professionals that are employed or contracted by federal agencies to determine the effect of replacing or removing character-defining features.

2.a. There is uncertainty about the expertise and objectivity of qualified professionals that are employed or contracted by federal agencies to determine that work has no or *minimal* (*new to this section*) adverse effect on character-defining features. The term *minimal* is very subjective. Also, (i) work on secondary elevations can constitute an adverse effect.

2.c. There is uncertainty about the expertise and objectivity of qualified professionals that are employed or contracted by federal agencies to assess the condition of historic materials, evaluate the technical and economic feasibility of repairing historic materials versus replacing them, and select the appropriate replacement material. Analysis of technical and economic feasibility can be finessed to outcomes the federal agency favors.

2.d. There is uncertainty about the expertise and objectivity of qualified professionals that are employed or contracted by federal agencies to determine the effect of removal or replacement of windows on the historic property.

#### Appendix B-2 Climate-Smart Building - Activities Not Requiring Further Review After Satisfaction of Conditions, Exclusions, or Requirements

1.a. If this section is for elements less or older than 45 years old, how does “installation” apply to those circumstances? Is this intended to mean *installation of new elements* on the building site? Also, there is uncertainty about the expertise and objectivity of qualified professionals that are employed or contracted by federal agencies to determine the effect of rehabilitating, replacing, or removing character-defining features.

2.a. There is uncertainty about the expertise and objectivity of qualified professionals that are employed or contracted by federal agencies to determine that rehabilitation, replacement, or installation has no or *minimal* adverse effect on character-defining features. Analysis of technical and economic feasibility, including long-term operational costs and climate resilience, can be finessed to outcomes the federal agency favors. Also, (i) work on secondary elevations can constitute an adverse effect.

2.c. This section is about climate-smart buildings but uses the term *historic housing* rather than *building*, which is how climate-smart activities on buildings is referenced throughout B-2. Why include the caveat “as needed” for the federal agency using a qualified professional to conduct the procedure for replacing historic building materials in the name of energy efficiency? Using a qualified professional should always be required. There is uncertainty about the expertise and objectivity of qualified professionals that are employed or contracted by federal agencies to assess the performance (energy efficiency) of historic materials, evaluate the technical and economic feasibility of repairing historic materials versus replacing them, and select the appropriate replacement material.

#### Appendix C-2 Climate-Friendly Transportation - Activities Not Requiring Further Review After Satisfaction of Conditions, Exclusions, or Requirements

1.a. There is uncertainty about the expertise and objectivity of qualified professionals that are employed or contracted by federal agencies to determine the effect of elevating ground surfaces more than ten inches or demolishing historic surface materials.

2.a. and 2.b. There is uncertainty about the expertise and objectivity of qualified professionals that are employed or contracted by federal agencies to determine the effect of demolishing historic building materials and historic street furniture and installing transit shelters in historic districts.

4.b. There is uncertainty about the expertise and objectivity of qualified professionals that are employed or contracted by federal agencies to determine the effect of installing new bridges in historic districts.



Katie Hobbs  
Governor

# ARIZONA

## STATE PARKS & TRAILS

Bob Broscheid  
Executive Director



October 9, 2024

Honorable Sara Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

Dear Chair Bronin:

Thank you for the opportunity to comment on the Advisory Council on Historic Preservation's (ACHP) *Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities (PC)*.

As State Historic Preservation Officer of Arizona, I view one of my significant responsibilities as ensuring that Section 106 National Historic Preservation Act (NHPA) consultation process is efficient and that federal programs and funds can be effectively deployed in our state to ensure the continued economic prosperity and health and safety of Arizonans. As an appointee of the last two seated Governors, I not only fulfill the roles and responsibilities of the SHPO as defined in Section 101 of the NHPA (54 USC 302303), but also work with our administration to ensure that these federal funds are utilized in a manner which achieves our State's sustainability objectives and protects the natural and cultural resources that are so essential to Arizona's history, character, and identity.

Today I write to you in full support of the statements made by the National Conference of State Historic Preservation Officers in their letter dated September 27, 2024, and those by the Society for American Archaeology in their letter dated September 20, 2024. As you are aware from my remarks made in consultation meetings, I believe this PC *fundamentally undermines* the intent of the framers of the NHPA, to build a federal preservation program that not only recognizes, but gives primacy to, the rights of state and local governments to have a seat at the table with regards to federal decision making that affects the tangible elements of their history. The creation of SHPOs, certified local governments (CLGs) and Tribal Historic Preservation Officers (THPOs), through subsequent amendment, is a cornerstone of the NHPA and here in Arizona, is the structuring principle that ensures that federal decision making reflects the priorities of our communities.

The prologue to the PC establishes, "(this) Program Comment aims to achieve objectives laid out in ACHP policy statements, to advance historic preservation goals, and to help satisfy the nation's pressing needs to expand access to housing, facilitate climate-resilient and zero emissions buildings, and promote climate-friendly transportation." With all due respect, I would argue that it not only fails to achieve these goals but also jeopardizes current collaborative efforts between federal agencies, tribes and the state to address these important sustainability objectives in a manner that privileges local expertise; social, economic and environmental contexts; and historic preservation priorities.

While our office largely supported the ACHP's policy statement on *Housing and Historic Preservation*, formally adopted December 23, 2023, this policy focused on best practices that could be employed by federal, state, tribal and municipal governments to facilitate the adaptive reuse of historic buildings within a collaborative framework. To wit, the policy statement concludes with the assertion that "the impacts of America's housing shortfall are so wide ranging that collaboration among public-serving institutions, developers, financial institutions, philanthropic organizations and others in the private sector is essential." The Arizona SHPO is somewhat perplexed as to how this exhortation for enhanced collaboration has

resulted in the unprecedented, unilateral development of a PC by the ACHP that would effectively undermine current collaborative efforts underway within states to promote use of existing building stock to promote the development of climate-resilient affordable housing.

Furthermore, we at the SHPO are concerned with the broad-brushed approach to development of a PC that targets not only federal programs related to affordable housing and clean energy, but also transportation. Arizona's federal-aid transportation program is administered through Federal Highway Administration (FHWA) assignment, which has required our Department of Transportation (DOT) to develop a comprehensive Programmatic Agreement (PA) to govern assumption of FHWA's Section 106 responsibilities. The resulting PA, negotiated through robust consultation with Arizona's 21 tribes, represents a highly successful streamlining tool for delivery of federally funded transportation projects in Arizona. It does so within the context of Arizona's commitment to the tribes to properly consider the extensive subsurface archaeological remains that are present in both urban and rural settings, as well as the broader cultural landscape within which properties of religious, traditional and cultural value to tribes are located. The protocol developed through collaboration with the DOT, SHPO, state and federal land managers, and the tribes provides for a 14-day review period for all projects with a finding of "no adverse effect," while preserving robust consultation with tribal governments. The potential for this PC to invalidate this agreement would have disastrous consequences for historic preservation in Arizona, affecting not only the appropriate consideration of traditional cultural properties for which tribal knowledge is key to identification and evaluation, but also destabilizing the relationship of trust built between the tribes and the state.

Over the past ten years, the Arizona SHPO has proactively worked with federal agencies to execute PAs that provide critical streamlining provisions, screened exemptions and batch consultations for undertakings that are either routine in nature or have minimal potential to create adverse effects to historic properties. These PAs reflect the collaborative efforts of federal, state, tribal and local governments to craft common-sense approaches that meet the needs of all parties and include:

- **Individualized agreements** with local governments for the administration of HUD-funded programs that customize process and codify decision making at the local level, where project priorities and schedules can best be addressed.
- **Novel agreements**, such as that developed in Arizona for landscape-level vegetation management and fuels reduction, to allow federal and state agencies, municipalities, and tribal governments to deploy routine practices as well as emergency response measures across multiple land jurisdictions. Identification of agency "leads" across multiple jurisdictions allow to minimize repetitive consultations and allow for swift decision making on what has increasingly become a significant climate-related threat for the State.
- **Enhancement of nationwide agreements** that recognize agency expertise and the long history of collaboration between SHPO and administrative units of federal agencies. Examples of such include our current agreements with the Arizona State Office of the Bureau of Land Management (BLM) and Regional Programmatic Agreement with the United States Forest Service (USFS) which enhance highly-knowledgeable agency personnel's ability to make in-house decisions. Our federal colleagues appreciate the ability to utilize such agreements as they often allow for more nuanced (i.e., less formulaic) treatment of resources unique to their jurisdictions. To wit, Grand Canyon National Park has initiated the development of a Park-specific PA with the SHPO, ACHP, and tribes that would expand the provisions of the current NPS Nationwide PA to include

use of substitute materials and agreed-upon avoidance measures to ensure preservation of Register-eligible archaeological resources.

I encourage the ACHP to expand the analysis undergirding its assumption that PCs would have the desired result of facilitating federalized housing, transportation and climate resiliency projects to include **state-specific** inquiry into the presence of PAs, Section 106 review times and federal agency state/regional feedback on the effectiveness of consultation. I imagine you will find more states—like Arizona—that routinely track their responsiveness to agency requests for consultation as a function of internal process improvement and agency accountability. The Arizona SHPO has five years of data indicating that when provided sufficient information by the federal agency/applicant, concurrence on finding of effect is provided an average of 14 days of receipt of consultation. We report this data on a quarterly and annual basis to the Governor’s Transformation Office according to the principles established under the Arizona Management System (<https://results.az.gov/arizonas-approach>.)

From my over twenty years of experience assisting federal agencies with compliance with NHPA Section 106 and eight years of experience as a SHPO, I strongly suspect that the elimination of our office from Section 106 decision making process would have quite the opposite result of that which is intended under the PC. Without the involvement of SHPOs, the Section 106 review process for even the most routine undertakings will suffer from absence of a key check on federal agency accountability. For every project that may receive the (in Arizona, nominal) benefits of enhanced streamlining, I predict there will be at least five projects that experience unnecessary delays due to lack of federal agency staff prioritization, errors in defining the undertaking, incomplete identification efforts, and most concerningly, discoveries of significant archaeological properties and burials of ancestors descended from one or more of Arizona’s 21 tribes.

The staff at the Arizona SHPO certainly have additional concerns on specific provisions of the PC as they pertain to public consultation requirements of Section 106; unilateral federal agency treatment decisions that are not tied to determinations of NRHP-eligibility; the evaluation of historic properties under Criterion Consideration G; and the potential phasing and/or segmenting of projects to “fast track” isolated components that meet the requirements for the PC while deferring other components for standard Section 106 consultation. These are valid concerns that have been raised by other commenters. However, I have chosen to focus for purposes of this initial review on what I believe is an **epistemologically flawed** approach to addressing a “problem” that—at a minimum—has not been analyzed adequately and that for many states, may not even exist. To fundamentally undermine one of the basic precepts of the federal preservation program—the inclusion of state, tribal, and local voices in decision making—in pursuit of unclear gains in “efficiency” poses a threat to the very nature of historic preservation in the United States.

Thank you once again for the opportunity to provide comment on this PC. As always, I appreciate your strong leadership in guiding federal historic preservation policy and welcome the opportunity to work with you, the ACHP and staff to enhance the effectiveness of the implementing regulations of the NHPA. To that end, please feel free to reach out to me directly at 602.542.4009 or by email at [KLeonard@azstateparks.gov](mailto:KLeonard@azstateparks.gov).

Respectfully,

A handwritten signature in black ink, appearing to read 'Kathryn Leonard', written in a cursive style.

Kathryn Leonard  
State Historic Preservation Officer  
Arizona State Parks and Trails

cc:

Eric M. Hein, Executive Director, National Conference of Historic Preservation Officers  
Valerie J. Grussing, Executive Director, National Association of Tribal Historic Preservation Officers  
Reid Nelson, Executive Director, Advisory Council on Historic Preservation  
Daniel H. Sandweiss, President, Society for American Archaeology  
Amanda Stratton, Executive Director, American Cultural Resources Association  
Abbey Christman, Chair, National Alliance of Preservation Commissions





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October 9, 2024

Ms. Sara Bronin  
Chair, Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

Regarding: Proposed Program Comment on Accessibility, Climate-Resilient, and  
Connected Communities

Dear Chair Bronin:

I appreciate the opportunity to provide comments to this program comment that aims to find efficiencies, prepare for the realities of a changing climate, and balance community values of housing, transportation, and historic preservation. As we administer federal laws and regulations on behalf of our shared public, we are called to engage in meaningful consultation with federal agencies, Tribal Nations (Tribes), Native Hawaiian Organizations (NHOs), and interested parties to understand the potential effects to historic resources, places that celebrate and commemorate our rich history, not only for our present, but for future generations. California joins the Advisory Council on Historic Preservation (ACHP) and the many partners in partnership in these endeavors with all sincerity. And while it is our belief that the current laws and regulations provide a firm framework while affording the necessary flexibility to engage in solutions that address the specifics of the historic resources themselves, evaluating processes, always with an aim to do better every day for the public whom we collectively serve, is key. We join you in this desire and offer our commitment towards always improving.

In reviewing the Proposed Program Comment on Accessibility, Climate-Resilient, and Connected Communities (Program Comment), the intent is to do just that, improve upon existing processes to meet the urgency that climate change poses. As drafted, the Program Comment is challenging to follow, precludes consultation with Tribes, State Historic Preservation Offices (SHPO), interested parties, and others, all of whom hold an important role in the identification and stewardship of historic resources, and presents many questions.

I highlight some in this letter as well as provide examples in the body of the document for illustration. They are not comprehensive line by line edits. Rather, the intent is to highlight concerns, many of which are repetitive, to elicit what I hope are next steps to continue consultation with Tribes, NHOs, the ACHP, federal agencies, and other

interested parties. Ultimately, to create frameworks that allow little to no potential to effect historic resources undertakings to advance in a more timely manner.

California has worked extensively in the intersection of cultural heritage and climate change for more than a decade, leading efforts to understand the values of all partners, the threats posed to our historic resources, and develop frameworks to consider all views in climate action solutions. The belief is that we cannot responsibly steward cultural heritage for our present and future communities if we are not actively engaged in understanding the views of many, the threats before us, and working together to balance community values and needs. We fully support efforts to do just that.

In addition to the desire to find efficiencies, to spend public monies wisely on matters that have more than just little to no potential to effect historic resources, and to do so in a timely manner, *it would be helpful to have more information about the specific issues* for which the Program Comment attempts to address. The volume and nature of existing issues, how the existing tools fall short of addressing said issues, and an analysis of gaps may be helpful. There are many existing tools, programmatic agreements, program comments, nationwide programmatic agreements, that were consulted upon with partners, have been in place, and are working to achieve efficiencies while focusing on those undertakings that are more complex. With a better understanding of the problems for which the Program Comment aims to address, *perhaps existing tools can be modified* to add to what is already working well- those agreements that were crafted collaboratively, especially with Tribes and NHOs who hold special significance to cultural resources and or sacred places.

*More information about the use of existing agreement documents, those that are in place, working, and were consulted upon in good faith,* is requested. As drafted, the Program Comments allows federal agencies to decide whether they use the Program Comment, other agreements, and implies that they can add language from the Program Comment into existing documents. Details as to how this might be implemented, the validity and use of existing agreement documents, and any gaps that might be created in transitions between consultation pathways warrants further consideration.

While the goals of the draft Program Comment are admirable, they may be better achieved using prototype programmatic agreements that provide nationwide consistency while allowing for modifications that are specific to States in consultation with partners. Coupling undertakings that are not quite aligned, based on a desired outcome of combating climate change rather than the potential to effect historic resources, may not lend itself to the most clear and clean processes such as this complex Program Comment attempts. Perhaps consider separating the transportation portion of this Program Comment is a possible first step in simplification and clarification without losing the efficiencies the Program Comment desires to create.

Current agreement document consultations provide exemptions, allowances, etc., as per the regulations, after thoughtful and meaningful consultation that engages partners in the identification of historic resources, understanding the potential effects, finding solutions for which to avoid, minimize, or if necessary, mitigate adverse effects. This inclusive process embraces inclusion of all parties who choose to participate, creating rich and robust stewardship of our heritage collectively. Recognizing that all things are not equal, *exemptions are appropriate when the process considers these values, and are allowed without dilution of the regulations or their intent.* Exemptions and allowances are afforded because, in part, the particulars of a consultation are reviewed by those with experience, knowledge, expertise, and context to inform potential effects and help guide resolution. Without the intent for restrictive or burdensome requirements, *the involvement of those professionally qualified or with special knowledge is critical to ensuring that allowances are employed in agreement documents.*

Other areas of concern relate to the Program Comments being afforded to parts of undertakings, not only the entire undertaking itself. Clarification as to how this is not segmenting reviews, how it considers cumulative effects, etc. would be helpful to understand before supporting this concept.

Regarding the built environment, material replacement is an attractive option to repair in rehabilitation undertakings, especially windows which are sold with known parameters of thermal insulation, solar gain and air leakage. These decisions consider more than just economics and technical specification and are important to ensuring that historic buildings retain integrity sufficient to convey the significance for which it was deemed eligible for or listed in the National Register of Historic Places (National Register). Additionally, allowances in the Program Comment seem to emphasize the primary façade of buildings as well as the exteriors in general. Not all historic buildings are eligible for or listed in the National Register because of a single façade or for its exterior's alone. *Rehabilitation solutions should consider the unique characteristics of each building with decision being made that are appropriate to achieving the purpose for the rehabilitation* (whether to elevate a building for sea level rise, modify for energy efficiency, upgrade for seismic concerns, or fire-harden buildings.)

In allowing federal agencies to determine if historic resources are present and then seeking to identify if there are any *Tribes or NHOs* with whom to consult, it is unclear how this meets the regulations for *meaningful consultation with these specific partners.* This warrants further consideration before support can be given.

The *assumption that previously disturbed areas are exempt from review seems unsubstantiated.* It is our experience in California that many of the surfaces that are currently paved, built upon, etc. did not have the benefit of surveys, identification and evaluation, consultation with Tribes, when created. Discoveries in previously disturbed areas are not uncommon. We also learn from our Tribal partners that previously disturbed areas often contain material that may have been transported from other

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significant sites and are therefore important culturally. Additionally, it is only those who hold special knowledge that can determine if the presence or absence of significance. This seems to be an area that would benefit from further consultation.

Experience with agreement documents, especially those with new exemptions and provisions, that the initial years of an agreement tell us what is working, where improvements may be needed- refinement is key to success. This also leads to the importance of annual reports, the distribution of the reports to all consulting parties, and discussion. Should a Program Comment be advanced, an *initial duration of five years*, a consultation with all parties, and then an extension to an agreed upon timeframe is recommended. *Annual reports to all consulting parties* are also requested. This transparency seems like an important companion to the assumption that partners can seek more information or object to a determination- there needs to be a mechanism by which they can be informed.

We fully support the goals of the Program Comment and remain committed to engaging with partners to co-create pathways and frameworks that are inclusive, respectful, efficient, to meet the needs of our communities to steward historic resources now and into the future. Count us in as part of the effort to work together to craft solutions.

Sincerely,



Julianne Polanco  
State Historic Preservation Officer

Enclosure

cc:

National Association of State Historic Preservation Officers  
National Association of Tribal Historic Preservation Officers  
Members, Advisory Council on Historic Preservation

**DRAFT PROGRAM COMMENT ON  
ACCESSIBLE, CLIMATE-RESILIENT, AND CONNECTED COMMUNITIES**

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 C.F.R. § 800.14(e), and went into effect on that date. It provides all *federal agencies* with an alternative way to comply with their responsibilities under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations, 36 C.F.R. part 800 (Section 106), regarding the *effects* of certain *housing*-related, *climate-smart building*-related, and *climate-friendly transportation infrastructure*-related activities.

**I. INTRODUCTION**

**A. Background**

The development of this Program Comment is driven by the nation’s pressing needs to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce its energy use and greenhouse gas emissions, improve climate resilience, and cut energy costs; and to decarbonize its transportation sector — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

Recognizing these needs, in 2023, the ACHP adopted its Housing and Historic Preservation Policy Statement (Housing Policy Statement) and its Climate Change and Historic Preservation Policy Statement (Climate Change Policy Statement), which commit the ACHP to explore new opportunities to use program alternatives to enable federal agencies to advance historic preservation while meeting the nation’s housing and climate goals. These policy statements reflect increasing public awareness that historic preservation strategies — and historic properties themselves — can play an important role in addressing the three interrelated sectors covered in this Program Comment.

Following these policy statements, the ACHP developed this government-wide Program Comment to help accelerate the review of projects carried out, permitted, licensed, funded, assisted, or approved by federal agencies to rehabilitate existing housing or create new housing in existing buildings, to maintain and update buildings and their immediate environs in response to climate concerns, and to rehabilitate or develop new climate-friendly transportation infrastructure.

**B. Current Federal Agency Action**

Every day, federal agencies propose to carry out, permit, license, fund, assist, or approve undertakings covered by this Program Comment, and when they do, they must comply with Section 106 of the National Historic Preservation Act. While the federal government’s role in supporting housing rehabilitation and production, climate-smart buildings, and climate-friendly transportation is difficult to quantify, an overview of current federal agency actions and investments offers insight into the scope and scale of undertakings covered by this Program Comment.

In the area of housing, federal agencies support housing for millions of Americans and preserve the viability and affordability, upgrade the energy efficiency, and enhance the climate resiliency of the nation’s housing stock. The Department of Housing and Urban Development (HUD), for example, supports 1 million housing units across 190,000 public housing buildings, with HUD spending nearly \$9 billion annually in capital and operating funds on these units, over half of which were

built before 1975. HUD also provides billions annually through the Community Development Block Grant and HOME Investments Partnership programs. In addition, the Department of Defense provides over one million units to Military Service members, including 846,000 units in military-owned barracks, while the Rural Housing Service of the Department of Agriculture provides loans to support affordable multifamily developments in rural areas and currently has over 400,000 units in its portfolio, including 17,000 units that support farm laborers. Thousands of projects are funded by other federal agencies working to ensure all Americans have safe, habitable, and affordable housing.

In the area of climate-smart buildings, federal agencies have long undertaken projects that seek to reduce energy cost burdens, cut climate pollution, and boost climate resilience of the nation's building stock. The Inflation Reduction Act — the largest climate bill in history — and the Bipartisan Infrastructure Law have accelerated these efforts. The Environmental Protection Agency \$27 billion Greenhouse Gas Reduction Fund, for example, finances zero emissions building projects and clean technology deployment nationally, including in low-income and disadvantaged communities. The Climate Smart Buildings Initiative is catalyzing more than \$8 billion of private sector investments by 2030 to perform energy efficiency upgrades in federal buildings. The \$1 billion HUD Green and Resilient Retrofit Program invests in energy efficiency, electrification, clean energy generation, climate resilience, and low-embodied-carbon materials in HUD-assisted multifamily housing. And the Department of Energy Efficiency and Conservation Block Grant Program is assisting states, local governments, and Tribes in implementing strategies to reduce energy use, to reduce fossil fuel emissions, and to improve energy efficiency, including for residential and commercial buildings.

In the area of climate-friendly transportation, the federal government's project portfolio — from sidewalks and bike lanes, to bus shelters and light rail — spans multiple Department of Transportation operating administrations as well as other federal agencies, including those that might fund such projects (such as HUD and the Environmental Protection Agency) or build such projects (such as the Department of Agriculture and the Department of Interior). Through the Bipartisan Infrastructure Law and other recent actions, the federal government is currently making significant investments to reduce greenhouse gas emissions and bolster the resilience of America's transportation infrastructure. This includes \$91 billion over five years for public transportation projects, including for transit accessibility, transit-oriented development, and expanded transit service. It also includes \$66 billion to improve the nation's rail systems, representing the largest investment in passenger rail since the creation of Amtrak, and additional funding for pedestrian and bike infrastructure, recreational trails, Safe Routes to School, and more. Other funding includes billions \$7.5 billion over five years for electric vehicle charging infrastructure, \$8.7 billion over five years for transportation infrastructure resilience, and \$2 billion to reduce the lifecycle emissions of transportation construction projects by investing in materials with lower levels of embodied carbon emissions compared to industry averages.

Many types of activities relating to these and other federal agency programs and investments require Section 106 review.

### **C. Prior ACHP Action**

The ACHP's statutory duties under the National Historic Preservation Act include advising the President, Congress, and state and local governments on historic preservation policy issues and overseeing the Section 106 process.

In its advising capacity, the ACHP has formally advised the President, Congress, and state and local governments on housing since at least 1995, when it issued its first policy statement on affordable housing. It updated this policy statement in 2006, and again in 2023. The Housing Policy Statement states that Section 106 reviews must “be grounded in a flexible yet consistent approach to ensure that housing can be developed expeditiously while still preserving the historic qualities of affected historic properties.” Also in 2023, the ACHP advised on climate change and historic preservation through its Climate Change Policy Statement. It urges action on building reuse and energy-and-emissions-saving retrofits of older and historic buildings (including enhanced electrification and increased energy efficiency standards). It also supports expediting Section 106 review of projects addressing climate change, including clean energy and climate-friendly transportation projects.

In its oversight of the Section 106 process, the ACHP has also issued or participated in other program alternatives to create tailored review processes for certain programs and undertakings relevant to this Program Comment. At the request of Department of Defense, for example, the ACHP has issued six program comments specifically related to housing, which cover housing developed under specific congressionally appropriated programs, housing constructed during specific eras, and housing designed and built with similar form, style, and materials. The ACHP has also recently been a signatory to several statewide programmatic agreements with HUD related to projects and programs subject to 24 C.F.R. Parts 50 and 58. Prior program comments addressing housing have reduced the operational and maintenance costs of historic housing, made homes more comfortable for occupants, and facilitated the preservation and reuse of existing buildings.

With regard to climate-smart buildings, ACHP has issued several program comments, along with an exemption for the General Services Administration’s routine operations and maintenance. The ACHP has also signed a Department of Energy Prototype Programmatic Agreement for weatherization activities and a Nationwide Programmatic Agreement Regarding Climate Resiliency and Sustainability Undertakings on Department of Homeland Security Owned Facilities, which cover a broad range of energy efficiency, water efficiency, and climate adaptation-related undertakings. Prior program alternatives incorporating climate-smart building strategies have reduced the operational and maintenance costs of historic buildings, made such buildings more comfortable for occupants, and facilitated the preservation and reuse of historic buildings.

With regard to climate-friendly transportation, the ACHP has issued two program comments specifically related to transportation projects, along with a government-wide exemption for certain electric vehicle supply equipment. In addition, the ACHP has been a signatory to statewide programmatic agreements with the Federal Highway Administration, state historic preservation offices, and state departments of transportation, covering a range of transportation-related activities. To the extent prior program alternatives have addressed climate-friendly transportation projects, they have facilitated such projects while upholding historic preservation values.

This Program Comment is guided in part by the mechanisms, provisions, and approaches in prior program alternatives that are most consistent with the ACHP’s recently adopted Housing Policy Statement and Climate Change Policy Statement. In expanding beyond the scope of these prior program alternatives, this Program Comment creates a consistent and holistic approach for Section 106 review across the federal government for certain undertakings, reducing complexity and equipping federal agencies to more effectively and efficiently address the nation’s needs.



#### D. Justification

Many types of activities relating to the programs identified in Section I.B. of this Program Comment, and other similar programs, require review under Section 106 of the National Historic Preservation Act. Recognizing the extent, and in some cases the increasing extent, of federal action in the housing, building, and transportation sectors, and the volume and repetitive nature of such action, the ACHP has issued this Program Comment to clarify preferred approaches to reviewing these covered undertakings. In doing so, this Program Comment enables federal agencies to focus on other undertakings with greater potential for adverse effects on historic properties, reducing taxpayer costs and facilitating project delivery — while enabling the production and rehabilitation of housing, the preparation of buildings to be climate-resilient, and the reduction of energy use and greenhouse gas emissions in the building and transportation sectors.

#### E. Goals

This Program Comment aims to promote actions that, consistent with the National Historic Preservation Act, 54 U.S.C. § 300101(1), “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”

More specifically, this Program Comment aims to achieve objectives laid out in ACHP policy statements, to advance historic preservation goals, and to help satisfy the nation’s pressing needs to expand access to housing, facilitate climate-resilient and zero emissions buildings, and promote climate-friendly transportation. It does so in recognition of three critical facts: that the United States has an aging housing stock, with half of existing housing units built before 1979; that more than a third of greenhouse emissions comes from the building sector, and buildings use 75% of the electricity generated annually; and that transportation sector is the largest source of greenhouse gas emissions in the United States, responsible for about one-third of all emissions.

This Program Comment also aims to leverage the embodied carbon in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for construction materials that currently account for more than 15 percent of annual global greenhouse gas emissions, and in turn slowing down climate change and its impacts on our most cherished places.

Ultimately, this Program Comment aims to benefit the people who live in the housing, work in the buildings, and move using the climate-friendly transportation infrastructure projects being carried out, permitted, licensed, funded, assisted, or approved by federal agencies.

## II. SCOPE

#### A. Overall Effect

This Program Comment provides an alternative way for *federal agencies* to comply with their Section 106 responsibility to take into account the *effects* on *historic properties* of their covered *undertakings*. The Program Comment also provides the ACHP a reasonable opportunity to comment regarding covered *undertakings*.

**Commented [OHP1]:** It also removes the ability of any other interested party (SHPO, local governments, individuals, etc.) to comment on covered undertakings.

#### **B. Effect on Other Applicable Laws**

This Program Comment does not modify, preempt, or replace any other federal laws, or any applicable state, local, or Tribal laws or regulations.

#### **C. Effect on Existing Agreements**

A *federal agency* that already has a Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must either:

1. Follow this Program Comment, rather than such MOA or PA for a class of covered *undertakings* for the life of this Program Comment. Before making a decision to do so, the *federal agency* must first consult with the signatories of such MOA or PA and then provide them written notice of the decision to apply this Program Comment to a class of covered *undertakings*; or
2. Continue to implement the existing MOA or PA regarding such covered *undertakings*, rather than this Program Comment.

*Federal agencies* may pursue amendments to such MOAs or PAs per their stipulations, to incorporate, in whole or in part, the terms of this Program Comment. *Federal agencies* may also consider terminating such MOA or PA and follow this Program Comment to satisfy their Section 106 responsibility for the covered *undertakings*.

A *federal agency* that already has a Section 106 program comment or program comments in effect for covered *undertakings* must follow the terms of those program comments to the extent those program comments address the *undertakings* covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of other program comments. *Federal agencies* may propose to the ACHP amendments to existing program comments following the amendment procedures in those program comments, to incorporate, in whole or in part, the terms of this Program Comment.

#### **D. Effect on Tribal Lands**

This Program Comment does not apply on *Tribal lands*, or to activities that may affect *historic properties* located on *Tribal lands*, unless the *Indian Tribe*, *Tribal historic preservation officer*, or a designated representative of the *Indian Tribe* has provided prior written notification to the Executive Director of the ACHP that the Tribe allows the use of the Program Comment on the Tribe's lands. *Indian Tribes* can agree to such use of the Program Comment by issuing an authorization for such use in a format substantially similar to the format contained in Appendix D to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on those *Tribal lands* on the date of receipt by the Executive Director of the ACHP, who must ensure notice on such authorization is included on the website of the ACHP. The *Indian Tribe*, *Tribal historic preservation officer*, or designated representative of the *Indian Tribe* may terminate the *Indian Tribe's* authorization to use this Program Comment by notifying the Executive Director of the ACHP in writing. Such a termination will be limited to the Program Comment's applicability to *undertakings* that would occur on or affect *historic properties* on the *Tribal lands* under the jurisdiction of the *Indian Tribe*.

#### E. Standard Section 106 Review

A *federal agency* must follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7 or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative, if:

1. The *federal agency* elects, for any reason, not to utilize this Program Comment for an *undertaking* for which alternative compliance approaches are prescribed in Section III of this Program Comment.
2. The *undertaking* or components of an *undertaking* that include activities not listed in the **Appendices**, meaning the undertaking would be subject to the Section 106 review process, but the *federal agency* could incorporate use of this Program Comment in its review of the entire *undertaking*.
3. The *undertaking* would occur on or have the potential to affect the following *historic properties*:
  - a. Any National Monument, National Historic Site, National Historic Trail, National Historical Park, National Military Park, National Battlefield, National Battlefield Park, or National Battlefield Site.
  - b. Any site, object, *building*, or structure individually designated as a *National Historic Landmark* or designated as a *contributing property* to a *National Historic Landmark* district, or found within the boundaries of a *National Historic Landmark* archaeological district.
  - c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*.

**Commented [OHP2]:** There is concern with ‘components of an undertaking’. How is this not segmenting the possible effects of an undertaking? How are cumulative effects considered if a portion of an undertaking is exempt and the rest of it is not? This warrants further consideration.

### III. ALTERNATIVE COMPLIANCE APPROACHES

#### A. Available Alternative Compliance Approaches

This Program Comment authorizes alternative compliance approaches for covered *undertakings*, as follows:

1. For *undertakings* or components of *undertakings* with no or minimal potential to adversely affect *historic properties*, as set forth in Appendix A-1, B-1, or C-1 of this Program Comment, a *federal agency* may proceed with the *undertaking* without conducting further review under Section 106.
2. For *undertakings* or components of *undertakings* for which the *federal agency* satisfies certain conditions, exclusions, or requirements, as set forth in Appendix A-2, B-2, or C-2 of this Program Comment, a *federal agency* may proceed with the *undertaking* if it satisfies the conditions, exclusions, or requirements prescribed in those Appendices, and it documents the manner in which it has satisfied such conditions, exclusions, or requirements.

**Commented [OHP3]:** Similar to agreement documents, in order to use provisions of this program comment, an entire undertaking should comply with the allowances or the program comment should to apply. Otherwise, segmentation of undertakings is likely to occur, making it difficult for the public or any other parties to follow the federal agency’s compliance efforts.

## B. Consultation with Indian Tribes and Native Hawaiian Organizations

The United States government has a unique legal and political relationship with *Indian Tribes* as set forth in the Constitution of the United States, treaties, statutes, court decisions, and Executive Orders. The United States recognizes the right of *Indian Tribes* to self-government. Tribes exercise inherent sovereign powers over their members and territories. The ACHP drafted this Program Comment with a commitment to strengthening the government-to-government relationship between the United States and *Indian Tribes*.

### 1. Potential Effects on Properties of Significance to Indian Tribes and Native Hawaiian Organizations

It is important to recognize that while this Program Comment was drafted to limit impacts on *historic properties*, such as sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, covered *undertakings* could directly or indirectly affect such properties.

### 2. Consultation-Related Obligations

If the *federal agency*, based on the location of the *undertaking* and the *area of potential effects*, determines that an *effect* on the *historic properties* of religious and cultural significance to *Indian Tribes* or *Native Hawaiian Organizations*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, may occur, it must make a reasonable and good faith effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* and invite them to consult to assess whether use of the Program Comment for the subject undertaking is appropriate. The *federal agency's* consultation effort should be informed by and be conducted in accordance with the National Historic Preservation Act, the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects, including by recognizing the special expertise of holders of Indigenous Knowledge.

The *federal agency's* effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* should be informed by, but not limited to the following: the knowledge and expertise of agency Tribal liaison staff, historic maps, information gathered from previous consultations pursuant to Section 106, databases of *Indian Tribes* and *Native Hawaiian Organizations* where accessible and appropriate, the Bureau of Indian Affairs Tribal Leader List, U.S. Department of the Interior Native Hawaiian Organization List, the National Park Service Tribal Historic Preservation Program contact database, National Association of Tribal Historic Preservation Officers, the U.S. Housing and Urban Development Tribal Directory Assistance Tool, *state historic preservation officer* databases, and other resources.

### 3. Effect of Finding of Potential Effect on Certain Properties

Should it be determined through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could potentially result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including a

**Commented [OHP4]:** This section to suggest that an agency will invite Tribes and Native Hawaiian Organizations to participate or consult on the appropriateness of using this PC if it identifies effects to historic properties of religious and cultural significance, rather than involving Tribes in the identification of historic properties in the APE.

Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* may not use this Program Comment and must instead follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative.

#### 4. Confidentiality-Related Obligations

Consistent with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, *federal agencies* should consider information regarding *historic properties* with traditional religious and cultural significance to *Indian Tribes* or *Native Hawaiian Organizations*, Tribal identified sacred sites, and Indigenous Knowledge shared with the *federal agency* by *Indian Tribes* or *Native Hawaiian Organizations* as sensitive, unless otherwise indicated by the *Indian Tribe* or *Native Hawaiian Organization*. *Federal agencies* should clearly inform *Indian Tribes* and *Native Hawaiian Organizations* of any limitations on the agency's ability to keep sensitive information confidential. *Federal agencies* must keep sensitive information provided by *Indian Tribes* or *Native Hawaiian Organizations* confidential to the extent authorized by applicable federal laws, such as Section 304 of the National Historic Preservation Act. *Federal agencies* are encouraged to use best practices on confidentiality delineated in the 2023 Interagency Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites when implementing this Program Comment.

#### C. The Use of Qualified Authorities

*Undertakings* covered by this Program Comment do not require the use of a *qualified authority* except where explicitly stated, or except where, in the reasonable judgment of the *federal agency* in consideration of various factors, the use of a *qualified authority* is necessary to fulfill the intent of the National Historic Preservation Act or necessary or useful to inform the *federal agency's* decision-making.

When the *federal agency* chooses to use a *qualified authority*, the type of *qualified authority* must be appropriate to the circumstances. For example, a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects to historic properties* of religious and cultural significance to the Tribe or to *Native Hawaiians*, respectively, should be consulted to inform the identification, *effects* determination, and other matters involving *historic properties* significant to that *Indian Tribe* or *Native Hawaiian Organization*. As another example, determinations regarding architectural resources and structures must be made by a *qualified professional* meeting such professional standards for historic architecture or architectural history established by the Secretary of the Interior.

#### D. Determinations of Eligibility

*Undertakings* covered by this Program Comment, due to their nature and potential *effects*, do not require a *federal agency* to determine whether an involved or affected property is a *historic property* except where explicitly stated.

**Commented [OHP5]:** The use of Secretary of the Interior's Professionally Qualified staff in areas of expertise should be a requirement under all Program Comments and agreement documents. This ensures that the exemption is thoughtfully applied and carefully considered using knowledge and expertise appropriate to the historic resources type.

Terms used should be defined and consistently used throughout the document

**Commented [OHP6]:** Many of the activities covered by this program comment mention character defining features, primary facades, and other characteristics defined in a determination of eligibility. If no DOE occurs, how would a federal agency determine these characteristics, especially without consultation with the Tribes, Native Hawaiian Organizations, SHPO and other parties?

#### IV. ASSISTANCE TO CONSULTING PARTIES

This Program Comment does not require a *federal agency* to pay any consulting party for providing its views or comments in response to 36 C.F.R. part 800 responsibilities, including invitations to consult in a Section 106 review; to respond to the proposed *area of potential effects*, scope of identification efforts, eligibility findings, assessment of *effect*; or to consult to seek ways to resolve any *adverse effects* or to develop a memorandum of agreement or programmatic agreement to conclude the Section 106 review finding or determination. If, however, a *federal agency* asks an *Indian Tribe*, *Native Hawaiian Organization*, or any consulting party to do more than the activities listed in the preceding sentence in connection with this Program Comment, the *federal agency* or its applicant, grantee, or permittee, if applicable, must enter into an appropriate arrangement to provide the *Indian Tribe*, *Native Hawaiian Organization*, or consulting party reasonable payment for such services, if and to the fullest extent the *federal agency* has the authority to enter into such an arrangement and pursuant to its policies and procedures. Examples of services include requests to:

- A. Conduct an archaeological, ethnographic, or other inventory or field survey to identify *historic properties* that may be affected by the *undertaking*.
- B. Perform a *records check* on behalf of the *federal agency*.
- C. Conduct research and make preliminary assessments of National Register eligibility on behalf of a *federal agency*, as opposed to responding to determination of eligibility.
- D. Provide an assessment of the potential *effects* of the *undertaking* on *historic properties*, as opposed to responding to such an assessment.
- E. Carry out *mitigation measures*, including conducting additional research or monitoring ground disturbing activities as part of a mitigation plan.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, evaluation, or mitigation efforts.
- G. Design or develop a specific plan or specifications for an *undertaking* that would meet the Secretary of the Interior's Standards for Rehabilitation or otherwise avoid, minimize, or mitigate *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.
- I. Contribute substantially to any of the above activities carried out by a third party.

A request during consultation by an *Indian Tribe* or *Native Hawaiian Organization* to conduct such services itself does not preclude reasonable payment for services simply because the request was made during consultation. A *federal agency* or its applicant, grantee, or permittee, if applicable, must consider entering into an arrangement, in accordance with this Section, with any *Indian Tribe* or *Native Hawaiian Organization* making such a request.

## V. UNANTICIPATED DISCOVERIES

### A. Immediate Response Requirements

If previously unidentified *historic properties* or unanticipated *effects*, including visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of the *undertaking*, the *federal agency* must immediately halt all activity that could affect the discovery and institute interim measures to protect the discovery from looting, vandalism, weather, and other threats. The *federal agency* must then follow the procedures set forth in 36 C.F.R. § 800.13(b); for sites with potential religious and cultural significance to *Indian Tribes* or *Native Hawaiian organizations*, the *federal agency* must request, and incorporate, if provided, the special expertise of *Tribes* or *Native Hawaiian Organizations* and the information provided by designated holders of Indigenous Knowledge and must follow those procedures accordance with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and for sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow these procedures in accordance with the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. A *federal agency* that has *historic property* discovery procedures in existing management plans pertaining to *historic properties* should follow such existing procedures.

### B. Response to the Discovery of Human Remains, Funerary Objects, Sacred Objects, or Items of Cultural Patrimony

The *federal agency* must ensure that in the event human remains, funerary objects, sacred objects, or items of cultural patrimony are discovered during implementation of an *undertaking*, all work within 50 feet of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, local law enforcement, and coroner/medical examiner in accordance with any applicable state statute(s) must be immediately contacted. The *federal agency* must be guided by the principles within the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. The *federal agency* must comply with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 C.F.R. part 10, in regard to any human remains, funerary objects, sacred objects, or items of cultural patrimony found on federal or Tribal land.

## VI. DISPUTE RESOLUTION

Any person may file a dispute over the implementation of this Program Comment or its use for any particular *undertaking*, by filing a notice with the relevant *federal agency*, including the *federal agency's* federal preservation officer, with a copy to the consulting parties involved in the *undertaking* and any relevant *Tribal historic preservation officer* or *state historic preservation officer*. Objecting parties may include but are not limited to *Indian Tribes*, *Tribal historic preservation officers*, *state historic preservation officers*, *Native Hawaiian Organizations*, local governments, preservation organizations, owners of historic properties, and members of the public. The *federal agency* must consult with the objecting party to resolve the dispute for not more than 60 *days*. Any disputes over the evaluation of unanticipated discoveries must be resolved in accordance with the requirements of 36 C.F.R. § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 *days*, the *federal agency* may forward to the ACHP all documentation relevant to the objection, including the *federal agency's* proposed resolution if any, request

**Commented [OHP7]:** How would “any person” know about “any particular undertaking” being implemented under the program comment? There seems to be no requirement for notification of the public, interested parties, SHPO, Tribes, Native Hawaiian Organizations etc.



the ACHP to provide within 30 *days* its advisory comments to resolve the dispute, and take the ACHP's comments into account before finalizing its approach to complying with Section 106. The *federal agency* must notify the objecting party and any relevant *Tribal historic preservation officer* or *state historic preservation officer* regarding its approach to complying with Section 106 for an *undertaking* that is the subject of a dispute. The *federal agency's* decision regarding the resolution will be final. Following the issuance of its final decision, the *federal agency* may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

The ACHP must monitor such disputes, and from time to time, the Executive Director of the ACHP may issue advisory opinions about the use of this Program Comment to guide *federal agencies*.

## VII. DURATION

This Program Comment will remain in effect from the date of adoption by the ACHP through December 31, 2044, unless prior to that time the ACHP withdraws the Program Comment in accordance with Section IX of this Program Comment. On any date during the six-month period preceding the expiration date, the ACHP Chair may amend the Program Comment to extend its duration in accordance with Section VIII.A. of this Program Comment. If an *Indian Tribe* authorizes the use of this Program Comment on its *Tribal lands* in accordance with Section II.D. of this Program Comment, such authorization will be in effect from the date of the issuance of the authorization until the termination of such authorization by the *Indian Tribe* or the expiration or withdrawal of this Program Comment, whichever is earlier.

**Commented [OHP8]:** Recommend an initial five year duration with a consultation to amend, modify, etc. and then extend. Intervals for similar check ins should be included in the duration clause.

## VIII. AMENDMENT

The ACHP may amend this Program Comment after consulting with *federal agencies* and other parties as it deems appropriate and as set forth below.

### A. Amendment by the Chair, ACHP

The Chair of the ACHP, after notice to the rest of the ACHP membership and *federal agencies* may amend this Program Comment to extend its duration. The ACHP must notify *federal agencies* and publish notice in the Federal Register regarding such amendment within 30 *days* after its issuance.

### B. Amendment by the Executive Director, ACHP

The Executive Director of the ACHP, after notice to the ACHP membership and other *federal agencies* may amend this Program Comment to adjust due dates and make corrections of grammatical and typographical errors. The ACHP must notify *federal agencies* and publish notice in the Federal Register regarding such amendments within 30 *days* after their issuance.

### C. All Other Amendments

Amendments to this Program Comment not covered by Sections VIII.A. or VIII.B. of this Program Comment will be subject to ACHP membership approval.

**Commented [OHP9]:** Recommend clarifying use of the term "other parties" by detailing who the ACHP will consult with for amendments to this Program Comment (SHPOs/Tribes and NHOs/ Local Governments/ the Public?).

## IX. WITHDRAWAL

If the ACHP determines that the consideration of *historic properties* is not being carried out in a manner consistent with this Program Comment, the ACHP may withdraw this Program Comment. The Chair of the ACHP must then notify *federal agencies* and publish notice in the Federal Register regarding withdrawal of the Program Comment within 30 *days* of the decision to withdraw. If this Program Comment is withdrawn, *federal agencies* must comply with the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative for individual *undertakings* covered by this Program Comment.

## X. REPORTS AND MEETINGS

### A. Federal Agency Annual Reports

The *federal agencies* that use this Program Comment must provide annual reports regarding the use of this Program Comment during the previous reporting period, ending June 30 annually, to the ACHP, as provided in this Section. Each agency's annual report must: provide examples of *undertakings* covered by Section III.A.1. of this Program Comment; provide information about the manner or extent to which the agency satisfied the conditions, exclusions, and requirements to proceed with the *undertakings* covered by Section III.A.2.; identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; include an assessment of the overall effectiveness of the Program Comment in meeting its intent; and summarize professional assistance and compliance monitoring activities. Annual reports are due on September 30 of each year, starting September 30, 2025 and ending September 30, 2029.

For the remaining duration of this Program Comment, the *federal agencies* that use this Program Comment must provide reports regarding the use of this Program Comment during the previous reporting period, ending June 30 triennially, to the ACHP, as provided in this Section. Each agency's triennial report must be submitted either as part of *federal agencies'* report to the ACHP pursuant to Executive Order (EO) 13287, "Preserve America," or, for *federal agencies* not otherwise required to submit such report to the ACHP, as a stand-alone triennial report. Each agency's triennial report must: identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; and include an assessment of the overall effectiveness of the Program Comment in meeting its intent. Triennial reports are due on September 30 of every third year, starting September 30, 2032.

In any report required by this Section, the ACHP encourages *federal agencies* to also propose for ACHP consideration amendments and refinements to this Program Comment based on their experience implementing it.

In any report required by this Section, a *federal agency* must include in its report the activities, if any, of entities to which it has delegated legal responsibility for compliance with Section 106 in accordance with federal law.

**Commented [OHP10]:** Reports should be provided to SHPOs, Tribes, Native Hawaiian Organizations and Interested Parties. These partners should also be included in consultations regarding any amendments.

## B. Annual Meetings

By January 31, 2026 and for four years thereafter, the ACHP must schedule an annual meeting and invite *federal agencies, Indian Tribes, state historic preservation officers, Tribal historic preservation officers, Native Hawaiian Organizations* and others it deems appropriate, to discuss implementation of the Program Comment. At the meeting, attendees will have an opportunity to provide their views on the overall effectiveness of the Program Comment in meeting its intent and purpose. Such views may inform decisions such as those regarding amendments to the Program Comment. Annual meetings may take place in-person, by phone, virtually using electronic meeting platforms, or any combination of such means.

**Commented [OHP11]:** Recommend that this be further defined to include SHPO, THPO, Native Hawaiian Organizations, etc. Both annual meetings and reporting should be transparent to all parties who should also be afforded the opportunity to comment/consult prior to making any amendments.

## C. ACHP Reports

At any time, but at least once during the initial three-year period during which this Program Comment is being used, and every three years thereafter, ACHP staff must provide a written or oral summary of information received from *federal agency* reports, annual meetings, or other sources about the utility of this Program Comment and make any recommendations for amendments to the ACHP membership.

## XI. DEFINITIONS

For purposes of this Program Comment, the following definitions apply, and beginning in Section II of this Program Comment, such words are *italicized* for convenience:

*Abatement* means acting or actions to eliminate, lessen, reduce, or remove.

*Adverse effect*, as provided in 36 C.F.R. § 800.5(a)(1), means an action that may alter, directly or indirectly, any of the characteristics of a *historic property* that qualify the property for inclusion in the National Register of Historic Places in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association; and it includes reasonably foreseeable *effects* caused by the *undertaking* that may occur later in time, be farther removed in distance or be cumulative.

*Area of potential effects*, as provided in 36 C.F.R. § 800.16(d), means the geographic area or areas within which an *undertaking* may directly or indirectly cause alterations in the character or use of *historic properties*, if any such properties exist, and is influenced by the scale and nature of an *undertaking* and may be different for different kinds of *effects* caused by the *undertaking*.

*Bicycle lane* means a portion of a roadway that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists.

*Bicycle parking* means a designated area to store a bicycle, whether personal or shared, including *bicycle racks* and dedicated bicycle docks used in a shared system.

*Bicycle rack* means a rack for a personal or shared bicycle, e-bicycle, or scooter that is typically u-shaped.

*Bicycle rail* means a traffic control device that provides a protective barrier between motor vehicle travel lanes and *protected bicycle lanes* or *cycle tracks*.

*Bulb out* means feature that extends the line of the curb into the traveled way, reducing the width of the street, also known as curb extensions or bump-outs.

*Building* means a constructed work created principally to shelter any form of human activity, including mobile and manufactured homes and *climate-friendly transportation facilities* that are *buildings*.

*Building energy control system* means a *mechanical system* enabling a *building* occupant to manage or monitor energy use and all components of such system, including but not limited to programmable thermostats, digital outdoor reset controls, occupancy sensors, Underwriters Laboratories listed energy management systems or *building* automation systems, demand response and virtual power plant technologies, smoke and carbon monoxide detectors, and related technologies.

*Character-defining feature* means an element of a *historic property* that demonstrates or includes the characteristics of a *historic property* that qualify the *historic property* for inclusion in the National Register of Historic Places, including elements that contribute to the *historic property*'s overall shape, style, design, and decorative details.

*Clean energy technologies* means *solar energy systems*, wind energy systems, battery energy storage systems, geothermal systems, and microgrids serving a *building* or *buildings*, or serving a *climate-friendly transportation facility*.

*Climate-friendly transportation infrastructure* means pedestrian, bicycle, *micromobility vehicle*, bus (including bus rapid transit), and rail infrastructure.

*Climate-friendly transportation facility* means a *building* or structure used for *bicycle parking*, *micromobility parking*, a bus station, a bus rapid transit station, or a rail station.

*Climate-smart building* means a *building* that is energy efficient, electric, uses clean energy, and is resilient.

*Climate resilience* is defined as the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

*Community solar system* means a solar photovoltaic *installation* with up to 5 megawatts nameplate capacity and delivering at least 50% of the power generated from the system to *buildings* within the same utility territory as the facility.

*Cool pavement* means paving materials that reflect more solar energy, enhance water evaporation, or have been otherwise modified to remain cooler than conventional pavements.

*Contributing property*, as provided in National Register Bulletin 16A, "How to Complete the National Register Registration Form," means a *building*, structure, object, or site, as applicable, within the boundaries of a *historic district* that adds to the historic associations, historic architectural qualities, or archaeological values for which a property is significant because it was present during the period of significance, relates to the documented significance of the property, and possesses historic integrity or is capable of yielding important information about the period; or it independently meets the criteria for the National Register of Historic Places.

*Cycle track* means a bicycle facility that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use of bicyclists.

*Day* means calendar *day*, taking place from one midnight to the following midnight.

*Economic feasibility* means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including estimated construction costs (including the cost of *building* material and labor), estimated operational costs, available budget, and timelines for compliance review processes to the extent they impact financial conditions for the *undertaking*.

*Effect*, as provided in 36 C.F.R. §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative alteration to the characteristics of a *historic property* qualifying it for inclusion in or eligibility for the National Register of Historic Places.

*Electrification* means the *replacement* or conversion of an energy-consuming device or system from non-electric sources of energy to electricity; or the *replacement* or conversion of an inefficient electric appliance to an efficient electric appliance.

*Electric vehicle supply equipment or EVSE* means conductors, including the ungrounded, grounded, and equipment grounding conductors and the electric vehicle (EV) connectors, attachment plugs, and all other fittings, devices, power outlets, or apparatus installed specifically for the purpose of delivering energy from the premises wiring to the EV. There are three levels of EVSE: i. Level 1: Refers to a freestanding or wall mounted charging structure that delivers a 110/120V charge, replenishing an EV battery at a rate of 4 to 6 miles of range per hour of charging time. Charging an EV at level 1 typically takes between 7 and 20 hours depending on the size of the vehicle's battery. ii. Level 2: Refers to a freestanding or wall mounted charging structure that delivers a 208/240V charge, replenishing an EV battery at a rate of 10 to 20 miles of range per hour of charging time. Charging an EV at level 2 typically takes between 2 and 5 hours depending on the size of the vehicle's battery. iii. Level 3 (also known as Direct Current (DC) Fast Charging): Refers to a freestanding or wall mounted structure capable of being networked that is designed to charge vehicles more quickly than level I or level II with an electrical output ranging between 40 kW-500 kW delivering 50-1000 volts of direct current to the EV battery. Converts AC power to DC within the charging station and delivers DC power directly to the battery. DC fast charging can typically replenish an EV battery at a rate of 50 to 200 miles of range per 30 minutes of charging time.

*Emergency situation* means any of the following: occurrence of a natural catastrophe, such as a hurricane, wildfire, flood, or excessive heat; declaration of emergency by the President, an *Indian Tribe*, governor, or a chief elected official of a territory or city; or recognition or report of a sudden, serious, and imminent threat to life, health, safety, or property.

*EVSE criteria* means (1) take place in existing *parking facilities* with no major electrical infrastructure modifications and are located as close to an existing electrical service panel as practicable; (2) use reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimize *ground disturbance* to the maximum extent possible, and ensure that it does not exceed previous levels of documented *ground disturbance*; (4) use the *lowest profile equipment* reasonably available that provides the necessary charging capacity; (5) place the *EVSE* in a minimally visibly intrusive area; and (6) use colors complementary to surrounding environment, where possible.

*Federal agency* means an agency as defined by 5 U.S.C. § 551(1), and includes state, local, or Tribal government officials who have been delegated legal responsibility for compliance with Section 106 in accordance with federal law.

*Flex post* means flexible bollards or delineators used to separate motor vehicle traffic from a *bicycle lane*, *protected bicycle lane*, or *cycle track*, and designed to withstand being hit or run over by motor vehicles.

*Green infrastructure* means the range of measures that use plant or soil systems, *permeable ground surface materials*, stormwater harvest and reuse, or landscaping to store, infiltrate, and evapotranspire stormwater and reduce flows to sewer systems or to surface waters, including but not limited to rain gardens, bioswales, bioretention facilities, and other ecosystem services and nature-based solutions used to treat stormwater as close to the source as possible and improve resiliency.

*Greenhouse gas* means gas that traps heat in the atmosphere, including but not limited to carbon dioxide, methane, nitrous oxide, and fluorinated gases (such as hydrofluorocarbons).

*Ground disturbance* means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils that are not *previously disturbed ground*.

*Ground surface material* means any hard material typically used to cover soils for transportation purposes, including but not limited to asphalt, concrete, pavers, cobblestones, Belgian blocks, bricks, gravel surface or base, or wood.

*Hazardous material* means lead, lead-containing material (including lead-based paint), asbestos, asbestos-containing material (including floor tile, plaster, insulation, glazing putty, roofing material, and flashing material), radon, and other similar materials detrimental to human health and safety.

*High friction surface treatment* means application of very high-quality aggregate to the pavement using a polymer binder to restore or maintain pavement friction at existing or potentially high crash areas.

*Historic building* means a *building* included in, or eligible for inclusion in, the National Register of Historic Places, as an individually listed property or as a *contributing property* to a *historic district*.

*Historic building material* means *building* material used in the construction of a *historic building* and installed during the period of significance, and any pre-existing *in-kind replacement* of same.

*Historic district* means a geographically definable area that possesses a significant concentration of *historic buildings*, associated *buildings* and structures, and objects united historically by plan or physical development that are *historic properties*.

*Historic property*, as provided in 36 C.F.R. § 800.16(l), means any prehistoric or *historic district*, site, *building*, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural importance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

*Housing* means any *building* containing one or more dwelling units, including but not limited to multi-unit apartment *buildings*, single-family homes, administrative and employee dwelling units, and recreation residences, in a variety of *building* types and configurations, including but not

limited to *buildings* served by an elevator or elevators, “walk-up” *buildings*, rowhouses, semi-detached homes, mobile and manufactured homes, and freestanding homes.

*Indian Tribe*, as provided in 36 C.F.R. § 800.16(m), means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*In-kind building materials* means new *building materials* that are identical to *historic building materials* in all possible respects, including their composition, design, color, texture, and other physical and visual properties.

*In-kind replacement* means *replacement* of historic or existing *building materials* with *in-kind building materials*.

*Installation* means the action or process of placing or fixing something, including but not limited to materials, *mechanical systems* and components, appliances, and equipment, or of being installed, in a particular location.

*Lowest profile equipment* means EVSE that is the smallest height and width possible that meets the EV charging needs.

*Maintenance and repair* means activities required to maintain in an operational state, or to bring back to operating condition by *repair* or *replacement* of obsolete, broken, damaged, or deteriorated features, elements, materials, and systems.

*Mechanical system* means any heating, cooling, indoor air quality, ventilation, dehumidification, air conditioning, plumbing, or electrical system, and the individual elements and components of each system.

*Micromobility vehicle* means small, lightweight vehicles such as e-bicycles and scooters, which can be human-powered or electronic, privately owned or shared, and operate at low to moderate speeds of 15 to 30 miles per hour.

*Micromobility parking* means an area to store for *micromobility vehicles*, whether private vehicles or shared vehicles, including dedicated bicycle docks used in a shared system.

*Minimally visibly intrusive* means that the EVSE is partially visible but does not detract from the views from or to historic properties.

*Mitigation measures* means any existing, new, or updated materials or actions that serve to address, compensate for, or otherwise resolve *adverse effects* on *historic properties*, and may include research reports, historical documentation, recordation, and other materials and activities.

*National Historic Landmark*, as provided in 36 C.F.R. § 800.16(p), means a *historic property* that the Secretary of the Interior has designated a *National Historic Landmark*.

*Native Hawaiian*, as provided in 36 C.F.R. § 800.16(s)(2), means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.



*Native Hawaiian Organization*, as provided in 36 C.F.R. § 800.16(s)(1), means any organization which serves and represents the interests of *Native Hawaiians*; has as a primary and stated purpose the provision of services to *Native Hawaiians*; and has demonstrated expertise in aspects of historic preservation that are significant to *Native Hawaiians*.

*Parking facilities* mean buildings, structures, land, rights-of-way, facilities, or areas used for parking of motor vehicles.

*Permeable ground surface materials* means permeable pavement, permeable pavers, porous flexible pavement, or other material or system that provides a hard surface, while allowing water to flow through to the underlying soils instead of into the storm sewer.

*Potentially historic ground surface materials* means any *ground surface material* comprised of pavers, cobblestones, Belgian blocks, bricks, or wood that are 45 years or older.

*Previously disturbed ground* means soils not likely to possess intact and distinct soil horizons and have a reduced likelihood of possessing *historic properties* within their original depositional contexts in the area and to the depth to be excavated, and does not mean plowed soils or historic urban deposits, including *previously disturbed right-of-way*.

*Previously disturbed right-of-way* means areas where previous construction or other activities have physically altered soils within the three-dimensional *area of potential effects* to the point where there is likely no potential for an archaeologically significant property to remain, including but not limited to: the entire curb-to-curb roadway, existing sidewalks, existing drains, and parking areas, including the prepared substrate constructed to support the infrastructure down to undisturbed or intact soil or subsoil. As-built drawings and plans can be used to determine the vertical and horizontal dimensions of the previously disturbed areas.

*Primary façade* means the exterior façade of a *building* which serves as the front or the major entry point of the *building*, provided that a determination of the *primary façade* depends on a variety of factors, and one *building* may have more than one *primary façade*.

*Primary right-of-way* means the corridor, open to the public for transportation purposes, from which a person may best view the *primary façade* of a *building* or, if the *primary façade* is not visible from the public *right-of-way*, the corridor nearest the façade through which people enter the *building*.

*Primary space* means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other space that contains a *character-defining feature* of a *historic building* or *historic climate-friendly transportation facility*.

*Protected bicycle lane* means a bicycle facility that is physically separated from motor vehicle traffic and is distinct from the sidewalk for the exclusive use by and increased safety of bicyclists.

*Qualified authority* means a *qualified professional* or a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects to historic properties* of religious and cultural significance to their *Indian Tribe* or to *Native Hawaiians*, respectively.

*Qualified professional* means a person who meets the relevant standards outlined in the Secretary of the Interior's Professional Qualifications Standards, as amended and annotated.

*Rail infrastructure* means structures, *building*, land, and equipment that supports land lines, including both the infrastructure that is in the rail *right-of-way* (such as ballast, ties, tracks, bridges, and tunnels) and the infrastructure that is adjacent to the *right-of-way* such as signs, signals, mileposts or switches.

*Recognized design manual* means one of the following: Federal Highway Administration Manual on Uniform Traffic Control Devices, American Association of State Highway and Transportation Officials A Policy on Geometric Design of Highways and Streets, National Association of City Transportation Officials (NACTO) Urban Street Design Guide, NACTO Urban Bikeway Design Guide, NACTO *transit* Street Design Guide, NACTO Bike Share Station Siting Guide, or NACTO Urban Street Stormwater.

*Records check* means a search of relevant *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, and *federal agency* files, records, inventories, and databases, or other sources recommended by such parties, for information about whether *historic properties*, including properties with traditional religious and cultural significance to one or more *Indian Tribes* or *Native Hawaiian Organizations*, are known to exist within an *area of potential effects*.

*Reduce energy use or greenhouse gas emissions* means to take an action that: lessens either the amount of energy used or *greenhouse gas* emitted to perform the same task or produce the same result; replaces an energy production source reliant on fossil fuels with a clean energy technology or upgrades a clean energy technology; or achieves *electrification*.

*Rehabilitation* means the act or process of making possible an efficient compatible use for a property through *repair*, alterations and additions while preserving those portions or features that convey its historical, cultural or architectural values.

*Replacement* means substitution of new element for an existing element, which may require a change in size, dimension, location, and configuration, in order to improve the function and condition of the element or the broader system of which the element is a part.

*Solar energy system* means any addition, alteration, or improvement which is designed to utilize solar energy either of the active type based on mechanically forced energy transfer or of the passive type based on convective, conductive, or radiant energy transfer, or some combination of these types to reduce the energy requirements of that structure from other energy sources, including but not limited solar hot water equipment, *community solar systems*, and solar photovoltaic equipment and all components.

*State historic preservation officer*, as provided in 36 C.F.R. § 800.16(v), means the official appointed or designated pursuant to Section 101(b)(1) of the National Historic Preservation Act to administer the state historic preservation program or a representative designated to act for the *state historic preservation officer*.

*Substitute building materials* means modern, industry standard, natural, composite, and synthetic materials that simulate the appearance, physical properties, and related attributes of historic materials well enough to make them alternatives for use when *historic building materials* require *replacement*.

*Technical feasibility* means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including health, safety, energy efficiency, climate resiliency,

**Commented [OHP12]:** Otherwise known as “eCO2” (equivalent CO2) as measured internationally in millions of kilograms. These climate resilient undertakings appear to be self-defined. Should there be a target quantification of greenhouse gas emission reduction achieved by the undertaking before this PC can be used?

durability of materials, and sound professional judgment (including architectural, archaeological, or engineering judgment).

*Transit* means mass transportation by a conveyance (including a bus, railcar, locomotive, trolley car, or light rail vehicle) that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation.

*Transit-oriented development building* means a *building* within one half mile of an existing or planned *transit* stop to be developed or redeveloped as part of a federal program or project to promote *transit*-oriented development.

*Tribal historic preservation officer*, as provided in 36 C.F.R. § 800.16(w), means the Tribal official appointed by the *Indian Tribe's* chief governing authority or designated by a Tribal ordinance or preservation program who has assumed the responsibilities of the *state historic preservation officer* for purposes of Section 106 compliance on *Tribal lands* in accordance with Section 101(d)(2) of the National Historic Preservation Act.

*Tribal lands*, as provided in 36 C.F.R. § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

*Undertaking*, as provided in 36 C.F.R. § 800.16(y), means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a *federal agency*, including those carried out by or on behalf of a *federal agency*; those carried out with federal financial assistance; and those requiring a federal permit, license or approval.

*Zero emissions building* means a *building* that is highly energy efficient, does not emit *greenhouse gases* directly from energy use, and is powered solely by clean energy, as further defined in the National Definition of a Zero Emissions Building.

## APPENDIX A-1: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### I. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to or on the same lot as *housing*:

a. *Rehabilitation, replacement, installation, and removal of any of the following elements less than 45 years old, provided such activity exclusively affects previously disturbed ground or creates no new ground disturbance:*

i. Concrete and asphalt ground surfaces such as streets, parking areas, driveways, and walkways, including repaving, restriping, replacing such surfaces with *permeable ground surface materials*, and reducing surface size, but not changing vertical alignment or expanding surface size.

ii. Park, playground, and sports equipment such as platforms, guardrails, handrails, climbers, ramps, stairways, ladders, balance beams, fitness equipment, rings, rolls, un-mechanized merry-go-rounds, seesaws, slides, swings, benches, netting, basketball hoops, drinking fountains, and *ground surface materials*, but not *buildings*.

iii. Fencing, but not *replacement* or removal of fencing that is a *character-defining feature* of a *historic property*.

iv. Wayfinding, address, and identification signage.

v. Lighting, such as *building-mounted* lighting and freestanding lighting in parking areas, along driveways or walkways, or in park and playground areas, and including relamping and rewiring, but not including *replacement* or removal of lighting that is a *character-defining feature* of a *historic property*.

vi. Water feature, such as decorative fountains, including replumbing, but not *replacement* or removal of a water feature that is a *character-defining feature* of a *historic property*.

vii. Curb, gutter, steps, ramp, and retaining wall, but not a retaining wall that is a *character-defining feature* of a *historic property*.

b. *Maintenance, repair, and in-kind replacement* of any element listed in Section I.a. of this Appendix.

c. Any of the following landscaping, grounds, and water management *activities*:

i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.

ii. Planting of grass, shrubs, and other plants, and xeriscaping.

iii. *Replacement* of a tree in its existing location and planting of a new tree within 40 feet of the *building*.

iv. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.

**Commented [OHP13]:** This should be determined by a qualified archaeologist, and consulted on to determine whether there is agreement with such an assessment.

**Commented [OHP14]:** How are character defining features identified when no determination of eligibility is required? Comment applies to references to character defining features throughout PC.

**Commented [OHP15]:** Potential for cultural or historic landscapes? Emphasizes problem with not requiring determinations of eligibility.

v. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.

vi. *Maintenance, repair, rehabilitation, replacement, and installation of green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*.

d. *Maintenance, repair, rehabilitation, replacement, and removal of the following elements serving housing*, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, **monopole** utility structures placed in augur holes, or other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, natural gas, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Vault toilets.

e. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter that do not impact *ground surface materials* 45 years or older or known *historic properties*.

f. *Installation and removal of temporary construction-related structures*, including scaffolding, **barriers**, screening, fences, protective walkways, signage, office trailers, and restrooms.

**Commented [OHP16]:** These actions have great potential to cause effects to archaeological resources; whether project actions would occur within “previously disturbed ground” should not only be verified by qualified archaeologist, but also consulted on by SHPO, Tribes, Native Hawaiian Organizations, and other interested parties.

**Commented [OHP17]:** Not including any temporary construction physically or structurally attaching to any building

## 2. Work on the Building Exterior

The following activities do not require further Section 106 review when conducted on or near the exterior of *housing*:

a. *Rehabilitation, replacement, and installation of the following elements*: on a *building* less than 45 years old and not known after a *records check* to be a *historic property*; on a *building* the *federal agency* or another *federal agency* has determined to not be a *historic property* within the preceding ten years; or on the *non-primary façade* of a *historic building* or on the *non-primary façade* of a *building* whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the *primary right-of-way*:

i. Doors, including insulated exterior doors and basement bulkhead doors.

ii. Windows, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings or window louvers.

iii. Canopies, awnings, and solar shades.

iv. Roofing, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, **parapets**, and reflective or energy efficient coating; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.

v. Improvements that address the requirements of the Americans with Disabilities Act, such as ramps and railings.

vi. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.

**Commented [OHP18]:** How does this take into account potentially exceptionally significant installations? A general comment throughout regarding the potential for exceptional significance historic resources.

- vii. *Solar energy systems.*
  - viii. Elevator systems.
  - ix. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
  - x. Foundations and seismic and structural *repairs*, with *ground disturbance* limited to areas within 10 feet of the *building*.
  - xi. Chimneys.
  - xii. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.
  - xiii. Siding.
  - xiv. Energy and water metering devices.
- b. *Maintenance, repair, and in-kind replacement* activities on any *building*, including:
- i. *Maintenance, repair, and in-kind replacement* of any element listed in Section 2.a. of this Appendix.
  - ii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.
  - iii. Repointing of mortar joints with mortar similar in composition, joint profile, color, hardness, and texture of existing mortar.
  - iv. Removal of exterior paint or graffiti using non-destructive means, limited to hand scraping, low-pressure water wash of less than 500 psi, heat plates, hot air guns, and chemical paint removal.
- c. *Maintenance, repair, rehabilitation, replacement, installation* and removal of any of the following elements on or near a *building*, provided that such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:
- i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.
  - ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.
  - iii. Foundation vents, if painted or finished to match the existing foundation material.
  - iv. *Green infrastructure*.
  - v. Gray water systems.
- d. Paint on previously painted exterior surfaces.

e. *Rehabilitation, replacement, and installation of clean energy technologies*, provided that:

i. Such technology is located either outside the boundaries of a *historic district*, or on the non-primary façade side of historic *housing*, or in a location not otherwise visible from the *primary right-of-way*; and is located on the same lot as or on an adjacent lot to that *housing*, or in the case of a *community solar system*, in a lot within two blocks or two thousand feet (whichever is longer) of the *housing* served;

ii. Such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*;

iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted *solar energy system* may be visible from the *primary right-of-way* if it is installed with methods that do not irreversibly damage historic materials, sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.

f. *Maintenance, repair, or in-kind replacement of clean energy technologies*.

g. *Abatement of hazardous materials* where *effects* of the *abatement* are reversible or temporary or not visible from the *primary right-of-way*, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal or *replacement* of: windows on the primary façade of historic *housing* or *housing* whose eligibility for inclusion in the National Register is not known; or windows 45 years or older.

3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of *housing*, and do not result in physical changes visible from the *primary right-of-way*:

a. *Maintenance, repair, rehabilitation, replacement, and installation, and abatement of hazardous materials*, that take place entirely within the interior of the *housing* and: in an individual *housing* unit; in any interior location of *housing* less than 45 years old and not known after a *records check* to be a *historic property*; on *housing* the *federal agency* or another *federal agency* has determined to be not a *historic property* within the preceding ten years; or in any interior space within historic *housing* that is not a *primary space*. Example activities covered by this Section 3.a. include: removal, alteration (including of width, height, and location), and construction of interior walls; alteration of floors and flooring (including of material, pattern, and texture); alteration of ceilings (including of material, lighting, and height); *installation* of *mechanical systems* and fire alarm, fire suppression, and security systems and equipment; insulation and air sealing; removal and *installation* of equipment and fixtures (including bathroom, kitchen, and lighting equipment and fixtures); *replacement* and refurbishment of elevator cabs, system-wide upgrades to elevator *mechanical systems*, *installation* of *building energy control systems*; and *installation* of code-required signage; removal, alteration, and construction of stairs; cosmetic improvements; and improvements to address the requirements of the Americans with Disabilities Act.

b. *Rehabilitation, replacement and installation* of any of the following elements, in any location other than the locations identified in Section 3.a. of this Appendix, if such activity does not result

in physical changes visible from the *primary right-of-way* and has no visual *effect* on the *primary spaces* of historic housing:

- i. *Mechanical systems*, including but not limited to heating, ventilating, and cooling components such as heat pumps, electric furnaces and boilers, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, ventilation systems, and refrigeration lines; and fire alarm, fire suppression, and security systems and equipment.
  - ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.
  - iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.
  - iv. Electronic ignition devices.
  - v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.
  - vi. Water conservation measures, such as low flow faucets, toilets, shower heads, urinals, and distribution device controls.
  - vii. Light fixtures, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
  - viii. *Building energy control systems*.
  - ix. EnergyStar (or similarly rated) appliances.
  - x. Battery energy storage systems.
  - xi. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, where such insulation can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.
  - xii. Spray foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch *historic building materials* and can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.
  - xiii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.
- c. *Maintenance, repair, and in-kind replacement* of any of the elements listed in Section 3.b., any *building* element, any improvement that addresses the requirements of the Americans with Disabilities Act, and any cosmetic or decorative features of the *housing*.
- d. *Maintenance, repair, in-kind replacement, and rehabilitation* of a skylight, atrium, courtyard, or lightwell; and *installation* of a new skylight, atrium, courtyard, or lightwell that will not be visible



from the *primary right-of-way* and will not result in interior reconfigurations to *primary spaces* or removal of *historic building materials* in *primary spaces*.

e. *Abatement of hazardous materials* where *effects* of the *abatement* are reversible or temporary or not visible from the *primary right-of-way*, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal or *replacement* of: windows on the primary façade of historic *housing* or *housing* whose eligibility for inclusion in the National Register is not known; or windows 45 years or older.

#### 4. Emergency Work

The following activities related to the exterior or interior of any historic *housing* do not require further Section 106 review when such work relates to an *emergency situation* and takes place within 30 *days* of the occurrence of the *emergency situation* and otherwise complies with 36 C.F.R. § 800.12:

- a. Temporary stabilization that causes no permanent damage to historic *housing* or any other *historic property*, including *installation* of temporary bracing, shoring and tarps.
- b. Emergency *repair* of masonry, concrete, or *building* façade cracks or falling elements.
- c. Emergency *repair* of falling plaster or other elements that pose an immediate and imminent health and safety hazard.
- d. *Abatement of hazardous materials* required to address an *emergency situation*.
- e. *Replacement* and demolition of a deteriorated or damaged mobile or manufactured home.

#### 5. Other Activities

The following activities do not require Section 106 review:

- a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of *housing*.
- b. Feasibility studies related to energy efficiency improvements, *electrification*, improvements incorporating *clean energy technologies*, and other topics relating to *building* energy use.
- c. Leasing, refinancing, acquisition, or purchase by the *federal agency of housing*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- d. Transfer, lease, or sale of a federal government-owned *housing* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- e. Transfer, lease, or sale out of federal ownership or out of federal control of historic *housing*, provided there are adequate and legally enforceable restrictions or conditions (such as in a deed

**Commented [OHP19]:** How is significance measured if no evaluation is required? What is the criteria for 'adequate'?

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covenant) to ensure long-term preservation of the property's historic significance in accordance with 36 C.F.R. § 800.5(a)(2)(vii).

f. *Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment* satisfying the *EVSE criteria*.

**APPENDIX A-2: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS**

**1. Site Work**

The following activities do not require further Section 106 review when conducted in areas adjacent to *housing* or on the same lot as *housing*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Replacement, installation, or removal of any of the following elements which are either less than 45 years old and create new ground disturbance in previously undisturbed soils, or 45 years or older; if a qualified authority makes a written determination that such activity will have no adverse effects on any historic property; or if the area of potential effects has been previously field surveyed (acceptable to current state or Tribal standards or within the past ten years) and, if applicable, has been subject to consultation with Indian Tribes and Native Hawaiian Organizations without such survey or consultation identifying any historic properties:*

- i. Any of the elements listed in Sections 1.a. and 1.d. of Appendix A-1, including *character-defining features* of such elements.
- ii. Test borings, soil sampling, well drilling, or perc tests more than eight inches in diameter, or that impact *ground surface materials* 45 years or older or known *historic properties*.

b. Planting of a new tree 40 feet or more from a *building* or *replacement* or *installation* of *green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*, if a *qualified authority* has made a written determination that such planting will have no *adverse effects* on any *historic property*.

**2. Work on the Building Exterior**

The following activities do not require further Section 106 review when conducted on, or in the case of *clean energy technologies* near (as further provided below), the exterior of *housing*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Rehabilitation, replacement, and installation of the following elements on the exterior of: buildings 45 years or older if a qualified authority determines that the building is not a historic property; or buildings 45 years or older determined by a qualified authority to be a historic property, if a qualified professional makes a written determination that such installation or replacement will have no or minimal adverse effects on any character-defining feature of a historic building:*

- i. Any of the elements listed in Section 2.a. of Appendix A-1, including elements in locations other than those identified in that Section.

b. *Rehabilitation, replacement, or installation of any of the following elements on, or in the case of clean energy technologies near (as further provided below), a building, which create new ground disturbance on previously undisturbed ground, if a qualified authority makes a written determination that such activities will have no adverse effects on any historic property:*

- i. Any of the elements listed in Section 2.c. of Appendix A-1, including elements in locations other than those identified in that Section.

ii. *Clean energy technologies*, when located or configured in a manner other than that identified in Section 2.e. of Appendix A-1.

c. *Replacement* of exterior *historic building materials* of historic *housing* with in-kind or *substitute building materials* after the *federal agency*, with the assistance of a *qualified authority*, conducts the following selection procedure:

i. Characterize existing *historic building materials* in terms of condition, design, material properties, performance (including insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*;

ii. Next, determine, based on an evaluation of *technical feasibility* and *economic feasibility*, if *historic building materials* can be *repaired* or if they must be replaced;

iii. Next, if *replacement* is required, identify potential in-kind and *substitute building materials* and evaluate their *technical feasibility* and *economic feasibility*;

iv. Finally, based on such evaluation, select the most appropriate in-kind or substitute *building material*;

provided, however, that a *federal agency* may only utilize this selection procedure if such *replacement* or demolition does not create *ground disturbance*, creates *ground disturbance* exclusively on *previously disturbed ground*, or, in the opinion of a *qualified authority*, has no *adverse effects* on any *historic property*.

d. The *abatement* of *hazardous materials*, where such activity is irreversible or permanent or will be visible from the *primary right-of-way*, create new *ground disturbance*, or result in the permanent removal or *replacement* of: windows on the primary façade of a historic *building* or a *building* whose eligibility for inclusion in the National Register is not known; or windows 45 years or older, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*.

### 3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of *housing*, after the satisfaction of the identified conditions, exclusions, and requirements:

a. In addition to those activities listed in Section 3 of Appendix A-1, *maintenance*, *repair*, *rehabilitation*, *replacement*, and *installation*, and the *abatement* of *hazardous materials*, where such activity results in physical changes to a historic *building* visible from the *primary right-of-way* or has a visual *effect* on the *primary spaces* of a historic *building*, if a *qualified authority* makes a written determination that such activity has no *adverse effects* on any *historic property*.

**Commented [OHP20]:** What are the criteria for technical and economic feasibility? These criteria must be made available to provide unbiased determinations.

**APPENDIX B-1: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW**

**1. Site Work**

The following activities do not require further Section 106 review when they are conducted in areas adjacent to a *building* or on the same lot as a *building*, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*:

a. *Rehabilitation, replacement, installation*, and removal of any of the following elements less than 45 years old, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and not including *replacement* or removal of any element that is a *character-defining feature* of a *historic property*:

i. Fencing.

ii. Lighting, such as *building-mounted* lighting and freestanding lighting in parking areas, along driveways and walkways, in park and playground areas, and in other areas, and including relamping and rewiring.

iii. Water feature, such as decorative fountains, including replumbing.

iv. Curb, gutter, steps, ramp, and retaining wall.

b. *Maintenance, repair*, and *in-kind replacement* of any element listed in Section 1.a. of this Appendix.

c. Any of the following landscaping, grounds, and water management activities:

i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.

ii. Planting of any of the following that are native, naturalized, drought-adapted, drought-resistant, drought-tolerant, water-wise, or xeric: grass, shrubs, and other plants; and xeriscaping.

iv. *Replacement* of a tree in its existing location and planting of a new tree within 40 feet of the *building*.

v. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.

vi. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.

vii. *Maintenance, repair, rehabilitation, replacement*, and *installation* of *green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*.

viii. Removal of concrete or asphalt ground surfaces or *replacement* of such surfaces with *permeable ground surface materials*.

ix. The following activities conducted to address fire threats within 200 feet of a *building* or auxiliary structure:

- a. Disposal of heavy accumulations of ground litter and debris.
- b. Removal of small conifers growing between mature trees, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*.
- d. *Maintenance, repair, rehabilitation, replacement* and removal of the following elements, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:
  - i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.
  - ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.
  - iii. Vault toilets.
- e. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter that do not impact *ground surface materials* 45 years or older or known historic properties.
- f. *Installation* and removal of temporary construction-related structures, including scaffolding, barriers, screening, fences, protective walkways, signage, office trailers, and restrooms.

## 2. Work Related to the Building Exterior

The following activities do not require further Section 106 review when they are conducted on or near the exterior of a *building* and when they are conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building*, or to enhance the *climate resilience* of the *building*:

- a. *Rehabilitation, replacement, and installation* of any of the following elements: on a *building* less than 45 years old and not known after a *records check* to be a *historic property*; on a *building* the *federal agency* or another *federal agency* has determined to not be a *historic property* within the preceding ten years; or on the *non-primary façade* of a *historic building* or on the *non-primary façade* of a *building* whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the *primary right-of-way*:
  - i. Doors, including insulated exterior doors.
  - ii. Windows, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
  - iii. Canopies, awnings, and solar shades.
  - iv. Roofing, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; white roofs or cool roofs; and green, sod, or grass roofs.
  - v. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.
  - vi. *Solar energy systems*.

- vii. Elevator systems.
  - viii. Chimneys.
  - ix. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, and frieze board vents.
  - x. Siding.
  - xi. Energy and water metering devices.
- b. *Maintenance, repair, and in-kind replacement* of the following elements on, or in the case of *clean energy technologies* near (as further provided below), any *building*:
- i. Any element listed in Section 2.a. of this Appendix.
  - ii. *Clean energy technologies*.
  - iii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.
  - iv. Repointing of mortar joints with mortar similar in composition, joint profile, color, hardness, and texture of existing mortar.
- c. *Maintenance, repair, rehabilitation, replacement, installation, and removal* of any of the following elements on or near a *building*, provided that such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:
- i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.
  - ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.
  - iii. Foundation vents, if painted or finished to match the existing foundation material.
  - iv. *Green infrastructure*.
  - v. Gray water systems.
- d. Paint on previously painted exterior surfaces.
- e. *Rehabilitation, replacement, and installation of clean energy technologies*, provided that:
- i. Such technology is located either outside the boundaries of a *historic district*, or on the non-primary façade side of a historic *building*, or in a location not otherwise visible from the *primary right-of-way*; and is located on the same lot as or on an adjacent lot to that *building* or *buildings*, or in the case of a *community solar system*, in a lot within two blocks or two thousand feet (whichever is longer) of the *building* or *buildings* served;
  - ii. Such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*;

iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted *solar energy system* may be visible from the *primary right-of-way* if it is installed with methods that do not irreversibly damage historic materials, sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.

### 3. Work Related to the Building Interior

The following activities do not require further Section 106 review when they are conducted in the interior of a *building* and when they are conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building*, or to enhance the *climate resilience* of the *building*:

a. *Maintenance, repair, rehabilitation, replacement, and installation* of any of the following elements:

i. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, where such insulation can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.

ii. Spray foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch *historic building materials*, and can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.

iii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.

b. *Maintenance, repair, rehabilitation, replacement and installation* of any of the following elements, if such activity does not result in physical changes visible from the *primary right-of-way*, and has no visual *effect* on the *primary spaces* of a historic *building*:

i. *Mechanical systems*, including but not limited to heating, ventilating, and cooling components such as furnaces, heat pumps, electric furnaces, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, heat pumps, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, and refrigeration lines.

ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.

iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.

iv. Electronic ignition devices.

v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.

vi. Water conservation measures, such as low flow faucets, toilets, shower heads, urinals, and distribution device controls.



vii. Light fixtures, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.

viii. *Building energy control systems.*

ix. EnergyStar (or similarly rated) appliances.

x. Battery energy storage systems.

#### 4. Other Activities

The following activities do not require Section 106 review:

a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of *buildings*.

b. Feasibility studies related to energy efficiency improvements, *electrification*, improvements incorporating *clean energy technologies*, and other topics relating to *building* energy use.

c. Leasing, refinancing, acquisition, or purchase by the *federal agency* of energy efficiency, *electrification*, and *clean energy technologies*, provided that any changes in use or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such technologies must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

d. *Maintenance, repair, rehabilitation, replacement, and installation* of *electric vehicle supply equipment* satisfying the *EVSE criteria*.

## **APPENDIX B-2: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS**

### **1. Site Work**

The following activities do not require further Section 106 review when conducted in areas adjacent to a *building* or on the same lot as a *building*, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Rehabilitation, replacement, installation, and removal of any of the following elements which are either less than 45 years old and create new ground disturbance in previously undisturbed soils, or 45 years or older, if a qualified authority makes a written determination that such activity will have no adverse effects on any historic property; or if the area of potential effects has been previously field surveyed (acceptable to current state or Tribal standards or within the past ten years) and, if applicable, has been subject to consultation with Indian Tribes and Native Hawaiian organizations without such survey or consultation identifying any historic properties*

i. Any element listed in Section 1.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section.

ii. Any element listed in Section 1.d. of Appendix B-1, unrestricted by any limiting conditions found in such Section.

b. *Planting of a new tree 40 feet or more from a building, or replacement or installation of green infrastructure either in previously disturbed ground, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the building, if a qualified authority makes a written determination that such planting will have no adverse effects on any historic property.*

### **2. Work Related to the Building Exterior**

The following activities do not require further Section 106 review when conducted on, or in the case of *clean energy technologies* near (as further provided below), the exterior of a *building*, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Rehabilitation, replacement, and installation of the following elements visible from the primary right-of-way and on the exterior of: buildings 45 years or older if a qualified professional determines that the building is not a historic property; or buildings 45 years or older determined by a qualified professional to be a historic property, if a qualified professional makes a written determination that such installation or replacement will have no or minimal adverse effects on any character-defining feature of a historic building; provided, however, that an analysis of adverse effects must consider technical feasibility and economic feasibility, including long-term operational costs and climate resilience of the building upon which elements are installed or replaced:*

i. Any element listed in Section 2.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section.

b. *Rehabilitation, replacement, or installation of any of the following elements on or near a building, which create new ground disturbance on previously undisturbed ground, if a qualified*

*authority* makes a written determination that such activities will have no *adverse effects* on any *historic property*:

- i. Any of the elements listed in Section 2.c. of Appendix B-1.
- ii. *Clean energy technologies*, when located or configured in a manner other than that identified in Section 2.e. of Appendix B-1.

c. *Replacement of historic building materials* of historic *housing* with in-kind or *substitute building materials* to improve energy efficiency after the *federal agency*, with the assistance of a qualified professional as needed, conducts the following selection procedure:

- i. Characterize existing *historic building materials* in terms of condition, design, material properties, performance, safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*;
- ii. Next, determine, based on an evaluation of *technical feasibility* and *economic feasibility*, if *historic building materials* can be *repaired* or if they must be replaced;
- iii. Next, if *replacement* is required, identify potential in-kind and *substitute building materials* and evaluate their *technical feasibility* and *economic feasibility*;
- iv. Finally, based on such evaluation, select the most appropriate in-kind or substitute *building material*;

provided, however, that a *federal agency* may only utilize this selection procedure if such *replacement* or demolition does not create *ground disturbance*, exclusively affects *previously disturbed ground*, or, in the opinion of a *qualified authority*, has no *adverse effects* on any *historic property*.

### 3. Work Related to the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of a *building*, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*, after the satisfaction of the identified conditions, exclusions, or requirements:

- a. In addition to those activities listed in Section 3 of Appendix B-1, *maintenance, repair, rehabilitation, replacement, and installation*, and the *abatement of hazardous materials*, where such activity results in physical changes to a historic *building* visible from the *primary right-of-way* or has a visual *effect* on the *primary spaces* of a historic *building*, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*.

## APPENDIX C-1: CLIMATE-FRIENDLY TRANSPORTATION-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Work on Ground Surfaces

The following activities do not require further Section 106 review, provided they do not result in the demolition or removal of potentially historic ground surface materials, and they are located entirely within the *previously disturbed right-of-way*:

**Commented [OHP21]:** -What if you are in a historic district? A combination of these elements could potentially adversely effect character defining features.

a. *Maintenance, repair, rehabilitation, replacement, and installation* of the following elements when used for or incorporated into pedestrian, bicycle, *micromobility vehicle*, or *transit* infrastructure:

i. *Ground surface material*, including *installation* of slurry seals, overlays, and seal coatings; sealing and *repairing* cracks; milling and re-paving; *repair* of potholes; and restoration after utility *installation*.

ii. Curb.

iii. Sidewalk.

iv. *Bulb out*.

v. Ramp.

vi. Crosswalk, including a raised crosswalk across a roadway and a raised intersection.

vii. Mark on the ground surface for visibility and delineation, including striping for *bicycle lanes*, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, *bicycle parking*, *micromobility parking*, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.

viii. Detectable warning on or before a curb, entry point, crosswalk, or accessible facility.

ix. Island, including a pedestrian island to reduce crossing distance or improve visibility, and a corner island to separate bicycles from motor vehicles or enable a protected bicycle queuing area or motor vehicle waiting zone.

b. *Maintenance, repair, rehabilitation, replacement, and installation* of the following *ground surface materials* and elements:

i. *High friction surface treatment*.

ii. *Cool pavement*.

iii. *Permeable ground surface materials*.

iv. Rumble strip.

vii. Traffic calming device, such as speed hump, speed table, raised crosswalk, and raised intersections.

c. Elevation of no more than 10 inches of the existing ground surface to maintain, create, or connect pathways for pedestrians, bicyclists, or *micromobility vehicle* users, or to facilitate boarding and disembarking at *transit* facilities.

## 2. Work Involving Fixtures and Equipment

The following activities do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials*, they are located entirely within the *previously disturbed right-of-way*, and they follow the specifications of a *recognized design manual* (if and to the extent covered in any such manual):

a. *Maintenance, repair, rehabilitation, replacement, and installation* of the following elements when used for or incorporated into pedestrian, bicycle, *micromobility vehicle*, or *transit* infrastructure:

- i. *Bicycle rack*.
- ii. *Micromobility parking* corral.
- iii. *Bicycle rail* or wheel stop no taller than 6 inches.
- iv. *Flex post* no taller than 36 inches and no larger in circumference than 22 inches.
- v. Bollard no taller than 48 inches and no larger in diameter than 12 inches.
- vi. Concrete or stone block no taller than 24 inches and no wider than 6 inches, to protect *bicycle parking* or *micromobility parking* or to delineate a pedestrian pathway.
- vii. Sign, signal, traffic control device, and signalization, including any such elements that address the requirements of the Americans with Disabilities Act.
- viii. Ticket dispensing structure, fee collection structure, interpretive wayside exhibit structure, and single-post metal or wooden sign 5 feet or less in height and 2 square feet or less in cross-section area, not including provisions for solar power.
- ix. Camera, intelligent transportation systems, and other technological equipment limiting, removing, or identifying unauthorized traffic from pathways dedicated to walking, biking, *micromobility vehicle* use, or *transit* use.
- x. Temporary construction fencing, but not grading, creating a soil borrow pit, or other significant excavation.

b. *Maintenance, repair, rehabilitation, replacement, and installation* of street furniture, including the following elements, provided that such activity does not result in the removal of historic street furniture:

- i. Bench.
- ii. Table.
- iii. Freestanding planter.
- iv. Street light.
- v. Shelter for *transit* users with a combined dimension (length plus width plus height) less than 30 linear feet and with advertising space no greater than 24 square feet visible at any one time; and *maintenance, repair, and in-kind replacement* of any other such shelter.

c. *Maintenance, repair, rehabilitation, and in-kind replacement* of the following elements:

- i. Catenary system.
- ii. Tracks, including ballasts and ties.
- iii. Camera, mast, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.

### 3. Work Relating to Vegetation and Landscapes

The following activities occurring within the same *right-of-way* or on the same lot as *climate-friendly transportation infrastructure* do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials*, and further provided that they exclusively affect *previously disturbed ground* or create no new *ground disturbance*:

a. Any of the following landscaping, grounds, and water management activities:

- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.
- ii. Planting of any of the following that are native, naturalized, drought-adapted, drought-resistant, drought-tolerant, water-wise, or xeric: grass, shrubs, and other plants; and xeriscaping.
- iii. *Replacement* of a tree in its existing location and planting of a new tree on, along, or within a street that already has street trees.
- iv. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.
- v. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.

b. *Maintenance, repair, rehabilitation, replacement, or installation of green infrastructure* or landscaping to delineate pedestrian pathways or *bicycle lanes*, provided such *green infrastructure* or landscaping follows the specifications of a *recognized design manual* (if and to the extent covered in any such manual).

### 4. Work on Bridges

The following activities related to a bridge built to serve pedestrian, bicycle, *micromobility vehicle*, or *transit* use do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials*; further provided that they exclusively affect *previously disturbed ground* or create no new *ground disturbance*; and further provided that the bridge is: either less than 45 years old and not known after a *records check* to be a *historic property*, or has been determined by the *federal agency* or another *federal agency* to not be a *historic property* within the preceding ten years:

- a. *Maintenance, repair, rehabilitation, and in-kind replacement* of drains, joints, joint seals, concrete decks, parapet, rail, concrete, steel elements, bearings, retaining walls, and bridge machinery.
- b. Cleaning and washing.

**Commented [OHP22]:** What about determinations made by SHPOs, are then included?

- c. Conducting electrochemical extraction and cathodic protection.
- d. Mitigating cracks, including pin-and-hanger *replacement* and other retrofits.
- e. Implementing countermeasures against scour.

5. Other Activities

The following activities do not require Section 106 review:

- a. Leasing, refinancing, acquisition, or purchase by the *federal agency* of:
  - i. A railway *right-of-way* for the *maintenance*, development, or expansion of either rail-to-trail pathways or passenger rail service;
  - ii. A *transit-oriented development building*; or
  - iii. Fleets of bicycles, hybrid or electric vehicles, or electric locomotives,provided that any physical activities related to such properties must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- b. Transfer, lease, or sale of a federal government-owned *climate-friendly transportation facility* or *transit-oriented development building* from one *federal agency* to another *federal agency*, provided that any changes in use or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such facility must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- c. Transfer, lease, or sale out of federal ownership or out of federal control of a historic *climate-friendly transportation facility* or *transit-oriented development building*, provided there are adequate and legally enforceable restrictions or conditions (such as in a deed covenant) to ensure long-term preservation of the property's historic significance in accordance with 36 C.F.R. § 800.5(a)(2)(vii).
- d. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, *micromobility vehicle*, or *transit* uses, including “play streets,” “school streets,” “safe route to school” streets, or “open streets,” provided that any physical activities related to such decisions, including but not limited to the *maintenance, repair, rehabilitation, replacement, or installation* of streets for the purpose of limiting motor vehicle access, must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- e. *Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment* satisfying the *EVSE criteria*.

**APPENDIX C-2: CLIMATE-FRIENDLY TRANSPORTATION-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS**

The following activities do not require further Section 106 review after the satisfaction of the identified conditions, exclusions, or requirements:

**1. Work on Ground Surfaces**

The following activities do not require further Section 106 review, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. Elevation of the existing ground surface by more than 10 inches, or that will result in the demolition or removal of *potentially historic ground surface materials*: to maintain, create, or connect pathways for pedestrians, bicyclists, or *micromobility vehicle* users, or to facilitate boarding and disembarking at *transit* facilities.

**2. Work Involving Fixtures and Equipment**

The following activities do not require further Section 106 review, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. Any activities listed in Section 2.a. of Appendix C-1 that will result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials*, or create new *ground disturbance* in previously undisturbed soils, or result in the removal of historic street furniture.
- b. *Rehabilitation, replacement, and installation* of a shelter for *transit* users with a combined dimension (length plus width plus height) 30 linear feet or more, or with advertising space more than 24 square feet visible at any one time.
- c. *Installation* of the following new elements that will result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials* or that create new *ground disturbance* in previously undisturbed soils:
  - i. Catenary system.
  - ii. Tracks, including ballasts and ties.
  - iii. Camera, mast, wiring, and other equipment and fixtures used for automatic traffic enforcement, to monitor motor vehicle traffic, or for security purposes.

**3. Work Relating to Vegetation and Landscapes**

The following activities do not require further Section 106 review, even if they create new *ground disturbance* in previously undisturbed soils, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. Planting of a new tree on, along, or within a street that has not previously had street trees, or in other locations where such planting is intended to improve the experience for pedestrians, bicyclists, *micromobility vehicle* users, or *transit* users.
- b. *Maintenance, repair, rehabilitation, replacement, or installation* of *green infrastructure* and landscaping related to pedestrian pathway or *bicycle lane* delineation that will result in the



demolition or removal of *potentially historic ground surface materials* or will create new *ground disturbance*.

#### 4. Work on Bridges

The following activities do not require further Section 106 review, even if they create new *ground disturbance* in previously undisturbed soils, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. Activities listed in Section 4 of Appendix C-1 and conducted on historic bridges.
- b. *Rehabilitation, replacement, or installation* of a bridge built to serve pedestrian, bicycle, *micromobility vehicle*, or *transit* use.

DRAFT FOR PUBLIC COMMENT – DATED 8/8/2024

**APPENDIX D: FORMAT FOR AUTHORIZATION BY AN INDIAN TRIBE FOR USE OF THIS PROGRAM COMMENT ON ITS TRIBAL LANDS**

On behalf of [NAME OF INDIAN TRIBE] and as a duly authorized representative of such Tribe, I authorize federal agencies to utilize the Program Comment on Housing on the Tribal Lands of the [NAME OF INDIAN TRIBE]. This authorization is in effect until the withdrawal or termination of the Program Comment or on the date of receipt by the Executive Director of the Advisory Council on Historic Preservation that [NAME OF INDIAN TRIBE] has rescinded its authorization, which it may do at any time.

For further information, please contact: [Tribal Contact; Name and Contact Information].

Signed by:

[Signature]

Name:

Title:

Date:

Acknowledged and accepted by the ACHP:

[Signature – leave blank]

Name:

Title:

Date:



# History Colorado

October 8, 2024

Honorable Sara C. Bronin  
Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington DC 20001-2637

RE: Colorado SHPO Response / Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities

Dear Chair Bronin:

The Colorado State Historic Preservation Office appreciates the opportunity to provide comment and feedback on the Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities.

In general, while we appreciate the stated intent motivating the Program Comment and believe a Program Alternative(s) of some variety could be the right approach for some of the activities included, the Program Comment as presented strays from the core tenets of the Section 106 consultative process and will almost certainly lead to more confusion and conflict, not less.

The Program Comment is exceptionally broad and deserves much additional consideration and collaborative development, which we strongly encourage the Advisory Council to authentically pursue.

While we have serious concerns about the Program Comment, in the spirit of SHPOs across the country working hard everyday to ensure that community-driven preservation outcomes are reached, we are providing a detailed response document that highlights areas of concern within the proposed Program Comment. You will find that attached.

My sincere thanks to our compliance team, who on top of an already significant workload, reviewed the draft and provided this feedback. Special thanks to Mr. Joseph Saldibar, a more than 20-year employee of the Colorado SHPO who brings a long and valued perspective to the importance of Section 106 and how it works best for Colorado communities and their historic resources.

Regards,

Patrick A. Eidman  
Chief Preservation Officer / Deputy State Historic Preservation Officer  
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## Colorado State Historic Preservation Office Comments Regarding the Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities

### Section I: Introduction

Section 106 has been described as a ‘stop, look, and listen’ approach to federal undertakings. Indeed, federal agencies are encouraged by 36.CFR.800 to *stop* for a reasonable period of time (30 days) in the earliest stages of the project to gather their thoughts; to *look* to see if there are historic properties that might be affected by the undertaking, whether such resources are important to the nation as a whole or to a smaller, often marginalized community; and most importantly to *listen* to the advice of others.

This last point is critically important, in that it acknowledges that no one person or agency can be a master of all things, or the holder of all knowledge, and that outside voices are often able to suggest alternatives that may be cheaper, easier, and/or more protective of historic properties. At the Colorado SHPO, we have personally witnessed many examples in which a proposed federal action was improved, often radically so, after receiving input and advice from its consulting parties. We have also witnessed many examples in which the federal agency itself willingly changed its opinion of an undertaking- regarding the eligibility of the resource or the effects of the project or both- after receiving additional information from state, local, Tribal, and public sector parties.

We fear that this spirit of open and helpful cooperation between federal, state, local, and private interests- perhaps a perfect expression of America’s democratic process- is about to be completely upended by the proposed Program Comment, bringing an unwanted return to the days when an all-powerful and unassailable federal government rode roughshod over the needs, desires, and wishes of everyone else.

Although the Program Comment stresses the pressing issues at hand- a need for housing, a need to conserve energy, a need to reduce reliance on fossil fuels- we note that the federal government of the 1950s and 60s was similarly driven by what *it* saw as the extremely pressing issues of *its* day- the need to replace transit with highways; to flatten downtowns for new office towers; to bulldoze farmland for new single-family sprawl. Any student of Historic Preservation can easily point to cases in which a zealous federal government refused to grant neither an inch nor a mile, when either might have been sufficient to reuse and restore existing building stocks, or to maintain the historic ‘walkability’ of downtowns instead of turning them into bleak canyons for combustion engines.

It was the senselessness of the destruction that brought about the creation of the National Historic Preservation Act in the first place. Tellingly, it did *not* allow for historic preservation concerns to *stop* projects- even ill-conceived ones- from going forward. All it asked was that federal agencies, those recipients of every taxpayer’s hard-earned dollars, take a brief 30-day moment to *stop*, *look*, and *listen*. For more than six decades, this has been sufficiently flexible to allow the United States to build more than fifty million new homes; to construct a wireless

network of more than 600,000 cell towers and cellular nodes; to win the Cold War against the Soviet Union and to support the world's most sophisticated military; and to attain its highest level of renewable energy use in more than a century.

Historic preservation is sometimes falsely accused of being resistant, or even hostile to change. We categorically reject this notion. As evidence, we point to the decades we have spent advocating in favor of revitalization over sprawl; in favor of repairing over simply tossing away; and most importantly, advocating for the right of the disadvantaged, the poor, the underserved, and the often-marginalized communities within our state to celebrate their heritage and to not only have a voice, but have that voice listened to by their government.

With that in mind, the Colorado SHPO finds value in the proposed Program Comment. We are no stranger to Programmatic Agreements, Program Comments, and other means of facilitate reviews when appropriate, and where the gains are obvious and acceptable by all. We have extended the spirit of streamlining to our own state government, drafting Memorandums of Understanding with state agencies to similarly simplify their reviews.

However, the key point in these other agreement documents is that while they 'make life easier,' they do *not* do so at the expense of historic properties; the very nature of a Programmatic Agreement is in the very name, *Agreement*; with no one party assuming dominance over the others. It is here where we find fault with the proposed Program Comment.

The draft we have before us preserves the traditional ritual of *stop, look, and listen*, but with an unfortunate twist. Under it, the federal agency can choose where to look, and to whom it will listen. It may, if it so chooses, to listen only to itself before rendering a final, irrevocable decision regarding an undertaking. Doing so is like asking the man on the street to watch the armored car while the guard ducks into the bank; we are hopeful that no bags of money go missing, but it seems likely that a few will.

The authors of the National Historic Preservation Act of 1966 knew that the idea that any one project or endeavor is 'too important' to merit even the most basic of discussions regarding its potential effects is both false and self-defeating. It is indeed possible to have one's cake and eat it, too, and in support of this we can point to the hundreds of thousands- if not millions- of financially, historically, aesthetically, and publicly successful projects that have taken place in the six decades following the passage of the National Historic Preservation Act..

Older readers may recall that in the 1960s, the only way to 'save the village' was to burn the village- specifically, that America's walkable, durable, transit-oriented downtowns needed to be bulldozed and replaced by miles of federally-funded highways, skyscrapers, and parking garages. Younger readers will recall the time just before the turn of the century when 'urban renewal' gave way to 'downtown revitalization' while the prescribed solution- demolishing everything in sight- remained the same.

Today we are all faced with new challenges. And yet the cure- to demolish, to clear, to replace- remains stubbornly the same. The cure has always been needlessly confrontational. It proposes

a zero-sum game when there is, in fact, room for *both* historic buildings and affordable housing, for historic materials *and* energy efficiency, because in many cases these things are one and the same. Even as policymakers envisioned broad highways and acres of tract housing, preservationists embraced dense downtowns, mass transit, and reducing waste. Today, as those same policymakers return to the ideas of walkable, vibrant, equitable urban cores, preservationists continue to advocate for the very same things. Here, we see a tremendous opportunity for the two groups to work together, creating more together than either group could create on their own.

With that in mind, we ask the ACHP to consider whether the ‘cure’ it is proposing in this Program Comment is proportional to the disease it claims to fight, and whether the streamlining measures it envisions will truly result in more energy-efficient, affordable building options. We are told that delays ‘caused’ by Section 106 review are catastrophic, but we are not told how, or why, or who is responsible for the delays. We are told that it is foolish to hold up projects on minor undertakings, and we agree; however, the Program Comment is not content to settle for minor things. Rather, it includes within its generous reach such undertakings as large-scale redevelopment, whole-building rehabilitation, and urban corridor reconstruction. These are the types of undertakings that are most likely to attract the attention of, and comments from, multiple consulting parties, including the SHPOs, local governments, and the general public. It is one thing to exclude a minor project from review on the basis that it is unimportant in the larger scheme of things, or that it is nearly impossible to adversely affect historic properties. It is quite another to assume that a major undertaking such as the ones described above would fall under the same assumptions, or that they should be exempted consulting parties won’t be interested in commenting on them, or that they should be exempted because they are ‘too important’ to allow consulting parties to delay them.

We offer a recent federal project as an example. 655 Broadway is a mid-rise office building constructed in 1957. The successful National Register nomination for the building states:

The 655 Broadway Building is a locally significant example of an early, mid-rise office tower built in the International in Denver. Its character defining features include its curtain wall construction and rhythmic exterior proportions. On the interior, finishes are generally modern, reflective of the building’s continued use as office space for over 60 years. Overall, the building retains sufficient integrity to convey its significance as one of the first mid-rise commercial buildings built along south Broadway in the International style.

In 2023, the Denver Housing Authority rehabilitated and restored the building, using federal funding from the Department of Housing and Urban Development. Because the undertaking was a historic rehabilitation project, DHA and its partners were also able to take advantage of both the federal historic preservation tax credit and the Colorado commercial historic preservation tax credit. The two credits returned 45% of the project costs back to the owners, a major cost-savings that only occurred because the owners chose to restore the building and to follow the Secretary of the Interior’s guidelines.

Today, “(t)he nine-story building houses 96 affordable units for seniors and disabled individuals. There are also an additional 14 apartments that will be used to help transition unhoused patients from Denver Health into housing after their hospital stay.”<sup>1</sup> 655 Broadway is located immediately adjacent to a large hospital (Denver Health). Prior to the rehabilitation of this building, homeless individuals who were treated at Denver Health had no place to go after they were released. This often led to them returning to the streets with no further support or resources, leading to them returning to Denver Health in an expensive and debilitating spiral. Use of the building for transitional housing allows those individuals to have a safe place to recover from their time in hospital. Likewise, the convenient location of 655 Broadway to Denver Health benefits the seniors who occupy the other 96 units in the building.

655 Broadway occupies a highly-visible location at the corner of Speer and Broadway, two major Denver streets. Its distinctive teal International Style facade is visible to the more than 26,000 drivers, pedestrians, and transit riders who pass through this intersection on a daily basis.



*Photo courtesy of Denver Housing Authority: <https://www.denverhousing.org/655-broadway>*

And yet this financially, socially, politically, environmentally successful would never have happened under the proposed Program Comment.

At the time the project was first proposed, in 2019, 655 Broadway was not listed on the National Register of Historic Places. It had not been formally evaluated for National Register eligibility. Neither the Denver Housing Authority nor Denver Health were aware of the building’s potential

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<sup>1</sup> Mathurin, Desiree. “Denver Converts Old Office Building on Broadway into 110 Units of Affordable Housing” *Denverite* (13 Dec. 2023): <https://denverite.com/2023/12/13/denver-housing-affordable-broadway/>



historic nature, nor of the availability of historic preservation tax credits that would significantly lower their project costs.

*After* consultation with the Colorado State Historic Preservation Office and the Denver Landmarks Preservation Commission, the project backers revised their rehabilitation plans to meet the Secretary of the Interior's Standards for Rehabilitation, allowing them to receive *both* HUD funding and historic tax credits. The non-profit Enterprise Housing Credit Investments provided an additional \$18 million in funding.

It is the 'after' that is critically important here, because the Section 106 process is the only reason the project became this successful.

Under the proposed Program Comment, this undertaking would have gotten no further than Appendix A-2.2.a, where it would have been deemed over 45 years old and "not a historic property," and thus exempted from all review of "(r)ehabilitation, replacement, and installation of doors, windows, canopies, roofing, and siding.

We do not need to wonder what might have happened in this scenario, as we have the proposed drawings from the project architect to show exactly what would have happened to this "non-historic building":



*Proposed rendering (2019) of 655 Broadway post-rehab. Courtesy Brent Schuettelpelz*

What could have been a lose-lose scenario- the loss of a historic building at a higher build cost to the project backers- became a win-win scenario instead because of, *and only because of* the Section 106 review process, and the *opportunity* given afforded by the NHPA to non-HUD



officials to:

- 1) Provide additional information unknown to HUD at the time of consultation (that the building was NRHP-eligible);
- (2) Propose alternatives that avoided a finding of adverse effect whilst achieving all of the project's goals (rehabilitation versus a gut rehab);
- (3) Inform the project proponents of additional financial incentives and programs available to them (state and federal historic tax credits)

In addition, we note that in this case, as in every Section 106 case, HUD and the project backers were completely free to decline the proposals and alternatives suggested by other consulting parties, and were completely free to gut the building and rebuild as they saw fit. Section 106 did not stop the project in any way, but it *did* allow all parties to plot a new path that was ultimately beneficial to everyone.

That is the heart of Section 106. That has always been the heart of Section 106- a mutual spirit of cooperation and a willingness to *stop, look, and listen* before proceeding. To be open to suggestions and to choose, should those suggestions prove useful, to accommodate them. To give other parties the satisfaction of being listened to, rather than ignored.

655 Broadway is only one of thousands of projects our office reviews on a yearly basis. We are but one of fifty states, and a younger one at that; we imagine that there are many 655 Broadways across the nation, historic structures of all shapes and types just waiting to be restored and put to good use as energy-efficient, affordable housing. This Program Comment would consign most of them to the dustbin of history, swept away just as efficiently as the Urban Renewal programs of the 1960s; the justifications slightly different, but the results all the same.

We strongly encourage ACHP to consider projects such as 655 Broadway as they deliberate putting this Program Comment into effect.

## **Section II: General Comments on the Program Comment Goals**

II.A Developing a single Program Comment versus three – one each for Housing, Energy-Efficiency, and Transit

We encourage ACHP to consider dividing this Program Comment into three separate Program Comments, each dealing with its assigned project type: housing, energy efficiency, and transit. We note that at present there is significant overlap among the three, particularly housing and energy efficiency, and that the Program Comment does a poor job of steering project applicants and federal agencies towards the appropriate set of guidelines (i.e., appendix A, B, or C) for the undertaking at hand.

For example, a major goal of the Program Comment at large (as stated in Section I.A.) is “to reduce (the nation’s) energy use and greenhouse gas emissions (and) and improve climate resilience.” Another, equally important goal is “to produce and rehabilitate affordable, *energy-efficient* (emphasis ours) and hazard-free housing.”

Here, we find it odd that the Program Comment treats energy-efficiency and affordable housing as separate creatures rather than two sides of the same coin, as they often are, and as we feel they should be. We would not wish to encourage a developer to build one without the other, especially given the high and growing costs of energy use and the resulting impact on low-income households. Yet the Program Comment provides confusing guidance all around. On the one hand, it seems to provide the very thing we are trying to avoid, outlining Path A for developers who *do* wish to build housing without energy-efficiency, as well as a Path B for developers who put energy savings ahead of housing units. Left out in the cold, confused, are the developers who want both things. Which path do they follow, A or B?

This confusion extends to the federal agencies that would be tasked with administering the Program Comment. Say that a developer arrives seeking federal assistance with a proposal to convert a former warehouse building to 100 units of housing, and to cover its substantial roof with an equally substantial solar array. Is this a housing project? Is it an energy-efficiency project? Which rules should be applied? Or is the review split down the middle, housing taking Path A, the solar panels Path B?

To illustrate this point, we note that in Appendix A-1 and A-2, when work is being conducted “on or near the exterior of *housing* (emphasis original),” roof-mounted solar energy systems may only be installed under certain conditions and in certain locations to be exempt from Section 106 review. In Appendix B-1 and B-2, to be used when the project is primarily to *reduce energy use or greenhouse gas emissions* (emphasis original), “solar energy systems” receive a blanket exemption. Presumably, it would be far easier to simply assume that housing and energy-efficiency go hand in hand in nearly all modern building projects, be they new builds or rehabilitation efforts, and to tailor the Program Comment to reflect this reality.

Finally, we feel that Appendix C is also worthy of its own Program Comment. Added to the end of this draft version, it feels orphaned, included solely for the sake of inclusion. Transit projects differ quite a bit from housing and energy-efficiency efforts. They largely impact infrastructure, versus buildings, and the work is much more likely to impact archaeological and Tribal cultural resources, rather than the built environment. We would venture that careful pre-project consultation and consideration is even more important here than in the other two parts of this Program Comment, as the resources that will be adversely affected are often unknown to the federal agency at the start of the undertaking, and as even small changes to a transit route can make the difference between an adverse and a no adverse effect funding.

There is no such discretion to be found here. Appendix C-2 allows for raising ground surfaces, as well as excavating them. It allows such work in both dense urban areas that have been occupied by humans for centuries, as well as in more rural areas that have not been impacted by intense development. Appendix C-2 allows these things to take place “if a qualified authority makes a written determination that such activity will have no adverse effects on any historic property,” but we note here the flaws in this approach:

- (1) The qualifying authority may or may not be familiar with defining and assessing adverse effects on archaeological resources, particularly subsurface ones that are not visible to the public;
- (2) The difficulty in establishing where such resources might be prior to the start of the project, leading federal agencies to mitigate unanticipated discoveries/effects when they might have avoided them;
- (3) A complete lack of guidance to federal agencies on how to handle visual adverse effects to historic properties, historic districts, and traditional cultural places, particularly given the proposed inclusion of visually-intrusive features (overhead lines, etc) in the list of exempted undertakings

## II.B. Lack of training for agency staff

Appendices A-2, B-2, and C-2 all allow a qualified authority to “make a written determination that such activity will have no adverse effect” on historic properties. This action then allows that authority to exempt large numbers of projects from the Section 106 review process.

We note that unlike a Programmatic Agreement, the mantle of this Program Comment may be taken up by any federal agency at any time, as it sees fit. It may do so regardless of its size, its structure, and/or its expertise. We note that there are wide disparities between the agencies in their ability and propensity to carry out consultation pursuant to 36 CFR Part 800:

- (1) Agencies which routinely handle Section 106 activities and which employ dedicated cultural resource professionals, who are specifically tasked with handling the tasks envisioned by this Program Comment;
- (2) Agencies which task their recipient entities with engaging in consultation, utilizing staff who do not have a background in cultural resources and who hold many other job duties and responsibilities;
- (3) Agencies whose programs and services rarely trigger the Section 106 review process, and who may not have staff familiar with either cultural resources nor the review process;
- (4) Agencies which rely on their private sector applicants to complete the bulk of the Section 106 review process.

As the above list illustrates, agencies may have a wide range of expertise on this topic, or none at all. Those who do are also impacted by staff turnover and the loss of institutional knowledge, especially at smaller agencies.

There is no training provision in this Program Comment, even though federal agency employees are specifically empowered to make critical decisions, including:

-If something is a character-defining feature;

-If replacement of a feature qualifies as ‘in-kind’;

-If the ‘records check’ of known historic properties was conducted appropriately and accurately;

-If the appropriate Tribal Historic Preservation Offices were contacted;

-If a building facade is “primary” or “non-primary”;

-If an unanticipated discovery or effect qualifies as an “Unanticipated Discovery” per Stipulation V of the Program Comment.

We note that the Program Comment leaves the duty of choosing a qualified authority to the federal agency, who are given no further guidance in this task other than to select a qualified authority who is “appropriate to the circumstances.” In most cases, this will require the agency to turn to the private sector for help. However, without training, it is hard to envision how the federal staff person is going to know how to hire a qualified authority, how to choose a *good* one, or even how to tell the difference between an expert authority and a sloppy one. We highly suspect that ‘price’ and ‘expediency’ will be the main drivers of these selections, not expertise or accuracy.

In the current Section 106 consultation process, other consulting parties provide a safety net for untrained federal staff (or their untrained recipient entities) through their ability to raise concerns when that agency has gathered insufficient, incomplete, or inaccurate information. Under the Program Comment, these safety nets are swept away, to the detriment of all.

## II.C. Conflicts with other historic preservation programs

Colorado offers two state-level financial assistance programs for owners of historic commercial buildings, one for owners of historic commercial (income-producing) properties and one for historic buildings used for housing. By statute, applicants for both credit programs must adhere to the Secretary of the Interior’s Standards for Rehabilitation.

Our state also has 143 local historic preservation commissions, each of which has its own set of historic preservation-related guidelines for historic buildings within its jurisdiction. Of these, 67 are also NPS-Certified Local Governments (CLGs) whose guidelines and regulations meet standards set by the National Park Service. Both CLGs and non-CLGs also base their review guidelines on the Secretary of the Interior’s Standards for Rehabilitation.

Colorado also has one of the country’s largest historic preservation grant programs. The State Historical Fund issues more than ten million dollars in grants each year. As with the tax credit program, applicants for grants must demonstrate that they meet the Secretary of the Interior’s Standards for Rehabilitation.

We note that many potential applicants for HUD funding would also be eligible for historic preservation tax credits. This is not a trivial matter- an applicant who successfully utilizes federal and Colorado historic tax credits can recover up to 55% of their total project expenditures. In rural communities where housing has always been a scarce commodity, and where capital is similarly hard to come by, use of tax credits and grants often mean the difference between a successful project and one that never breaks ground.

There is, therefore, significant overlap between tax credits, grants, and federal funding. There is also significant overlap (and shared goals) between federal funding meant for housing and energy efficiency and tax credits/grants meant to accomplish the same.

The Program Comment threatens to introduce uncertainty into this equation. We note that no mention of the Secretary of the Interior's Standards for Rehabilitation are found within its pages; federal agencies and qualified authorities are not bound by its recommendations when making a finding of "no adverse effect" to historic properties.

It does not take much imagination to envision a scenario in which a project applicant receives a finding of "no adverse effect," a thumbs-up, and federal funding from a federal agency, only to be told at the next step that their proposed undertaking does not meet the Secretary of the Interior's Standards for Rehabilitation, and is therefore ineligible for further financial assistance. It also does not take much imagination to predict the applicant's reaction when a federal agency (say, Housing and Urban Development) approving a project, only for a different federal agency (the National Park Service) rejecting it- even though both are part of the same federal government, and both are purportedly assessing the project's effect on historic properties.

ACHP has, in the recent past, proposed to address this disconnect through the creation of an additional set(s) of preservation standards that would be more compatible with the Program Comment, but these standards have yet to emerge, and there is no indication that they ever will. In the meantime, we anticipate numerous conflicts in this arena, with no solution short of requiring the applicant to meet the Standards that the Program Comment told them were not applicable to their undertaking, or asking them to forgo the financial assistance they need.

This, we note, is another example of the Program Comment creating the very thing it exists to prevent- *uncertainty for applicants*.

We believe that the best and easiest solution to this conflict is to excise the portions of the Program Comment that grant unilateral authority to federal agencies and qualified authorities to declare 'no adverse effect' for undertakings. In support, we note that the Program Comment is designed to be amended in the future. Should ACHP and NPS reach an agreement on a new set of 'Standards for Housing Rehabilitation' or similar in the future, the Program Comment may be amended to allow federal agencies and qualified authorities to use this new Standard. Until then, we argue that discretion is the better part of valor, and that the Program Comment should avoid creating potentially catastrophic disruptions in the current 'financial stack' of beneficial historic rehabilitation projects.

## II.D. On moral hazards

We note that the Program Comment, as written, makes it exceptionally easy for a federal agency to avoid all consultation under 36 CFR Part 800. While it is true that all 'streamlining' Agreements encourage federal agencies to consider ways to *reduce* consultation, there will always remain a smaller subset of undertakings that require consultation between parties.

This is not the case in this Program Comment, which contains off-ramps for its off-ramps, to the point where it seems unlikely that any undertaking would make it all the way to the very end. Agencies here are given broad incentives to see that their undertakings are exempted- their reward is to be able to fund/permit the project immediately, without having to wait thirty days for consultation. When deciding- as the Program Comment allows- to make the sole deciding decision between a finding of “adverse effect” that requires additional days or weeks of consultation, and a finding of “no adverse effect” that immediately concludes the process, the obvious outcome seems inevitable. This is especially true in cases where the federal agency is under financial or political pressure to approve a proposed project, or if the agency thinks that it will not have the resources or time necessary to see an adverse effects finding to its conclusion.

The same can be said of ‘qualified authorities,’ the definition of which is given broad latitude in the Program Comment. Our experience with the 2004 Nationwide Programmatic Agreement for Cell Towers informs us that the quality of third-party qualified authorities varies wildly. There is significant market pressure to underbid the competition by submitting sparse information to agencies. The counterbalance to that market pressure is that a consultant who provides poor documentation risks introducing delays into the process (by virtue of consulting parties requesting additional information). FCC and their telecom partners are thus incentivized to seek a reasonable balance between cost and quality.

This counterbalance does not exist in the Program Comment, unless it is the agency itself that decides that the information it receives is inadequate to make a proper finding under Appendix A-2 or B-2. Given that choosing to do so means that the Agency must continue to spend time, money, and resources on the undertaking in front of it, whereas *not* raising questions brings an immediate end to the consultation process, we find it difficult to envision a scenario in which the agency (particularly a small or inexperienced one) would refuse whatever it has received.

The other ‘safety net’ in the standard Section 106 process is the existing opportunity afforded to consulting parties and the general public to comment upon (1) a specific undertaking and how the federal agency has handled it; and (2) the general manner in which that agency manages its responsibility to be a good steward of historic resources.

This protective oversight is also eliminated by the Program Comment. Section VI of the Comment encourages “any person” to file a dispute over implementation of the Program Comment, “or its use for any particular undertaking.” But as others have noted, the very purpose of the Program Comment is to streamline significant portions of the Section 106 process, *including* the public comment period. At best, the general public, historic societies, and local governments are left to find out for themselves whether or not the federal agency carried out its duties accurately and diligently; they are likely to do so only *after* the project has been reviewed, the funding issued, and the work completed.

At best, this approach serves only to antagonize potential project partners by excluding them entirely from the discussion table. At worst, it encourages those same affected parties to conduct their own form of ‘consultation’ via litigation and FOIA requests, hardly a cost- or time-efficient solution for anyone involved.

## **Section III: Clause-Specific Comments**

### **A. Main Body Clause-Specific Comments**

#### **II.E.2. Standard Section 106 Review**

Our staff had difficulty parsing this clause. Is it meant to say that the federal agency could, in cases where some portions of its undertaking fall under the Program Comment and others do not, use the Program Comment to exempt portions of the undertaking from review? Or does the Program Comment, in such cases, apply to the agency's "review of the *entire* undertaking," even if it does not entirely fall under its reach? Does the entire undertaking 'kick back' to the standard Section 106 process?

#### **II.E.3. National Historic Landmarks**

The National Historic Landmarks program is one of the oldest federal-level preservation initiatives. As such, it has undergone significant evolution over time. One of the most important changes has been the level of documentation expected of aspiring nomination writers. Currently, a person wishing to list a historic district as a National Historic Landmark must evaluate every building within its boundaries, determining whether each meets the criteria for being considered a 'contributing building.'

However, this was not always the case. Surveys of historic properties and districts under the National Historic Sites program (the precursor to the Landmarks program) continued sporadically through the Great Depression before being suspended during World War II. The definitions of 'quality' and 'completeness' of research were in their infancy in this time period, and in any case were quite secondary to the primary goal of providing employment to out-of-work historians, architects, and archaeologists.

When the National Historic Landmarks program was revived in the late 1950s, the standards of quality and completeness were still in flux. Nevertheless, numerous National Historic Landmark listings, of both individual sites and historic districts, were completed during this time period, including here in Colorado.

This brings us to the issue at hand. The proposed Program Comment would not apply to "(a)ny site, object, building, or structure individually designated as a National Historic Landmark or designated as a contributing property to a National Historic Landmark district." We must reconcile this clause with the fact that many of Colorado's earliest National Historic Landmark districts make little, if any effort to distinguish between 'contributing' and 'non-contributing.' The Leadville National Historic Landmark District (1961) nomination includes 71 city blocks and more than 600 individual buildings; only a dozen are specifically mentioned in the text. The writers of the Pikes Peak National Historic Landmark nomination (also 1961) took an even more expedient route, drawing the boundary line at 14,000 feet above sea level without describing or evaluating any site, object, or building above that geographic line.

The dilemma we face here is that, to use Leadville as an example, more than 95% of the buildings in the district have *no* historic designation, contributing or not. We may assume, given that this is a historic district, that at least 50% of the buildings within its boundaries are historic, or at least were when the district was listed in 1961. The district has not been resurveyed in the subsequent six decades. We are left, then, with the issue of how to classify these buildings under the Program Comment. Taken literally, the Program Comment would apply only to the dozen buildings specifically called out in the text, even though a district of this size could not exist, and could not be legally listed, if those twelve buildings constituted the entirety of historic structures within its boundaries. The writers of the nomination no doubt envisioned that the majority of the 600 buildings were contributing- they would not have drawn the boundaries as large as they did otherwise- but would a federal agency using this Program Comment treat them this way? If not, is the Program Comment's language sufficient to protect the buildings this clause intends to protect?

III.A.1: We note that "minimal potential to adversely affect historic properties is undefined here. While this phrase is sometimes used in everyday Section 106/historic preservation conversations, it could stand to use a more formal designation within the context of this Program Comment. We remind ACHP that this Program Comment is meant to be used by a variety of federal agencies with a corresponding variation in expertise and education. Without definition, one person's "minimal" will be quite different from another's.

III.A.2: We note that there is a disconnect the requirements in this clause- that the agency must document "the manner in which it has satisfied such conditions, exclusions, or requirements) with the language in Stipulation X, in which the agencies must only provide "examples of undertakings covered" by Section III.A.1 and III.A.2. It is not clear which path federal agencies are to take here, and whether there are any penalties to be assessed should they fail to do either.

## VI: Dispute Resolution

We have discussed previously the challenge presented by expecting "any person" to file "a dispute over the implementation of the Program Comment" when one of its central goals is to bypass most of the consulting parties/public comment period altogether. This is especially true of "members of the public," as presumably they are not closely engaged with the undertakings and everyday dealings of federal agencies. How will ACHP assist these members of the public with filing disputes? How will the public know that an undertaking was exempted by this Program Comment, or which federal agency was responsible? How will they be able to differentiate between a federal agency that has acted correctly and one which has not? What forms, websites, and procedures will be set up for them?

We also note that vesting authority to "issue advisory opinions about the use of this Program Comment to guide federal agencies" solely in the hands of a single individual (the Executive Director of the ACHP) does not provide us with much encouragement. While present and future



Executive Directors are knowledgeable, they are not infallible, nor are they free from political influence. Placing the ability to address disputes and concerns into a wider set of hands would go a long way towards neutering these issues and concerns.

## VII: Duration

Programmatic Agreements typically extend for either five or ten years. The length of the Agreement typically depends on whether the parties foresee significant changes in policy or funding in the short term- if everyone is comfortable with the terms of the Agreement, and stability is assumed, a ten-year duration is preferred.

Duration periods are specifically intended to encourage retrospection. Has the Agreement worked as intended? Is everyone happy with how its terms are being carried out? Are there additional work items or undertakings that could be exempted from review? At each renewal, the signatories are encouraged to consider these issues.

The Program Comment extends for twenty years (to 12/31/44). While this guarantees that it will remain in effect for a significant period of time, it also raises the very real possibility that it will not be examined, evaluated, or questioned in any significant way until the middle of the 2040s. We note that, according to the U.S. Census, the population will grow by more than thirty million in that time frame (all of them needed some form of housing); current energy technologies (such as solar and geothermal) will continue to advance; and both the public and private sectors will continue to evolve as people choose how they wish to work, live, and play.

We see no reason why a twenty-year timeline is required for this document. Surely its drafters are aware of current apprehension other consulting parties hold towards the implementation of this Program Comment. Offering to 'reopen the box' in five years so that a frank discussion of 'what works and what doesn't' can take place would, we feel ameliorate many of those concerns. By contrast, opening with a proposal to run the Comment largely unchained for two decades sends the exact opposite message.

## XI: Definitions

Area of Potential Effects: Our assumption on reading that the Area of Potential Effect "may be different for different kinds of effects caused by the undertaking" refers to the difference between *direct and indirect* effects, but this is not explained in this clause; it is left, instead, for the reader to determine just how effects may differ for different projects. This leaves the clause open for misinterpretation at best, and misuse at worst. We note here, as elsewhere, that this Program Comment is intended for use by multiple federal agencies of different levels of staffing, experience, and attitude towards historic properties- ambiguity is not something the Program Comment can afford.

Contributing Property: The language here should match the language used in 36.CFR.60.4.

Primary Facade and Primary Right-of-Way: We feel compelled to point out here that there are many historic properties that have *no* public right-of-way. This includes, but is by no means limited to:

Military facilities where public access is limited or non-existent;  
Properties in non-public areas of public property, such as employee housing;  
Agricultural properties where most or all buildings are set far back from the main road, surrounded by farmland;  
Properties in rural areas where road of any kind are in short supply;  
Properties that are nominally on a public street but which are deliberately screened from public view by vegetation, high fences, or both;  
Properties that have nothing but primary facades (e.g., train stations, state capitol buildings, etc.)  
Contributing outbuildings;

We note that while the language here states that “one building may have more than one primary facade,” it does not say the same about having more than one primary right-of-way, or how agencies are supposed to handle buildings that have no primary right-of-way.

We further note that even local historic preservation ordinances rarely, if ever focus solely on the “primary right-of-way,” given that the properties they deal with rarely save all of their best historic features for that one elevation. One can find no shortage of examples of stained glass, bay windows, porches, turrets, entrances, porte cocheres, and other elements that exist on the side elevations of historic buildings. Contrary to the expectations of the language in this Program Comment, such elements were always meant to be part of the architectural expression of the building they are part of.

Under a broad reading of the Program Comment- a path a federal agency might take- there is nothing to stop said agency from approving the replacement of a stained-glass window, or approving it being heavily modified to accommodate mechanical equipment, if the agency determines that it is on a ‘non-primary facade.’

We harbor significant worries about a definition that may be interpreted as “if I can’t see it, it doesn’t exist,” and encourage ACHP to reconsider.

## **B. Appendices Review and Clause-Specific Comments**

Appendix A and Appendix B divide their instructions into two broad categories:

- (1) Activities associated with properties that are less than 45 years old and are “not known after a records check to be a historic property”; properties that were previously determined to be ineligible for listing on the National Register; or work on a non-primary facade of a buildings of any type that is not listed on the National Register;

- (2) Activities associated with properties that are more than 45 years old if the federal agency or qualified authority determines that it is not historic, or that the activity is determined by one of the above that the activity will result in no adverse effect.

## Appendix A

A1.1.a: A possible question here is how a reviewer would know whether one or more of the elements enumerated here is “less than 45 years old,” particularly in the absence of good record-keeping on the part of the property owner.

A1.1.d: This clause appears to assume that any area “within 10 feet of existing paved areas” and “within 10 feet of the building” is an area that is automatically devoid of potential cultural resources. We are inclined to disagree. In the Mountain West, we can cite numerous examples in which roads were routed around buildings which are no longer standing (but whose remains are still less than ten feet away from the road, buried under the soil), and of buildings that formerly had associated additions, porches, latrines, privies, sheds, and other structures/resources of archaeological interest “within ten feet.”

Additionally, this clause creates confusion with A2.1.a, which speaks of “new ground disturbance in previously undisturbed soils.”

A1.2.a: This is an example of where the Program Comment could be stronger in meeting its goals. Here, the project applicant may choose to replace doors, windows, roofing, siding, etc. with immunity, as long as the definition of ‘housing’ in the Program Comment can be appended to the project in some manner.

In this clause, the project applicant and the federal agency are considering the replacement of a wide variety of materials. The doors, windows, etc. covered here might be less than 45 years old, or they may be older (and on a non-primary facade of an older building). In either case, one would assume from the Program Comment (Introductory Section) that ensuring energy-efficiency would be a given here. Yet, this is not the case. Indeed, nothing in this clause requires a project applicant to replace doors, windows, etc. with anything that is demonstrably energy-efficient, or even allegedly energy-efficient. Should the applicant choose to replace historically-accurate double-pane windows with inaccurate single-pane units, no review is required. Should they choose to have those new windows shipped from across the country, or across the globe, rather than repair the existing ones, no pause is given. Should wood siding be sent to the landfill, and oil-based vinyl siding put up in its place, the Program Comment can only offer its regards.

We disagree with the idea that housing may be treated separately from energy-efficiency, particularly in a Program Comment that purports to support both. Rather, we believe that this section (and its companion, A2.2.a) should *require* that the project applicant demonstrate the following:

- 1) That each window, door, etc. is being replaced by a unit of superior energy-efficiency;

- 2) That the applicant has considered not only the raw r- or u-value of the original versus replacement, but also disposal costs, embodied energy, transport costs, and the use of non-renewable resources.

Given the oft-stated goal of the Program Comment to reduce energy waste and combat climate change, we do not see this provision as being burdensome or superfluous.

A1.2.b.iii: There is a significant and important distinction between “similar in composition” and “identical in composition” when it comes to mortar; one is not a substitute for the other. Mortar in older buildings is softer

A1.2.e: There is a point of confusion here, given that A1.2.a.viii also lists “solar energy systems” as a broadly-exempted activity.

A1.3: It is difficult to envision how any “work on the building interior” would be “visible from the primary right-of-way,” and we question whether this should be a criteria used when evaluating interior work.

A1.3.b.vii: Our office would be happy to send example photos of can lights being cut into highly character defining interior plasterwork as a reason for why this type of work should not be exempted.

A1.3.b.xi: This clause is one of several examples where separating “character-defining features” from the rest of the interior becomes problematic. Altering what is deemed to be a non-character-defining feature can easily affect features that are character-defining, and this is a good example of how that can happen. Insulation installations that change the wall depth can have a cascading effect that results in changes to sills, trim, windows, fireplaces, and relationships to other walls/features, including in character-defining rooms and spaces (and/or specific character-defining features). No guidance is provided in the Program Comment to federal agencies when they are confronted with a situation such as this, where an action is exempt from review but results in secondary adverse effects elsewhere.

A1.4.e: We suggest that this clause be rewritten for clarity. As it stands, it is difficult to imagine how replacement of a deteriorated mobile or manufactured home could be construed as “emergency work.”

## Appendix A-2

As noted above, this section replicates most of the language found in Appendix A-1. Most of our comments listed in Appendix A-1 would apply equally to their counterparts in A-2.

We previously noted the moral and logistical challenges of giving an agency official or qualified authority the sole power to make the determinations and judgments tasked to them in this appendix.

However, we also take the time here to call out the ‘balancing test’ described in Appendix A-2, in which the government agency/qualified authority is given a further opportunity to exclude projects from Section 106 review based on an examination of multiple ‘factors.’ These include:

- 1) Weighing historic value versus physical hazards;
- 2) Weighing historic value versus technical and economic feasibility;
- 3) Evaluating in-kind and substitute materials *solely* on technical and economic feasibility

As others will likely note, this approach is likely to produce nothing but uncertainty and confusion. It tasks the qualified authority with comparing apples and oranges, or in this case, the ‘value’ in keeping a historic element versus the ‘value’ of replacing it. It does not provide the qualified authority with a ‘scoring system’ to determine when A trumps B, or vice-versa. It does not how *much greater* the economic feasibility of replacement must be to justify said replacement, or even if it needs to *be* greater. If window rehab costs \$1,000 a unit and replacements costs \$999, should replacement automatically win out? Should the ratio be lower, i.e. \$500 versus \$1000? Would a higher replacement cost *still* be justifiable? Appendix A-2 seems to anticipate that it may.

The problem with this complicated calculus is that it introduces inconsistency into a Program Comment that was specifically developed to *reduce* inconsistency. There seems no doubt that different agencies will interpret this ‘test’ different ways, some more liberal than others. The problem is further exacerbated by the fact that the qualified authority is acting alone in this endeavor; there are no consulting parties to provide the equivalent of a ‘second opinion,’ no fact-checkers to contest cost estimates, no professionals who might suggest a cheaper or simpler solution. Even the federal agency offers no help, for an agency directive that “economics always trumps historic’ (or vice-versa) would itself violate the letter and spirit of this Program Comment.

Accordingly, we suggest striking this unwieldy and confusing section.

## Appendix B

We note that there is also significant overlap between Appendix A and Appendix B; the latter contains clauses that make sense when applied to housing, but much less so if the sole goal is to “reduce energy use” or “to enhance climate resilience of the building.”

B1.1.a: As an example of the above, we question what role items like fencing, curbs, and ramps play in reducing energy use, reducing greenhouse gas emissions, or enhancing climate resilience. We cannot imagine a scenario in which these would be considered “climate-smart building activities”; rather, they seem to have been copied verbatim from Appendix A.

If the goal of the Program Comment is to provide a list of exempted activities for projects that are “primarily” to reduce energy use, etc., then the list of exempted activities should be limited *solely* to those which are conducted in attainment of that goal.

B1.2.a: Our comments mirror our comments in Appendix A. However, we assign them even greater importance in Appendix B, given that the explicit goals of this Amendment are to enhance climate resilience and reduce energy use. Like A1.2.a, B1.2.a does not *require* the use of energy-efficient materials. It does not require the project applicant to demonstrate that they are improving climate resilience, only that their purported goal is to do so. As the Russians would say, *doveryai, no proveryai* (*‘trust, but verify’*).

Further, we note that while economic considerations are given weight in other sections of this Program Comment (*see, for example, our comments on Appendix A2*), they are conspicuously absent here. The challenges presented by replacement windows are well known and well-documented. These include:

- (1) The embodied energy cost in removing a useful window before the end of its lifespan;
- (2) The energy costs associated with producing, shipping, and installing a new window unit, particularly if the unit is shipped long distances, or is made from non-renewable resources (such as vinyl);
- (3) The payback period of a new window compared to its predecessor, which depends on a variety of factors and which can take up to 40 years.

We feel that this section of the Program Comment is a waste of a tremendous opportunity. If the goal is to improve the thermal performance of buildings- and the Program Comment is quite clear that it is- then there should be no reason why this clause should not *mandate* that all materials and products in this section must meet a certain standard (for example, EnergyStar) in order to be exempt from review. Without such a requirement, we are simply drawing a regressive and damaging loophole for others to exploit.

B2.2.a: See above. There seems to be no reason why these materials must be certified as being energy efficient and that they will directly positively affect the performance of the building if they are to be allowed to bypass review.

## Appendix C

C.2.1.a: “Elevation of the ground surface by more than 10 inches” does not come with an *upper* height limit, raising questions as to how ACHP envisions this clause will be used and, perhaps more importantly, how a federal agency may envision it.

C.2.2.a.iv: We wonder if there is a typographical error here. A flex post, almost by definition, is meant to be a lightweight road maker separating lanes of traffic or users of roads. A flex post

with a circumference of 22 inches would be seven inches thick, in effect making it a bollard rather than a flex post.

C.2.2.b: The terms “maintenance,” “repair,” “rehabilitation,” and “replacement” are used interchangeably here, even though they are quite different from one another in terms of complexity, expense, and technique.

This clause references ‘historic street furniture,’ a term that is not defined in the Program Comment and is left open to interpretation. This is likely to become a problematic issue given that it may be difficult for an inexperienced reviewer to determine the age of said furniture, much less its relationship to a particular building, landscape, street, or plaza. It will certainly be tempting to treat any piece of street furniture younger than its surroundings as entirely disposable, and to treat original pieces of street furniture as secondary to the building/park/street they are associated with. Essentially, the Program Comment is acknowledging that a park bench *can* be a historic park bench, but does not offer any guidance as to how, or why, or when. Making a blanket determination that “park benches maybe historic, but none of *my* park benches are historic” is an expedient solution, and one that is not prohibited by this clause or by the Program Comment as a whole.

C.2.2.b.v: The provided definition of a shelter for transit users as having a combined dimension of 30 linear feet *or more* (emphasis ours)” has no upper size limit, and the Program Comment does not provide a definition for ‘shelter.’ Under this clause, New York City’s Grand Central Terminal qualifies, as it is certainly larger than 30 combined linear feet, and it provides shelter to bus and train passengers.

While we assume that this clause envisions ‘shelters’ in the traditional sense- a simple city bus stop, or an open-sided rail platform- the Program Comment provides no such clarification. Given that this clause allows for the unilateral decision to rehabilitate or even replace ‘shelters’ of any size, we feel that this is an extremely important issue to clarify.

October 9, 2024

Honorable Sara Bronin  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001  
(sent only via email to [program\\_alternatives@achp.gov](mailto:program_alternatives@achp.gov))

Re: Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities

Dear Chair Bronin:

The Connecticut State Historic Preservation Office (CT SHPO) attended the webinar hosted by the Advisory Council on Historic Preservation (ACHP) dedicated to developing the referenced Program Comment, as well as the previous four webinars that served as a precursor to its development and were based on broad policy statements promulgated by the ACHP. Unfortunately, it does not appear that the ACHP considered our prior comments regarding the use of the Program Comment to achieve the broad policy goals of the current Chair. Our office does not have the staff time to provide line by line comments on the proposed language, but we do support suggestions and edits provided by the National Conference of State Historic Preservation Officers. Alternatively, we offer the following broad observations.

- The proposed Program Comment undermines one of the most elegantly written regulations, 36 CFR part 800 or Section 106. The cornerstone of this legislation, as taught and advocated by the ACHP, is consultation. A fact that has been lost in the development of the referenced Program Comment and a fact that will be eliminated from the process if this Program Comment is adopted. As an agency that has regular communication with its constituents actively concerned about the historic character of their communities, as well as those that become activated by federal agency actions, our office is deeply dissatisfied that consultation is being removed from a broad set of undertakings covered by the Program Comment without meaningful prior consultation.
- As daily practitioners of Section 106 and an office that frequently provides guidance to our federal partners, the language of the Program Comment is confusing. All too often, federal agencies defer to our office for their own compliance. Our office guides them and helps them through the process in a legally defensible manner. The reality, however, is that most agencies struggle with sufficient levels of staffing in general. Without any training requirements and lack of subject matter experts on staff to efficiently process the range of undertakings covered by the Program Comment, CTSHPHO is concerned with its appropriate application and questions the level of



support that the ACHP will provide. Particularly concerning areas of confusion are the following broad observations.


- In several instances, the Program Comment uses the phrase “components of an undertaking.” It is unclear if the Program Comment is allowing for projects to be segmented and, if so, how will that decision be made and who will make it? And, how will the Area of Potential Effect for the “components of an undertaking” be delineated and how will that be differentiated from the Area of Potential Effect for presumably the remainder of the undertaking that is not included in the Program Comment.
- The Program Comment states that a federal agency does not need to determine if an “affected property is a historic property except where explicitly stated,” but the Appendices reference project exemptions 38 times if there are no impacts to character defining features or will not otherwise have an adverse effect on historic properties. How will the ACHP or the agency reconcile not having to make property eligibility determinations with understanding when or how the Program Comment can be used.
- Similarly, the Unanticipated Discoveries section is intended to accommodate unforeseen impacts to previously unidentified historic properties. If there are no mechanisms in place for making determinations of eligibility by the federal agency, who or how will historic properties be evaluated as part of the Immediate Response Requirements. Further, the Unanticipated Discoveries section suggests that only historic properties with tribal interests would be given additional consideration. For example, if a septic system being installed under the Program Comment encountered evidence of the Roanoke settlement, could work could unfettered?
- Connecticut’s tribal historic preservation programs generally are at a disadvantage for nationwide program alternatives that are limited to tribal lands. As an area of early European settlement and displacement of indigenous communities, the areas that meet the definition of Tribal Lands do not adequately represent the extent to which federally recognized tribes have a documented relationship with the landscape and areas where they typically express an interest in federal undertakings.
- The Appendices allow for a variety of activities within areas described as “previously disturbed ground.” Although this term is defined in the Program Comment, the concept of previously disturbed is highly variable and there are no assurances that qualified individuals will make this determination. Although the Program Comment acknowledges a consideration of the “three-dimensional area of potential effects,” there is no guidance as to how the depth of disturbances will be determined and evaluated relative to the project impacts. Because archaeological sites in our region are rarely visible on the surface, significant archaeological deposits beneath superficially disturbed soils only would be encountered during construction, prohibiting opportunities for

avoidance or minimization of harm. In fact, this likely would result in costly delays that would impact the “economic feasibility” of a project.

- CT SHPO is perplexed by many of the activities listed in the appendices. A large number of them are activities that our office rarely, if ever, review because in following the standard Section 106 process, the agency determines that the activities do not have the to cause effects to historic properties (e.g. applying fertilizer or paint to already painted surfaces). In addition, the Program Comment explicitly states that it was drafted to alleviate “the nation’s pressing needs to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce its energy use and greenhouse gas emissions, improve climate resilience, and cut energy costs; and to decarbonize its transportation sector.” CT SHPO does not understand how activities such as water features and fountains achieve this goal and, in fact, seem counter to it.
- Normally, CT SHPO prefers a shorter duration when a program alternative is first adopted to provide an opportunity for sooner reflection to correct unforeseen consequences or improve intended outcomes. It is our opinion that a shorter duration is even more appropriate for this Program Comment that is driven by policy goals which can change with every administration. Therefore, CT SHPO recommends a duration of no greater than eight years.
- Finally, because our office has put so much effort into streamlining Section 106 for a larger and more comprehensive set of undertakings with agencies with whom we currently have executed Programmatic Agreements, we request, at a minimum, that those program alternatives supersede the proposed Program Comment to “more effectively and efficiently address the nation’s needs.”

CT SHPO appreciates the opportunity to share these remarks on the proposed Program Comment. We encourage the ACHP to foster open dialogue with all parties to distinguish perceived obstructions from objective project delays that can be resolved through program alternatives. For additional information, please contact me at (860) 500-2329 or [catherine.labadia@ct.gov](mailto:catherine.labadia@ct.gov).

Sincerely,



Catherine Labadia  
Deputy State Historic Preservation Officer

Cc (via email): Hein, NCSHPO

The FL SHPO appreciates the opportunity to comment on the ACHP's *Draft Program Comment on Accessible, Climate-Resilient, And Connected Communities* (hereinafter PC). We understand the need to streamline certain types of housing and transportation projects, which is why we worked closely and diligently with our federal partners to successfully create efficiencies with programmatic agreements such as those we executed with HUD, FHWA, and FEMA. We support the ACHP in its efforts to prioritize and facilitate the reuse of historic buildings. However, the proposed Program Comment undermines the intent of the NHPA by removing the opportunity for SHPOs, THPOs, Tribes, local governments, and the public to provide meaningful and necessary input on federal undertakings with the potential to effect historic properties. The ACHP claims it aims to accelerate the review of projects, but in its current iteration, the proposed Program Comment is far too broad in scope, lacks clarity, and will likely achieve the exact opposite.

We echo and endorse the comments of NCSHPO and other SHPOs and provide the following feedback as well:

- The Program Comment seems to grant unilateral decision making to federal agencies or potentially the entity an agency has delegated its Section 106 responsibilities to.
- A reasonable and good faith effort to identify historic properties should be required as many of the exempt or streamlined activities could directly impact character defining features of historic buildings, structures, districts, and archaeological sites.
- Projects that impact a property whose NRHP eligibility or status is unknown should not be exempt from consultation.
- It is unclear who and how an agency will determine whether an undertaking is occurring within "previously disturbed ground" or "previously disturbed right-of-way" and many of the exemptions involve a great deal of ground disturbance. This has the potential to create detrimental damage to significant archaeological sites and sites that may be ineligible or disturbed, but contain human remains.
- Many terms and phrases, such as "climate smart-building" lack sufficient definitions. Such vague definitions are too open to interpretation and could be applied to any building or structure.
- Terms like "qualified authority" and "qualified professional" are used inconsistently or even interchangeably throughout the document. This is confusing.
- Extensive exterior changes to a primary façade may result in visual effects to adjacent properties in a historic district. Alternatively interior changes can severely affect properties individually listed in the National Register.
- The exemptions and streamlined activities do not account for the requirements of local preservation ordinances, e.g. paint color within a local historic district. Which is why the exclusion of SHPOs and local governments is concerning.
- To exempt consultation for the sale or lease of federal property to non-federal ownership or control, the Program Comment should better define "adequate and legally enforceable restrictions."
- Spray foam should never be used should be used in a historic property, even when specified that it will not touch or damage historic materials. Improper and inadequate insulation can gather moisture and prevent airflow, especially in wooden buildings or structures.

## **DRAFT PROGRAM COMMENT ON ACCESSIBLE, CLIMATE-RESILIENT, AND CONNECTED COMMUNITIES**

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 C.F.R. § 800.14(e), and went into effect on that date. It provides all *federal agencies* with an alternative way to comply with their responsibilities under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations, 36 C.F.R. part 800 (Section 106), regarding the *effects* of certain *housing*-related, *climate-smart building*-related, and *climate-friendly transportation infrastructure*-related activities.

### **I. INTRODUCTION**

#### **A. Background**

The development of this Program Comment is driven by the nation’s pressing needs to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce its energy use and greenhouse gas emissions, improve climate resilience, and cut energy costs; and to decarbonize its transportation sector — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

Recognizing these needs, in 2023, the ACHP adopted its Housing and Historic Preservation Policy Statement (Housing Policy Statement) and its Climate Change and Historic Preservation Policy Statement (Climate Change Policy Statement), which commit the ACHP to explore new opportunities to use program alternatives to enable federal agencies to advance historic preservation while meeting the nation’s housing and climate goals. These policy statements reflect increasing public awareness that historic preservation strategies — and historic properties themselves — can play an important role in addressing the three interrelated sectors covered in this Program Comment.

Following these policy statements, the ACHP developed this government-wide Program Comment to help accelerate the review of projects carried out, permitted, licensed, funded, assisted, or approved by federal agencies to rehabilitate existing housing or create new housing in existing buildings, to maintain and update buildings and their immediate environs in response to climate concerns, and to rehabilitate or develop new climate-friendly transportation infrastructure.

#### **B. Current Federal Agency Action**

Every day, federal agencies propose to carry out, permit, license, fund, assist, or approve undertakings covered by this Program Comment, and when they do, they must comply with Section 106 of the National Historic Preservation Act. While the federal government’s role in supporting housing rehabilitation and production, climate-smart buildings, and climate-friendly transportation is difficult to quantify, an overview of current federal agency actions and investments offers insight into the scope and scale of undertakings covered by this Program Comment.

In the area of housing, federal agencies support housing for millions of Americans and preserve the viability and affordability, upgrade the energy efficiency, and enhance the climate resiliency of the nation’s housing stock. The Department of Housing and Urban Development (HUD), for example, supports 1 million housing units across 190,000 public housing buildings, with HUD spending nearly \$9 billion annually in capital and operating funds on these units, over half of which were built before 1975. HUD also provides billions of dollars annually through the Community Development Block Grant and HOME Investments Partnership programs. In addition, the Department of Defense provides over one million units to Military Service members, including

846,000 units in military- owned barracks, while the Rural Housing Service of the Department of Agriculture provides loans to support affordable multifamily developments in rural areas and currently has over 400,000 units in its portfolio, including 17,000 units that support farm laborers. Thousands of projects are funded by other federal agencies working to ensure all Americans have safe, habitable, and affordable housing.

In the area of climate-smart buildings, federal agencies have long undertaken projects that seek to reduce energy cost burdens, cut climate pollution, and boost climate resilience of the nation’s building stock. The Inflation Reduction Act — the largest climate bill in history — and the Bipartisan Infrastructure Law have accelerated these efforts. The Environmental Protection Agency \$27 billion Greenhouse Gas Reduction Fund, for example, finances zero emissions building projects and clean technology deployment nationally, including in low-income and disadvantaged communities. The Climate Smart Buildings Initiative is catalyzing more than \$8 billion of private sector investments by 2030 to perform energy efficiency upgrades in federal buildings. The \$1 billion HUD Green and Resilient Retrofit Program invests in energy efficiency, electrification, clean energy generation, climate resilience, and low-embodied-carbon materials in HUD-assisted multifamily housing. And the Department of Energy Efficiency and Conservation Block Grant Program is assisting states, local governments, and Tribes in implementing strategies to reduce energy use, to reduce fossil fuel emissions, and to improve energy efficiency, including for residential and commercial buildings.

In the area of climate-friendly transportation, the federal government’s project portfolio — from sidewalks and bike lanes, to bus shelters and light rail — spans multiple Department of Transportation operating administrations as well as other federal agencies, including those that might fund such projects (such as HUD and the Environmental Protection Agency) or build such projects (such as the Department of Agriculture and the Department of Interior). Through the Bipartisan Infrastructure Law and other recent actions, the federal government is currently making significant investments to reduce greenhouse gas emissions and bolster the resilience of America’s transportation infrastructure. This includes \$91 billion over five years for public transportation projects, including for transit accessibility, transit-oriented development, and expanded transit service. It also includes \$66 billion to improve the nation’s rail systems, representing the largest investment in passenger rail since the creation of Amtrak, and additional funding for pedestrian and bike infrastructure, recreational trails, Safe Routes to School, and more. Other funding includes billions \$7.5 billion over five years for electric vehicle charging infrastructure, \$8.7 billion over five years for transportation infrastructure resilience, and \$2 billion to reduce the lifecycle emissions of transportation construction projects by investing in materials with lower levels of embodied carbon emissions compared to industry averages.

Many types of activities relating to these and other federal agency programs and investments require Section 106 review.

### **C. Prior ACHP Action**

The ACHP’s statutory duties under the National Historic Preservation Act include advising the President and Congress, and state and local governments on historic preservation policy issues and overseeing the Section 106 process.

In its advising capacity, devised the President, Congress, and state and local governments on housing since at least 1995, when it issued its first policy statement on affordable housing. It updated this policy statement in 2006, and again in 2023. The Housing Policy Statement states that Section 106 reviews must “be grounded in a flexible yet consistent approach to ensure that housing can be developed expeditiously while still preserving the historic qualities of affected historic properties.”

Also in 2023, the ACHP advised on climate change and historic preservation through its Climate Change Policy Statement. It urges action on building reuse and energy-and-emissions-saving retrofits of older and historic buildings (including enhanced electrification and increased energy efficiency standards). It also supports expediting Section 106 review of projects addressing climate change, including clean energy.

In its oversight of the Section 106 process, the ACHP has also issued or participated in other program alternatives to create tailored review processes for certain programs and undertakings relevant to this Program Comment. At the request of Department of Defense, for example, the ACHP has issued six program comments specifically related to housing, which cover housing developed under specific congressionally appropriated programs, housing constructed during specific eras, and housing designed and built with similar form, style, and materials. The ACHP has also recently been a signatory to several statewide programmatic agreements with HUD related to projects and programs subject to 24 C.F.R. Parts 50 and 58. Prior program comments addressing housing have reduced the operational and maintenance costs of historic housing, made homes more comfortable for occupants, and facilitated the preservation and reuse of existing buildings.

With regard to climate-smart buildings, ACHP has issued several program comments, along with an exemption for the General Services Administration's routine operations and maintenance. The ACHP has also signed a Department of Energy Prototype Programmatic Agreement for weatherization activities and a Nationwide Programmatic Agreement Regarding Climate Resiliency and Sustainability Undertakings on Department of Homeland Security Owned Facilities, which cover a broad range of energy efficiency, water efficiency, and climate adaptation-related undertakings. Prior program alternatives incorporating climate-smart building strategies have reduced the operational and maintenance costs of historic buildings, made such buildings more comfortable for occupants, and facilitated the preservation and reuse of historic buildings.

With regard to climate-friendly transportation, the ACHP has issued two program comments specifically related to transportation projects, along with a government-wide exemption for certain electric vehicle supply equipment. In addition, the ACHP has been a signatory to statewide programmatic agreements with the Federal Highway Administration, state historic preservation offices, and state departments of transportation, covering a range of transportation-related activities. To the extent prior program alternatives have addressed climate-friendly transportation projects, they have facilitated such projects while upholding historic preservation values.

This Program Comment is guided in part by the mechanisms, provisions, and approaches in prior program alternatives that are most consistent with the ACHP's recently adopted Housing Policy Statement and Climate Change Policy Statement. In expanding beyond the scope of these prior program alternatives, this Program Comment offers an alternative for Section 106 review across the federal government for certain undertakings, reducing complexity and equipping federal agencies to more effectively and efficiently preserve and protect our nation's historic resources while addressing other critical policy needs.

#### **D. Justification**

Many types of undertakings relating to the programs identified in Section I.B. of this Program Comment, and other similar programs, require review under Section 106 of the National Historic Preservation Act. Recognizing the extent, and in some cases the increasing extent, of federal action in the housing, building, and transportation sectors, and the volume and repetitive nature of such action, the ACHP has issued this Program Comment to clarify the ACHP's preferred approaches to reviewing these covered undertakings. In doing so, this Program Comment enables federal agencies to focus on other undertakings with greater potential for adverse effects on historic properties, reducing taxpayer costs and facilitating project delivery — while streamlining the production and rehabilitation of housing, the preparation of buildings to be climate-resilient, and the reduction of energy use and greenhouse gas emissions in the building and transportation sectors.

This Program Comment also aims to leverage the embodied carbon in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for construction materials that currently account for more than 15 percent of annual global greenhouse gas emissions, and in turn slowing down climate change and its impacts on our most cherished places.

#### **E. Goals**

This Program Comment aims to promote actions that, consistent with the National Historic Preservation Act, 54 U.S.C. § 300101(1), “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”

More specifically, this Program Comment aims to achieve objectives laid out in ACHP policy statements, to advance historic preservation goals, and to harmonize them with the nation's pressing needs to expand access to housing and to, facilitate climate-resilient and lower emissions buildings, and promote climate-friendly transportation

## **II. SCOPE**

#### **A. Overall Effect**

This Program Comment provides an alternative way for *federal agencies* to comply with their Section 106 responsibility to take into account the *effects* on *historic properties* of their covered *undertakings*. The issuance of this Program Comment at the ACHP's own initiative, by default, serves as our reasonable opportunity to comment regarding covered *undertakings*.

#### **B. Effect on Other Applicable Laws**

This Program Comment does not modify, preempt, or replace any other federal or Tribal laws, or any applicable state, local, or Tribal laws or regulations.

#### **C. Effect on Existing Agreements**

A *federal agency* that already has a Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must either:

1. Follow this Program Comment, rather than such MOA or PA for a class of covered



*undertakings* for the life of this Program Comment. Before making a decision to do so, the *federal agency* must first consult with the signatories of such MOA or PA and then seek their consent to apply this Program Comment to a class of covered *undertakings*; or

2. Continue to implement the existing MOA or PA regarding such covered *undertakings*, rather than this Program Comment.

*Federal agencies* may pursue amendments to such MOAs or PAs per their stipulations, to incorporate, in whole or in part, the terms of this Program Comment. *Federal agencies* may also consider terminating such MOA or PA and follow this Program Comment to satisfy their Section 106 responsibility for the covered *undertakings*.

A *federal agency* that already has a Section 106 program comment or program comments in effect for covered *undertakings* must follow the terms of those program comments to the extent those program comments address the *undertakings* covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of other program comments or MOAs or PAs, unless, for the latter, agreed to by all signatories. *Federal agencies* may propose to the ACHP amendments to existing program comments following the amendment procedures in those program comments, to incorporate, in whole or in part, the terms of this Program Comment.

#### **D. Effect on Tribal Lands**

This Program Comment does not apply on *Tribal lands*, or to activities that may affect *historic properties* located on *Tribal lands*, unless the *Indian Tribe*, *Tribal historic preservation officer*, or a designated representative of the *Indian Tribe* has provided prior written notification to the Executive Director of the ACHP that the Tribe allows the use of the Program Comment on the Tribe's lands. *Indian Tribes* can agree to such use of the Program Comment by issuing an authorization for such use in a format substantially similar to the format contained in Appendix D to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on those *Tribal lands* on the date of receipt of the authorization by the Executive Director of the ACHP, who must ensure notice on such authorization is included on the website of the ACHP. The *Indian Tribe*, *Tribal historic preservation officer*, or designated representative of the *Indian Tribe* may terminate the *Indian Tribe's* authorization to use this Program Comment by notifying the Executive Director of the ACHP in writing. Such a termination will be limited to the Program Comment's applicability to *undertakings* that would occur on or affect *historic properties* on the *Tribal lands* under the jurisdiction of the *Indian Tribe*.

#### **E. Standard Section 106 Review**

A *federal agency* must follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7 or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative, if:

1. The *federal agency* elects, for any reason, not to utilize this Program Comment for an *undertaking* for which alternative compliance approaches are prescribed in Section III of this Program Comment.
2. The *undertaking* or components of an *undertaking* that include activities not listed in the Appendices, meaning the undertaking would be subject to the Section 106 review process, but the *federal agency* could incorporate use of this Program Comment in its review of the entire *undertaking*.
3. The *undertaking* would occur on or have the potential to affect the following *historic properties*:





a. Any National Monument, National Historic Site, National Historic Trail, National Historical Park, National Military Park, National Battlefield, National Battlefield Park, or National Battlefield Site.

b. Any site, object, *building*, or structure individually designated as a *National Historic Landmark* or designated as a *contributing property* to a *National Historic Landmark* district or found within the boundaries of a *National Historic Landmark* archaeological district.



c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*.

### III. ALTERNATIVE COMPLIANCE APPROACHES

#### A. Available Alternative Compliance Approaches

This Program Comment authorizes alternative compliance approaches for covered *undertakings*, as follows:

1. For *undertakings* or **components** of *undertakings* no or minimal potential to adversely affect *historic properties*, as set forth in Appendix A-1, B-1, or C-1 of this Program Comment, a *federal agency* may proceed with the *undertaking* without conducting further review under Section 106.

2. For *undertakings* or **components** of *undertakings* for which the *federal agency* satisfies certain conditions, exclusions, or requirements, as set forth in Appendix A-2, B-2, or C-2 of this Program Comment, a *federal agency* may proceed with the *undertaking* if it satisfies the conditions, exclusions, or requirements prescribed in those Appendices, and it documents the manner in which it has satisfied such conditions, exclusions, or requirements.



## **B. Consultation with Indian Tribes and Native Hawaiian Organizations**

The United States government has a unique legal and political relationship with *Indian Tribes* as set forth in the Constitution of the United States, treaties, statutes, court decisions, and Executive Orders. The United States recognizes the right of *Indian Tribes* to self-government. Tribes exercise inherent sovereign powers over their members and territories. The ACHP drafted this Program Comment with a commitment to strengthening the government-to-government relationship between the United States and *Indian Tribes*.

### **1. Potential Effects on Properties of Significance to Indian Tribes and Native Hawaiian Organizations**

It is important to recognize that while this Program Comment was drafted to limit impacts on *historic properties*, such as sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, covered *undertakings* could directly or indirectly affect such properties.

### **2. Consultation-Related Obligations**

If the *federal agency*, based on the location of the *undertaking* and the *area of potential effect*, determines that an *effect* on the *historic properties* of religious and cultural significance to *Indian Tribes* or *Native Hawaiian Organizations*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, may occur, it must make a reasonable and good faith effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* and invite them to consult to assess whether use of the Program Comment for the subject undertaking is appropriate. The *federal agency's* consultation effort should be informed by and be conducted in accordance with the National Historic Preservation Act, the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects, including by recognizing the special expertise of holders of Indigenous Knowledge.

The *federal agency's* effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* should be informed by, but not limited to the following: the knowledge and expertise of agency Tribal liaison staff, historic maps, information gathered from previous consultations pursuant to Section 106, databases of *Indian Tribes* and *Native Hawaiian Organizations* where accessible and appropriate, the Bureau of Indian Affairs Tribal Leader List, U.S. Department of the Interior Native Hawaiian Organization List, the National Park Service Tribal Historic Preservation Program contact database, National Association of Tribal Historic Preservation Officers, the U.S. Housing and Urban Development Tribal Directory Assistance Tool, *state historic preservation officer* databases, and other resources.

### **3. Effect of Finding of Potential Effect on Certain Properties**

Should it be determined through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could potentially result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including a

Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* may not use this Program Comment and must instead follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative.

#### 4. Confidentiality-Related Obligations

Consistent with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, *federal agencies* should consider information regarding *historic properties* with traditional religious and cultural significance to *Indian Tribes* or *Native Hawaiian Organizations*, Tribal identified sacred sites, and Indigenous Knowledge shared with the *federal agency* by *Indian Tribes* or *Native Hawaiian Organizations* as sensitive, unless otherwise indicated by the *Indian Tribe* or *Native Hawaiian Organization*. *Federal agencies* should clearly inform *Indian Tribes* and *Native Hawaiian Organizations* of any limitations on the agency's ability to keep sensitive information confidential. *Federal agencies* must keep sensitive information provided by *Indian Tribes* or *Native Hawaiian Organizations* confidential to the extent authorized by applicable federal, State and local laws, such as Section 304 of the National Historic Preservation Act. *Federal agencies* are encouraged to use best practices on confidentiality delineated in the 2023 Interagency Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites when implementing this Program Comment.

### C. Consultation with Qualified Authorities and the Use of Qualified Professionals

*Undertakings* covered by this Program Comment do not require the use of a *qualified authority* except where explicitly stated, or except where, in the reasonable ~~to prevent the~~ judgment of a *federal agency* in consideration of various factors, ~~that~~ the use of a *qualified authority* is necessary to fulfill the intent of the National Historic Preservation Act or necessary or useful to inform the *federal agency's* decision-making.

When the *federal agency* chooses to use a *qualified authority*, the type of *qualified authority* must be appropriate to the circumstances. For example, a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects* to *historic properties* of religious and cultural significance to the Tribe or to *Native Hawaiians*, respectively, should be consulted to inform the identification, *effects* determination, and other matters involving *historic properties* significant to that *Indian Tribe* or *Native Hawaiian Organization*. As another example, determinations regarding architectural resources and structures must be made by a *qualified professional* meeting such professional standards for historic architecture or architectural history established by the Secretary of the Interior.

### D. ~~D~~eterminations of Eligibility

*Undertakings* covered by this Program Comment, due to their nature and potential *effects*, do not require a *federal agency* to determine whether an involved or affected property is a *historic property* except where explicitly stated.

#### IV. ASSISTANCE TO CONSULTING PARTIES

This Program Comment does not require a *federal agency* to pay any consulting party for providing its views or comments in response to 36 C.F.R. part 800 responsibilities, including invitations to consult in a Section 106 review; to respond to the proposed *area of potential effect*, scope of identification efforts, eligibility findings, assessment of *effect*; or to consult to seek ways to resolve any *adverse effects* or to develop a memorandum of agreement or programmatic agreement to conclude the Section 106 review finding or determination. If, however, a *federal agency* asks an *Indian Tribe*, *Native Hawaiian Organization*, or any consulting party to do more than the activities listed in the preceding sentence in connection with this Program Comment, the *federal agency* or *its* applicant, grantee, or permittee, if applicable, must enter into an appropriate arrangement to provide the *Indian Tribe*, *Native Hawaiian Organization*, or consulting party reasonable payment for such services, if and to the fullest extent the *federal agency* has the authority to enter into such an arrangement and pursuant to its policies and procedures. Examples of services include requests to:

- A. Conduct an archaeological, ethnographic, or other inventory or field survey to identify *historic properties* that may be affected by the *undertaking*.
- B. Perform a *records check* on behalf of the *federal agency*.
- C. Conduct research and make preliminary assessments of National Register eligibility on behalf of a *federal agency*, as opposed to responding to a determination of eligibility.
- D. Provide an assessment of the potential *effect* of the *undertaking* on *historic properties*, as opposed to responding to such an assessment.
- E. Carry out *mitigation measures*, including conducting additional research or monitoring ground disturbing activities as part of a mitigation plan.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, evaluation, or mitigation efforts.
- G. Design or develop a specific plan or specifications for an *undertaking* that would meet the Secretary of the Interior's Standards for Rehabilitation or otherwise avoid, minimize, or mitigate *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.
- I. Contribute substantially to any of the above activities carried out by a third party.

A request during consultation by an *Indian Tribe* or *Native Hawaiian Organization* to conduct such services itself does not preclude reasonable payment for services simply because the request was made during consultation. A *federal agency* or its applicant, grantee, or permittee, if applicable, must consider entering into an arrangement, in accordance with this Section, with any *Indian Tribe* or *Native Hawaiian Organization* making such a request.

## V. UNANTICIPATED DISCOVERIES

### A. Immediate Response Requirements

If previously unidentified *historic properties* or unanticipated *effects*, including visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of the *undertaking*, the *federal agency* must immediately **halt** all activity that could affect the discovery and institute interim measures to protect the discovery from **further** impacts, looting, vandalism, weather, and other threats. The *federal agency* must then follow the procedures set forth in 36 C.F.R. § 800.13(b); for sites with potential religious and cultural significance to *Indian Tribes* or *Native Hawaiian* organizations, the *federal agency* must request, and incorporate, if provided, the special expertise of Tribes or *Native Hawaiian Organizations* and the information provided by designated holders of Indigenous Knowledge and must follow those procedures in accordance with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and for sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow those procedures in accordance with the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. A *federal agency* that has *historic property* discovery procedures in existing management plans pertaining to *historic properties* should follow such existing procedures.

### B. Response to the Discovery of Human Remains, Funerary Objects, Sacred Objects, or Items of Cultural Patrimony

The *federal agency* must ensure that in the event human remains, funerary objects, sacred objects, or items of cultural patrimony are discovered during implementation of an *undertaking*, all work within an appropriate buffer zone, or a minimum of 50 feet (whichever is greater) of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, local law enforcement, and coroner/medical examiner in accordance with any applicable state statute(s) must be immediately contacted. The *federal agency* must be guided by the principles within the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. The *federal agency* must comply with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 C.F.R. part 10, in regard to any human remains, funerary objects, sacred objects, or items of cultural patrimony found on federal or Tribal land.

## VI. DISPUTE RESOLUTION

Any person may file a **dispute** over the implementation of this Program Comment or its use for any particular *undertaking*, by filing a notice with the relevant *federal agency*, including the *federal agency's* federal preservation officer, with a copy to the consulting parties involved in the *undertaking* and any relevant *Tribal historic preservation officer* or *state historic preservation officer*. Objecting parties may include but are not limited to *Indian Tribes*, *Tribal historic preservation officers*, *state historic preservation officers*, *Native Hawaiian Organizations*, local governments, preservation organizations, owners of historic properties, and members of the public. The *federal agency* must consult with the objecting party to resolve the dispute for not more than 60 *days*. Any disputes over the evaluation of unanticipated discoveries must be resolved in accordance with the requirements of 36 C.F.R. § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 *days*, the *federal agency* shall forward to the ACHP all documentation relevant to the objection, including the *federal agency's* proposed resolution if any, request

the ACHP to provide within 30 *days* its advisory comments to resolve the dispute, and take the ACHP's comments into account before finalizing its approach to complying with Section 106. The *federal agency* must notify the objecting party and any relevant *Tribal historic preservation officer* or *state historic preservation officer* regarding its approach to complying with Section 106 for an *undertaking* that is the subject of a dispute. Following the issuance of ACHP's final decision, the *federal agency* may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

The ACHP must monitor such disputes, and from time to time, the Executive Director of the ACHP may issue advisory opinions about the use of this Program Comment to guide *federal agencies*.

## VII. DURATION

This Program Comment will remain in effect from the date of adoption by the ACHP through December 31, 2044, unless prior to that time the ACHP withdraws the Program Comment in accordance with Section IX of this Program Comment. On any date during the six-month period preceding the expiration date, the Program Comment may be amended to extend its duration in accordance with Section VIII. of this Program Comment. If an *Indian Tribe* authorizes the use of this Program Comment on its *Tribal lands* in accordance with Section II.D. of this Program Comment, such authorization will be in effect from the date of the issuance of the authorization until the termination of such authorization by the *Indian Tribe* or the expiration or withdrawal of this Program Comment, whichever is earlier.

## VIII. AMENDMENT

The ACHP may amend this Program Comment after consulting with *federal agencies, state and tribal historic preservation officers*, and other parties as it deems appropriate and as set forth below.

### A. Amendment by the Chair, ACHP

The Chair of the ACHP, after notice to the rest of the ACHP membership and *federal agencies* may amend this Program Comment to extend its duration. The ACHP must notify *federal agencies* and SHPOs and publish notice in the Federal Register regarding such amendment within 30 *days* after its issuance.

### B. Amendment by the Executive Director, ACHP

The Executive Director of the ACHP, after notice to the ACHP membership and other *federal agencies* may amend this Program Comment to adjust due dates and make corrections of grammatical and typographical errors. The ACHP must notify *federal agencies* and publish notice in the Federal Register regarding such amendments within 30 *days* after their issuance.

### C. All Other Amendments

Amendments to this Program Comment not covered by Sections VIII.A. or VIII.B. of this Program Comment will be subject to ACHP membership approval.



## IX. WITHDRAWAL

If the ACHP determines that the consideration of *historic properties* is not being carried out in a manner consistent with this Program Comment, the ACHP membership may vote to withdraw this Program Comment. The Chair of the ACHP must then notify *federal agencies, state and tribal historic preservation officers*, and publish notice in the Federal Register regarding withdrawal of the Program Comment within 30 days of the decision to withdraw. If this Program Comment is withdrawn, *federal agencies* must comply with the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative for individual *undertakings* covered by this Program Comment.

## X. REPORTS AND MEETINGS

### A. Federal Agency Annual Reports

The *federal agencies* that use this Program Comment must provide annual reports regarding the use of this Program Comment during the previous reporting period, ending June 30 annually, to the ACHP, as provided in this Section. Each agency's annual report must: provide examples of *undertakings* covered by Section III.A.1. of this Program Comment; provide information about the manner or extent to which the agency satisfied the conditions, exclusions, and requirements to proceed with the *undertakings* covered by Section III.A.2.; identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; include an assessment of the overall effectiveness of the Program Comment in meeting its intent; and summarize professional assistance and compliance monitoring activities. Annual reports are due on September 30 of each year, starting September 30, 2025, and ending September 30, 2029.

For the remaining duration of this Program Comment, the *federal agencies* that use this Program Comment must provide reports regarding the use of this Program Comment during the previous reporting period, ending June 30 triennially, to the ACHP, as provided in this Section. Each agency's triennial report must be submitted either as part of the *federal agencies'* report to the ACHP pursuant to Executive Order (EO) 13287, "Preserve America," or, for *federal agencies* not otherwise required to submit such report to the ACHP, as a stand-alone triennial report. Each agency's triennial report must: identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; and include an assessment of the overall effectiveness of the Program Comment in meeting its intent. Triennial reports are due on September 30 of every third year, starting September 30, 2032.

In any report required by this Section, the ACHP encourages *federal agencies* to also propose for ACHP consideration amendments and refinements to this Program Comment based on their experience implementing it.

In any report required by this Section, a *federal agency* must include in its report the activities of entities, if any, to which it has delegated legal responsibility for compliance with Section 106 in accordance with federal law.

## **B. Annual Meetings**

By January 31, 2026, and for four years thereafter, the ACHP must schedule an annual meeting and invite *federal agencies*, *Indian Tribes*, *state historic preservation officers*, *Tribal historic preservation officers*, *Native Hawaiian Organizations* and others it deems appropriate, to discuss implementation of the Program Comment. At the meeting, attendees will have an opportunity to provide their views on the overall effectiveness of the Program Comment in meeting its intent and purpose. Such views may inform decisions such as those regarding amendments to the Program Comment. Annual meetings may take place in-person, by phone, virtually using electronic meeting platforms, or any combination of such means.

## **C. ACHP Reports**

At any time, but at least once during the initial three-year period during which this Program Comment is being used, and every three years thereafter, ACHP staff must provide a written or oral summary of information received from *federal agency* reports, annual meetings, or other sources about the utility of this Program Comment and make any recommendations for amendments to the ACHP membership.

# **XI. DEFINITIONS**

For purposes of this Program Comment, the following definitions apply, and beginning in Section II of this Program Comment, such words are *italicized* for convenience:

*Abatement* means acting or actions to eliminate, lessen, reduce, or remove.

*Adverse effect*, as provided in 36 C.F.R. § 800.5(a)(1), means an action that may alter, directly or indirectly, any of the characteristics of a *historic property* that qualify the property for inclusion in the National Register of Historic Places in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association; and it includes reasonably foreseeable *effects* caused by the *undertaking* that may occur later in time, be farther removed in distance or be cumulative.

*Area of potential effects*, as provided in 36 C.F.R. § 800.16(d), means the geographic area or areas within which an *undertaking* may directly or indirectly cause alterations in the character or use of *historic properties*, if any such properties exist, and is influenced by the scale and nature of an *undertaking* and may be different for different kinds of *effects* caused by the *undertaking*.

*Bicycle lane* means a portion of a roadway that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists.

*Bicycle parking* means a designated area to store a bicycle, whether personal or shared, including *bicycle racks* and dedicated bicycle docks used in a shared system.

*Bicycle rack* means a rack for a personal or shared bicycle, e-bicycle, or scooter that is typically u-shaped.

*Bicycle rail* means a traffic control device that provides a protective barrier between motor vehicle travel lanes and *protected bicycle lanes* or *cycle tracks*.



*Bulb out* means feature that extends the line of the curb into the traveled way, reducing the width of the street, also known as curb extensions or bump-outs.

*Building* means a constructed work created principally to shelter any form of human activity, including mobile and manufactured homes.

*Building energy control system* means a *mechanical system* enabling a *building* occupant to manage or monitor energy use and all components of such system, including but not limited to programmable thermostats, digital outdoor reset controls, occupancy sensors, Underwriters Laboratories listed energy management systems or *building* automation systems, demand response and virtual power plant technologies, smoke and carbon monoxide detectors, and related technologies.

*Character-defining feature* means an element of a *historic property* that demonstrates or includes the characteristics of a *historic property* that qualify the *historic property* for inclusion in the National Register of Historic Places, including elements that contribute to the *historic property*'s overall shape, style, design, and decorative details.

*Clean energy technologies* means wind energy systems, battery energy storage systems, geothermal systems, and microgrids serving a *building* or *buildings*, or serving a *climate-friendly transportation facility*.

*Climate-friendly transportation infrastructure* means pedestrian, bicycle, *micromobility vehicle*, bus (including bus rapid *transit*), and rail *infrastructure*.

*Climate-friendly transportation facility* means a *building* or structure used for *bicycle parking*, *micromobility parking*, a bus station, a bus rapid *transit* station, or a rail station.

*Climate-smart building* means a *building* that is energy efficient, electric, uses clean energy, and is resilient.

*Climate resilience* is defined as the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

*Cool pavement* means paving materials that reflect more solar energy, enhance water evaporation, or have been otherwise modified to remain cooler than conventional pavements.

*Contributing property*, as provided in National Register Bulletin 16A, "How to Complete the National Register Registration Form," means a *building*, structure, object, or site, as applicable, within the boundaries of a *historic district* that adds to the historic associations, historic architectural qualities, or archaeological values for which a property is significant because it was present during the period of significance, relates to the documented significance of the property, and possesses historic integrity or is capable of yielding important information about the period; or it independently meets the criteria for the National Register of Historic Places.

*Cycle track* means a bicycle facility that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use of bicyclists.

*Day* means calendar *day*, taking place from one midnight to the following midnight.

*Economic feasibility* means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including estimated construction costs (including the cost of *building* material and labor), estimated operational costs, estimated replacement costs after the known lifetime of proposed materials or elements, available budget, and timelines for compliance review processes to the extent they impact financial conditions for the *undertaking*.

*Effect*, as provided in 36 C.F.R. §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative alteration to the characteristics of a *historic property* qualifying it for inclusion in or eligibility for the National Register of Historic Places.

*Electrification* means the *replacement* or conversion of an energy-consuming device or system from non-electric sources of energy to electricity; or the *replacement* or conversion of an inefficient electric appliance to an efficient electric appliance.

*Electric vehicle supply equipment or EVSE* means conductors, including the ungrounded, grounded, and equipment grounding conductors and the electric vehicle (EV) connectors, attachment plugs, and all other fittings, devices, power outlets, or apparatus installed specifically for the purpose of delivering energy from the premises wiring to the EV. There are three levels of EVSE: i. Level 1: Refers to a freestanding or wall mounted charging structure that delivers a 110/120V charge, replenishing an EV battery at a rate of 4 to 6 miles of range per hour of charging time. Charging an EV at level 1 typically takes between 7 and 20 hours depending on the size of the vehicle's battery. ii. Level 2: Refers to a freestanding or wall mounted charging structure that delivers a 208/240V charge, replenishing an EV battery at a rate of 10 to 20 miles of range per hour of charging time. Charging an EV at level 2 typically takes between 2 and 5 hours depending on the size of the vehicle's battery. iii. Level 3 (also known as Direct Current (DC) Fast Charging): Refers to a freestanding or wall mounted structure capable of being networked that is designed to charge vehicles more quickly than level I or level II with an electrical output ranging between 40 kW-500 kW delivering 50-1000 volts of direct current to the EV battery. Converts AC power to DC within the charging station and delivers DC power directly to the battery. DC fast charging can typically replenish an EV battery at a rate of 50 to 200 miles of range per 30 minutes of charging time.

*Emergency situation* means any of the following: occurrence of a natural catastrophe, such as a hurricane, wildfire, flood, or excessive heat; declaration of emergency by the President, an *Indian Tribe*, governor, or a chief elected official of a territory or city; or recognition or report of a sudden, serious, and imminent threat to life, health, safety, or property.

*EVSE criteria* means (1) take place in existing *parking facilities* with no major electrical infrastructure modifications and are located as close to an existing electrical service panel as practicable; (2) use reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimize *ground disturbance* to the maximum extent possible, and ensure that it does not exceed previous levels of documented *ground disturbance*; (4) use the *lowest profile equipment* reasonably available that provides the necessary charging capacity; (5) place the *EVSE* in a minimally visibly intrusive area; and (6) use colors complementary to surrounding environment, where possible.

*Federal agency* means an agency as defined by 5 U.S.C. § 551(1), and includes state, local, or Tribal government officials who have been delegated legal responsibility for compliance with Section 106 in accordance with federal law.

*Flex post* means flexible bollards or delineators used to separate motor vehicle traffic from a *bicycle lane*, *protected bicycle lane*, or *cycle track*, and designed to withstand being hit or run over by motor vehicles.

*Green infrastructure* means the range of measures that use plant or soil systems, *permeable ground surface materials*, stormwater harvest and reuse, or landscaping to store, infiltrate, and evapotranspire stormwater and reduce flows to sewer systems or to surface waters, including but not limited to rain gardens, bioswales, bioretention facilities, and other ecosystem services and nature-based solutions used to treat stormwater as close to the source as possible and improve resiliency.

*Greenhouse gas* means gas that traps heat in the atmosphere, including but not limited to carbon dioxide, methane, nitrous oxide, and fluorinated gases (such as hydrofluorocarbons).

*Ground disturbance* means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils that are not *previously disturbed ground*.

*Ground surface material* means any hard material typically used to cover soils for transportation purposes, including but not limited to asphalt, concrete, pavers, cobblestones, Belgian blocks, bricks, gravel surface or base, or wood.

*Hazardous material* means lead, lead-containing material (including lead-based paint), asbestos, asbestos-containing material (including floor tile, plaster, insulation, glazing putty, roofing material, and flashing material), radon, and other similar materials detrimental to human health and safety.

*High friction surface treatment* means application of very high-quality aggregate to the pavement using a polymer binder to restore or maintain pavement friction at existing or potentially high crash areas.

*Historic building* means a *building* included in, or eligible for inclusion in, the National Register of Historic Places, as an individually listed property or as a *contributing property* to a *historic district*.

*Historic building material* means *building material* used in the construction of a *historic building* and installed during the period of significance, and any pre-existing *in-kind replacement* of same.

*Historic district* means a geographically definable area that possesses a significant concentration of historic *buildings*, associated *buildings* and structures, and objects united historically by plan or physical development that are *historic properties*.

*Historic property*, as provided in 36 C.F.R. § 800.16(l), means any prehistoric or *historic district*, site, *building*, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural importance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

*Housing* means any *building* containing one or more dwelling units, including multi-unit apartment *buildings*, single-family homes, administrative and employee dwelling units, and recreation residences, in a variety of *building* types and configurations, including but not

limited to *buildings* served by an elevator or elevators, “walk-up” *buildings*, rowhouses, semi-detached homes, mobile and manufactured homes, and freestanding homes.

*Indian Tribe*, as provided in 36 C.F.R. § 800.16(m), means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*In-kind building materials* means new *building materials* that are identical to *historic building materials* in all possible respects, including their composition, design, color, texture, material, and other physical and visual properties.

*In-kind replacement* means *replacement* of historic or existing *building materials* with *in-kind building materials*.

*Installation* means the action or process of placing or fixing something, including but not limited to materials, *mechanical systems* and components, appliances, and equipment, or of being installed, in a particular location.

*Maintenance and repair* means activities required to maintain in an operational state, or to bring back to operating condition by *repair* or *replacement* of obsolete, broken, damaged, or deteriorated features, elements, materials, and systems.

*Mechanical system* means any heating, cooling, indoor air quality, ventilation, dehumidification, air conditioning, plumbing, or electrical system, and the individual elements and components of each system.

*Mitigation measures* means any existing, new, or updated materials or actions that serve to address, compensate for, or otherwise resolve *adverse effects* on *historic properties*, and may include research reports, historical documentation, recordation, and other materials and activities.

*National Historic Landmark*, as provided in 36 C.F.R. § 800.16(p), means a *historic property* that the Secretary of the Interior has designated a *National Historic Landmark*.

*Native Hawaiian*, as provided in 36 C.F.R. § 800.16(s)(2), means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.



*Native Hawaiian Organization*, as provided in 36 C.F.R. § 800.16(s)(1), means any organization which serves and represents the interests of *Native Hawaiians*; has as a primary and stated purpose the provision of services to *Native Hawaiians*; and has demonstrated expertise in aspects of historic preservation that are significant to *Native Hawaiians*.

*Parking facilities* mean buildings, structures, land, rights-of-way, facilities, or areas used for parking of motor vehicles.

Permeable *ground surface materials* means permeable pavement, permeable pavers, porous flexible pavement, or other material or system that provides a hard surface, while allowing water to flow through to the underlying soils instead of into the storm sewer.

*Potentially historic ground surface materials* means any *ground surface material* comprised of pavers, cobblestones, Belgian blocks, bricks, or wood that are 45 years or older.

*Previously disturbed ground* means soils not likely to possess intact and distinct soil horizons and have a reduced likelihood of possessing *historic properties* within their original depositional contexts in the area and to the depth to be excavated, and does not mean plowed soils or historic urban deposits, including *previously disturbed right-of-way*.

*Previously disturbed right-of-way* means areas where previous construction or other activities have physically altered soils within the three-dimensional *area of potential effects* to the point where there is likely no potential for an archaeologically significant property to remain, including but not limited to: the entire curb-to-curb roadway, existing sidewalks, existing drains, and parking areas, including the prepared substrate constructed to support the infrastructure down to undisturbed or intact soil or subsoil. As-built drawings and plans can be used to determine the vertical and horizontal dimensions of the previously disturbed areas.

*Primary façade* means the exterior façade of a *building* which serves as the front or the major entry point of the *building*, provided that a determination of the *primary façade* depends on a variety of factors, and one *building* may have more than one *primary façade*.

*Primary right-of-way* means the corridor, open to the public for transportation purposes, from which a person may best view the *primary façade* of a *building* or, if the *primary façade* is not visible from the public *right-of-way*, the corridor nearest the façade through which people enter the *building*.

*Primary space* means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other space that contains a *character-defining feature* of a *historic building* or historic *climate-friendly transportation facility*.

*Protected bicycle lane* means a bicycle facility that is physically separated from motor vehicle traffic and is distinct from the sidewalk for the exclusive use by and increased safety of bicyclists.

*Qualified authority* means a *qualified professional* or a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects* to *historic properties* and/or those of religious and cultural significance to their *Indian Tribe* or to *Native Hawaiians*, respectively.

*Qualified professional* means a person who meets the relevant standards outlined in the Secretary of the Interior's Professional Qualifications Standards, as amended and annotated.

*Recognized design manual* means one of the following: Federal Highway Administration Manual

on Uniform Traffic Control Devices, American Association of State Highway and Transportation Officials A Policy on Geometric Design of Highways and Streets, National Association of City Transportation Officials (NACTO) Urban Street Design Guide, NACTO Urban Bikeway Design Guide, NACTO *transit* Street Design Guide, NACTO Bike Share Station Siting Guide, or NACTO Urban Street Stormwater.

*Records check* means a search of relevant *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, and *federal agency* files, records, inventories, and databases, or other sources recommended by such parties, for information about whether *historic properties*, including properties with traditional religious and cultural significance to one or more *Indian Tribes* or *Native Hawaiian Organizations*, are known to exist within an *area of potential effects*.

*Reduce energy use or greenhouse gas emissions* means to take an action that: lessens either the amount of energy used or *greenhouse gas* emitted to perform the same task or produce the same result; replaces an energy production source reliant on fossil fuels with a clean energy technology or upgrades a clean energy technology; or achieves *electrification*.

*Rehabilitation* means the act or process of making possible an efficient compatible use for a property through *repair*, alterations, and additions while preserving those portions or features that convey its historical, cultural, or architectural values.

*Replacement* means substitution of a new element for an existing element, which may require a change in size, dimension, location, material, and configuration, in order to improve the function and condition of the element or the broader system of which the element is a part.

*Solar energy system* means any addition, alteration, or improvement which is designed to utilize solar energy either of the active type based on mechanically forced energy transfer or of the passive type based on convective, conductive, or radiant energy transfer, or some combination of these types to reduce the energy requirements of that structure from other energy sources, limited to minor systems such as solar hot water equipment.

*State historic preservation officer*, as provided in 36 C.F.R. § 800.16(v), means the official appointed or designated pursuant to Section 101(b)(1) of the National Historic Preservation Act to administer the state historic preservation program or a representative designated to act for the *state historic preservation officer*.

*Substitute building materials* means modern, industry standard, natural, composite, and synthetic materials that simulate the appearance, physical properties, and related attributes of historic materials well enough to make them alternatives for use when *historic building materials* require *replacement*.

*Technical feasibility* means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including health, safety, energy efficiency, climate resiliency,





durability of materials, and sound professional judgment (including architectural, archaeological, or engineering judgment).

*Transit* means mass transportation by a conveyance (including a bus, railcar, locomotive, trolley car, or light rail vehicle) that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation.

*Transit-oriented development building* means a *building* within one half mile of an existing or planned *transit* stop to be developed or redeveloped as part of a federal program or project to promote *transit*-oriented development.

*Tribal historic preservation officer*, as provided in 36 C.F.R. § 800.16(w), means the Tribal official appointed by the *Indian Tribe's* chief governing authority or designated by a Tribal ordinance or preservation program who has assumed the responsibilities of the *state historic preservation officer* for purposes of Section 106 compliance on *Tribal lands* in accordance with Section 101(d)(2) of the National Historic Preservation Act.

*Tribal lands*, as provided in 36 C.F.R. § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

*Undertaking*, as provided in 36 C.F.R. § 800.16(y), means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a *federal agency*, including those carried out by or on behalf of a *federal agency*; those carried out with federal financial assistance; and those requiring a federal permit, license or approval.

*Zero emissions building* means a *building* that is highly energy efficient, does not emit *greenhouse gases* directly from energy use, and is powered solely by clean energy, as further defined in the National Definition of a Zero Emissions Building.

## APPENDIX A-1: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to or on the same lot as *housing*:

a. *Rehabilitation, replacement, installation*, and removal of any of the following elements less than 45 years old, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*:

i. Concrete and asphalt ground surfaces such as streets, parking areas, driveways, and walkways, including repaving, restriping, replacing such surfaces with *permeable ground surface materials*, and reducing surface size, but not changing vertical alignment or expanding surface size.

ii. Park, playground, and sports equipment 45 years old or less, such as platforms, guardrails, handrails, climbers, ramps, stairways, ladders, balance beams, fitness equipment, rings, rolls, un-mechanized merry-go-rounds, seesaws, slides, swings, benches, netting, basketball hoops, drinking fountains, and *ground surface materials*, but not *buildings*.

iii. Fencing, but not *replacement* or removal of fencing that is a *character-defining feature* of a *historic property*.

iv. Wayfinding, address, and identification signage.

v. Lighting, such as *building-mounted* lighting and freestanding lighting in parking areas, along driveways or walkways, or in park and playground areas, and including relamping and rewiring, but not including *replacement* or removal of lighting that is a *character-defining feature* or repair that would impact a *character-defining feature* of a *historic property*.

vi. Water feature, such as decorative fountains, including replumbing, but not *replacement* or removal of a water feature that is a *character-defining feature* or repair that would impact a *character-defining feature* of a *historic property*.

vii. Curb, gutter, steps, ramp, and retaining wall, but not any that are a *character-defining feature* of a *historic property*.

b. *Maintenance, repair*, and in-kind replacement of any element listed in Section 1.a. of this Appendix.

c. Any of the following landscaping, grounds, and water management activities:

i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.

ii. Planting of grass, shrubs, and other plants, and xeriscaping, providing there is no historic landscape present.

iii. *Replacement* of a tree in its existing location and planting of a new tree within 40 feet of the *building*, provided this is no historic landscape present.

iv. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.



v. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.

vi. *Maintenance, repair, rehabilitation, replacement, and installation of green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*.

d. *Maintenance, repair, rehabilitation, replacement, and removal of the following elements serving housing, provided such activity exclusively affects previously disturbed ground, creates no new ground disturbance, and further provided that such activity does not result in physical changes visible from the primary right-of-way:*

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in auger holes, or other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, natural gas, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Vault toilets.

e. Test borings, soil sampling, or perc tests less than eight inches in diameter that do not impact *ground surface materials* 45 years or older or known *historic properties*.

f. *Installation and removal of temporary construction-related structures, including scaffolding, barriers, screening, fences, protective walkways, signage, office trailers, and restrooms.*

## 2. Work on the Building Exterior

The following activities do not require further Section 106 review when conducted on or near the exterior of *housing*:

a. *Rehabilitation, replacement, and installation of the following elements: on a building less than 45 years old and not known after a records check to be a historic property; on a building the authority federal agency or another federal agency has determined to not be a historic property within the preceding ten years; or on the non-primary façade of a historic building or on the non-primary façade of a building whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the primary right-of-way:*

i. Doors, including insulated exterior doors and basement bulkhead doors.

ii. Windows, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings or window louvers.

iii. Canopies, awnings, and solar shades.

iv. Roofing, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.

v. Improvements that address the requirements of the Americans with Disabilities Act, such as ramps and railings, provided that the installation does not impact a *character-defining feature*

vi. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.

vii. *Solar energy systems.*

viii. Elevator systems.

ix. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.

x. Foundations and seismic and structural *repairs*, with *ground disturbance* limited to areas within 10 feet of the *building*.

xi. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.

xii. Siding.

xiii. Energy and water metering devices.

b. *Maintenance, repair, and in-kind replacement* activities on any *building*, including:

i. *Maintenance, repair, and in-kind replacement* of any element listed in Section 2.a. of this Appendix.

ii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.

iii. Repointing of mortar joints with mortar matching in composition, joint profile, color, hardness, and texture of existing mortar.

iv. Removal of exterior paint or graffiti using non-destructive means, limited to hand scraping, low-pressure water wash of less than 500 psi, heat plates, hot air guns, and chemical paint removal.

c. *Maintenance, repair, rehabilitation, replacement, installation* and removal of any of the following elements on or near a *building*, provided that such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Foundation vents, if painted or finished to match the existing foundation material.

iv. *Green infrastructure*.

v. Gray water systems.

d. Paint on previously painted exterior surfaces.

e. *Rehabilitation, replacement, and installation of clean energy technologies*, provided that:

i. Such technology is located either outside the boundaries of a *historic district*, on a flat roof, on a secondary façade side of historic *housing*, or in a location not otherwise visible from the *primary right-of-way*; and is located on the same lot as or on an adjacent lot to that *housing*, or in the case of a *community solar system*, in a lot within two blocks or two thousand feet (whichever is longer) of the *housing* served;

ii. Such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*;

iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted *solar energy system* may be visible from the *primary right-of-way* if it is on a flat roof, installed with methods that do not irreversibly damage historic materials, sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on a flat roof has a profile that matches the flat roof profile.

f. *Maintenance, repair, or in-kind replacement of clean energy technologies*.

g. *Abatement of hazardous materials* where effects of the *abatement* are reversible or temporary or not visible from a *primary right-of-way*, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal or *replacement* of: windows of historic *housing* or *housing* whose eligibility for inclusion in the National Register is not known; or windows 45 years or older.

### 3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of *housing*, and do not result in physical changes visible from a *primary right-of-way* or a *primary space*:

a. *Maintenance, repair, rehabilitation, replacement, and installation, and abatement of hazardous materials*, that take place entirely within the interior of the *housing* and: in an individual *housing* unit; in any interior location of *housing* less than 45 years old and not known after a *records check* to be a *historic property*; on *housing* the *federal agency* or another *federal agency* has determined to be not a *historic property* within the preceding ten years; or in any interior space within historic *housing* that is not a *primary space*. Example activities covered by this Section 3.a. include: removal, alteration (including of width, height, and location), and construction of interior walls; alteration of floors and flooring (including of material, pattern, and texture); alteration of ceilings (including of material, lighting, and height); *installation* of *mechanical systems* and fire alarm, fire suppression, and security systems and equipment; insulation and air sealing; removal and *installation* of equipment and fixtures (including bathroom, kitchen, and lighting equipment and fixtures); *replacement* and refurbishment of elevator cabs, system-wide upgrades to elevator *mechanical systems*, *installation* of *building energy control systems*; and *installation* of code-required signage; removal, alteration, and construction of stairs (when not a character-defining feature); cosmetic improvements; and improvements to address the requirements of the Americans with Disabilities Act.

b. *Rehabilitation, replacement and installation* of any of the following elements, in any location other than the locations identified in Section 3.a. of this Appendix, if such activity does not result

in physical changes visible from a *primary right-of-way* and has no visual *effect* on the *primary spaces* of historic *housing*:

- i. *Mechanical systems*, including but not limited to heating, ventilating, and cooling components such as heat pumps, electric furnaces and boilers, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, ventilation systems, and refrigeration lines; and fire alarm, fire suppression, and security systems and equipment.
  - ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.
  - iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.
  - iv. Electronic ignition devices.
  - v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.
  - vi. Water conservation measures, such as low flow faucets, toilets, shower heads, urinals, and distribution device controls.
  - vii. Light fixtures, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
  - viii. *Building energy control systems*.
  - ix. EnergyStar (or similarly rated) appliances.
  - x. Battery energy storage systems.
  - xi. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, where such insulation can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.
  - xii. Spray foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch *historic building materials* and can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.
  - xiii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.
- c. *Maintenance, repair, and in-kind replacement* of any of the elements listed in Section 3.b., of any *building element*, including any existing improvement that addresses the requirements of the Americans with Disabilities Act, and any cosmetic or decorative features of the *housing*.
- d. *Maintenance, repair, in-kind replacement, and rehabilitation* of an existing skylight, atrium, courtyard, or lightwell that is not a *character-defining feature*; and *installation* of a new skylight, atrium, courtyard, or lightwell that will not be visible

from a *primary right-of-way* and will not result in interior reconfigurations to *primary spaces* or removal of *historic building materials* in *primary spaces*.

e. *Abatement of hazardous materials* where *effects* of the *abatement* are reversible or temporary or not visible from a *primary right-of-way*, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal or *replacement* of: windows on the primary façade of historic *housing* or *housing* whose eligibility for inclusion in the National Register *is not* known; or windows 45 years or older.

#### 4. Emergency Work

The following activities related to the exterior or interior of any historic *housing* do not require further Section 106 review when such work relates to an *emergency situation* and takes place within 30 *days* of the occurrence of the *emergency situation* and otherwise complies with 36 C.F.R. § 800.12:

- a. Temporary stabilization that causes no permanent damage to historic *housing* or any other *historic property*, including *installation* of temporary bracing, shoring and tarps.
- b. Emergency *repair* of masonry, concrete, or *building* façade cracks or falling elements.
- c. Emergency *repair* of falling plaster or other elements that pose an immediate and imminent health and safety hazard.
- d. *Abatement of hazardous materials* required to address an *emergency situation*.
- e. *Replacement* and demolition of a deteriorated or damaged mobile or manufactured home.

#### 5. Other Activities

The following activities do not require Section 106 review:

- a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of *housing*.
- b. Feasibility studies related to energy efficiency improvements, *electrification*, improvements incorporating *clean energy technologies*, and other topics relating to *building* energy use.
- c. Leasing, refinancing, acquisition, or purchase by the *federal agency* of *housing*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- d. *Transfer*, lease, or sale of a federal government-owned *housing* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- e. Transfer, lease, or sale out of federal ownership or out of federal control of historic *housing*, provided there are adequate and legally enforceable restrictions or conditions (such as in a deed

covenant) to ensure long-term preservation of the property’s historic significance in accordance with 36 C.F.R. § 800.5(a)(2)(vii).



## APPENDIX A-2: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

### 1. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to housing or on the same lot as housing, after the satisfaction of the identified conditions, exclusions, or requirements:

- a. *Replacement, installation, or removal of any of the following elements which are either less than 45 years old and create new ground disturbance in previously undisturbed soils, or 45 years or older; if a qualified authority makes a written determination that such activity will have no adverse effects on any historic property; or if the area of potential effects has been previously field surveyed (acceptable to current state or Tribal standards or within the past ten years) and, if applicable, has been subject to consultation with Indian Tribes and Native Hawaiian Organizations without such survey or consultation identifying any historic properties:*
  - i. Any of the elements listed in Sections 1.a. and 1.d. of Appendix A-1, including character-defining features of such elements.
  - ii. Test borings, soil sampling, well drilling, or perc tests more than eight inches in diameter, or that impact ground surface materials 45 years or older or known historic properties.
- b. Planting of a new tree 40 feet or more from a building or replacement or installation of green infrastructure either in previously disturbed ground, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the building, if a qualified authority has made a written determination that such planting will have no adverse effects on any historic property.

### 2. Work on the Building Exterior

The following activities do not require further Section 106 review when conducted on, or in the case of clean energy technologies near (as further provided below), the exterior of housing, after the satisfaction of the identified conditions, exclusions, or requirements:

- a. *Rehabilitation, replacement, and installation of the following elements on the exterior of: buildings 45 years or older if a qualified authority determines that the building is not a historic property; or buildings 45 years or older determined by a qualified authority to be a historic property, if a qualified professional makes a written determination that such installation or replacement will have no or minimal adverse effects on any character-defining feature of a historic building:*
  - i. Any of the elements listed in Section 2.a. of Appendix A-1, including elements in locations other than those identified in that Section.
- b. *Rehabilitation, replacement, or installation of any of the following elements on, or in the case of clean energy technologies near (as further provided below), a building, which create new ground disturbance on previously undisturbed ground, if a qualified authority makes a written determination that such activities will have no adverse effects on any historic property:*
  - i. Any of the elements listed in Section 2.c. of Appendix A-1, including elements in locations other than those identified in that Section.



ii. *Clean energy technologies*, when located or configured in a manner other than that identified in Section 2.e. of Appendix A-1.

c. *Replacement of exterior historic building materials of historic housing with in-kind or substitute building materials after the federal agency, with the assistance of a qualified authority, conducts the following selection procedure:*

i. Characterizes existing *historic building materials* in terms of condition, design, material properties, performance (including insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*;

ii. Next, determines, based on an evaluation of *technical feasibility* and *economic feasibility*, if *historic building materials* can be *repaired* or if they must be replaced;

iii. Next, if *replacement* is required, identifies potential in-kind and *substitute building materials* and evaluates their *technical feasibility* and *economic feasibility*;

iv. Finally, based on such evaluation, selects the most appropriate in-kind or substitute *building material*;

provided, however, that a *federal agency* may only utilize this selection procedure if such *replacement* or demolition does not create *ground disturbance*, creates *ground disturbance* exclusively on *previously disturbed ground*, or, in the opinion of a *qualified authority*, has no *adverse effects* on any *historic property*.

d. The *abatement of hazardous materials*, where such activity is irreversible or permanent or will be visible from the *primary right-of-way*, create new *ground disturbance*, or result in the permanent removal or *replacement of*: character-defining-features on the primary façade of a historic *building* or a *building* whose eligibility for inclusion in the National Register is not known; or windows 45 years or older, if the appropriate *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*.

### 3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of *housing*, after the satisfaction of the identified conditions, exclusions, and requirements:

a. Those activities listed in Section 3 of Appendix A-1, *maintenance, repair, rehabilitation, replacement, and installation*, and the *abatement of hazardous materials*, where such activity results in physical changes to a historic *building* visible from the *primary right-of-way* or has a visual or direct *effect* on the *primary spaces* of a historic *building*, iA *qualified authority* makes a written determination that such activity has no *adverse effects* on any *historic property*.



## APPENDIX B-1: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Site Work

The following activities do not require further Section 106 review when they are conducted in areas adjacent to a *building* or on the same lot as a *building*, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*:

a. *Rehabilitation, replacement, installation, and removal* of any of the following elements less than 45 years old, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and not including *replacement* or removal of any element that is a *character-defining feature* of a *historic property*:

i. **Fencing**.

ii. Lighting, such as *building-mounted* lighting and freestanding lighting in parking areas, along driveways and walkways, in park and playground areas, and in other areas, and including relamping and rewiring.

iii. Water feature, such as decorative fountains, including replumbing.

iv. Curb, gutter, steps, ramp, and retaining wall.

b. *Maintenance, repair, and in-kind replacement* of any element listed in Section 1.a. of this Appendix.

c. Any of the **following** landscaping, grounds, and water management activities:

i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.

ii. Planting of any of the following that are native, naturalized, drought-adapted, drought-resistant, drought-tolerant, water-wise, or xeric: grass, shrubs, and other plants; and xeriscaping.

iv. **Replacement** of a tree in its existing location and planting of a new tree within 40 feet of the *building*.

v. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.

vi. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.

vii. *Maintenance, repair, rehabilitation, replacement, and installation* of *green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*.

viii. Removal of concrete or asphalt ground surfaces or *replacement* of such surfaces with *permeable ground surface materials*.

ix. The following activities conducted to address fire threats within 200 feet of a *building* or auxiliary structure:

- a. Disposal of heavy accumulations of ground litter and debris.
- b. Removal of small conifers growing between mature trees, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*.
- d. *Maintenance, repair, rehabilitation, replacement* and removal of the following elements, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:
  - i. *Above-ground* utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.
  - ii. *Below-ground* utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.
  - iii. Vault toilets.
- e. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter that do not impact *ground surface materials* 45 years or older or known historic properties.
- f. *Installation* and removal of temporary construction-related structures, including scaffolding, barriers, screening, fences, protective walkways, signage, office trailers, and restrooms.

## 2. Work Related to the Building Exterior

The following activities do not require further Section 106 review when they are conducted on or near the exterior of a *building* and when they are conducted *primarily* to *reduce energy use or greenhouse gas emissions* of the *building*, or to enhance the *climate resilience* of the *building*:

- a. *Rehabilitation, replacement, and installation* of any of the following elements: on a *building* less than 45 years old and not known after a *records check* to be a *historic property*; on a *building* the *federal agency* or another *federal agency* has determined to not be a *historic property* within the preceding ten years; or on the *non-primary façade* of a *historic building* or on the *non-primary façade* of a *building* whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the *primary right-of-way*:
  - i. Doors, including insulated exterior doors.
  - ii. Windows, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
  - iii. Canopies, awnings, and solar shades.
  - iv. Roofing, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; white roofs or cool roofs; and green, sod, or grass roofs.
  - v. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.
  - vi. *Solar energy systems*.

vii. Elevator systems.

viii. Chimneys.

ix. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, and frieze board vents.

x. Siding.

xi. Energy and water metering devices.

b. *Maintenance, repair, and in-kind replacement* of the following elements on, or in the case of *clean energy technologies* near (as further provided below), any *building*:

i. Any element listed in Section 2.a. of this Appendix, if a qualifying authority agrees.

ii. *Clean energy technologies*.

iii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.

iv. Repointing of mortar joints with mortar similar in composition, joint profile, color, hardness, and texture of existing mortar.

c. *Maintenance, repair, rehabilitation, replacement, installation*, and removal of any of the following elements on or near a *building*, provided that such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in auger holes, and other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Foundation vents, if painted or finished to match the existing foundation material.

iv. *Green infrastructure*.

v. Gray water systems.

d. Paint on previously painted exterior surfaces.

e. *Rehabilitation, replacement, and installation* of *clean energy technologies*, provided that:

i. Such technology is located either outside the boundaries of a *historic district*, or on the non-primary façade of a historic *building*, or in a location not otherwise visible from the *primary right-of-way*; and is located on the same lot as or on an adjacent lot to that *building* or *buildings*, or in the case of a *community solar system*, in a lot within two blocks or two thousand feet (whichever is longer) of the *building* or *buildings* served;

ii. Such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*;

iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted *solar energy system* may be visible from the *primary right-of-way* if it is installed with methods that do not irreversibly damage historic materials, sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.

### 3. Work Related to the Building Interior

The following activities do not require further Section 106 review when they are conducted in the interior of a *building* and when they are conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building*, or to enhance the *climate resilience* of the *building*:

a. *Maintenance, repair, rehabilitation, replacement, and installation* of any of the following elements:

i. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, where such insulation can be installed and removed without damaging exterior walls, interior character defining features, even if such insulation increases interior wall thickness.

ii. Spray foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch *historic building materials*, and can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.

iii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.

b. *Maintenance, repair, rehabilitation, replacement and installation* of any of the following elements, if such activity does not result in physical changes visible from the *primary right-of-way*, and has no visual *effect* on the *primary spaces* of a historic *building*:

i. *Mechanical systems*, including but not limited to heating, ventilating, and cooling components such as furnaces, heat pumps, electric furnaces, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, heat pumps, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, and refrigeration lines.

ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.

iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.

iv. Electronic ignition devices.

v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.

vi. Water conservation measures, such as low flow faucets, toilets, shower heads, urinals, and distribution device controls.

vii. Light fixtures, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.

viii. *Building energy control systems.*

ix. EnergyStar (or similarly rated) appliances.

x. Battery energy storage systems.

#### 4. Other Activities

The following activities do not require Section 106 review:

a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of *buildings*.

b. Feasibility studies related to energy efficiency improvements, *electrification*, improvements incorporating *clean energy technologies*, and other topics relating to *building* energy use.

c. Leasing, refinancing, acquisition, or purchase by the *federal agency* of energy efficiency, *electrification*, and *clean energy technologies*, provided that any changes in use or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such technologies must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

d. *Maintenance, repair, rehabilitation, replacement, and installation* of *electric vehicle supply equipment* satisfying the *EVSE criteria*.

## **APPENDIX B-2: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS**

### **1. Site Work**

The following activities do not require further Section 106 review when conducted in areas adjacent to a *building* or on the same lot as a *building*, and *when conducted primarily to reduce energy use or greenhouse gas emissions of the building or to enhance climate resilience of the building*, after the satisfaction of the identified conditions, exclusions, or requirements:

- a. *Rehabilitation, replacement, installation*, and removal of any of the following elements which are either less than 45 years old and create new *ground disturbance* in previously undisturbed soils, or 45 years or older, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*; or the *area of potential effect* has been previously field surveyed (acceptable to current state or Tribal standards or within the past five years) and, if applicable, has been subject to consultation with *Indian Tribes* and *Native Hawaiian* organizations without such *survey* or consultation identifying any *historic properties*
  - i. Any element listed in Section 1.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section.
  - ii. Any element listed in Section 1.d. of Appendix B-1, unrestricted by any limiting conditions found in such Section.
- b. Planting of a new tree 40 feet or more from a *building*, or *replacement* or *installation* of *green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*, if a *qualified authority* makes a written determination that such planting will have no *adverse effects* on any *historic property*.

### **2. Work Related to the Building Exterior**

The following activities do not require further Section 106 review when conducted on, or in the case of *clean energy technologies* *near* (as further provided below), the exterior of a *building*, and when conducted *primarily to reduce energy use or greenhouse gas emissions of the building or to enhance climate resilience of the building*, after the satisfaction of the identified conditions, exclusions, or requirements:

- a. *Rehabilitation, replacement, and installation* of the following elements visible from the *primary right-of-way* and on the exterior of: *buildings* 45 years or older if a *qualified professional* determines that the *building* is not a *historic property*; or *buildings* 45 years or older determined by a *qualified professional* to be a *historic property*, if a *qualified professional* makes a written determination that such *installation* or *replacement* will have no *adverse effects* on any *character-defining feature* of a *historic building*; provided, however, that an analysis of *adverse effects* must consider *technical feasibility* and *economic feasibility*, including long-term operational costs and *climate resilience* of the *building* upon which elements are installed or replaced:
  - i. Any element listed in Section 2.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section.
- b. *Rehabilitation, replacement, or installation* of any of the following elements on or near a *building*, which create new *ground disturbance* on previously undisturbed ground, if a *qualified authority* makes a written determination that such activities will have no *adverse effects* on any *historic property*:

i. Any of the elements listed in Section 2.c. of Appendix B-1.

ii. *Clean energy technologies*, when located or configured in a manner other than that identified in Section 2.e. of Appendix B-1.

c. *Replacement of historic building materials* of historic housing with in-kind or *substitute building materials* to improve energy efficiency after the *federal agency*, with the assistance of a qualified professional as needed, conducts the following selection procedure:

i. Characterize existing *historic building materials* in terms of condition, design, material properties, performance, safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*;

ii. Next, determine, based on an evaluation of *technical feasibility* and *economic feasibility*, if *historic building materials* can be *repaired* or if they must be replaced;

iii. Next, if *replacement* is required, identify potential in-kind and *substitute building materials* and evaluate their *technical feasibility* and *economic feasibility*;

iv. Finally, based on such evaluation, select the most appropriate in-kind or substitute *building material*;

provided, however, that a *federal agency* may only utilize this selection procedure if such *replacement* or demolition does not create *ground disturbance*, exclusively affects *previously disturbed ground*, or, in the opinion of a *qualified authority*, has no *adverse effects* on any *historic property*.

### 3. Work Related to the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of a *building*, and when *conducted primarily to reduce energy use or greenhouse gas emissions of the building or to enhance climate resilience of the building*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. In addition to those activities listed in Section 3 of Appendix B-1, *maintenance, repair, rehabilitation, replacement, and installation*, and the *abatement of hazardous materials*, where such activity results in physical changes to a historic *building* visible from the *primary right-of-way* or has a visual or direct *effect* on the *primary spaces* of a historic *building*, if

b. a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*.





**APPENDIX D: FORMAT FOR AUTHORIZATION BY AN INDIAN TRIBE FOR USE OF THIS PROGRAM COMMENT ON ITS TRIBAL LANDS**

On behalf of [NAME OF INDIAN TRIBE] and as a duly authorized representative of such Tribe, I authorize federal agencies to utilize the Program Comment on Housing on the Tribal Lands of the [NAME OF INDIAN TRIBE]. This authorization is in effect until the withdrawal or termination of the Program Comment or on the date of receipt by the Executive Director of the Advisory Council on Historic Preservation that [NAME OF INDIAN TRIBE] has rescinded its authorization, which it may do at any time.

For further information, please contact: [Tribal Contact; Name and Contact Information].

Signed by:

[Signature]

Name:

Title:

Date:

Acknowledged and accepted by the ACHP:

[Signature – leave blank]

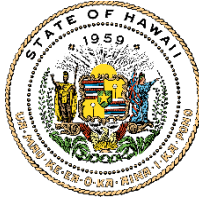
Name:

Title:

Date:

JOSH GREEN, M.D.  
GOVERNOR | KE KIA'ĀINA

SYLVIA LUKE  
LIEUTENANT GOVERNOR | KA HOPE KIA'ĀINA



STATE OF HAWAII | KA MOKU'ĀINA 'O HAWAII'  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
KA 'OIHANA KUMUWAIWAI 'ĀINA

STATE HISTORIC PRESERVATION DIVISION  
KAKUHIHEWA BUILDING  
601 KAMOKILA BLVD, STE 555  
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DAWN N.S. CHANG  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE  
MANAGEMENT

RYAN K.P. KANAKA'OLE  
FIRST DEPUTY

DEAN D. UYENO  
ACTING DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES  
BOATING AND OCEAN RECREATION  
BUREAU OF CONVEYANCES  
COMMISSION ON WATER RESOURCE  
MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES  
ENFORCEMENT  
ENGINEERING  
FORESTRY AND WILDLIFE  
HISTORIC PRESERVATION  
KAHOOLAWE ISLAND RESERVE COMMISSION  
LAND  
STATE PARKS

October 9, 2024

IN REPLY REFER TO:  
**Project No.:** NA  
**Document No.:** 2410JLP01  
Architecture

Hon. Sara Bronin  
Chair, Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001  
c/o achp@achp.gov

Dear Chair Bronin,

**RE: Advisory Council on Historic Preservation Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities**

Thank you for the opportunity to review the *Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities* (Program Comment). We have reviewed the proposed draft and have determined that, in its current state, the proposed Program Comment is not ready to be implemented at this time. Please note, that we have not been able to make a complete and substantive review of all of the appendices and will submit a revised comment letter once we have been able to complete a substantive review of Appendix B1 thru C2. That being said, we have the following questions and comments for your consideration:

1. Fidelity of Claims Made Throughout the Program Comment Relative to Policy Statements

Page 1; I. INTRODUCTION; A. Background, paragraph 2

States that the ACHP policy statements on housing and climate change, "commit the ACHP to explore new opportunities to use program alternatives to enable federal agencies to advance historic preservation while meeting the nation's housing and climate goals." However, neither policy statement commits ACHP to explore program alternatives nor does either policy statement appear to identify ACHP as the appropriate entity to develop an program alternative that would lead to eliminating the need of an agency to consulting with SHPOs, THPOs, NHOS, and the community. Instead, the policy statements simply recognize that program alternatives could be developed to address housing and climate change needs.

Furthermore, both policy statements recognize and promote the importance of and necessity to consult with communities and preserve historic properties while addressing housing and climate change issues, respectively. ACHP's assertion here is an exaggeration of the cited policy statements and the need for developing a single programmatic alternative, as evidenced in the draft Program Comment on Accessible, Climate-Resilient, and Connected Communities.

2. Clarification of Connections among "Interrelated Sectors" and Appropriateness of Utilizing One Program Comment to Address Differing Project Types and Program Areas

Page 1; I. INTRODUCTION; A. Background, paragraph 2

States that the program comment address three interrelated sectors; however, the three sectors are not clearly defined. The first paragraph suggests that the sectors are housing and energy efficiency, but it also mentions transportation. Please provide explicit clarity as to the three sectors you are referring to and expand upon why ACHP believes that these three sectors are sufficiently interrelated to merit one Program Comment to cover their distinct areas and goals. The breadth of programs covered by this one program comment does not appear to be appropriate. Each area identified is vastly different with vastly different project types that require particular thought and consideration relative to their project scopes of work and impacts to historic and cultural resources. Please clarify how the projects for housing are repetitive and the same as those for transportation, so much so that they should be covered by the same program comment. If, however, the housing projects are different transportation and other sectors covered by this program comment then each sector should get its own program alternative.

3. Purpose and Intent of the Program Comment

Page 1; I. INTRODUCTION; A. Background, paragraph 3

Pg. 1, Paragraph 3 states that, "the ACHP developed this government-wide Program Comment to help accelerate the review of projects carried out, permitted, licensed, funded, assisted, or approved by federal agencies to rehabilitate existing housing or create new housing in existing buildings, to maintain and update buildings and their immediate environs in response to climate concerns, and to rehabilitate or develop new climate-friendly transportation infrastructure." A program comment developed for the purpose of creating an alternative to the Section 106 historic preservation consultation process should state how the program comment will preserve historic resources; otherwise, it might be interpreted as an exemption to historic preservation requirements. Historic preservation should be the foremost goal of any Section 106 program alternative and should clearly communicate how preservation of historic resources will be realized under the program alternative.

4. Limited/Lack of Recognition for Federal Agency's Responsibility to Consider Historic Preservation/Historic Properties

Page 1-2; I. INTRODUCTION; B. Current Federal Agency Action

Summarizes the various undertakings that are the responsibility of federal agencies and are supported and/or expanded by recent Congressional and Executive action. References the requirement for Section 106 review but does not explain what it is or the need for federal agencies to take into account the

effects their undertakings, listed previously within this section, have on historic resources. Omitting an explanation or the importance of Section 106 to the preservation of historic and cultural resources suggests that ACHP does not view Section 106 as an important check-and-balance system in comparison with the programs listed within this section. Please revise and reflect the purpose and need for Section 106 and compliance with the National Historic Preservation Act as it pertains to “Current Federal Agency Action.”

## 5. Program Comments as Appropriate Program Alternatives

Page 3; I. INTRODUCTION; C. Prior ACHP Action; Paragraph 2

States, “the ACHP has also issued or participated in other program alternatives to create tailored review processes for certain programs and undertakings relevant to this Program Comment. At the request of Department of Defense, for example, the ACHP has issued six program comments specifically related to housing, which cover housing developed under specific congressionally appropriate programs, housing constructed during specific eras, and housing designed and built with similar form, style, and materials...Prior program comments addressing housing have reduced the operational and maintenance costs of historic housing, made homes more comfortable for occupants, and facilitated the preservation and reuse of existing buildings.” ACHP goes on in the following paragraphs within this section to outline the other various program comments the agency has developed and suggests that their involvement alone has streamlined reviews and lowered costs for housing projects. The number of program comments for which ACHP is solely in control and development of is concerning. This escalating trend of establishing Program Comments appears to be categorically exempting an alarming number of project and resource types across the country—effectively gutting the National Historic Preservation Act without meaningful consultation with local communities and stakeholders. Has ACHP conducted any kind of study or analysis to evaluate the effect these program comments have had to historic properties and accounted for the number of historic resources that have been adversely impacted by their implementation without consultation or mitigation? How will ACHP account for such adverse impacts created by this Program Comment? ACHP has suggested that undertakings that would result in adverse effects cannot use this and other Program Comments, but has an audit ever been done to back up that assertion? Why is ACHP utilizing a Program Comment instead of having federal agencies develop their own Programmatic Agreements and/or turning this Program Comment into a Prototype PA that can be consulted on at the local level with local stakeholders?

## 6. Nullification of Local Agreements

Page 5; II. Scope; C. Effect on Existing Agreements

States that a federal agency should notify and consult with signatories of agreement documents that already cover undertakings included within the proposed program comment but ultimately leaves the decision on whether or not to apply the program comment up to the federal agency. This program comment has the ability to recognize the respect existing agreement documents and declare that this program alternative cannot be used in place of an existing agreement. Can ACHP provide clarity about ACHP has not included such language and instead leaves it up to the federal agency on whether or not to uphold existing agreements and mitigation measures? How are local SHPOs, THPOs, NHOs, and consulting parties expected to trust that federal agencies are making a good faith effort to consult if they ignore previous consultation efforts and agreements if ACHP’s Program Comment nullifies them?

## 7. Diversity, Equity, and Inclusion for Aboriginal, Indigenous, and Marginalized Communities

### Pg. 6; II. Scope; E Standard Section 106 Review

States that must follow the Section 106 process found at 36 CFR Part 800 if the undertaking will occur on or have the potential to affect, “sites of religious and cultural significance to Indian Tribes and Native Hawaiian Organizations.” You have not, however, indicated how a federal agency will identify said religious and culturally significant historic properties prior to implementing this Program Comment; if they will consult with local communities to determine if such religious and culturally significant historic properties are present; or, what the dispute resolution and appeals processes are if a federal agency refuses to recognize that their undertaking may or will affect a site of religious and cultural significance to Indian Tribes and Native Hawaiian Organizations. Furthermore, it only requires that a federal agency is prohibited from using this Program Comment for properties previously identified and listed as NHLs; it does not require federal agencies to identify or consider their undertaking’s impact to historic and cultural resources that are eligible for listing as National Historic Landmarks, which would preclude such sites that belong to marginalized and underrepresented communities from being recognized, avoided, and preserved. Can ACHP include language that requires federal agencies to consider whether such sites are present within their project area and to required that if an historic property that appears to be eligible for listing as an NHL is found within their APE they must follow the Section 106 process found at 36 CFR Part 800?

## 8. Documenting and Reporting

### Pg. 6; III. Alternative Compliance Approaches; A. Available Alternative Compliance Approaches

This section of the Program Comment includes not alternative approach other than a federal agency’s ability to self-determine whether their undertaking meets one of the Appendices of the Program Comment. What recordation and reporting mechanism has ACHP created to account for these decisions, the undertakings they belong to, and how ACHP will evaluate and determine whether an agency is applying the Program Comment correctly? Such language should be included; and should afford SHPOs, THPOs, NHOs, and consulting parties the ability to review and comment on an annual report that identifies all of the undertakings this Program Comment was applied to within their respective state or territory.

## 9. Consultation and Process

### Pg. 7; III. Alternative Compliance Approaches; B. Consultation with Indian Tribes and Native Hawaiian Organizations; 3. Effect of Finding of Potential Effect on Certain Properties

How will an NHO be consulted with if a federal agency is making the determination about whether or not to apply the Program Comment? Please outline a process that an agency will follow that can be understood by SHPOs, THPOs, NHPs, and consulting parties to identify how a federal agency will decide how to apply the Program Comment and when they might be consulted to identify or confirm the presence of historic properties and whether or not to apply the Program Comment. This program comment lacks specificity throughout or an alternative process. Instead, it appears to give a categorical exemption to Section 106 provided that a project is in accordance with one of the Appendices. Please include details about, when, how, who, duration, etc. a federal agency is required to consult under this

Program Comment. Also, the title of this section should be edited to be clearer; perhaps remove “Effect of” from the front of the title.

#### 10. Qualified Authority

Pg. 8; III. Alternative Compliance Approaches; C. The Use of Qualified Authorities

Please expand upon and explain the difference and purpose of recognizing and utilizing the input from a Qualified Authority and not also SOI Qualified Professionals.

#### 11. Dispute Resolution

Pg. 10; VI. Dispute Resolution; paragraph 1

States that, [a]ny person may file a dispute over the implementation of this Program Comment or its use for any particular undertaking, by filing a notice with the relevant federal agency, including the federal agency’s federal preservation officer, with a copy to the consulting parties involved in the undertaking and any relevant Tribal historic preservation officer or state historic preservation officer.” However, the use of this program comment would preclude the involvement of consulting parties who are not THPOs or NHOs. The language provided suggests that SHPOs and other entities may also be consulting parties; but this Program Comment forecloses on their ability to consult and takes away their right to be a consulting party for undertakings that fall under this Program Comment. Can ACHP edit this section to clarify/reflect which entities are actually consulting parties under this Program Comment? Specifically, limit consulting parties to THPOs, NHOs, and any signatory of this Program Comment or voting member of the advisory council.

#### 12. Duration

Pg. 11; VII. Duration; paragraph 1

A twenty year duration period is far to extensive a period of time for any agreement document, let alone one that is drafted to create a program alternative for executive and congressional policies—which may change from administration to administration. Best practices typically limit agreement documents to no more than 10 year increments, with the ability to amend to extend as necessary. Furthermore, this program comment’s breadth should require that the program comment be evaluated at the one, three, and five year increment of time to ensure that there is no significant loss in historic and cultural resources and that it is working effectively. Such an evaluation should allow for SHPOs, THPOs, NHPOs, and consulting parties to meet with ACHP and discuss the impact of the program comment and whether it should be amended or withdrawn.

#### 13. Annual Reporting

Pg. 12; X. Reports and Meetings; A. Federal Agency Annual Reports

Does not require federal agencies to provide SHPOs, THPOs, NHOs, or consulting parties with annual reports or inform them of which undertakings they applied the program comment to. This effectively hides a federal agency’s activities from consulting parties and eliminates their ability to voice concerns

or objections to the federal agency or ACHP. This section should include a requirement that the federal agency provide SHPOs, THPOs, NHOs, and consulting parties with an annual report every year.

Furthermore, all federal agencies should have to report every year and not every three years. Only requiring a report every three years means that neither the ACHP or the public will be able to see or evaluate how federal agencies are applying the program comment. Such reports will be too large to evaluate and too difficult for agencies to produce.

#### 14. Annual Meetings

Pg. 13; X. Reports and Meetings; B. Annual Meetings

States that for four years after the Program Comment is executed the ACHP will meet with federal agencies, Indian Tribes, state historic preservation officers, Tribal historic preservation officers, Native Hawaiian Organizations, and others it deems appropriate to discuss the implementation of the Program Comment. However, it will be difficult for said entities to consult if they are not informed about what projects the program comment have been used for and what the outcome of the projects were.

Furthermore, this stipulation should be required for every year the program comment is in existence.

#### 15. Appendix A; Pgs. 21-28

##### a. Ground Disturbance

This appendix does not account for depth of ground disturbance or soil type. In many places the type of soil and depth of ground disturbance may indicate the likelihood of subsurface historic properties or iwi. Some of the activities identified (whether planting a tree, digging a posthole, altering utility lines, or repaving a road would result in the identification of subsurface historic properties and/or iwi—both previously known and inadvertent). Such activities should not be done in those locations without an Archaeological Inventory Survey, Archaeological Monitoring, and/or Cultural Monitoring.

##### b. Work on Building Exterior

Many of the activities identified within this appendix have best practices that should be followed (see SOI Standards, Preservation Briefs, etc.) and such best practices are location specific. The general nature of the activities listed, the assumed appropriateness does not work in all locations and is confusing to follow. This list of work would be better defined in a Programmatic Agreement developed between a SHPO, THPO, NHOs, and consulting parties with HUD, USDA, delegated authorities, and the like rather than listed as they are in a program comment of this sort. There are too many variables that if not considered would affect a building's integrity, eligibility, and consideration for preservation incentives at a later date. For example, as written, projects listed under item #2 suggest that a historic building could have non-historic and non-compatible roofing placed on one half of the roof and historic or compatible roofing placed on the front of the building. If this section does remain, it would be better to separate what activities and in what scenario it would be appropriate to rehabilitate, versus replace, versus install something new rather than lumping them all together and hoping that the person reading this section will interpret it appropriately.

Also, should include a footnote or qualifying statement that if a project proponent is also interested in capturing historic preservation tax credits not all treatment measures that ACHP has identified under this Program Comment as “not needing further review” does not mean that the treatment measures are appropriate for an historic property, are in keeping with SOI standards, and/or would qualify a project for historic preservation tax credits.

c. Work on Building Interior

Many of the activities identified within this appendix have best practices that should be followed (see SOI Standards, Preservation Briefs, etc.) and such best practices are location specific. The general nature of the activities listed, the assumed appropriateness does not work in all locations and is confusing to follow. This list of work would be better defined in a Programmatic Agreement developed between a SHPO, THPO, NHOs, and consulting parties with HUD, USDA, delegated authorities, and the like rather than listed as they are in a program comment of this sort. There are too many variables that if not considered would affect a building’s integrity, eligibility, and consideration for preservation incentives at a later date. For example, the use and definition of a primary space is vague enough to allow a federal agency to take gross liberties that would result in the loss of key interior walls that subdivide spaces original to a property that were primary spaces at the time for key occupants (such as interior walls of butler’s pantries and quarters for servants or enslaved persons) that are key to understanding the history of a place.

Also, should include a footnote or qualifying statement that if a project proponent is also interested in capturing historic preservation tax credits not all treatment measures that ACHP has identified under this Program Comment as “not needing further review” does not mean that the treatment measures are appropriate for an historic property, are in keeping with SOI standards, and/or would qualify a project for historic preservation tax credits.

d. Other Activities

The transfer, lease, or sale of property outside of federal ownership, regardless of “restrictions or conditions” should always require Section 106 compliance because the federal agency cannot guarantee local enforcement of restrictions or conditions without a local entity as a signatory to the agreement that ensures preservation. Furthermore, such transfers have consistently been determined to be adverse effects to historic properties and no undertaking that results in an adverse effect should be included within this Program Comment.

16. Appendix A-2: Housing-Related Activities Not Requiring Further Review After the Satisfaction of Conditions, Exclusions, or Requirements

This section is confusing and hard to differentiate from the previous appendix. It might help to provide a narrative summary at the beginning of the appendix to explain when to apply this appendix and how it differs from the others. Furthermore, it suggests that conditions, exclusions, and requirements would or should be put into place but does not identify who would place those conditions, exclusions,



and requirements, nor does it identify who would enforce them or if/how the federal agency would consult on those conditions, exclusions, and requirements.

a. Site Work

If this section is intended to place restrictions on these activities, then the restriction should include language that an SOI Qualified Archaeologist has reviewed the proposed scope of work and determined that it is in a location and scale of ground disturbance with a low likelihood of encountering subsurface historic properties or iwi. Additionally, it should provide provisions where archaeological monitoring is required for ground disturbance below the base course in areas where an SOI Qualified Archaeologist has determined that there is a moderate to high likelihood of encountering subsurface historic properties or iwi.

b. Work on the Building Exterior

The use of the term “qualified authority” alone without also including SOI Qualified Professional is something that may need to be clarified. One may not be recognized as a qualified authority but may meet SOI professional qualifications for architect, historic architect, or architectural historian and be able to make such determinations on non-Native historic properties and, in some cases, on Native historic properties. What is ACHP’s intent to limit determinations to someone identified as the “qualified authority”? How is that universally more appropriate than allowing for a “qualified authority” and/or SOI Qualified professional?

The Hawaii State Historic Preservation Division (SHPD) looks forward to continuing to consult with the Advisory Council on Historic Preservation about this and future drafts of the Program Comment as it’s further developed.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Puff', with a stylized, looping flourish at the end.

Jessica L. Puff  
State Historic Preservation Administrator  
Deputy State Historic Preservation Officer

October 8, 2024

The Honorable Sara Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

Dear Chair Bronin:

Thank you for the opportunity to provide comments on *Proposed Program Comment on Accessible, Climate-Resilient, Connected Communities*. The Iowa State Historic Preservation Office (SHPO), housed within the Iowa Economic Development Authority, receives funding through the National Park Service Historic Preservation Fund. The following comments are based on the draft program comment circulated by the Advisory Council on Historic Preservation (ACHP). This letter elaborates on overarching themes present in the program comment that are concerning for the Section 106 process and historic properties in the Iowa. While the intent of the program comment is to streamline projects and avoid adverse effects to historic properties, the impact of this program comment is eliminating the opportunity for meaningful consultation on projects that could result in adverse effects to historic properties. While many exclusions could result in streamlined processes, other exclusions could easily result in adverse effects through lack of identification efforts, qualified professional involvement, and consultation with tribes and local preservation partners. The attached marked up program comment highlights specific examples where we could accept exclusions and where we have concerns.

The program comment indicates that tribal partners and CLGs will not be afforded an opportunity to comment through the Section 106 process on undertakings that might directly affect their communities and cultures. Iowa's tribal partners are important consulting voices on projects throughout their ancestral lands where tribal knowledge of historic properties with religious and cultural significance are integral to the identification of historic properties, avoidance of adverse effects, and minimization of effects. It seems, however, that the program comment exclusions result in the omission of tribal partners unless specific undertakings occur on tribal lands. Likewise, Certified Local Governments (CLGs) are active consulting parties at the local level for project types excluded by this agreement. Often, the SHPO provides federal agencies reminders and guidance to identify and consult with tribal partners and CLGs during the consultation process—partners often overlooked by agencies during consultation. Throughout ACHP's meetings on the program comment, the ACHP noted that project sponsors would need to follow local ordinances regarding historic preservation. Not all CLGs have ordinances or review responsibilities that would require a federal agency to consult with them at a local level.

Some proposed excluded undertakings arrive at our office with a determination of "no historic properties affected" or "no adverse effect" even though proposed activities would result in adverse effects. SHPOs are an integral part of the Section 106 process and through our reviews, many undertakings that would cause adverse effects result in changes to project scope, receiving a final determination of "no adverse effect". Through active consultation, many activities included in the program comment result in no adverse effect not because they are activities that do not cause adverse effects, but because SHPOs actively engage with project partners and agencies to reduce or eliminate adverse effects to historic properties resulting from activities that are excluded under this program comment.

Consultation calls, public meetings, and listening sessions have focused on the idea that these exclusions will primarily affect interior spaces. Yet a significant number of exclusions include the potential to affect the exterior of buildings in such a manner that could cause adverse effects to the building and surrounding public spaces. This seems to go against the intent of the program comment. Additionally, some projects associated with Section 106 housing undertakings also undergo review for historic tax

credits. We recommend any exclusions used in program alternatives be harmonious to the requirements of historic tax credit programs.

The program comment relegates SHPOs to be databases for federal agencies. We observed use of the phrase “record check” throughout the exclusions. While records checks are useful, most of the state of Iowa has not undergone survey for archaeological/architectural properties. Agencies often complete record checks for undertakings and provide unsupported determinations of “no historic properties affected” because no sites are known to occur on unsurveyed ground. Records checks alone do not provide sufficient identifications efforts for many projects and could result in adverse effects to historic properties, stoppage of work, and project implementation delays. The program comment also allows agencies the ability to exclude properties that they have determined are “not eligible.” Such a determination does not require consultation with the SHPO, CLGs, and/or tribal partners. Rarely, if ever, does a HUD responsible entity identify a property as “eligible” for listing on the National Register. Instead, eligibility determinations derive from Section 106 consultation.

Our contacts and consultation on many project types included in the program comment are often at the regional, state, and local level, either with formal delegation of authority or applicants informally being instructed by the federal agency to initiate consultation with our office. As currently written, the decision to implement this program comment would occur at the national level without requirements to consult with the impacted delegates or consulting parties prior to implementation. Federal agencies can, following consultation with signatures, decide to implement this program comment without agreement from other signatories. This does not allow signatories of existing agreements to decline to utilize the program comment; disrupting usage of effective agreements already in place.

Undertakings associated with transportation are markedly different than those associated with housing and climate type exclusions. Furthermore, a programmatic agreement with the DOT already covers many transportation-related activities. We recommend removal of Appendices C 1 and C 2 from the program comment and that these types of exclusions be considered at the state level. As we already have an efficient programmatic agreement in place with Federal Highways Administration and the Iowa DOT, integration of additional exclusions can be accomplished without complicating the process with a program comment.

Historic preservation works best when local peoples and agencies engage in the process. There are good examples of programmatic agreements from which we can draw upon for program alternatives, including nationwide, prototype, or program-level agreements. Foundational pieces of successful agreements lacking in this program comment are two-fold. First, a state-level approach allows customization for the unique circumstances found at the state level including qualified professional availability, local history, and architectural and archaeological nuances not accounted for at a nationwide level. Second, consultation between agencies and consulting parties, both in development of the agreement and its implementation/reporting, caters to specific views/perspectives, rules, codes, and procedures governing each party. Ongoing consultation identifies areas where the agreement is working, where it is not, and cultivates strong relationships that result in significant streamlining opportunities; even when an undertaking might result in an adverse effect. Cooperative and consistent consultation results in expedited reviews with high positive success rates. Examples of programmatic agreements that work well in Iowa include:

- A. The Programmatic Agreement Among the Federal Highway Administration, the Iowa Department of Transportation, the State Historic Preservation Officer, and the Advisory Council on Historic Preservation Regarding Implementation of Federal-aid Transportation Project in the State of Iowa, as amended.

- B. Prototype Programmatic Agreement Between the US Department of Agriculture, Iowa Natural Resources Conservation Service (NRCS), and the Iowa State Historic Preservation Officer (SHPO) Regarding Conservation Assistance, as amended.
- C. The Programmatic Agreement Among the Federal Emergency Management Agency, the Iowa State Historic Preservation Officer, and the Iowa Department of Homeland Security and Emergency Management, as amended.

Iowa SHPO has a current average response time of 13 days for Section 106 project submissions. Our office continues to seek ways to reduce review times, but an ever-increasing number of projects results in high workloads at all stages and roles in the Section 106 process. In our experience, programmatic agreements are the best means of appropriately streamlining reviews at the state level while integrating SHPO and other consulting party voices. We look forward to exploring streamlining options and alternatives that do not eliminate SHPOs from the process so that we can better cater exclusions and processes to our various agency partners and local conditions.

Nationwide-level decision makers are not the same individuals involved in the practical application of Section 106 consultation, making significant investments in training imperative. Many agencies lack the necessary historic preservation professionals needed to use exclusions in the program comment and these agencies rely upon SHPO to identify concerns through their review as a part of standard Section 106 and programmatic agreement streamlined reviews. Agencies with the most coverage of this program comment (i.e., HUD), use responsible entities or delegate authority to fulfill Section 106 compliance and these entities rarely have Secretary of the Interior-qualified staff. In our reading of the program comment and through the various listening sessions we have attended, there is no concrete plan to train users of this program comment. Consistently we receive feedback from those directly involved with the Section 106 process, such as responsible entities or delegates, indicating that they need or are interested in training in Section 106, historic preservation, or identification of historic properties. Training and education opportunities are identified in consultation with SHPO on other projects and then provided on a case by case basis for agency staff, responsible entities, and delegates on specific needs by SHPO. Without clear guidelines and requirements for training and use of this program comment, there is the real possibility that practitioners at the regional, state, and local levels will not be supported through the implementation of this program comment.

The Iowa SHPO is concerned with reporting requirements of the program comment. As written, agencies would submit a sample of undertakings that have utilized the program comment. As the agency can choose the sample, such reporting creates biases toward successes while omitting failures. All undertakings utilizing the program comment should include documentation and be available for annual reporting with SHPOs and THPOs directly provided copies of the annual reporting. Furthermore, reporting should be annual throughout the duration of the comment and not move toward a triennial reporting system.

The use of “previously disturbed ground” in the exclusions is cause for concern. Iowa SHPO can point to many examples where agencies liberally apply this concept, and after review by our (and tribal partners) office, agree that historic property identification is incomplete and/or rework project scopes to keep a determination of “no historic properties affected” or “no adverse effect.” In Iowa, numerous projects are submitted and claim previously disturbed ground for areas under cultivation. Some submittals extend the concept of “previously disturbed” to any area that has platted lots. Archaeological site preservation is possible in both cultivated areas and in locations of heavy urban development, and there are examples across the country. Additionally, some archaeological sites have been avoided and left in place within rights-of-way that agencies later assume to be “previously disturbed.” This program comment creates potential for future projects to occur under the idea of “previously disturbed” ground or right-of-way without acknowledgement that different areas of the country have different conditions resulting in the need for local and state level knowledge of cultural development and history.

We appreciate the opportunity to provide comments on the proposed program comment. The Iowa SHPO believes that we can strike a balance between historic preservation and the goals of projects covered under the program comment. We are concerned that the impact of this program comment will be different than the intent, resulting in the loss of historic properties for Iowa communities. Should you have any questions concerning our comments or if you would like to discuss any items further, please contact me at [heather.gibb@iowaeda.com](mailto:heather.gibb@iowaeda.com) or at 515-348-6285.

Sincerely,



Heather Gibb  
State Historic Preservation Officer  
Iowa State Historic Preservation Office  
Iowa Economic Development Authority

**DRAFT PROGRAM COMMENT ON  
ACCESSIBLE, CLIMATE-RESILIENT, AND CONNECTED COMMUNITIES**

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 C.F.R. § 800.14(e), and went into effect on that date. It provides all *federal agencies* with an alternative way to comply with their responsibilities under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations, 36 C.F.R. part 800 (Section 106), regarding the *effects* of certain *housing*-related, *climate-smart building*-related, and *climate-friendly transportation infrastructure*-related activities.

## **I. INTRODUCTION**

### **A. Background**

The development of this Program Comment is driven by the nation’s pressing needs to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce its energy use and greenhouse gas emissions, improve climate resilience, and cut energy costs; and to decarbonize its transportation sector — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

Recognizing these needs, in 2023, the ACHP adopted its Housing and Historic Preservation Policy Statement (Housing Policy Statement) and its Climate Change and Historic Preservation Policy Statement (Climate Change Policy Statement), which commit the ACHP to explore new opportunities to use program alternatives to enable federal agencies to advance historic preservation while meeting the nation’s housing and climate goals. These policy statements reflect increasing public awareness that historic preservation strategies — and historic properties themselves — can play an important role in addressing the three interrelated sectors covered in this Program Comment.

Following these policy statements, the ACHP developed this government-wide Program Comment to help accelerate the review of projects carried out, permitted, licensed, funded, assisted, or approved by federal agencies to rehabilitate existing housing or create new housing in existing buildings, to maintain and update buildings and their immediate environs in response to climate concerns, and to rehabilitate or develop new climate-friendly transportation infrastructure.

### **B. Current Federal Agency Action**

Every day, federal agencies propose to carry out, permit, license, fund, assist, or approve undertakings covered by this Program Comment, and when they do, they must comply with Section 106 of the National Historic Preservation Act. While the federal government’s role in supporting housing rehabilitation and production, climate-smart buildings, and climate-friendly transportation is difficult to quantify, an overview of current federal agency actions and investments offers insight into the scope and scale of undertakings covered by this Program Comment.

In the area of housing, federal agencies support housing for millions of Americans and preserve the viability and affordability, upgrade the energy efficiency, and enhance the climate resiliency of the nation’s housing stock. The Department of Housing and Urban Development (HUD), for example, supports 1 million housing units across 190,000 public housing buildings, with HUD spending nearly \$9 billion annually in capital and operating funds on these units, over half of which were

built before 1975. HUD also provides billions annually through the Community Development Block Grant and HOME Investments Partnership programs. In addition, the Department of Defense provides over one million units to Military Service members, including 846,000 units in military-owned barracks, while the Rural Housing Service of the Department of Agriculture provides loans to support affordable multifamily developments in rural areas and currently has over 400,000 units in its portfolio, including 17,000 units that support farm laborers. Thousands of projects are funded by other federal agencies working to ensure all Americans have safe, habitable, and affordable housing.

In the area of climate-smart buildings, federal agencies have long undertaken projects that seek to reduce energy cost burdens, cut climate pollution, and boost climate resilience of the nation's building stock. The Inflation Reduction Act — the largest climate bill in history — and the Bipartisan Infrastructure Law have accelerated these efforts. The Environmental Protection Agency \$27 billion Greenhouse Gas Reduction Fund, for example, finances zero emissions building projects and clean technology deployment nationally, including in low-income and disadvantaged communities. The Climate Smart Buildings Initiative is catalyzing more than \$8 billion of private sector investments by 2030 to perform energy efficiency upgrades in federal buildings. The \$1 billion HUD Green and Resilient Retrofit Program invests in energy efficiency, electrification, clean energy generation, climate resilience, and low-embodied-carbon materials in HUD-assisted multifamily housing. And the Department of Energy Efficiency and Conservation Block Grant Program is assisting states, local governments, and Tribes in implementing strategies to reduce energy use, to reduce fossil fuel emissions, and to improve energy efficiency, including for residential and commercial buildings.

In the area of climate-friendly transportation, the federal government's project portfolio — from sidewalks and bike lanes, to bus shelters and light rail — spans multiple Department of Transportation operating administrations as well as other federal agencies, including those that might fund such projects (such as HUD and the Environmental Protection Agency) or build such projects (such as the Department of Agriculture and the Department of Interior). Through the Bipartisan Infrastructure Law and other recent actions, the federal government is currently making significant investments to reduce greenhouse gas emissions and bolster the resilience of America's transportation infrastructure. This includes \$91 billion over five years for public transportation projects, including for transit accessibility, transit-oriented development, and expanded transit service. It also includes \$66 billion to improve the nation's rail systems, representing the largest investment in passenger rail since the creation of Amtrak, and additional funding for pedestrian and bike infrastructure, recreational trails, Safe Routes to School, and more. Other funding includes billions \$7.5 billion over five years for electric vehicle charging infrastructure, \$8.7 billion over five years for transportation infrastructure resilience, and \$2 billion to reduce the lifecycle emissions of transportation construction projects by investing in materials with lower levels of embodied carbon emissions compared to industry averages.

Many types of activities relating to these and other federal agency programs and investments require Section 106 review.

### **C. Prior ACHP Action**

The ACHP's statutory duties under the National Historic Preservation Act include advising the President, Congress, and state and local governments on historic preservation policy issues and overseeing the Section 106 process.

In its advising capacity, the ACHP has formally advised the President, Congress, and state and local governments on housing since at least 1995, when it issued its first policy statement on affordable housing. It updated this policy statement in 2006, and again in 2023. The Housing Policy Statement states that Section 106 reviews must “be grounded in a flexible yet consistent approach to ensure that housing can be developed expeditiously while still preserving the historic qualities of affected historic properties.” Also in 2023, the ACHP advised on climate change and historic preservation through its Climate Change Policy Statement. It urges action on building reuse and energy-and-emissions-saving retrofits of older and historic buildings (including enhanced electrification and increased energy efficiency standards). It also supports expediting Section 106 review of projects addressing climate change, including clean energy and climate-friendly transportation projects.

In its oversight of the Section 106 process, the ACHP has also issued or participated in other program alternatives to create tailored review processes for certain programs and undertakings relevant to this Program Comment. At the request of Department of Defense, for example, the ACHP has issued six program comments specifically related to housing, which cover housing developed under specific congressionally appropriated programs, housing constructed during specific eras, and housing designed and built with similar form, style, and materials. The ACHP has also recently been a signatory to several statewide programmatic agreements with HUD related to projects and programs subject to 24 C.F.R. Parts 50 and 58. Prior program comments addressing housing have reduced the operational and maintenance costs of historic housing, made homes more comfortable for occupants, and facilitated the preservation and reuse of existing buildings.

With regard to climate-smart buildings, ACHP has issued several program comments, along with an exemption for the General Services Administration’s routine operations and maintenance. The ACHP has also signed a Department of Energy Prototype Programmatic Agreement for weatherization activities and a Nationwide Programmatic Agreement Regarding Climate Resiliency and Sustainability Undertakings on Department of Homeland Security Owned Facilities, which cover a broad range of energy efficiency, water efficiency, and climate adaptation-related undertakings. Prior program alternatives incorporating climate-smart building strategies have reduced the operational and maintenance costs of historic buildings, made such buildings more comfortable for occupants, and facilitated the preservation and reuse of historic buildings.

With regard to climate-friendly transportation, the ACHP has issued two program comments specifically related to transportation projects, along with a government-wide exemption for certain electric vehicle supply equipment. In addition, the ACHP has been a signatory to statewide programmatic agreements with the Federal Highway Administration, state historic preservation offices, and state departments of transportation, covering a range of transportation-related activities. To the extent prior program alternatives have addressed climate-friendly transportation projects, they have facilitated such projects while upholding historic preservation values.

This Program Comment is guided in part by the mechanisms, provisions, and approaches in prior program alternatives that are most consistent with the ACHP’s recently adopted Housing Policy Statement and Climate Change Policy Statement. In expanding beyond the scope of these prior program alternatives, this Program Comment creates a consistent and holistic approach for Section 106 review across the federal government for certain undertakings, reducing complexity and equipping federal agencies to more effectively and efficiently address the nation’s needs.



#### **D. Justification**

Many types of activities relating to the programs identified in Section I.B. of this Program Comment, and other similar programs, require review under Section 106 of the National Historic Preservation Act. Recognizing the extent, and in some cases the increasing extent, of federal action in the housing, building, and transportation sectors, and the volume and repetitive nature of such action, the ACHP has issued this Program Comment to clarify preferred approaches to reviewing these covered undertakings. In doing so, this Program Comment enables federal agencies to focus on other undertakings with greater potential for adverse effects on historic properties, reducing taxpayer costs and facilitating project delivery — while enabling the production and rehabilitation of housing, the preparation of buildings to be climate-resilient, and the reduction of energy use and greenhouse gas emissions in the building and transportation sectors.

#### **E. Goals**

This Program Comment aims to promote actions that, consistent with the National Historic Preservation Act, 54 U.S.C. § 300101(1), “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”

More specifically, this Program Comment aims to achieve objectives laid out in ACHP policy statements, to advance historic preservation goals, and to help satisfy the nation’s pressing needs to expand access to housing, facilitate climate-resilient and zero emissions buildings, and promote climate-friendly transportation. It does so in recognition of three critical facts: that the United States has an aging housing stock, with half of existing housing units built before 1979; that more than a third of greenhouse emissions comes from the building sector, and buildings use 75% of the electricity generated annually; and that transportation sector is the largest source of greenhouse gas emissions in the United States, responsible for about one-third of all emissions.

This Program Comment also aims to leverage the embodied carbon in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for construction materials that currently account for more than 15 percent of annual global greenhouse gas emissions, and in turn slowing down climate change and its impacts on our most cherished places.

Ultimately, this Program Comment aims to benefit the people who live in the housing, work in the buildings, and move using the climate-friendly transportation infrastructure projects being carried out, permitted, licensed, funded, assisted, or approved by federal agencies.

## **II. SCOPE**

#### **A. Overall Effect**

This Program Comment provides an alternative way for *federal agencies* to comply with their Section 106 responsibility to take into account the *effects on historic properties* of their covered *undertakings*. The Program Comment also provides the ACHP a reasonable opportunity to comment regarding covered *undertakings*.

## **B. Effect on Other Applicable Laws**

This Program Comment does not modify, preempt, or replace any other federal laws, or any applicable state, local, or Tribal laws or regulations.

## **C. Effect on Existing Agreements**

A *federal agency* that already has a Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must either:

1. Follow this Program Comment, rather than such MOA or PA for a class of covered *undertakings* for the life of this Program Comment. Before making a decision to do so, the *federal agency* must first consult with the signatories of such MOA or PA and then provide them written notice of the decision to apply this Program Comment to a class of covered *undertakings*; or
2. Continue to implement the existing MOA or PA regarding such covered *undertakings*, rather than this Program Comment.

*Federal agencies* may pursue amendments to such MOAs or PAs per their stipulations, to incorporate, in whole or in part, the terms of this Program Comment. *Federal agencies* may also consider terminating such MOA or PA and follow this Program Comment to satisfy their Section 106 responsibility for the covered *undertakings*.

A *federal agency* that already has a Section 106 program comment or program comments in effect for covered *undertakings* must follow the terms of those program comments to the extent those program comments address the *undertakings* covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of other program comments. *Federal agencies* may propose to the ACHP amendments to existing program comments following the amendment procedures in those program comments, to incorporate, in whole or in part, the terms of this Program Comment.

## **D. Effect on Tribal Lands**

This Program Comment does not apply on *Tribal lands*, or to activities that may affect *historic properties* located on *Tribal lands*, unless the *Indian Tribe*, *Tribal historic preservation officer*, or a designated representative of the *Indian Tribe* has provided prior written notification to the Executive Director of the ACHP that the Tribe allows the use of the Program Comment on the Tribe's lands. *Indian Tribes* can agree to such use of the Program Comment by issuing an authorization for such use in a format substantially similar to the format contained in Appendix D to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on those *Tribal lands* on the date of receipt by the Executive Director of the ACHP, who must ensure notice on such authorization is included on the website of the ACHP. The *Indian Tribe*, *Tribal historic preservation officer*, or designated representative of the *Indian Tribe* may terminate the *Indian Tribe's* authorization to use this Program Comment by notifying the Executive Director of the ACHP in writing. Such a termination will be limited to the Program Comment's applicability to *undertakings* that would occur on or affect *historic properties* on the *Tribal lands* under the jurisdiction of the *Indian Tribe*.

## **E. Standard Section 106 Review**

A *federal agency* must follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7 or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative, if:

1. The *federal agency* elects, for any reason, not to utilize this Program Comment for an *undertaking* for which alternative compliance approaches are prescribed in Section III of this Program Comment.

2. The *undertaking* or components of an *undertaking* that include activities not listed in the Appendices, meaning the undertaking would be subject to the Section 106 review process, but the *federal agency* could incorporate use of this Program Comment in its review of the entire *undertaking*.

3. The *undertaking* would occur on or have the potential to affect the following *historic properties*:

- a. Any National Monument, National Historic Site, National Historic Trail, National Historical Park, National Military Park, National Battlefield, National Battlefield Park, or National Battlefield Site.

- b. Any site, object, *building*, or structure individually designated as a *National Historic Landmark* or designated as a *contributing property* to a *National Historic Landmark* district, or found within the boundaries of a *National Historic Landmark* archaeological district.

- c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*.

## **III. ALTERNATIVE COMPLIANCE APPROACHES**

### **A. Available Alternative Compliance Approaches**

This Program Comment authorizes alternative compliance approaches for covered *undertakings*, as follows:

1. For *undertakings* or components of *undertakings* with no or minimal potential to adversely affect *historic properties*, as set forth in Appendix A-1, B-1, or C-1 of this Program Comment, a *federal agency* may proceed with the *undertaking* without conducting further review under Section 106.

2. For *undertakings* or components of *undertakings* for which the *federal agency* satisfies certain conditions, exclusions, or requirements, as set forth in Appendix A-2, B-2, or C-2 of this Program Comment, a *federal agency* may proceed with the *undertaking* if it satisfies the conditions, exclusions, or requirements prescribed in those Appendices, and it documents the manner in which it has satisfied such conditions, exclusions, or requirements.

## B. Consultation with Indian Tribes and Native Hawaiian Organizations

The United States government has a unique legal and political relationship with *Indian Tribes* as set forth in the Constitution of the United States, treaties, statutes, court decisions, and Executive Orders. The United States recognizes the right of *Indian Tribes* to self-government. Tribes exercise inherent sovereign powers over their members and territories. The ACHP drafted this Program Comment with a commitment to strengthening the government-to-government relationship between the United States and *Indian Tribes*.

### 1. Potential Effects on Properties of Significance to Indian Tribes and Native Hawaiian Organizations

It is important to recognize that while this Program Comment was drafted to limit impacts on *historic properties*, such as sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, covered *undertakings* could directly or indirectly affect such properties.

### 2. Consultation-Related Obligations

If the *federal agency*, based on the location of the *undertaking* and the *area of potential effects*, determines that an *effect* on the *historic properties* of religious and cultural significance to *Indian Tribes* or *Native Hawaiian Organizations*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, may occur, it must make a reasonable and good faith effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* and invite them to consult to assess whether use of the Program Comment for the subject undertaking is appropriate. The *federal agency's* consultation effort should be informed by and be conducted in accordance with the National Historic Preservation Act, the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects, including by recognizing the special expertise of holders of Indigenous Knowledge.

The *federal agency's* effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* should be informed by, but not limited to the following: the knowledge and expertise of agency Tribal liaison staff, historic maps, information gathered from previous consultations pursuant to Section 106, databases of *Indian Tribes* and *Native Hawaiian Organizations* where accessible and appropriate, the Bureau of Indian Affairs Tribal Leader List, U.S. Department of the Interior Native Hawaiian Organization List, the National Park Service Tribal Historic Preservation Program contact database, National Association of Tribal Historic Preservation Officers, the U.S. Housing and Urban Development Tribal Directory Assistance Tool, *state historic preservation officer* databases, and other resources.

### 3. Effect of Finding of Potential Effect on Certain Properties

Should it be determined through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could potentially result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including a

Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* may not use this Program Comment and must instead follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative.

#### 4. Confidentiality-Related Obligations

Consistent with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, *federal agencies* should consider information regarding *historic properties* with traditional religious and cultural significance to *Indian Tribes* or *Native Hawaiian Organizations*, Tribal identified sacred sites, and Indigenous Knowledge shared with the *federal agency* by *Indian Tribes* or *Native Hawaiian Organizations* as sensitive, unless otherwise indicated by the *Indian Tribe* or *Native Hawaiian Organization*. *Federal agencies* should clearly inform *Indian Tribes* and *Native Hawaiian Organizations* of any limitations on the agency's ability to keep sensitive information confidential. *Federal agencies* must keep sensitive information provided by *Indian Tribes* or *Native Hawaiian Organizations* confidential to the extent authorized by applicable federal laws, such as Section 304 of the National Historic Preservation Act. *Federal agencies* are encouraged to use best practices on confidentiality delineated in the 2023 Interagency Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites when implementing this Program Comment.

### C. The Use of Qualified Authorities

*Undertakings* covered by this Program Comment do not require the use of a *qualified authority* except where explicitly stated, or except where, in the reasonable judgment of the *federal agency* in consideration of various factors, the use of a *qualified authority* is necessary to fulfill the intent of the National Historic Preservation Act or necessary or useful to inform the *federal agency's* decision-making.

When the *federal agency* chooses to use a *qualified authority*, the type of *qualified authority* must be appropriate to the circumstances. For example, a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects* to *historic properties* of religious and cultural significance to the Tribe or to *Native Hawaiians*, respectively, should be consulted to inform the identification, *effects* determination, and other matters involving *historic properties* significant to that *Indian Tribe* or *Native Hawaiian Organization*. As another example, determinations regarding architectural resources and structures must be made by a *qualified professional* meeting such professional standards for historic architecture or architectural history established by the Secretary of the Interior.

### D. Determinations of Eligibility

*Undertakings* covered by this Program Comment, due to their nature and potential *effects*, do not require a *federal agency* to determine whether an involved or affected property is a *historic property* except where explicitly stated.

#### IV. ASSISTANCE TO CONSULTING PARTIES

This Program Comment does not require a *federal agency* to pay any consulting party for providing its views or comments in response to 36 C.F.R. part 800 responsibilities, including invitations to consult in a Section 106 review; to respond to the proposed *area of potential effects*, scope of identification efforts, eligibility findings, assessment of *effect*; or **to consult to seek ways to resolve any *adverse effects*** or to develop a memorandum of agreement or programmatic agreement to conclude the Section 106 review finding or determination. If, however, a *federal agency* asks an *Indian Tribe*, *Native Hawaiian Organization*, or any consulting party to do more than the activities listed in the preceding sentence in connection with this Program Comment, the *federal agency* or its applicant, grantee, or permittee, if applicable, must enter into an appropriate arrangement to provide the *Indian Tribe*, *Native Hawaiian Organization*, or consulting party reasonable payment for such services, if and to the fullest extent the *federal agency* has the authority to enter into such an arrangement and pursuant to its policies and procedures. Examples of services include requests to:

- A. Conduct an archaeological, ethnographic, or other inventory or field survey to identify *historic properties* that may be affected by the *undertaking*.
- B. Perform a *records check* on behalf of the *federal agency*.
- C. Conduct research and make preliminary assessments of National Register eligibility on behalf of a *federal agency*, as opposed to responding to determination of eligibility.
- D. Provide an assessment of the potential *effects* of the *undertaking* on *historic properties*, as opposed to responding to such an assessment.
- E. Carry out *mitigation measures*, including conducting additional research or monitoring ground disturbing activities as part of a mitigation plan.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, evaluation, or mitigation efforts.
- G. Design or develop a specific plan or specifications for an *undertaking* that would meet the Secretary of the Interior's Standards for Rehabilitation or otherwise avoid, minimize, or mitigate *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.
- I. Contribute substantially to any of the above activities carried out by a third party.

A request during consultation by an *Indian Tribe* or *Native Hawaiian Organization* to conduct such services itself does not preclude reasonable payment for services simply because the request was made during consultation. A *federal agency* or its applicant, grantee, or permittee, if applicable, must consider entering into an arrangement, in accordance with this Section, with any *Indian Tribe* or *Native Hawaiian Organization* making such a request.



## V. UNANTICIPATED DISCOVERIES

### A. Immediate Response Requirements

If previously unidentified *historic properties* or unanticipated *effects*, including visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of the *undertaking*, the *federal agency* must immediately halt all activity that could affect the discovery and institute interim measures to protect the discovery from looting, vandalism, weather, and other threats. The *federal agency* must then follow the procedures set forth in 36 C.F.R. § 800.13(b); for sites with potential religious and cultural significance to *Indian Tribes* or *Native Hawaiian* organizations, the *federal agency* must request, and incorporate, if provided, the special expertise of Tribes or *Native Hawaiian Organizations* and the information provided by designated holders of Indigenous Knowledge and must follow those procedures accordance with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and for sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow these procedures in accordance with the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. A *federal agency* that has *historic property* discovery procedures in existing management plans pertaining to *historic properties* should follow such existing procedures.

### B. Response to the Discovery of Human Remains, Funerary Objects, Sacred Objects, or Items of Cultural Patrimony

The *federal agency* must ensure that in the event human remains, funerary objects, sacred objects, or items of cultural patrimony are discovered during implementation of an *undertaking*, all work within 50 feet of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, local law enforcement, and coroner/medical examiner in accordance with any applicable state statute(s) must be immediately contacted. The *federal agency* must be guided by the principles within the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. The *federal agency* must comply with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 C.F.R. part 10, in regard to any human remains, funerary objects, sacred objects, or items of cultural patrimony found on federal or Tribal land.

## VI. DISPUTE RESOLUTION

Any person may file a dispute over the implementation of this Program Comment or its use for any particular *undertaking*, by filing a notice with the relevant *federal agency*, including the *federal agency's* federal preservation officer, with a copy to the consulting parties involved in the *undertaking* and any relevant *Tribal historic preservation officer* or *state historic preservation officer*. Objecting parties may include but are not limited to *Indian Tribes*, *Tribal historic preservation officers*, *state historic preservation officers*, *Native Hawaiian Organizations*, local governments, preservation organizations, owners of historic properties, and members of the public. The *federal agency* must consult with the objecting party to resolve the dispute for not more than 60 *days*. Any disputes over the evaluation of unanticipated discoveries must be resolved in accordance with the requirements of 36 C.F.R. § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 *days*, the *federal agency* may forward to the ACHP all documentation relevant to the objection, including the *federal agency's* proposed resolution if any, request

the ACHP to provide within 30 *days* its advisory comments to resolve the dispute, and take the ACHP's comments into account before finalizing its approach to complying with Section 106. The *federal agency* must notify the objecting party and any relevant *Tribal historic preservation officer* or *state historic preservation officer* regarding its approach to complying with Section 106 for an *undertaking* that is the subject of a dispute. The *federal agency's* decision regarding the resolution will be final. Following the issuance of its final decision, the *federal agency* may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

The ACHP must monitor such disputes, and from time to time, the Executive Director of the ACHP may issue advisory opinions about the use of this Program Comment to guide *federal agencies*.

## VII. DURATION

This Program Comment will remain in effect from the date of adoption by the ACHP through December 31, 2044, unless prior to that time the ACHP withdraws the Program Comment in accordance with Section IX of this Program Comment. On any date during the six-month period preceding the expiration date, the ACHP Chair may amend the Program Comment to extend its duration in accordance with Section VIII.A. of this Program Comment. If an *Indian Tribe* authorizes the use of this Program Comment on its *Tribal lands* in accordance with Section II.D. of this Program Comment, such authorization will be in effect from the date of the issuance of the authorization until the termination of such authorization by the *Indian Tribe* or the expiration or withdrawal of this Program Comment, whichever is earlier.

## VIII. AMENDMENT

The ACHP may amend this Program Comment after consulting with *federal agencies* and other parties as it deems appropriate and as set forth below.

### A. Amendment by the Chair, ACHP

The Chair of the ACHP, after notice to the rest of the ACHP membership and *federal agencies* may amend this Program Comment to extend its duration. The ACHP must notify *federal agencies* and publish notice in the Federal Register regarding such amendment within 30 *days* after its issuance.

### B. Amendment by the Executive Director, ACHP

The Executive Director of the ACHP, after notice to the ACHP membership and other *federal agencies* may amend this Program Comment to adjust due dates and make corrections of grammatical and typographical errors. The ACHP must notify *federal agencies* and publish notice in the Federal Register regarding such amendments within 30 *days* after their issuance.

### C. All Other Amendments

Amendments to this Program Comment not covered by Sections VIII.A. or VIII.B. of this Program Comment will be subject to ACHP membership approval.



## IX. WITHDRAWAL

If the ACHP determines that the consideration of *historic properties* is not being carried out in a manner consistent with this Program Comment, the ACHP may withdraw this Program Comment. The Chair of the ACHP must then notify *federal agencies* and publish notice in the Federal Register regarding withdrawal of the Program Comment within 30 days of the decision to withdraw. If this Program Comment is withdrawn, *federal agencies* must comply with the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative for individual *undertakings* covered by this Program Comment.

## X. REPORTS AND MEETINGS

### A. Federal Agency Annual Reports

The *federal agencies* that use this Program Comment must provide annual reports regarding the use of this Program Comment during the previous reporting period, ending June 30 annually, to the ACHP, as provided in this Section. Each agency's annual report must: provide examples of *undertakings* covered by Section III.A.1. of this Program Comment; provide information about the manner or extent to which the agency satisfied the conditions, exclusions, and requirements to proceed with the *undertakings* covered by Section III.A.2.; identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; include an assessment of the overall effectiveness of the Program Comment in meeting its intent; and summarize professional assistance and compliance monitoring activities. Annual reports are due on September 30 of each year, starting September 30, 2025 and ending September 30, 2029.

For the remaining duration of this Program Comment, the *federal agencies* that use this Program Comment must provide reports regarding the use of this Program Comment during the previous reporting period, ending June 30 triennially, to the ACHP, as provided in this Section. Each agency's triennial report must be submitted either as part of *federal agencies'* report to the ACHP pursuant to Executive Order (EO) 13287, "Preserve America," or, for *federal agencies* not otherwise required to submit such report to the ACHP, as a stand-alone triennial report. Each agency's triennial report must: identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; and include an assessment of the overall effectiveness of the Program Comment in meeting its intent. Triennial reports are due on September 30 of every third year, starting September 30, 2032.

In any report required by this Section, the ACHP encourages *federal agencies* to also propose for ACHP consideration amendments and refinements to this Program Comment based on their experience implementing it.

In any report required by this Section, a *federal agency* must include in its report the activities, if any, of entities to which it has delegated legal responsibility for compliance with Section 106 in accordance with federal law.

## **B. Annual Meetings**

By January 31, 2026 and for four years thereafter, the ACHP must schedule an annual meeting and invite *federal agencies, Indian Tribes, state historic preservation officers, Tribal historic preservation officers, Native Hawaiian Organizations* and others it deems appropriate, to discuss implementation of the Program Comment. At the meeting, attendees will have an opportunity to provide their views on the overall effectiveness of the Program Comment in meeting its intent and purpose. Such views may inform decisions such as those regarding amendments to the Program Comment. Annual meetings may take place in-person, by phone, virtually using electronic meeting platforms, or any combination of such means.

## **C. ACHP Reports**

At any time, but at least once during the initial three-year period during which this Program Comment is being used, and every three years thereafter, ACHP staff must provide a written or oral summary of information received from *federal agency* reports, annual meetings, or other sources about the utility of this Program Comment and make any recommendations for amendments to the ACHP membership.

# **XI. DEFINITIONS**

For purposes of this Program Comment, the following definitions apply, and beginning in Section II of this Program Comment, such words are *italicized* for convenience:

*Abatement* means acting or actions to eliminate, lessen, reduce, or remove.

*Adverse effect*, as provided in 36 C.F.R. § 800.5(a)(1), means an action that may alter, directly or indirectly, any of the characteristics of a *historic property* that qualify the property for inclusion in the National Register of Historic Places in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association; and it includes reasonably foreseeable *effects* caused by the *undertaking* that may occur later in time, be farther removed in distance or be cumulative.

*Area of potential effects*, as provided in 36 C.F.R. § 800.16(d), means the geographic area or areas within which an *undertaking* may directly or indirectly cause alterations in the character or use of *historic properties*, if any such properties exist, and is influenced by the scale and nature of an *undertaking* and may be different for different kinds of *effects* caused by the *undertaking*.

*Bicycle lane* means a portion of a roadway that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists.

*Bicycle parking* means a designated area to store a bicycle, whether personal or shared, including *bicycle racks* and dedicated bicycle docks used in a shared system.

*Bicycle rack* means a rack for a personal or shared bicycle, e-bicycle, or scooter that is typically u-shaped.

*Bicycle rail* means a traffic control device that provides a protective barrier between motor vehicle travel lanes and *protected bicycle lanes* or *cycle tracks*.

*Bulb out* means feature that extends the line of the curb into the traveled way, reducing the width of the street, also known as curb extensions or bump-outs.

*Building* means a constructed work created principally to shelter any form of human activity, including mobile and manufactured homes and *climate-friendly transportation facilities* that are *buildings*.

*Building energy control system* means a *mechanical system* enabling a *building* occupant to manage or monitor energy use and all components of such system, including but not limited to programmable thermostats, digital outdoor reset controls, occupancy sensors, Underwriters Laboratories listed energy management systems or *building* automation systems, demand response and virtual power plant technologies, smoke and carbon monoxide detectors, and related technologies.

*Character-defining feature* means an element of a *historic property* that demonstrates or includes the characteristics of a *historic property* that qualify the *historic property* for inclusion in the National Register of Historic Places, including elements that contribute to the *historic property*'s overall shape, style, design, and decorative details.

*Clean energy technologies* means *solar energy systems*, wind energy systems, battery energy storage systems, geothermal systems, and microgrids serving a *building* or *buildings*, or serving a *climate-friendly transportation facility*.

*Climate-friendly transportation infrastructure* means pedestrian, bicycle, *micromobility vehicle*, bus (including bus rapid transit), and rail infrastructure.

*Climate-friendly transportation facility* means a *building* or structure used for *bicycle parking*, *micromobility parking*, a bus station, a bus rapid transit station, or a rail station.

*Climate-smart building* means a *building* that is energy efficient, electric, uses clean energy, and is resilient.

*Climate resilience* is defined as the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

*Community solar system* means a solar photovoltaic *installation* with up to 5 megawatts nameplate capacity and delivering at least 50% of the power generated from the system to *buildings* within the same utility territory as the facility.

*Cool pavement* means paving materials that reflect more solar energy, enhance water evaporation, or have been otherwise modified to remain cooler than conventional pavements.

*Contributing property*, as provided in National Register Bulletin 16A, "How to Complete the National Register Registration Form," means a *building*, structure, object, or site, as applicable, within the boundaries of a *historic district* that adds to the historic associations, historic architectural qualities, or archaeological values for which a property is significant because it was present during the period of significance, relates to the documented significance of the property, and possesses historic integrity or is capable of yielding important information about the period; or it independently meets the criteria for the National Register of Historic Places.

*Cycle track* means a bicycle facility that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use of bicyclists.

*Day* means calendar *day*, taking place from one midnight to the following midnight.

*Economic feasibility* means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including estimated construction costs (including the cost of *building* material and labor), estimated operational costs, available budget, and timelines for compliance review processes to the extent they impact financial conditions for the *undertaking*.

*Effect*, as provided in 36 C.F.R. §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative alteration to the characteristics of a *historic property* qualifying it for inclusion in or eligibility for the National Register of Historic Places.

*Electrification* means the *replacement* or conversion of an energy-consuming device or system from non-electric sources of energy to electricity; or the *replacement* or conversion of an inefficient electric appliance to an efficient electric appliance.

*Electric vehicle supply equipment or EVSE* means conductors, including the ungrounded, grounded, and equipment grounding conductors and the electric vehicle (EV) connectors, attachment plugs, and all other fittings, devices, power outlets, or apparatus installed specifically for the purpose of delivering energy from the premises wiring to the EV. There are three levels of EVSE: i. Level 1: Refers to a freestanding or wall mounted charging structure that delivers a 110/120V charge, replenishing an EV battery at a rate of 4 to 6 miles of range per hour of charging time. Charging an EV at level 1 typically takes between 7 and 20 hours depending on the size of the vehicle's battery. ii. Level 2: Refers to a freestanding or wall mounted charging structure that delivers a 208/240V charge, replenishing an EV battery at a rate of 10 to 20 miles of range per hour of charging time. Charging an EV at level 2 typically takes between 2 and 5 hours depending on the size of the vehicle's battery. iii. Level 3 (also known as Direct Current (DC) Fast Charging): Refers to a freestanding or wall mounted structure capable of being networked that is designed to charge vehicles more quickly than level I or level II with an electrical output ranging between 40 kW-500 kW delivering 50-1000 volts of direct current to the EV battery. Converts AC power to DC within the charging station and delivers DC power directly to the battery. DC fast charging can typically replenish an EV battery at a rate of 50 to 200 miles of range per 30 minutes of charging time.

*Emergency situation* means any of the following: occurrence of a natural catastrophe, such as a hurricane, wildfire, flood, or excessive heat; declaration of emergency by the President, an *Indian Tribe*, governor, or a chief elected official of a territory or city; or recognition or report of a sudden, serious, and imminent threat to life, health, safety, or property.

*EVSE criteria* means (1) take place in existing *parking facilities* with no major electrical infrastructure modifications and are located as close to an existing electrical service panel as practicable; (2) use reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimize *ground disturbance* to the maximum extent possible, and ensure that it does not exceed previous levels of documented *ground disturbance*; (4) use the *lowest profile equipment* reasonably available that provides the necessary charging capacity; (5) place the *EVSE* in a minimally visibly intrusive area; and (6) use colors complementary to surrounding environment, where possible.

*Federal agency* means an agency as defined by 5 U.S.C. § 551(1), and includes state, local, or Tribal government officials who have been delegated legal responsibility for compliance with Section 106 in accordance with federal law.

*Flex post* means flexible bollards or delineators used to separate motor vehicle traffic from a *bicycle lane*, *protected bicycle lane*, or *cycle track*, and designed to withstand being hit or run over by motor vehicles.

*Green infrastructure* means the range of measures that use plant or soil systems, *permeable ground surface materials*, stormwater harvest and reuse, or landscaping to store, infiltrate, and evapotranspire stormwater and reduce flows to sewer systems or to surface waters, including but not limited to rain gardens, bioswales, bioretention facilities, and other ecosystem services and nature-based solutions used to treat stormwater as close to the source as possible and improve resiliency.

*Greenhouse gas* means gas that traps heat in the atmosphere, including but not limited to carbon dioxide, methane, nitrous oxide, and fluorinated gases (such as hydrofluorocarbons).

*Ground disturbance* means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils that are not *previously disturbed ground*.

*Ground surface material* means any hard material typically used to cover soils for transportation purposes, including but not limited to asphalt, concrete, pavers, cobblestones, Belgian blocks, bricks, gravel surface or base, or wood.

*Hazardous material* means lead, lead-containing material (including lead-based paint), asbestos, asbestos-containing material (including floor tile, plaster, insulation, glazing putty, roofing material, and flashing material), radon, and other similar materials detrimental to human health and safety.

*High friction surface treatment* means application of very high-quality aggregate to the pavement using a polymer binder to restore or maintain pavement friction at existing or potentially high crash areas.

*Historic building* means a *building* included in, or eligible for inclusion in, the National Register of Historic Places, as an individually listed property or as a *contributing property* to a *historic district*.

*Historic building material* means *building material* used in the construction of a *historic building* and installed during the period of significance, and any pre-existing *in-kind replacement* of same.

*Historic district* means a geographically definable area that possesses a significant concentration of *historic buildings*, associated *buildings* and structures, and objects united historically by plan or physical development that are *historic properties*.

*Historic property*, as provided in 36 C.F.R. § 800.16(l), means any prehistoric or *historic district*, site, *building*, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural importance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

*Housing* means any *building* containing one or more dwelling units, including but not limited to multi-unit apartment *buildings*, single-family homes, administrative and employee dwelling units, and recreation residences, in a variety of *building types* and configurations, including but not

limited to *buildings* served by an elevator or elevators, “walk-up” *buildings*, rowhouses, semi-detached homes, mobile and manufactured homes, and freestanding homes.

*Indian Tribe*, as provided in 36 C.F.R. § 800.16(m), means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*In-kind building materials* means new *building materials* that are identical to *historic building materials* in all possible respects, including their composition, design, color, texture, and other physical and visual properties.

*In-kind replacement* means *replacement* of historic or existing *building materials* with *in-kind building materials*.

*Installation* means the action or process of placing or fixing something, including but not limited to materials, *mechanical systems* and components, appliances, and equipment, or of being installed, in a particular location.

*Lowest profile equipment* means EVSE that is the smallest height and width possible that meets the EV charging needs.

*Maintenance and repair* means activities required to maintain in an operational state, or to bring back to operating condition by *repair* or *replacement* of obsolete, broken, damaged, or deteriorated features, elements, materials, and systems.

*Mechanical system* means any heating, cooling, indoor air quality, ventilation, dehumidification, air conditioning, plumbing, or electrical system, and the individual elements and components of each system.

*Micromobility vehicle* means small, lightweight vehicles such as e-bicycles and scooters, which can be human-powered or electronic, privately owned or shared, and operate at low to moderate speeds of 15 to 30 miles per hour.

*Micromobility parking* means an area to store for *micromobility vehicles*, whether private vehicles or shared vehicles, including dedicated bicycle docks used in a shared system.

*Minimally visibly intrusive* means that the EVSE is partially visible but does not detract from the views from or to historic properties.

*Mitigation measures* means any existing, new, or updated materials or actions that serve to address, compensate for, or otherwise resolve *adverse effects* on *historic properties*, and may include research reports, historical documentation, recordation, and other materials and activities.

*National Historic Landmark*, as provided in 36 C.F.R. § 800.16(p), means a *historic property* that the Secretary of the Interior has designated a *National Historic Landmark*.

*Native Hawaiian*, as provided in 36 C.F.R. § 800.16(s)(2), means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

*Native Hawaiian Organization*, as provided in 36 C.F.R. § 800.16(s)(1), means any organization which serves and represents the interests of *Native Hawaiians*; has as a primary and stated purpose the provision of services to *Native Hawaiians*; and has demonstrated expertise in aspects of historic preservation that are significant to *Native Hawaiians*.

*Parking facilities* mean buildings, structures, land, rights-of-way, facilities, or areas used for parking of motor vehicles.

*Permeable ground surface materials* means permeable pavement, permeable pavers, porous flexible pavement, or other material or system that provides a hard surface, while allowing water to flow through to the underlying soils instead of into the storm sewer.

*Potentially historic ground surface materials* means any *ground surface material* comprised of pavers, cobblestones, Belgian blocks, bricks, or wood that are 45 years or older.

*Previously disturbed ground* means soils not likely to possess intact and distinct soil horizons and have a reduced likelihood of possessing *historic properties* within their original depositional contexts in the area and to the depth to be excavated, and does not mean plowed soils or historic urban deposits, including *previously disturbed right-of-way*.

*Previously disturbed right-of-way* means areas where previous construction or other activities have physically altered soils within the three-dimensional *area of potential effects* to the point where there is likely no potential for an archaeologically significant property to remain, including but not limited to: the entire curb-to-curb roadway, existing sidewalks, existing drains, and parking areas, including the prepared substrate constructed to support the infrastructure down to undisturbed or intact soil or subsoil. As-built drawings and plans can be used to determine the vertical and horizontal dimensions of the previously disturbed areas.

*Primary façade* means the exterior façade of a *building* which serves as the front or the major entry point of the *building*, provided that a determination of the *primary façade* depends on a variety of factors, and one *building* may have more than one *primary façade*.

*Primary right-of-way* means the corridor, open to the public for transportation purposes, from which a person may best view the *primary façade* of a *building* or, if the *primary façade* is not visible from the public *right-of-way*, the corridor nearest the façade through which people enter the *building*.

*Primary space* means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other space that contains a *character-defining feature* of a *historic building* or historic *climate-friendly transportation facility*.

*Protected bicycle lane* means a bicycle facility that is physically separated from motor vehicle traffic and is distinct from the sidewalk for the exclusive use by and increased safety of bicyclists.

**Qualified authority** means a *qualified professional* or a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects* to *historic properties* of religious and cultural significance to their *Indian Tribe* or to *Native Hawaiians*, respectively.

*Qualified professional* means a person who meets the relevant standards outlined in the Secretary of the Interior's Professional Qualifications Standards, as amended and annotated.



*Rail infrastructure* means structures, *building*, land, and equipment that supports land lines, including both the infrastructure that is in the rail *right-of-way* (such as ballast, ties, tracks, bridges, and tunnels) and the infrastructure that is adjacent to the *right-of-way* such as signs, signals, mileposts or switches.

*Recognized design manual* means one of the following: Federal Highway Administration Manual on Uniform Traffic Control Devices, American Association of State Highway and Transportation Officials A Policy on Geometric Design of Highways and Streets, National Association of City Transportation Officials (NACTO) Urban Street Design Guide, NACTO Urban Bikeway Design Guide, NACTO *transit* Street Design Guide, NACTO Bike Share Station Siting Guide, or NACTO Urban Street Stormwater.

*Records check* means a search of relevant *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, and *federal agency* files, records, inventories, and databases, or other sources recommended by such parties, for information about whether *historic properties*, including properties with traditional religious and cultural significance to one or more *Indian Tribes* or *Native Hawaiian Organizations*, are known to exist within an *area of potential effects*.

*Reduce energy use or greenhouse gas emissions* means to take an action that: lessens either the amount of energy used or *greenhouse gas* emitted to perform the same task or produce the same result; replaces an energy production source reliant on fossil fuels with a clean energy technology or upgrades a clean energy technology; or achieves *electrification*.

*Rehabilitation* means the act or process of making possible an efficient compatible use for a property through *repair*, alterations and additions while preserving those portions or features that convey its historical, cultural or architectural values.

*Replacement* means substitution of new element for an existing element, which may require a change in size, dimension, location, and configuration, in order to improve the function and condition of the element or the broader system of which the element is a part.

*Solar energy system* means any addition, alteration, or improvement which is designed to utilize solar energy either of the active type based on mechanically forced energy transfer or of the passive type based on convective, conductive, or radiant energy transfer, or some combination of these types to reduce the energy requirements of that structure from other energy sources, including but not limited solar hot water equipment, *community solar systems*, and solar photovoltaic equipment and all components.

*State historic preservation officer*, as provided in 36 C.F.R. § 800.16(v), means the official appointed or designated pursuant to Section 101(b)(1) of the National Historic Preservation Act to administer the state historic preservation program or a representative designated to act for the *state historic preservation officer*.

*Substitute building materials* means modern, industry standard, natural, composite, and synthetic materials that simulate the appearance, physical properties, and related attributes of historic materials well enough to make them alternatives for use when *historic building materials* require *replacement*.

*Technical feasibility* means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including health, safety, energy efficiency, climate resiliency,



durability of materials, and sound professional judgment (including architectural, archaeological, or engineering judgment).

*Transit* means mass transportation by a conveyance (including a bus, railcar, locomotive, trolley car, or light rail vehicle) that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation.

*Transit-oriented development building* means a *building* within one half mile of an existing or planned *transit* stop to be developed or redeveloped as part of a federal program or project to promote *transit*-oriented development.

*Tribal historic preservation officer*, as provided in 36 C.F.R. § 800.16(w), means the Tribal official appointed by the *Indian Tribe's* chief governing authority or designated by a Tribal ordinance or preservation program who has assumed the responsibilities of the *state historic preservation officer* for purposes of Section 106 compliance on *Tribal lands* in accordance with Section 101(d)(2) of the National Historic Preservation Act.

*Tribal lands*, as provided in 36 C.F.R. § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

*Undertaking*, as provided in 36 C.F.R. § 800.16(y), means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a *federal agency*, including those carried out by or on behalf of a *federal agency*; those carried out with federal financial assistance; and those requiring a federal permit, license or approval.

*Zero emissions building* means a *building* that is highly energy efficient, does not emit *greenhouse gases* directly from energy use, and is powered solely by clean energy, as further defined in the National Definition of a Zero Emissions Building.

## APPENDIX A-1: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to or on the same lot as *housing*:

a. *Rehabilitation, replacement, installation, and removal of any of the following elements less than 45 years old, provided such activity exclusively affects previously disturbed ground or creates no new ground disturbance:*

i. Concrete and asphalt ground surfaces such as streets, parking areas, driveways, and walkways, including repaving, restriping, replacing such surfaces with *permeable ground surface materials*, and reducing surface size, but not changing vertical alignment or expanding surface size.

ii. Park, playground, and sports equipment such as platforms, guardrails, handrails, climbers, ramps, stairways, ladders, balance beams, fitness equipment, rings, rolls, un-mechanized merry-go-rounds, seesaws, slides, swings, benches, netting, basketball hoops, drinking fountains, and *ground surface materials*, but not *buildings*.

iii. Fencing, but not *replacement* or removal of fencing that is a *character-defining feature* of a *historic property*.

iv. Wayfinding, address, and identification signage.

v. Lighting, such as *building-mounted* lighting and freestanding lighting in parking areas, along driveways or walkways, or in park and playground areas, and including relamping and rewiring, but not including *replacement* or removal of lighting that is a *character-defining feature* of a *historic property*.

vi. Water feature, such as decorative fountains, including replumbing, but not *replacement* or removal of a water feature that is a *character-defining feature* of a *historic property*.

vii. Curb, gutter, steps, ramp, and retaining wall, but not a retaining wall that is a *character-defining feature* of a *historic property*.

b. *Maintenance, repair, and in-kind replacement* of any element listed in Section 1.a. of this Appendix.

c. Any of the following landscaping, grounds, and water management activities:

i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.

ii. Planting of grass, shrubs, and other plants, and xeriscaping.

iii. *Replacement* of a tree in its existing location and planting of a new tree within 40 feet of the *building*.

iv. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.

v. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.

vi. *Maintenance, repair, rehabilitation, replacement, and installation of green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*.

d. *Maintenance, repair, rehabilitation, replacement, and removal of the following elements serving housing*, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:

i. *Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures* placed in auger holes, or other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, natural gas, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Vault toilets.

e. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter that do not impact *ground surface materials* 45 years or older or known *historic properties*.

f. *Installation and removal of temporary construction-related structures, including scaffolding, barriers, screening, fences, protective walkways, signage, office trailers, and restrooms.*

## 2. Work on the Building Exterior

The following activities do not require further Section 106 review when conducted on or near the exterior of *housing*:

a. *Rehabilitation, replacement, and installation of the following elements*: on a *building* less than 45 years old and not known after a *records check* to be a *historic property*; on a *building* the *federal agency* or another *federal agency* has determined to not be a *historic property* within the preceding ten years; or on the *non-primary façade* of a *historic building* or on the *non-primary façade* of a *building* whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the *primary right-of-way*:

i. Doors, including insulated exterior doors and basement bulkhead doors.

ii. Windows, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings or window louvers.

iii. Canopies, awnings, and solar shades.

iv. Roofing, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.

v. Improvements that address the requirements of the Americans with Disabilities Act, such as ramps and railings.

vi. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.

vii. *Solar energy systems.*

viii. Elevator systems.

ix. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.

x. Foundations and seismic and structural *repairs*, with *ground disturbance* limited to areas within 10 feet of the *building*.

xi. Chimneys.

xii. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.

xiii. Siding.

xiv. Energy and water metering devices.

b. *Maintenance, repair, and in-kind replacement* activities on any *building*, including:

i. *Maintenance, repair, and in-kind replacement* of any element listed in Section 2.a. of this Appendix.

ii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.

iii. Repointing of mortar joints with mortar similar in composition, joint profile, color, hardness, and texture of existing mortar.

iv. Removal of exterior paint or graffiti using non-destructive means, limited to hand scraping, low-pressure water wash of less than 500 psi, heat plates, hot air guns, and chemical paint removal.

c. *Maintenance, repair, rehabilitation, replacement, installation* and removal of any of the following elements on or near a *building*, provided that such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in auger holes, and other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Foundation vents, if painted or finished to match the existing foundation material.

iv. *Green infrastructure*.

v. Gray water systems.

d. Paint on previously painted exterior surfaces.

e. *Rehabilitation, replacement, and installation of clean energy technologies*, provided that:

i. Such technology is located either outside the boundaries of a *historic district*, or on the non-primary façade side of historic *housing*, or in a location not otherwise visible from the *primary right-of-way*; and is located on the same lot as or on an adjacent lot to that *housing*, or in the case of a *community solar system*, in a lot within two blocks or two thousand feet (whichever is longer) of the *housing* served;

ii. Such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*;

iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted *solar energy system* may be visible from the *primary right-of-way* if it is installed with methods that do not irreversibly damage historic materials, sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.

f. *Maintenance, repair, or in-kind replacement* of *clean energy technologies*.

g. *Abatement of hazardous materials* where effects of the *abatement* are reversible or temporary or not visible from the *primary right-of-way*, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal or *replacement* of: windows on the primary façade of historic *housing* or *housing* whose eligibility for inclusion in the National Register is not known; or windows 45 years or older.

### 3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of *housing*, and do not result in physical changes visible from the *primary right-of-way*:

a. *Maintenance, repair, rehabilitation, replacement, and installation, and abatement of hazardous materials*, that take place entirely within the interior of the *housing* and: in an individual *housing* unit; in any interior location of *housing* less than 45 years old and not known after a *records check* to be a *historic property*; on *housing* the *federal agency* or another *federal agency* has determined to be not a *historic property* within the preceding ten years; or in any interior space within historic *housing* that is not a *primary space*. Example activities covered by this Section 3.a. include: removal, alteration (including of width, height, and location), and construction of interior walls; alteration of floors and flooring (including of material, pattern, and texture); alteration of ceilings (including of material, lighting, and height); *installation of mechanical systems* and fire alarm, fire suppression, and security systems and equipment; insulation and air sealing; removal and *installation* of equipment and fixtures (including bathroom, kitchen, and lighting equipment and fixtures); *replacement* and refurbishment of elevator cabs, system-wide upgrades to elevator *mechanical systems*, *installation of building energy control systems*; and *installation* of code-required signage; removal, alteration, and construction of stairs; cosmetic improvements; and improvements to address the requirements of the Americans with Disabilities Act.

b. *Rehabilitation, replacement and installation* of any of the following elements, in any location other than the locations identified in Section 3.a. of this Appendix, if such activity does not result

in physical changes visible from the *primary right-of-way* and has no visual *effect* on the *primary spaces* of historic *housing*:

i. *Mechanical systems*, including but not limited to heating, ventilating, and cooling components such as heat pumps, electric furnaces and boilers, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, ventilation systems, and refrigeration lines; and fire alarm, fire suppression, and security systems and equipment.

ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.

iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.

iv. Electronic ignition devices.

v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.

vi. Water conservation measures, such as low flow faucets, toilets, shower heads, urinals, and distribution device controls.

vii. Light fixtures, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.

viii. *Building energy control systems*.

ix. EnergyStar (or similarly rated) appliances.

x. Battery energy storage systems.

xi. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, where such insulation can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.

xii. Spray foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch *historic building materials* and can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.

xiii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.

c. *Maintenance, repair, and in-kind replacement* of any of the elements listed in Section 3.b., any *building element*, any improvement that addresses the requirements of the *Americans with Disabilities Act*, and any cosmetic or decorative features of the *housing*.

d. *Maintenance, repair, in-kind replacement, and rehabilitation* of a skylight, atrium, *courtyard*, or lightwell; and *installation* of a new skylight, atrium, courtyard, or lightwell that will not be visible

from the *primary right-of-way* and will not result in interior reconfigurations to *primary spaces* or removal of *historic building materials* in *primary spaces*.

e. *Abatement* of *hazardous materials* where *effects* of the *abatement* are reversible or temporary or not visible from the *primary right-of-way*, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal or *replacement* of: windows on the primary façade of historic *housing* or *housing* whose eligibility for inclusion in the National Register is not known; or windows 45 years or older.

#### 4. Emergency Work

The following activities related to the exterior or interior of any historic *housing* do not require further Section 106 review when such work relates to an *emergency situation* and takes place within 30 *days* of the occurrence of the *emergency situation* and otherwise complies with 36 C.F.R. § 800.12:

- a. Temporary stabilization that causes no permanent damage to historic *housing* or any other *historic property*, including *installation* of temporary bracing, shoring and tarps.
- b. Emergency *repair* of masonry, concrete, or *building* façade cracks or falling elements.
- c. Emergency *repair* of falling plaster or other elements that pose an immediate and imminent health and safety hazard.
- d. *Abatement* of *hazardous materials* required to address an *emergency situation*.
- e. *Replacement* and demolition of a deteriorated or damaged mobile or manufactured home.

#### 5. Other Activities

The following activities do not require Section 106 review:

- a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of *housing*.
- b. Feasibility studies related to energy efficiency improvements, *electrification*, improvements incorporating *clean energy technologies*, and other topics relating to *building* energy use.
- c. Leasing, refinancing, acquisition, or purchase by the *federal agency* of *housing*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- d. Transfer, lease, or sale of a federal government-owned *housing* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- e. Transfer, lease, or sale out of federal ownership or out of federal control of historic *housing*, provided there are adequate and legally enforceable restrictions or conditions (such as in a deed

covenant) to ensure long-term preservation of the property's historic significance in accordance with 36 C.F.R. § 800.5(a)(2)(vii).

f. *Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment* satisfying the *EVSE criteria*.



## APPENDIX A-2: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

### 1. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to *housing* or on the same lot as *housing*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Replacement, installation, or removal of any of the following elements which are either less than 45 years old and create new ground disturbance in previously undisturbed soils, or 45 years or older; if a qualified authority makes a written determination that such activity will have no adverse effects on any historic property; or if the area of potential effects has been previously field surveyed (acceptable to current state or Tribal standards or within the past ten years) and, if applicable, has been subject to consultation with Indian Tribes and Native Hawaiian Organizations without such survey or consultation identifying any historic properties:*

- i. Any of the elements listed in Sections 1.a. and 1.d. of Appendix A-1, including *character-defining features* of such elements.
- ii. Test borings, soil sampling, well drilling, or perc tests more than eight inches in diameter, or that impact *ground surface materials* 45 years or older or known *historic properties*.

b. *Planting of a new tree 40 feet or more from a building or replacement or installation of green infrastructure either in previously disturbed ground, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the building, if a qualified authority has made a written determination that such planting will have no adverse effects on any historic property.*

### 2. Work on the Building Exterior

The following activities do not require further Section 106 review when conducted on, or in the case of *clean energy technologies* near (as further provided below), the exterior of *housing*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Rehabilitation, replacement, and installation of the following elements on the exterior of buildings 45 years or older if a qualified authority determines that the building is not a historic property; or buildings 45 years or older determined by a qualified authority to be a historic property, if a qualified professional makes a written determination that such installation or replacement will have no or minimal adverse effects on any character-defining feature of a historic building:*

- i. Any of the elements listed in Section 2.a. of Appendix A-1, including elements in locations other than those identified in that Section.

b. *Rehabilitation, replacement, or installation of any of the following elements on, or in the case of clean energy technologies near (as further provided below), a building, which create new ground disturbance on previously undisturbed ground, if a qualified authority makes a written determination that such activities will have no adverse effects on any historic property:*

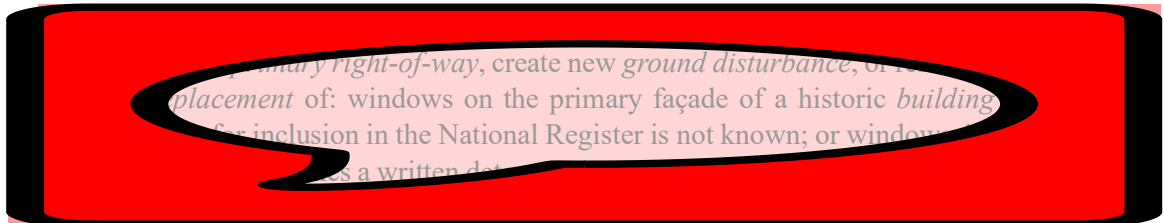
- i. Any of the elements listed in Section 2.c. of Appendix A-1, including elements in locations other than those identified in that Section.

ii. *Clean energy technologies*, when located or configured in a manner other than that identified in Section 2.e. of Appendix A-1.

c. Replacement of exterior *historic building materials* of historic *housing* with in-kind or *substitute building materials* after the *federal agency*, with the assistance of a *qualified authority*, conducts the following selection procedure:

- i. Characterize existing *historic building materials* in terms of condition, design, material properties, performance (including insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*;
- ii. Next, determine, based on an evaluation of *technical feasibility* and *economic feasibility*, if *historic building materials* can be *repaired* or if they must be replaced;
- iii. Next, if *replacement* is required, identify potential in-kind and *substitute building materials* and evaluate their *technical feasibility* and *economic feasibility*;
- iv. Finally, based on such evaluation, select the most appropriate in-kind or substitute *building material*;

provided, however, that a *federal agency* may only utilize this selection procedure if such *replacement* or demolition does not create *ground disturbance*, *creates ground disturbance exclusively on previously disturbed ground*, or, in the opinion of a *qualified authority*, has no *adverse effects* on any *historic property*.



### 3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of *housing*, after the satisfaction of the identified conditions, exclusions, and requirements:

- a. In addition to those activities listed in Section 3 of Appendix A-1, *maintenance, repair, rehabilitation, replacement, and installation*, and the *abatement* of *hazardous materials*, where such activity results in physical changes to a historic *building* visible from the *primary right-of-way* or has a visual *effect* on the *primary spaces* of a historic *building*, if a *qualified authority* makes a written determination that such activity has no *adverse effects* on any *historic property*.

## APPENDIX B-1: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Site Work

The following activities do not require further Section 106 review when they are conducted in areas adjacent to a *building* or on the same lot as a *building*, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*:

a. *Rehabilitation, replacement, installation, and removal* of any of the following elements less than 45 years old, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and not including *replacement* or removal of any element that is a *character-defining feature* of a *historic property*:

i. *Fencing.*

ii. *Lighting, such as building-mounted lighting and freestanding lighting in parking areas, along driveways and walkways, in park and playground areas, and in other areas, and including relamping and rewiring.*

iii. *Water feature, such as decorative fountains, including replumbing.*

iv. *Curb, gutter, steps, ramp, and retaining wall.*

b. *Maintenance, repair, and in-kind replacement* of any element listed in Section 1.a. of this Appendix.

c. *Any of the following landscaping, grounds, and water management activities:*

i. *Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.*

ii. *Planting of any of the following that are native, naturalized, drought-adapted, drought-resistant, drought-tolerant, water-wise, or xeric: grass, shrubs, and other plants; and xeriscaping.*

iv. *Replacement of a tree in its existing location and planting of a new tree within 40 feet of the building.*

v. *Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.*

vi. *Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a character-defining feature of a historic property.*

vii. *Maintenance, repair, rehabilitation, replacement, and installation of green infrastructure either in previously disturbed ground, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the building.*

viii. *Removal of concrete or asphalt ground surfaces or replacement of such surfaces with permeable ground surface materials.*

ix. *The following activities conducted to address fire threats within 200 feet of a building or auxiliary structure:*

a. Disposal of heavy accumulations of ground litter and debris.

b. Removal of small conifers growing between mature trees, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*.

d. *Maintenance, repair, rehabilitation, replacement* and removal of the following elements, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Vault toilets.

e. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter that do not impact *ground surface materials* 45 years or older or known historic properties.

f. *Installation* and removal of temporary construction-related structures, including scaffolding, barriers, screening, fences, protective walkways, signage, office trailers, and restrooms.

## 2. Work Related to the Building Exterior

The following activities do not require further Section 106 review when they are conducted on or near the exterior of a *building* and when they are conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building*, or to enhance the *climate resilience* of the *building*:

a. *Rehabilitation, replacement, and installation* of any of the following elements: on a *building* less than 45 years old and not known after a *records check* to be a *historic property*; on a *building* the *federal agency* or another *federal agency* has determined to not be a *historic property* within the preceding ten years; or on the *non-primary façade* of a *historic building* or on the *non-primary façade* of a *building* whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the *primary right-of-way*:

i. Doors, including insulated exterior doors.

ii. Windows, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.

iii. Canopies, awnings, and solar shades.

iv. Roofing, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; white roofs or cool roofs; and green, sod, or grass roofs.

v. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.

vi. *Solar energy systems*.

vii. Elevator systems.

viii. Chimneys.

ix. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, and frieze board vents.

x. Siding.

xi. Energy and water metering devices.

b. *Maintenance, repair, and in-kind replacement* of the following elements on, or in the case of *clean energy technologies* near (as further provided below), any *building*:

i. Any element listed in Section 2.a. of this Appendix.

ii. *Clean energy technologies*.

iii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.

iv. Repointing of mortar joints with mortar similar in composition, joint profile, color, hardness, and texture of existing mortar.

c. *Maintenance, repair, rehabilitation, replacement, installation*, and removal of any of the following elements on or near a *building*, provided that such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Foundation vents, if painted or finished to match the existing foundation material.

iv. *Green infrastructure*.

v. Gray water systems.

d. Paint on previously painted exterior surfaces.

e. *Rehabilitation, replacement, and installation of clean energy technologies*, provided that:

i. Such technology is located either outside the boundaries of a *historic district*, or on the non-primary façade side of a *historic building*, or in a location not otherwise visible from the *primary right-of-way*; and is located on the same lot as or on an adjacent lot to that *building* or *buildings*, or in the case of a *community solar system*, in a lot within two blocks or two thousand feet (whichever is longer) of the *building* or *buildings* served;

ii. Such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*;

iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted *solar energy system* may be visible from the *primary right-of-way* if it is installed with methods that do not irreversibly damage historic materials, sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.

### 3. Work Related to the Building Interior

The following activities do not require further Section 106 review when they are conducted in the interior of a *building* and when they are conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building*, or to enhance the *climate resilience* of the *building*:

a. *Maintenance, repair, rehabilitation, replacement, and installation* of any of the following elements:

i. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, where such insulation can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.

ii. Spray foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch *historic building materials*, and can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.

iii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.

b. *Maintenance, repair, rehabilitation, replacement and installation* of any of the following elements, if such activity does not result in physical changes visible from the *primary right-of-way*, and has no visual *effect* on the *primary spaces* of a historic *building*:

i. *Mechanical systems*, including but not limited to heating, ventilating, and cooling components such as furnaces, heat pumps, electric furnaces, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, heat pumps, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, and refrigeration lines.

ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.

iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.

iv. Electronic ignition devices.

v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.

vi. Water conservation measures, such as low flow faucets, toilets, shower heads, urinals, and distribution device controls.

vii. Light fixtures, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.

viii. *Building energy control systems.*

ix. EnergyStar (or similarly rated) appliances.

x. Battery energy storage systems.

#### 4. Other Activities

The following activities do not require Section 106 review:

a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of *buildings*.

b. Feasibility studies related to energy efficiency improvements, *electrification*, improvements incorporating *clean energy technologies*, and other topics relating to *building* energy use.

c. Leasing, refinancing, acquisition, or purchase by the *federal agency* of energy efficiency, *electrification*, and *clean energy technologies*, provided that any changes in use or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such technologies must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

d. *Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment* satisfying the *EVSE criteria*.



## APPENDIX B-2: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

### 1. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to a *building* or on the same lot as a *building*, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Rehabilitation, replacement, installation*, and removal of any of the following elements which are either less than 45 years old and create *new ground disturbance in previously undisturbed soils*, or 45 years or older, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*; or *if the area of potential effects has been previously field surveyed (acceptable to current state or Tribal standards or within the past ten years) and, if applicable, has been subject to consultation with Indian Tribes and Native Hawaiian organizations without such survey or consultation identifying any historic properties*

i. Any element listed in Section 1.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section.

ii. Any element listed in Section 1.d. of Appendix B-1, unrestricted by any limiting conditions found in such Section.

b. Planting of a new tree 40 feet or more from a *building*, or *replacement or installation of green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*, if a *qualified authority* makes a written determination that such planting will have no *adverse effects* on any *historic property*.

### 2. Work Related to the Building Exterior

The following activities do not require further Section 106 review when conducted on, or in the case of *clean energy technologies* near (as further provided below), the exterior of a *building*, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Rehabilitation, replacement, and installation* of the following elements visible from the *primary right-of-way* and on the exterior of: *buildings* 45 years or older if a *qualified professional* determines that the *building* is not a *historic property*; or *buildings* 45 years or older determined by a *qualified professional* to be a *historic property*, if a *qualified professional* makes a written determination that such *installation or replacement* will have *no or minimal adverse effects* on any *character-defining feature* of a *historic building*; provided, however, that an analysis of *adverse effects* must consider *technical feasibility* and *economic feasibility*, including long-term operational costs and *climate resilience* of the *building* upon which elements are installed or replaced:

i. Any element listed in Section 2.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section.

b. *Rehabilitation, replacement, or installation* of any of the following elements on or near a *building*, which create *new ground disturbance* on previously undisturbed ground, if a *qualified*



*authority* makes a written determination that such activities will have no *adverse effects* on any *historic property*:

i. Any of the elements listed in Section 2.c. of Appendix B-1.

ii. *Clean energy technologies*, when located or configured in a manner other than that identified in Section 2.e. of Appendix B-1.

c. Replacement of *historic building materials* of *historic housing* with *in-kind* or *substitute building materials* to improve energy efficiency after the *federal agency*, with the assistance of a qualified professional *as needed*, conducts the following selection procedure:

i. Characterize existing *historic building materials* in terms of condition, design, material properties, performance, safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*;

ii. Next, determine, based on an evaluation of *technical feasibility* and *economic feasibility*, if *historic building materials* can be *repaired* or if they must be replaced;

iii. Next, if *replacement* is required, identify potential *in-kind* and *substitute building materials* and evaluate their *technical feasibility* and *economic feasibility*;

iv. Finally, based on such evaluation, select the most appropriate *in-kind* or *substitute building material*;

provided, however, that a *federal agency* may only utilize this selection procedure if such *replacement* or demolition does not create *ground disturbance*, *exclusively affects previously disturbed ground*, or, in the opinion of a *qualified authority*, has no *adverse effects* on any *historic property*.

### 3. Work Related to the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of a *building*, and when conducted primarily to *reduce energy use* or *greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. In addition to those activities listed in Section 3 of Appendix B-1, *maintenance*, *repair*, *rehabilitation*, *replacement*, and *installation*, and the *abatement* of *hazardous materials*, where such activity results in physical changes to a *historic building* visible from the *primary right-of-way* or has a visual effect on the *primary spaces* of a *historic building*, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*.

## APPENDIX C-1: CLIMATE-FRIENDLY TRANSPORTATION-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Work on Ground Surfaces

The following activities do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials*, and they are located entirely within the *previously disturbed right-of-way*:

a. *Maintenance, repair, rehabilitation, replacement, and installation* of the following elements when used for or incorporated into pedestrian, bicycle, *micromobility vehicle*, or *transit* infrastructure:

i. *Ground surface material*, including *installation* of slurry seals, overlays, and seal coatings; sealing and *repairing* cracks; milling and re-paving; *repair* of potholes; and restoration after utility *installation*.

ii. *Curb*.

iii. *Sidewalk*.

iv. *Bulb out*.

v. *Ramp*.

vi. *Crosswalk*, including a raised crosswalk across a roadway and a raised intersection.

vii. *Mark on the ground surface for visibility and delineation*, including striping for *bicycle lanes*, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, *bicycle parking*, *micromobility parking*, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.

viii. *Detectable warning on or before a curb, entry point, crosswalk, or accessible facility*.

ix. *Island*, including a pedestrian island to reduce crossing distance or improve visibility, and a corner island to separate bicycles from motor vehicles or enable a protected bicycle queuing area or motor vehicle waiting zone.

b. *Maintenance, repair, rehabilitation, replacement, and installation* of the following *ground surface materials* and elements:

i. *High friction surface treatment*.

ii. *Cool pavement*.

iii. *Permeable ground surface materials*.

iv. *Rumble strip*.

vii. *Traffic calming device*, such as speed hump, speed table, raised crosswalk, and raised intersections.

c. *Elevation of no more than 10 inches of the existing ground surface to maintain, create, or connect pathways for pedestrians, bicyclists, or micromobility vehicle users, or to facilitate boarding and disembarking at transit facilities*.

## 2. Work Involving Fixtures and Equipment

The following activities do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials*, they are located entirely within the *previously disturbed right-of-way*, and they follow the specifications of a *recognized design manual* (if and to the extent covered in any such manual):

a. *Maintenance, repair, rehabilitation, replacement, and installation* of the following elements when used for or incorporated into pedestrian, bicycle, *micromobility vehicle*, or *transit* infrastructure:

i. *Bicycle rack.*

ii. *Micromobility parking corral.*

iii. *Bicycle rail* or wheel stop no taller than 6 inches.

iv. *Flex post* no taller than 36 inches and no larger in circumference than 22 inches.

v. Bollard no taller than 48 inches and no larger in diameter than 12 inches.

vi. Concrete or stone block no taller than 24 inches and no wider than 6 inches, to protect *bicycle parking* or *micromobility parking* or to delineate a pedestrian pathway.

vii. Sign, signal, traffic control device, and signalization, including any such elements that address the requirements of the Americans with Disabilities Act.

viii. Ticket dispensing structure, fee collection structure, interpretive wayside exhibit structure, and single-post metal or wooden sign 5 feet or less in height and 2 square feet or less in cross-section area, not including provisions for solar power.

ix. Camera, intelligent transportation systems, and other technological equipment limiting, removing, or identifying unauthorized traffic from pathways dedicated to walking, biking, *micromobility vehicle* use, or *transit* use.

x. Temporary construction fencing, but not grading, creating a soil borrow pit, or other *significant excavation*.

b. *Maintenance, repair, rehabilitation, replacement, and installation* of street furniture, including the following elements, provided that such activity does not result in the removal of historic street furniture:

i. *Bench.*

ii. *Table.*

iii. *Freestanding planter.*

iv. *Street light.*

v. *Shelter for transit users with a combined dimension (length plus width plus height) less than 30 linear feet and with advertising space no greater than 24 square feet visible at any one time; and maintenance, repair, and in-kind replacement of any other such shelter.*

c. *Maintenance, repair, rehabilitation, and in-kind replacement* of the following elements:

- i. Catenary system.
- ii. Tracks, including ballasts and ties.
- iii. Camera, mast, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.

### 3. Work Relating to Vegetation and Landscapes

The following activities occurring within the same *right-of-way* or on the same lot as *climate-friendly transportation infrastructure* do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials*, and further provided that they exclusively affect *previously disturbed ground* or create no new *ground disturbance*:

a. Any of the following landscaping, grounds, and water management activities:

- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.
- ii. Planting of any of the following that are native, naturalized, drought-adapted, drought-resistant, drought-tolerant, water-wise, or xeric: grass, shrubs, and other plants; and xeriscaping.
- iii. *Replacement* of a tree in its existing location and planting of a new tree on, along, or within a street that already has street trees.
- iv. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.
- v. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.

b. *Maintenance, repair, rehabilitation, replacement, or installation of green infrastructure* or landscaping to delineate pedestrian pathways or *bicycle lanes*, provided such *green infrastructure* or landscaping follows the specifications of a *recognized design manual* (if and to the extent covered in any such manual).

### 4. Work on Bridges

The following activities related to a bridge built to serve pedestrian, bicycle, *micromobility vehicle*, or *transit* use do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials*; further provided that they exclusively affect *previously disturbed ground* or create no new *ground disturbance*; and further provided that the bridge is: either less than 45 years old and not known after a *records check* to be a *historic property*, or has been determined by the *federal agency* or another *federal agency* to not be a *historic property* within the preceding ten years:

- a. *Maintenance, repair, rehabilitation, and in-kind replacement* of drains, joints, joint seals, concrete decks, parapet, rail, concrete, steel elements, bearings, retaining walls, and bridge machinery.
- b. Cleaning and washing.

c. Conducting electrochemical extraction and cathodic protection.

d. Mitigating cracks, including pin-and-hanger *replacement* and other retrofits.

e. Implementing countermeasures against scour.

## 5. Other Activities

The following activities do not require Section 106 review:

a. Leasing, refinancing, acquisition, or purchase by the *federal agency* of:

i. A railway *right-of-way* for the *maintenance*, development, or expansion of either rail-to-trail pathways or passenger rail service;

ii. A *transit-oriented development building*; or

iii. Fleets of bicycles, hybrid or electric vehicles, or electric locomotives,

provided that any physical activities related to such properties must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

b. Transfer, lease, or sale of a federal government-owned *climate-friendly transportation facility* or *transit-oriented development building* from one *federal agency* to another *federal agency*, provided that any changes in use or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such facility must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

c. Transfer, lease, or sale out of federal ownership or out of federal control of a historic *climate-friendly transportation facility* or *transit-oriented development building*, provided there are adequate and legally enforceable restrictions or conditions (such as in a deed covenant) to ensure long-term preservation of the property's historic significance in accordance with 36 C.F.R. § 800.5(a)(2)(vii).

d. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, *micromobility vehicle*, or *transit* uses, including “play streets,” “school streets,” “safe route to school” streets, or “open streets,” provided that any physical activities related to such decisions, including but not limited to the *maintenance, repair, rehabilitation, replacement, or installation* of streets for the purpose of limiting motor vehicle access, must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

e. *Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment* satisfying the *EVSE criteria*.

## APPENDIX C-2: CLIMATE-FRIENDLY TRANSPORTATION-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

The following activities do not require further Section 106 review after the satisfaction of the identified conditions, exclusions, or requirements:

### 1. Work on Ground Surfaces

The following activities do not require further Section 106 review, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. Elevation of the existing ground surface by more than 10 inches, or that will result in the demolition or *removal of potentially historic ground surface materials*; to maintain, create, or connect pathways for pedestrians, bicyclists, or *micromobility vehicle* users, or to facilitate boarding and disembarking at *transit* facilities.

### 2. Work Involving Fixtures and Equipment

The following activities do not require further Section 106 review, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. Any activities listed in Section 2.a. of Appendix C-1 that will result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials*, or create new *ground disturbance* in previously undisturbed soils, or result in the removal of historic street furniture.
- b. *Rehabilitation, replacement, and installation* of a shelter for *transit* users with a combined dimension (length plus width plus height) 30 linear feet or more, or with advertising space more than 24 square feet visible at any one time.
- c. *Installation* of the following new elements that will result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials* or that create new *ground disturbance* in previously undisturbed soils:
  - i. Catenary system.
  - ii. Tracks, including ballasts and ties.
  - iii. Camera, mast, wiring, and other equipment and fixtures used for automatic traffic enforcement, to monitor motor vehicle traffic, or for security purposes.

### 3. Work Relating to Vegetation and Landscapes

The following activities do not require further Section 106 review, even if they create new *ground disturbance* in previously undisturbed soils, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. *Planting of a new tree on, along, or within a street that has not previously had street trees*, or in other locations where such planting is intended to improve the experience for pedestrians, bicyclists, *micromobility vehicle* users, or *transit* users.
- b. *Maintenance, repair, rehabilitation, replacement, or installation of green infrastructure and landscaping related to pedestrian pathway or bicycle lane delineation that will result in the*

demolition or removal of *potentially historic ground surface materials* or will create new *ground disturbance*.

#### 4. Work on Bridges

The following activities do not require further Section 106 review, even if they create new *ground disturbance* in previously undisturbed soils, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. Activities listed in Section 4 of Appendix C-1 and conducted on historic bridges.
- b. *Rehabilitation, replacement, or installation* of a bridge built to serve pedestrian, bicycle, *micromobility vehicle*, or *transit* use.

**APPENDIX D: FORMAT FOR AUTHORIZATION BY AN INDIAN TRIBE FOR USE OF THIS PROGRAM COMMENT ON ITS TRIBAL LANDS**

On behalf of [NAME OF INDIAN TRIBE] and as a duly authorized representative of such Tribe, I authorize federal agencies to utilize the Program Comment on Housing on the Tribal Lands of the [NAME OF INDIAN TRIBE]. This authorization is in effect until the withdrawal or termination of the Program Comment or on the date of receipt by the Executive Director of the Advisory Council on Historic Preservation that [NAME OF INDIAN TRIBE] has rescinded its authorization, which it may do at any time.

For further information, please contact: [Tribal Contact; Name and Contact Information].

Signed by:

[Signature]

Name:

Title:

Date:

Acknowledged and accepted by the ACHP:

[Signature – leave blank]

Name:

Title:

Date:





IDAHO STATE  
**HISTORICAL  
SOCIETY**



**Brad Little**  
Governor of Idaho

**Janet Gallimore**  
Executive Director  
State Historic  
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**Idaho State Museum:**  
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**Idaho State Archives  
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**State Historic  
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**Old Idaho Penitentiary  
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HISTORY.IDAHO.GOV

8 October 2024

Sara C. Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001-2637

via Electronic Mail

**RE: Draft *Program Comment on Accessible, Climate-Resilient, and Connected Communities***

Dear Chair Bronin,

The Idaho SHPO is submitting comments on the most recent draft of the proposed *Program Comment on Accessible, Climate-Resilient, and Connected Communities* (PC). We understand that the goals of this proposed PC are to (1) advance the principles described in the ACHP *Policy Statement on Climate Change* (adopted 16 June 2023) and (2) expedite the review of projects that have minimal to no potential to affect historic properties, if they are present. Generally, we find these commendable goals but note that the progress of the PC-development process has been swift. We encourage the ACHP to consider allotting more time to the consultation process to ensure all parties are in agreement that consultation has been meaningful and appropriate prior to proceeding with adoption of a PC.

Additionally, we have concerns that combining three programmatic areas into a single PC will lead to confusion and misreading of the document. From our perspective, the proposed PC would be a better and easier tool to utilize if subdivided into three separate program alternatives: an exemption-based Program Comment focused on exempting specific housing and energy efficiency related activities from Section 106 review which have little to no potential to impact historic properties; a program alternative focused on streamlining and expediting Section 106 consultation on housing and energy efficiency related activities if certain conditions are met; and a program alternative focusing on transportation related undertakings that can be streamlined if certain conditions are met. Our recommendation is that the latter two be nationwide Programmatic Agreements or prototype Programmatic Agreements rather than Program Comments. National prototype programmatic agreements are particularly ideal because they include consultation with interested parties in each individual state, a fundamental cornerstone of the NHPA. However, our primary point is that we believe all parties would be better served with three discrete documents.

Our primary concerns with the PC as currently written are discussed below. We have included specific requests for revisions.



- *Coordination with Other Reviews:* The standard Section 106 process is often done concurrently with various other reviews. In relation to housing and energy efficiency projects, other reviews commonly include local planning and zoning codes, as well as federal and state tax incentive programs. For transportation projects, the requirements of Section 4(f) must be met (23 CFR 774). While it is likely not possible to consider all local and state codes/requirements, the requirements associated with federal tax incentives and Section 4(f) should be integrated into the PC to avoid confusion, with the existing qualification in Stipulation II.B that a Section 106 program alternative cannot modify the requirements associated with any other laws. If activities in the appendices would not allow a project to qualify for tax incentives or a *de minimis* finding under Section 4(f), those activities should be specifically identified, if not removed.
  - *Request:* (1) Ensure that Appendices A and B are consistent with the *Secretary of the Interior's Standards for Rehabilitation* (36 CFR 67) which are regulatory standards for the federal tax incentives program and (2) Ensure that Appendix C is consistent with a Section 4(f) *de minimis* finding, if the Appendix is not removed
- *Area of Potential Effect (APE) Definition and Guidance:* We note that the current draft PC does not include guidance on establishing an appropriate APE. A fully exemption-based PC would not need guidance on establishing an APE, but we feel that, as currently designed, this PC does, as it goes beyond exemptions and streamlines review for many activities *if* they will not have adverse effects to a historic property. Additionally, Section II.E.3 specifies that the PC is not applicable when an undertaking "would occur on or have the potential to affect" specific types of historic properties, but it is unclear how the potential to affect will be determined without guidance on establishing an APE. We note also that Appendices A-2, B-2, and C-2 include language such as the "activity will have no adverse effects on any historic property." A more robust discussion of APE would be helpful to ensure that these findings of effect are made in a consistent and uniform manner, and the appendices are being applied in the manner intended.
  - *Request:* Insert a stipulation with additional discussion and guidance on APE, specifically for activities listed in Appendices A-2, B-2, and C-2 (streamlined activities).
- *Historic Property Identification Efforts:* Section III.D states that "the undertakings covered by this Program Comment, due to their nature and potential effects, do not require a federal agency to determine whether an involved or affected property is a historic property except



where explicitly stated.” While we agree that many of the activities listed in the appendices (particularly Appendices A-1, B-1, and C-1, which we consider exempted activities appendices) would not result in an adverse effect if historic properties were present, we feel that additional guidance on identification efforts is necessary, particularly for activities listed in Appendices A-2, B-2, and C-2 (streamlined activities). We suggest that, at minimum, agencies should be required to consult SHPO/THPO site databases, with the APE informing the record search area, as is the case with the nPA for FCC. We also suggest that guidance on reasonable fieldwork identification efforts would be helpful.

- *Request:* Insert a stipulation with additional discussion and guidance on reasonable and good-faith historic property identification efforts within the APE for Appendices A-2, B-2, and C-2.
- *Eligibility Determinations by a Qualified Authority:* The current draft of the PC requires the use of qualified authorities, an umbrella term to include both individuals meeting the Secretary of the Interior’s Professional Qualification Standards (qualified professional) and individuals with indigenous knowledge-based expertise (Stipulation III.C), in certain situations. We note that, throughout the body of the PC, the terms “qualified authority” and “qualified professional” are not used consistently and suggest that it would be helpful for the distinction to be clarified prior to finalization.

We also note that within the appendices, there are multiple instances where activities may be streamlined if a property “has been determined by the federal agency or another federal agency to not be a historic property” (Appendix C-1.4). This should be specific that those making the determination must be appropriately qualified, or should require SHPO/THPO concurrence, or a determination made by the Keeper of the National Register. Further, as you know, the National Historic Preservation Act directs SHPOs, “in cooperation with Federal and State agencies, local governments, and private organizations and individuals, direct and conduct a comprehensive statewide survey of historic property and maintain inventories of the property.” If a federal agency is identifying historic properties and making determinations about eligibility, it is critical that this information be shared with SHPOs for concurrence to ensure: all parties have up-to-date information; PC users are applying the document appropriately; and future Section 106 consultation involving the same properties is based on consistent information between the agency and the SHPO.

- *Request:* (1) Insert language specifying that federal agency representatives who are making eligibility



determinations are appropriately qualified. (2) Require concurrence by SHPO/THPO on all new/changed eligibility determinations that have not had prior SHPO/THPO concurrence, (3) Require agencies to submit appropriate documentation of new/changed eligibility determinations to SHPO/THPO, and (4) Require all potential historic properties (sites unevaluated or needing additional data to evaluate) are treated as eligible historic properties for the purposes of the PC.

- *Annual Reporting and Meetings:* Section X stipulates that federal agencies must submit an annual report to ACHP for the first five years of the PC and every three years thereafter. While we understand that preparing an annual report is a time-consuming administrative task for agencies, we feel that the efficiencies provided by the PC are extensive enough that agencies should be able to produce a report annually throughout the duration of the PC. We request that this report is submitted not only to ACHP but also to the relevant SHPO/THPO offices so that SHPOs/THPOs can provide more useful feedback to ACHP during the Annual Meetings, which we also request to continue throughout the life of the PC. Without a full list of the undertakings exempted/streamlined under the PC, SHPOs may not be able to give accurate feedback on the effectiveness of the PC and its implementation and will be limited in the ways they can help propose adjustments and additions. We suggest that ACHP include a template for the annual report with the PC to maintain consistency across agencies and provide agencies with a predictable deliverable to add to their workload.
  - *Request:* (1) Require annual reporting and meetings throughout the duration of the PC, (2) Include an annual report template with the PC, and (3) Require annual reports to be submitted to relevant SHPOs/THPOs in addition to ACHP
- *Organization of the Appendices:* We note that the appendices are organized by type of undertaking (housing related, climate smart building, and transportation) and within each type there are two subsections, where subsection 1 generally contains a list of exempted activities not requiring Section 106 review on a project-by-project basis, and subsection 2 generally contains a list of activities where consultation may be streamlined/expedited if certain conditions are met. Many of the conditions in subsection 2 involve effect findings made by a qualified professional, where the qualified professional makes a written determination. We request these written documents be sent to the appropriate SHPO/THPO. Our preference is for the written determinations to be sent to SHPO/THPO for consultation prior to project implementation so that we can involve ACHP if any serious



flaws in the qualified professional's work exist that would adversely affect historic properties (e.g., they did not consider effects to a nearby historic district or consider whether the property may contribute to a historic district). We also suggest that guidance and/or a template for this written justification is included with the PC to help clarify the expectations of the written documentation and ensure the appropriate information is provided.

- *Request:* (1) Reorganize the appendices so that all activities requiring a finding or monitoring by a qualified professional/authority are moved to subsection 2, (2) Include a template for the written determinations/justifications required under subsection 2, and (3) Include a process for SHPO/THPO notification/review of the written determinations for these streamlined undertakings.
- In addition to our general comments regarding the structure and content of the PC, we have several specific concerns related to items within the appendices:
- "*Installation:*" We find that the inclusion of *installation* in many of the appendices creates exempted actions that are too broad and, as a result, have the potential to adversely affect historic properties. The current draft of the PC defines installation as "the action or process of placing or fixing something, including but not limited to materials, mechanical systems and components, appliances, and equipment, or of being installed, in a particular location." This definition suggests that new features, equipment, and systems may be installed without any parameters as to size, location, visibility, etc.
  - *Request:* (1) Refine the definition of installation to include only installation of replacement systems/parts when the replacement remains in the original location and is roughly the same size, and (2) Remove installation of new features from activities exempted under the PC
- "*Replacement:*" We note that several activities in the appendices include replacement, which the PC defines as "substitution of new element for an existing element, which may require a change in size, dimension, location, and configuration, in order to improve the function and condition of the element or the broader system of which the element is a part." As above, this definition suggests that new features, equipment, and systems may be installed without any parameters as to size, location, visibility, etc. and therefore have the potential to adversely affect historic properties. To ensure that historic properties will not be affected by replacement activities, we feel that replacement



should be conditioned as “replacement in kind” within the appendices (particularly the exemption appendices).

- *Request:* Revise the activities in the appendices to include “replacement in kind” as opposed to “replacement”
- *Transfer, Lease, or Sale out of Federal Ownership/Control:* We are uncomfortable with the inclusion of transfer, lease, or sale out of federal ownership or federal control (Appendix A-1.5.e and Appendix C-1.5.c) without very specific requirements regarding what constitutes “adequate and legally enforceable restrictions or conditions to ensure long-term preservation of the property’s historic significance.” In Idaho there are very few entities with the qualified expertise to hold covenants/easements and review future projects for appropriateness; SHPO review and involvement on a case-by-case basis is critical.
  - *Request:* Remove these actions from the PC and require individual consultation with SHPO/THPO when transfer, lease, or sale out of federal ownership/control will occur
- *Emphasis:* Within the appendices, we note that several exempted activities are included when “less than 45 years old.” We recommend adding bolded emphasis to the age within these sections.
  - *Request:* Use bold font on “less than 45 years of age”

Overall, the ID SHPO is supportive of the ACHP’s goals to expedite consultation to facilitate the implementation of climate friendly transportation; to aid in providing accessible, energy efficient housing; and to further the adoption of “green” energy production at the household and community levels. We do, however, question whether a combined PC is the most appropriate program alternative to utilize and feel that it would benefit from being subdivided into three different program alternatives: an exemption based Program Comment focused on exempting specific housing and energy efficiency related activities from Section 106 review which have little to no potential to impact historic properties; a nationwide Programmatic Agreement or prototype Programmatic Agreement focused on streamlining and expediting Section 106 consultation on housing and energy efficiency related activities if certain conditions are met; and a nationwide Programmatic Agreement or prototype Programmatic Agreement focusing on transportation related undertakings that can be streamlined if certain conditions are met. If this PC moves forward, we hope that you will take the above-discussed comments into consideration when crafting a final document.

Thank you for your consideration.



IDAHO STATE  
**HISTORICAL  
SOCIETY**

Sincerely,

**Tricia Canaday**  
**Deputy State Historic Preservation Officer, SHPO Administrator**  
**Idaho State Historic Preservation Office**

**CC:** Erik Hein, NCSHPO  
Christina Hingle, NCSHPO



October 9, 2024

Sara C. Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001-2637

Dear Chair Bronin:

Thank you for the opportunity to comment on the Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities (Program Comment). Knowing that other State Historic Preservation Offices (SHPO) and preservation community members have shared their concerns in-depth, this letter is sent to express solidarity with those concerns without reiterating each one.

The needs outlined in the Program Comment to address affordable housing, climate resiliency, and transportation connections are important. We work with property owners, developers, and community leaders daily who are navigating those challenges while balancing maintenance of the character of their property and community as unique and vibrant places. Education is key to counter the implication that preservation and Section 106 are hindering the ability of people to address these challenges. Streamlining reviews can and should be pursued where it is clear no adverse impacts will harm historic properties. Unfortunately, this Program Comment exempts a wide swath of activities without thorough consideration or consultation on effects and little transparency for agency decisions or accountability for decisions that go wrong.

As with other Program Comments reviewed recently, our biggest concern is the lack of qualified individuals to advise federal agencies. Our estimate is that 80%-90% of requests for comment that we receive do not include a determination and most do not have a basic level of information in the submission that would allow SHPO staff to assist with the determinations. Much time is spent asking for additional information to even understand the request. Many agencies rely on SHPO staff to conduct background research and suggest a determination. SHPOs are the "qualified professional/authority" in most cases because federal agencies do not have an architectural historian or archeologist on staff. Some that do have those professionals, tend to not utilize them to conduct the background review and provide a determination to us. If this is the case under existing procedures, what accountability will there be for agencies and their designees under the Program Comment who continue to operate without qualified personnel and now without SHPO review as a check and balance? The dispute resolution process is not workable when reporting does not capture all projects, and reports are not shared transparently.

Additionally, archeological site records are not open to the public and we do not make our database open to individuals who are not qualified under the Secretary of the Interior's *Professional Qualification Standards*. Federal agencies who traditionally count on SHPO archeologists to inform them if there are sites in the area and the potential impact the project will have to these sites will either work blindly trying to assess impacts, or worse, will be ignoring potential impacts and clearing projects to proceed.

We have found Programmatic Agreements (PA) with federal agencies and designees to address specific property types or project circumstances work best. We have valuable relationships with many agencies and work closely with partners within understood procedures laid out by those PAs. We echo the comments detailed by the National Conference of State Historic Preservation Officers (NCSHPO) recommending that the transportation sections of the draft Program Comment be separated out into another Program Alternative and



reiterate the comments of others that even the housing and climate resiliency pieces should be addressed separately. This would provide an opportunity to make them as clear as possible while considering that different states and regions of the country will have different needs.

In summary, the Kansas SHPO supports efforts to streamline review procedures and make the Section 106 process as effective as possible especially for projects that address affordable housing, climate change, and transportation. However, as stated by other SHPOs and preservation partner organizations, this combined Program Comment is too broad, and definitions are too vague to ensure that historic properties are being adequately considered in the decision-making processes of federal agencies. We urge the Advisory Council to hold off on adoption of this draft Program Comment and seek out additional consultation with SHPOs, Tribes, CLGs, federal agencies, and other stakeholders to thoroughly think through the ramifications of the exemptions included.

Sincerely,

A handwritten signature in black ink that reads "Patrick Zollner". The script is fluid and cursive, with the first name and last name clearly distinguishable.

Patrick Zollner  
Kansas State Historic Preservation Officer  
Executive Director, Kansas Historical Society

A handwritten signature in blue ink that reads "Katrina L. Ringler". The script is fluid and cursive, with the first name and last name clearly distinguishable.

Katrina L. Ringler  
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**CRAIG A. POTTS**  
EXECUTIVE DIRECTOR &  
STATE HISTORIC PRESERVATION OFFICER

October 8, 2024

Sara C. Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

**RE: Response to ACHP Proposed Program Comment on Accessible, Climate-Resilient, & Connected Communities**

Dear Chair Bronin,

Thank you for the opportunity to provide comments on the above referenced ACHP Program Comment proposal. Like many of our colleagues in the preservation field nationwide, Kentucky remains highly concerned regarding the practical application of this proposed Program Comment and the precedent it sets for the unilateral removal of states, territories, tribal nations and others from meaningful consultation with the federal government under the National Historic Preservation Act. This proactive step by the ACHP is unprecedented in its effort to prioritize the speed of federal decision making over the consulting party process. We often explain to our constituents that Section 106 Review is process focused rather than outcome focused. The nature of this proposed Program Comment runs counter to that long held tenet.

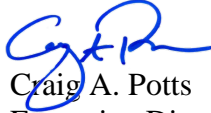
SHPO's play a unique role in Section 106 Review and are often required to educate federal agency representatives and citizens who can be equally unfamiliar with the associated regulations and the benefits of good-faith consultation. This practical experience on the "front lines" of Section 106 Review provides SHPO's with valuable perspective on the implementation of new policy proposals like this one, and we see significant problems with the current draft. Kentucky has taken the opportunity to consult closely with our SHPO counterparts through the National Conference of State Historic Preservation Officers and our collective perspectives are fully and appropriately conveyed in that organization's response. While we will not reiterate those comments here, it is important to note that we believe the draft currently under consideration will cause confusion in its practical application, will run counter to long established working relationships and agreement documents and will lead to less communication, accountability and transparency on the part of the federal government. We also believe it will streamline avoidable adverse effects.



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We respectfully request that the proposed Program Comment be withdrawn in favor of a tailored Nationwide or Prototype Programmatic Agreement that includes all appropriate consulting party comments to avoid or mitigate foreseeable adverse effects to historic properties while achieving reasonable and desirable efficiencies. Thank you once again for the opportunity to provide these comments. Should you have any questions please feel free to contact me at [craig.potts@ky.gov](mailto:craig.potts@ky.gov) or at 502-330-8362.

Sincerely,



Craig A. Potts  
Executive Director  
Kentucky Heritage Council and  
State Historic Preservation Officer



**The Commonwealth of Massachusetts**  
William Francis Galvin, Secretary of the Commonwealth  
Massachusetts Historical Commission

October 9, 2024

Sara C. Bronin  
Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

RE: Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities

Dear Chair Bronin:

Thank you for the opportunity to comment on the Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities.

The Massachusetts Historical Commission, office of the State Historic Preservation Officer, has several concerns with the Draft Program Comment and endorses the September 27, 2024 comments of the National Conference of State Historic Preservation Officers. Additionally, we endorse the comments of the Preservation Partners: American Cultural Resources Association American Institute of Architects, Asian & Pacific Islander Americans in Historic Preservation, National Alliance of Preservation Commissions, National Preservation Partners Network, Preservation Action, Society for American Archaeology, and Society for Historical Archaeology. In addition we support the comments of the SHPOs from various states.

While we support the efforts to streamline Section 106 consultation for undertakings with little or no effects on historic properties and to reduce MA SHPO Section 106 workload, the Draft Program Comment does not meet the goals of historic preservation and the Section 106 process in general.

The MA SHPO has the following comments on the Draft Program Comment:

- Specific terms used throughout the Draft Program Comment need more precise definitions. Without clearly defined terms, a broad interpretation will result in inconsistent outcomes, and will subsequently outcomes, and will subsequently lead to misunderstandings of which undertakings are covered by the Program Comment.
- The Draft Program Comment, as written, will create confusion within agencies as they try to follow their own policy goals. It will also lead to an inconsistent process, possibly creating longer review times. In our experience, a number of federal agencies rely heavily on SHPO staff for support and/or Section 106 compliance. The Draft Program Comment fails to acknowledge the need for professionally qualified staff at federal agencies who meet the Secretary of the Interior's Professional Qualification Standards.
- The Draft Program Comment does not meet public consultation requirements. Public consultation is a key requirement of the Section 106 process.

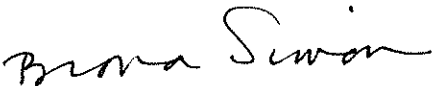
- The Draft Program Comment conflicts with the Secretary of Interior's Standards for Rehabilitation. The Secretary of the Interior's Standards for Rehabilitation must be followed, per regulation for the federal rehabilitation tax credit. The federal historic rehabilitation tax credit provides critical equity for a substantial amount of housing rehabilitation projects in Massachusetts. These housing projects often also rely on federal subsidies, loans, and low income housing tax credits to make the rehabilitations financially feasible, hence requiring a federal Section 106 review. The Draft Program Comment is not consistent with the requirements of the federal rehabilitation tax credit program. The Program Comment would need to be subordinate to the tax credit regulations. Rehabilitation and climate resiliency do not need to be mutually exclusive. The Stone Mill in Lawrence Massachusetts rehabilitation was just completed using state and federal historic rehabilitation tax credits putting 86 units of mixed-income rental housing into the community. The design met the Secretary of the Interior's Standards, preserving the historic character-defining features of the building while becoming a model for energy efficiency. The building received four inches of insulation, high-performance, triple-pane historic replica windows, creating an airtight building envelope making a high-efficiency electric only building.
- The Draft Program Comment does not offer any mitigation for adverse effects to historic properties. This is an important part of the Section 106 process.
- The exemptions for ground disturbance without a professional archaeological assessment could result in damage to archaeological sites and unmarked graves. Discoveries made during construction inevitably lead to project delays and cost over-rides.

The Draft Program Comment has no clearly defined terms, has a list of items that includes items that are not undertakings, does not follow the Secretary of the Interior's Standards for Rehabilitation, offers no public consultation, and provides no mitigation for adverse effects. It is essentially a blanket "approval" that is not consistent with the goals of the National Historic Preservation Act.

If the goal of the Program Comment is to decrease review time and reduce inefficiencies in the Section 106 process, then areas should be identified and targeted with more specific and focused program alternatives.

The Draft Program Comment should be withdrawn and the steps outlined in 36 CFR 800.14 should be followed.

Sincerely,



Brona Simon  
State Historic Preservation Officer  
State Archaeologist  
Executive Director  
Massachusetts Historical Commission

xc: Erik Hein, NCSHPO

Wes Moore, Governor  
Aruna Miller, Lt. Governor



Rebecca L. Flora, AICP, LEED ND / BD+C, Secretary  
Elizabeth Hughes, MHT Director and  
State Historic Preservation Officer

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## Maryland

### DEPARTMENT OF PLANNING

### MARYLAND HISTORICAL TRUST

October 2, 2024

The Honorable Sara Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308 Washington, DC 20001  
Sent via email to: [program\\_alternatives@achp.gov](mailto:program_alternatives@achp.gov)

Re: ACHP's Draft Program Comment on Accessible, Climate-Resilient and Connected Communities

Dear Chair Bronin:

Thank you for providing the opportunity to comment on the ACHP's proposed *Program Comment on Accessible, Climate-Resilient and Connected Communities*.

The Maryland Historical Trust (MHT), Maryland's State Historic Preservation Office (SHPO), is an active and legally mandated participant in Section 106 consultation for federal undertakings in Maryland. MHT typically consults on over 3,000 federal undertakings each year and an additional 2,000 state assisted projects. Through consultation with federal agencies, the recipients of their funds/permits/licenses, other defined consulting parties, and the public, we strive to facilitate the appropriate consideration of historic properties in project planning and delivery and to help ensure compliance with the Section 106 regulations.

MHT values the effectiveness of many current program alternatives applicable to Maryland, including Nationwide Programmatic Agreements, Program Comments, Exemptions, and multiple agency-specific programmatic agreements for federal agency programs and facilities in our state. Successful program alternatives include those with clearly defined goals and processes, and those developed through collaborative consultation with applicable parties. While we support the concept of the ACHP's proposed Program Comment, it is our opinion that the current draft needs considerable revision and further consultation with the full range of Section 106 participants and stakeholders in order to develop an achievable and defensible final document.

The proposed draft Program Comment (PC) would provide an alternative mechanism for all federal agencies to comply with Section 106 regarding the effects on certain *housing-related*, *climate-smart building-related*, and *climate-friendly transportation infrastructure-related* activities. While the basic premise for the PC is valid, specifically for eliminating and streamlining Section 106 reviews for certain categories of undertakings with *no or minimal potential to adversely affect historic properties*, we believe that the current draft is too expansive and cumbersome. More important, the proposed PC is inconsistent with key premises of the Section 106 process itself, and key relationships amongst preservation agencies and programs, specifically:

- It eliminates consultation with SHPOs and other defined consulting parties under Section 106 for a very wide-ranging group of not-necessarily related categories of housing, clean energy, and climate-friendly transportation infrastructure undertakings.

- It creates a definition of “undertaking” that is not aligned with current practice.
- It circumvents the Section 106 process by not requiring adequate efforts to identify and evaluate historic properties, including and especially landscapes and archaeological resources.
- It prioritizes the ACHP’s “policy statements” above the goals of the agencies and consulting parties who participate in the Section 106 process.
- It fails to reinforce the need for professionally qualified staff at federal agencies who meet the Secretary of the Interior’s *Professional Qualification Standards*.
- It creates unacceptable scenarios such as exemptions for adverse effects.
- It creates conflicts with guidance provided by the National Park Service related to the application of National Register criteria and the Secretary of the Interior’s *Standards*.
- It fails to address the delegation of federal agency responsibilities under Section 106 to funding or permit recipients or pass-through entities.
- The development of the PC does not follow the consultative and fact-based process that is expected of any federal agency that would propose a PC or other agreement document.
- The implementation of the PC would create conflicts with many other contractual agreement documents related to the Section 106 process that were developed in time-consuming and detailed processes and involve numerous federal agencies, SHPOs, and partners.
- The PC lacks reasonable dispute resolution provisions.
- The PC lacks specific goals, supporting data, solid reporting and measurable outcomes to gauge the impact of its implementation.

MHT offers the following comments on the draft PC, primarily focused on global issues rather than the detailed specifics of included project activities.

- MHT supports the basic premise of the PC for eliminating and streamlining Section 106 reviews for those categories of undertakings with *no or minimal potential to adversely affect historic properties*. However, the PC as drafted is too expansive and goes beyond this scope to include actions with the potential to adversely affect historic properties. For federal agencies electing to implement the PC, it would essentially eliminate the need for consultation with SHPOs, and other defined consulting parties under Section 106, for a very wide-ranging group of undertakings - many of which would involve historic properties.
- Consultation is one of the core principles of the Section 106 process established in the ACHP's regulations in 36 CFR Part 800. Key participants in the Section 106 process include the federal agency, SHPOs, tribes, local governments, applicants for federal assistance/permits/licenses, and other individuals and organizations with a demonstrated interest in the undertaking, along with the public. Consultation affords these parties the opportunity to comment on undertakings that may affect historic properties in their communities. Such input is vital to guiding project planning and the decision-making process for projects that may affect significant resources. The current draft PC would essentially eliminate this consultation and the associated benefits, transparency, and community engagement that such a consultation process provides.

- The categories of undertakings covered by the PC are too broad to be combined into a single PC. Other existing PCs developed by ACHP and federal agencies have focused on very specific agency programs, project categories, and resource types and reflect a manageable alternative approach to Section 106. At a minimum, this PC should be separated into two PCs – one focused on housing and climate-smart building-related undertakings and the other devoted to climate-friendly transportation infrastructure undertakings.
- The climate-friendly transportation infrastructure undertakings are generally more straightforward and as a class are less likely to result in adverse effects. States may already have Programmatic Agreements to address these project types as we do here in MD with FHWA and FTA. These project types would work well in a single PC.
- A PC that is focused on clearly defined activities not requiring further review/exemptions - those actions with *no or minimal potential to adversely affect historic properties* - would meet the stated goals and be easier and more defensible to implement. Including actions in the PC that have the potential to adversely affect historic properties, without achievable parameters and applicable consultation with SHPOs and consulting parties, creates challenges and concerns regarding effective implementation.
- How federal agencies will implement this PC is entirely unclear and left to the discretion of the agency. Other than cases where states may have existing PAs, there is no notification or consultation with SHPOs regarding the use of the PC (see Section II.C). SHPOs may be contacted by applicants for federal assistance for undertakings that may be covered by the PC, yet it is not the SHPO's decision whether an undertaking would be handled under the PC. This will likely lead to considerable confusion among applicants, consultants, SHPOs, and even federal agencies regarding an undertaking's applicable Section 106 status.
- It is unclear how federal agencies will handle consultation for undertakings that include BOTH activities listed under the PC Appendices as well as components that fall outside those parameters. Are SHPOs going to be consulting about partial undertakings as opposed to a project as a whole (see Section II.E and III.A)? Such a separation of project components will be confusing to consulting parties involved in the standard Section 106 consultation.
- The use of Qualified Authorities/Qualified Professionals (QAs/QPs) (Section III.C) is vague and does not have clearly defined parameters. Who is determining that an individual is a QA/QP? Is the federal agency confirming those qualifications? Is a federal agency providing preservation staff to meet those qualifications? The decisions of the QA/QP do not require any review or consultation with SHPOs, and there is a huge category of projects that will be exempted from 106 review if the QA/QP makes a finding of no historic properties or no adverse effect. In the standard Section 106 consultation process, SHPOs help provide quality control, ensure adherence to applicable standards, and facilitate compliance with Section 106. Including consultation with SHPOs, instead of some unspecified QP, for those actions that must meet certain parameters would help provide checks and balances to safeguard the appropriate treatment of historic properties.
- The PC asserts that Determinations of Eligibility (DOEs) are not needed (Section III.D) because "Undertakings covered by this PC, due to their nature and potential effects, do not require a federal agency



to determine whether an involved or affected property is a historic property except where explicitly stated.” However, for those activities where the QA/QP is determining their adherence to the Secretary of the Interior’s *Standards*, they would need to know if the involved resource was eligible or not. Such evaluations of National Register eligibility should involve SHPOs for consistency and adherence with 36 CFR 800.4(c).

- The applicability of Section IV: Assistance to Consulting Parties is unclear. Does it solely apply to tribes? Since the PC does not require consultation with SHPOs and other Consulting Parties, why is this language included? The language should be clarified or eliminated.
- Why does Section IV.E include *Carry out mitigation measures*? The premise of the PC is to address projects with no to minimal potential to have adverse effects, so mitigation should not be discussed.
- How would an individual or SHPO know that a given project has been covered under this PA, what federal agency was involved, etc., to be able to file a dispute over the implementation of the PC pursuant to Section VI: Dispute Resolution? SHPOs regularly receive inquiries from concerned public, local governments, and other non-profit organizations regarding projects taking place in their communities. How would SHPOs respond or redirect those inquiries appropriately when they had never been notified of the project?
- The PC duration is 20 years which seems excessive, particularly when the ACHP does not generally encourage MOAs or program PAs with a duration of more than 5 years. Given the expansive scope of this PC, it should have a more reasonable duration (5-10 years), with mechanisms for amendment and extension.
- Section X: Reports and Meeting does not have a very robust plan for federal agencies to report and ACHP to provide ongoing oversight of the effectiveness of this PC.
- Why is *mitigation* included in Section XI: Definition, since the premise of the PC is to address projects unlikely to have adverse effects?
- The defined use of *Primary Façade* is challenging and not consistent with the general treatment of historic properties and application of the Secretary of the Interior’s *Standards*.
- The definitions of *Replacement* and *Substitute building materials* are also problematic and should be consistent with those used in the Secretary of the Interior’s *Standards*.
- The various activities listed in the Appendices are cumbersome and confusing, particularly when they combine work at non-historic properties and work meeting certain parameters at historic properties. While there may be exemptions that we can agree to, activities fall into a gray area when they involve replacement materials, primary facades, QA/QPs applying the Secretary of the Interior’s *Standards* and making findings of no adverse effect, etc. Further consultation with all involved parties is needed to refine the activity list and provide clear separation and description of applicable activity types.
- Appendix C-1 and C-2 are probably the clearest with regard to the list and categories of activities. As noted above, these should be covered in a stand-alone PC focused on the transportation infrastructure actions.

- The flowcharts are both helpful and difficult to follow. Also, the flowcharts do not show a kick out for those activities where the QA/QP has **not** made a finding of no adverse effect. Those projects should follow the standard Section 106 consultation path and that should be represented on the flowcharts by notation and/or asterisk.
- There are no checks and balances in this PC. That is the role SHPO typically plays in the Section 106 consultation. QA/QPs will review and make findings under the PC, and unless an individual chooses to file a dispute, SHPOs will never know about these projects.
- The use/application of this PC may result in projects being ineligible for rehabilitation tax credits, where applicable, since many of the allowed activities are counter to recommended treatments in the Secretary of the Interior's *Standards*. That would seem to defeat one of PC's goals, to promote reuse of historic housing, and result in project sponsors not being able to leverage these financial incentives.
- If this PC goes into effect, it will impact and may conflict with the way SHPOs handle project reviews under their respective state historic preservation legislation, as well as conflict with local historic preservation requirements.
- MHT agrees with comments submitted by the Maryland Department of Transportation's State Highway Administration sent via email by Steve Archer on September 27, 2024.
- Finally, MHT endorses the comments and detailed edits on the PC provided by NCSHPO in Erik Hein's letter dated September 27, 2024.

MHT supports the implementation of Section 106 program alternatives that are defensible, transparent, well defined to achieve specific goals, and developed through good faith collaboration with all involved parties. We would support substantive reworking of the draft PC to incorporate the considerable comments provided by many consulting parties and produce a sound PC that meets the spirit and intent of a Section 106 program alternative. Thank you for your consideration of views shared on this proposed Program Comment.

Sincerely,



Elizabeth Hughes

Director / State Historic Preservation Officer

Cc: Erik Hein (NCSHPO)  
Steve Archer (MDOT SHA)



JANET T. MILLS  
GOVERNOR

MAINE HISTORIC PRESERVATION COMMISSION  
55 CAPITOL STREET  
65 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333

KIRK F. MOHNEY  
DIRECTOR

September 27, 2024

Sara C. Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001-2637

Dear Chair Bronin:

Thank you for the opportunity to comment on the Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities [Program Comment].

The need to create affordable housing and to adapt to a changing climate are pressing national needs. No one – and certainly not State Historic Preservation Offices [SHPOs] that are at the front lines confronting these issues on a daily basis – would dispute this. However, the proposed Program Comment fails to balance the pursuit of these policy goals with the values and benefits of historic preservation. In fact, it implies that historic preservation and the Section 106 process are a hindrance to achieving these broad policy goals without any evidence to support it. The Maine Historic Preservation Commission takes exception to this assertion. We also submit that the Program Comment fundamentally undermines important principles of the National Historic Preservation Act.

Sweeping in its scope, the proposed Program Comment exempts from Section 106 review a broad range of activities that are carried out by multiple federal entities and their designees with little to no consultation with or involvement from SHPOs or the public. It permits a decision-making process among federal entities and their designees that lacks transparency; establishes reporting requirements that are limited in scope and duration; and severely constrains the ability of SHPOs and other interested parties to raise concerns or seek recourse.

Among other shortcomings, the Program Comment focuses on the preservation of the primary facades of buildings, while largely dismissing the architectural relevance of secondary elevations. In addition, the Program Comment introduces the concept of “minimal adverse effects” which is not defined here and does not exist in the Advisory Council on Historic Preservation’s [ACHP] regulations; it does not discuss mitigation; and it has a duration that is not consistent with guidance provided by the ACHP for other program alternatives that the Maine SHPO has recently been party to.

Maine’s inventory of historic properties (both archaeological and above ground) is not by any means comprehensive. In addition, other potential sources of information such as town assessor’s records are – at least in Maine – notoriously inaccurate in the dating of older buildings. Since most federal agencies and designees with whom we interact (particularly those

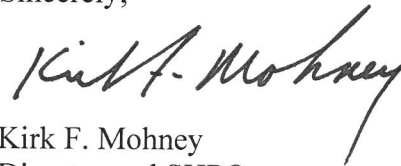
engaged in housing related activities and climate smart building related activities) lack the professionally qualified staff to determine if an historic property is present in a project's area of potential effect, they rely on our staff to do that. Furthermore, in our experience very few federal agencies (let alone its designees) have access to a "qualified authority" who possesses the knowledge of local and statewide patterns of history and architectural history to make decisions about significance without consulting the SHPO. In Maine, if the SHPO is removed from the consultation process, it is highly likely that historic properties will be adversely impacted by well-meaning but ill-equipped agencies and individuals.

Maine's programmatic agreement (PA) for transportation related activities and the supporting standard operating procedures prepared by the Maine DOT lay out a detailed and predictable process for implementing Section 106 that involves the SHPO pursuant to Section 101(b)(3) of the National Historic Preservation Act and the Council's regulations in 36 CFR Part 800. This PA has streamlined the Section 106 process for a broader group of transportation related activities than those identified in the proposed program comment. Allowing the Program Comment to be used at the federal agency's discretion instead of the existing PA will introduce confusion and inconsistency in the planning of transportation projects in Maine. For this reason, we urge the ACHP to eliminate the program comment's applicability to so-called climate friendly transportation related activities.

The Maine SHPO supports efforts to reduce its Section 106 workload by entering into agreements in accordance with the provisions of 36 CFR Part 800.14. However, we also believe that the statutory role of the SHPO to represent a state's interests in protecting its historic properties must be acknowledged and respected. The proposed Program Comment does not do that. Therefore, we recommend that the ACHP step back from its proposed action, and initiate the process outlined in its own regulations to engage with SHPOs, the NCSHPO and other interested parties to develop a program alternative that balances the goals of historic preservation with those of addressing housing and climate resiliency.

In closing, it is ironic that the ACHP would characterize the work of SHPOs and THPOs as "the backbone of preservation activity in the nation..." (Letter to Chairs and Ranking Members of the Senate and House committees on appropriations regarding the FY 2025 HPF appropriation dated August 24, 2024) and yet propose a Program Comment that largely sidelines us.

Sincerely,

A handwritten signature in black ink, reading "Kirk F. Mohnhey". The signature is fluid and cursive, with the first name "Kirk" being more prominent and the last name "Mohnhey" following in a similar style.

Kirk F. Mohnhey  
Director and SHPO  
Maine Historic Preservation Commission



GRETCHEN WHITMER  
GOVERNOR

STATE OF MICHIGAN  
MICHIGAN STRATEGIC FUND  
STATE HISTORIC PRESERVATION OFFICE

QUENTIN L. MESSER, JR.  
PRESIDENT

The Honorable Sara Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308 Washington, DC 20001  
Sent via email to: [program\\_alternatives@achp.gov](mailto:program_alternatives@achp.gov)

Re: ACHP's Draft Program Comment on Accessible, Climate-Resilient and Connected Communities

Dear Chair Bronin:

Thank you for the opportunity to comment on the Advisory Council's draft *Program Comment on Accessible, Climate-resilient and Connected Communities* issued on August 8. The Michigan State Historic Preservation Office (SHPO) is in alignment with comments previously issued by the National Conference of State Historic Preservation Officers (NCSHPO), Preservation Partners, the City of Detroit and the Society for American Archaeology (SAA) and numerous other SHPO counterparts nationwide.

We would like to enumerate our concerns with this draft Program Comment with the following:

**Lack of Consulting Party/Stakeholder Engagement:**

In its current form, the Program Comment would eliminate the involvement of the public, stakeholders, SHPOs and Tribal Historic Preservation Officers (THPOs) from the consultation process for individual projects. This part of Section 106 is core to its purpose and part of why it was established in the first place. Moreover, these entities have certain authority and responsibilities granted through the National Historic Preservation Act of 1966, as amended (NHPA) and the Section 106 regulations (36 CFR Part 800) which would be eliminated under this policy without consent.

By removing SHPOs and THPOs from project consultation almost entirely, resources will not be identified and protected until it is too late in the process. As a case in point, extensive indigenous human remains were discovered during ground disturbance for an affordable housing project in Flint, Michigan, necessitating a pause to the project and consultation with Tribes. Similarly, a routine sidewalk and streetscape improvement project in Rochester, Michigan uncovered human remains and necessitated similar work stoppages and additional consultation. These are projects that went through the standard Section 106 review process by the SHPO with pre-project consultation. We hate to think what would have happened both for the projects and the cultural resources themselves had the SHPO not been consulted in and protocols for unanticipated discoveries discussed in advance for these projects. Instead of avoiding delays, the proposed Program Comment would prompt delays in project completion.



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The Program Comment mistakenly assumes that if federal agencies run into a Section 106 issues or adverse effects that SHPO would be able to move quickly to engage in consultation. Without SHPO awareness of projects at the earliest stages, our own capacity makes it hard to move expeditiously when we must get up to speed on the whole project. Finally, the lack of local stakeholder involvement is concerning because both states and local communities, including those with established local historic district laws, should always have a say in what they value as part of their local history when it comes to the use of taxpayer dollars. Indeed, this is the fundamental reasoning behind the NHPA which this Program Comment would bypass. The proposed Program Comment, by eliminating public, SHPO and THPO consultation, will lead to negative outcomes and longer timelines.

**Concern with Federal Agency Capacity and Lack of Expertise:**

While the Michigan SHPO supports exempting certain types of undertakings or work items from Section 106 review (installation of water heaters or grab bars, etc.), this Program Comment takes broad strokes to exempt certain types of projects from full Section 106 review. In fact, we estimate that given the poorly defined categories subject to this policy, this proposed Program Comment could impact as many as 60-70% of the projects reviewed by the Michigan SHPO. Almost any project we see could be constructed to cover climate, housing and transportation. This would include major highway developments and lengthy oil and gas pipelines burrowed under our Great Lakes. Moreover, it does not allow for necessary expertise to identify historic properties in the first place, a necessary component of the Section 106 regulations.

This Program Comment is predicated on the ability of federal agencies to access adequate data regarding historic resources when there is no evidence to suggest that this will be widely available. In the case of Michigan, we are working to develop an online database of identified historic properties, but after years in preparation, this will not be available until 2025. Moreover, the resources listed in the database will not be exhaustive. Identification of historic resources is a continuous process, and the Michigan SHPO is constantly working with qualified professionals to identify previously unknown resources. We have serious concerns that without the aid of qualified professionals and in the absence of SHPO and THPO consultation, archaeological sites, potential Traditional Cultural Landscapes and Properties (TCL/TCPs) and buildings from the recent past, to name a few, will be overlooked and therefore inadvertently impacted if this policy is implemented. It is notable, furthermore, that reliance on existing data, as this Program Comment would do, will undermine the under-resourced, disadvantaged and underrepresented communities throughout the United States that do not have adequate resources to conduct surveys and collect data on historic properties.

In our experience, even with the Section 106 review process decades old, few federal agencies are invested in historic preservation and live up to the ideals outlined in the NHPA. The proposed Program Comment will only further weaken their engagement. For example, the U.S. Department of Housing and Urban Development (HUD) with its decentralized financing structure that filters down into local governments and non-governmental organizations, has particularly struggled with Section 106 compliance over the years. Without expertise in the historic preservation arena, how will the varied agencies and responsible entities comprehend what they are looking at in terms of historic significance? As noted, existing data is frequently not sufficient to guide them.

Similarly, the process for determining exemptions appears to be complicated and hard to understand. Federal agencies will likely not know how to clearly interpret these guidelines and will cause confusion and misunderstandings. It is also not clear how the Program Comment will engage with state and local laws, such as local historic district ordinances, that are intended to protect historic properties. In the case of HUD, an especially “hands-off” agency, who will interpret these guidelines? The central agency? The local government? How will this impact HUD’s entitlement communities that statutorily act on behalf the federal agency? With the ongoing compliance issues we regularly see in Michigan, we find it hard to believe that small local governments or local housing agencies will be able to fully understand these proposed new guidelines. Just at a time when we have created strong relationships with housing partners and instituted efficient processes, now we must introduce a whole new layer of confusing bureaucracy to analyze, interpret, and implement. We foresee that this is bound to result in conflict, mistakes and likely delays.

The proposed Program Comment will create additional confusion about how, when, and where Section 106 is required. Confusion will ultimately result in longer review times. To echo NCSHPO’s comments, this Program Comment should have more precise definitions and a more focused scope. There also needs to be increased accountability on the part of federal agencies in the form of broader reporting obligations and better-defined qualifications standards.

#### **State and Regional Differences in Approach:**

This Program Comment does not account for state and regional differences in the challenges projects face. Flooding from hurricanes along the United States coastlines is wholly different than flooding around the Great Lakes for example. Michigan alone has weather extremes, with heavy snows in the Upper Peninsula and flash flooding around the numerous rivers across the state. A one-size-fits-all approach does not account for these differences. The use of a Programmatic Agreement at the state or even regional level would help to account for those differences and create review pathways that are clear and tailored to those conditions.

#### **Overlooking Archaeology:**

The proposed Program Comment fails to recognize that ground “disturbance” is highly contextual and requires archaeological and tribal expertise to determine if disturbances have the potential to compromise the integrity of buried sites or traditional cultural landscapes and places (TCL/TCP). Eliminating the subject matter experts from consultation will result in significant negative affects to below-ground archaeological resources and traditional cultural landscapes and places (TCL/TCP).

As written, the Program Comment does not acknowledge TCL/TCPs and could result in unmitigated destruction, and devastation to elements that often comprise TCL/TCPs such as water, shorelines, archaeological sites and other cultural resources, flora and fauna, and natural features. If implemented, we also anticipate a significant increase in the number of inadvertent discoveries along with the destruction of archaeological sites.

SHPOs, THPOs, and descendant communities are the regional experts and repositories of data for our respective states and Tribal Nations, and as such are aware of essential contextual information for understanding the nature and complexity of archaeological resources and TCL/TCPs. The proposed Program Comment has a top-down and ethnocentric perspective that fails to recognize the localized and community-based nature of heritage knowledge that SHPOs have accumulated from decades of stakeholder collaboration.

The exemptions for ground disturbance in the proposed Program Comment impose a one-size fits all approach that does not recognize the importance of situational contexts in predicting the archaeological and cultural sensitivity of an undertaking. For example, conventional wisdom suggests that urban settings and previously disturbed rights-of-way have highly disturbed soils and lack archaeological integrity. However, we can cite numerous significant examples, within the last decade, of how this perspective is misleading and is often proven incorrect when an unanticipated discovery of human remains or archaeological sites occur.

Unfortunately, archaeological sites and human remains are relatively routinely uncovered in “previously disturbed” areas and rights-of-way throughout Michigan and elsewhere in the U.S. Likewise, our urban communities have a rich and important history that would be ignored without careful assessment of local contexts that might otherwise be deemed “disturbed”. Whether or not an undertaking occurs in “previously disturbed” ground is often best defined and assessed by archaeologists and tribal knowledge keepers. The bottom line is, that only through the knowledge and expertise of SHPOs and THPOs, can ground disturbance and cultural sensitivity be appropriately evaluated.

To illustrate our perspective, we would like to share the recent revitalization of the Douglass Homes Project in Detroit. In brief, in 2012 the Detroit Housing Commission sought to demolish the Douglass Homes towers and redevelop the land using Department of Housing and Urban Development (HUD) funds. The Brewster-Douglas housing projects were the first example of urban renewal in the United States, which meant that they were historically significant, in their own right. However, the Douglass housing project was built on top of the late nineteenth century Jewish and African American neighborhood known as Paradise Valley. Due to this complex history of underrepresented communities, the redevelopment project required careful assessment and consultation with numerous stakeholders to ensure an appropriate level of identification and evaluation of historic properties. The resulting archaeological project recorded 11 archaeological sites that tell the stories of both Jewish and African American communities in Detroit. This project illustrates the role, and importance of consultation in the Section 106 process to create a successful balance between preservation and development. This project is just one of many examples that demonstrates that urban spaces traditionally considered low sensitivity or disturbed have the potential for significant cultural resources

### **Conflicts with Federal and State Tax Credit Projects:**

The proposed Program Comment conflicts with the Secretary of the Interior’s *Standards for*



*Rehabilitation* required for tax credit programs. This will be particularly problematic for tax credit projects that are also using federal funds. Moreover, we foresee the possibility of extensive federally-funded work on historic properties that would have to be undone in the course of executing a tax credit project. This would ultimately create confusion and a tremendous waste of taxpayer funding. The *Standards* have been effective for decades and should be uniformly applied.

### **Lack of Push for Federal Agencies to use Programmatic Agreements:**

The ACHP has stated that review timelines have been an issue for federal agencies working through the Section 106 process. From our perspective there are other ways to address timeline concerns if the ACHP would push for federal agencies to establish Programmatic Agreements (PA) with SHPOs across the country. Our office has invested thousands of hours into developing PAs that work for our state, federal agencies, local agencies, and communities. PAs have proven to be extremely successful at streamlining Section 106 review and promoting responsible development in harmony with historic preservation. The Michigan SHPO has successfully executed many PAs which work well for transportation projects and housing. These PAs allow federal agencies and their delegated authorities to complete 90% of project reviews internally. It has also allowed these agencies to prioritize reviews as priorities shift and change.

For example, our 2022 PA with the Michigan Department of Transportation (MDOT) and Federal Highway Administration (FHWA) included all 12 of Michigan's federally recognized Tribal nations and 38 Federally recognized Tribes from other states outside Michigan, as well as the public in the consultation process. The PA established excepted projects, developed an early coordination process with tribal governments, established protocols for inadvertent discoveries, and established cultural resource staff within MDOT to conduct reviews for both trunkline and local area projects. This PA took more than two years to negotiate with these numerous stakeholders and in the two years since its implementation it has proven to streamline FHWA projects in the state of Michigan.

Another extremely successful PA was signed in 2022 with the Housing & Revitalization Department for the City of Detroit and the U.S. Department of Housing and Urban Development (HUD) for housing projects within the City of Detroit. This PA included the public, numerous state and local stakeholders, and seven Tribal nations in the consultation process. The PA has streamlined Section 106 review for all federal, state, and local agencies involved and is responsible for, in part, why the Housing Resources Department for the City of Detroit hired a fulltime archaeologist earlier this year.

The proposed Program Comment attempts to supersede existing PAs and will undermine the relationships that our office has cultivated with federal agencies, THPOs, local governments, and organizations in the negotiation of successful PAs. Moreover, it does not provide any mitigation for adverse effects to historic properties, whereas PAs do. We encourage the ACHP to explore ways to engage federal agencies in getting them to understand the benefits of a PA so that this tool can be better utilized.

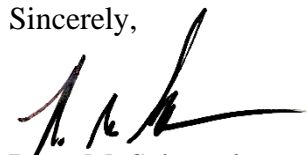
**Conclusion:**

While the Michigan SHPO supports building further simplicity and efficiency into the Section 106 process, this should not be at the expense of irreplaceable cultural resources. The ACHP has not built a strong case for why this proposed Program Comment is necessary. Anecdotal accounts about process delays and stoppages due to conflicts related to the Section 106 review process are no substitute for actual data that would demonstrate the need for this policy.

Moreover, we cannot forget that the NHPA was enacted in the shadow of rampant highway and so-called urban renewal development that had wiped out entire neighborhoods of historic significance. Section 106 was designed to treat all federal undertakings with the same, consistent approach, regardless of federal administrative priorities, social trends, or policies around development. This sets a very dangerous precedent whereby historic preservation concerns may be set aside for the latest administrative priority without careful consideration to impacts to irreplaceable historic resources. What may be favorable now could be overturned and subject to different priorities with another administration.

Section 106 was never intended to stop projects, but rather to adequately consult and consider alternatives to avoid impacts to historic properties. If the ACHP's goal is to streamline Section 106, we respectfully suggest that the way to accomplish this is to 1) ensure SHPOs and THPOs have appropriate funding to fully staff offices, 2) encourage agencies to work with SHPOs and THPOs to develop PAs that are appropriate for our states and regions, and 3) educate federal agencies of their responsibilities under Section 106 and ensure that they employ SOI qualified staff. We concur with NCSHPO in that this proposed Program Comment should seek to harmonize, not subvert historic preservation, with other policy goals.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Schumaker', with a long horizontal flourish extending to the right.

Ryan M. Schumaker  
State Historic Preservation Officer  
Michigan State Historic Preservation Office

CC: Martha MacFarlane-Faes, Michigan SHPO  
Scott Slagor, Michigan SHPO

October 9, 2024

*e-submittal*

The Honorable Sarah C. Bronin  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

Dear Chair Bronin:

Thank you for the opportunity to provide comments on the proposed Advisory Council on Historic Preservation's (ACHP) Draft Program Comment on Accessible, Climate Resilient, and Connected Communities (PC) that addresses certain housing-related, climate-smart building-related, and climate-friendly transportation infrastructure-related activities. Several Minnesota State Historic Preservation Office (MN SHPO) team members participated in the virtual discussions for the public and for SHPOs offered by the ACHP.

We request that our comments included here and those of the NCSHPO, SHPOs, and our preservation partners in the federal program are taken into consideration so that a better path forward is ultimately adopted. Especially a path that meets the broad intent of the PC but still preserves the very basis of the National Historic Preservation Act of 1966, as amended. In addition to the many comments already provided by our preservation partners, especially, NCSHPO (dated September 27, 2024) and other SHPOs, we emphasize these general concerns regarding the current draft PC:

- The length, broad application, and complexity of the draft PC will add to the existing widespread confusion about the Section 106 purpose and process. Major nationwide efforts, such as this PC, should instead focus on training, improving technology to assist in the process, and supporting practitioners on the state-level by highlighting best practices across agencies.
- The draft PC undermines established and ongoing relationships MN SHPO has with their federal preservation partners. Minnesota's programmatic agreement (PA) for transportation related activities already streamlines Section 106 reviews pursuant to Section 101(b)(3) of the National Historic Preservation Act. An amended PA will be executed in 2025 which will also include a procedures manual. The draft PC should not void existing state-level PAs that are already streamlining reviews, were developed in partnership and consultation with partners, and are based on the Council's established regulations in 36 CFR Part 800.
- *Section II.E. Standard Section 106 Review.* The wording in item two is unclear – is the federal agency able to utilize the PC for its review of the entire undertaking if the undertaking includes components that include activities not listed in the Appendices?
- The PC introduces new terminology not currently used, including “minimal potential to adversely effect” and “minimal adverse effect,” but provides no definition to apply appropriately.

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**MINNESOTA STATE HISTORIC PRESERVATION OFFICE**

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AN EQUAL OPPORTUNITY AND SERVICE PROVIDER

- Of great concern is that undertakings covered by the PC “do not require a federal agency to determine whether an involved or affected property is a historic property except where explicitly stated.” Without determining whether a property meets the definition of a historic property under Section 106 of the NHPA, which includes definition of its area(s) and period(s) of significance and boundary, there cannot reasonably be an awareness or understanding of the effects of an undertaking to the property – nor whether those effects meet the “minimal” threshold, however that is understood as used in this PC.
- The federal agency is only directed to identify potentially interested Indian Tribes and Native Hawaiian Organizations and invite them to consult on whether use of the PC is appropriate if the federal agency, “based on the location of the undertaking and the area of potential effects, determines that an effect on the historic properties of religious and cultural significance to Indian Tribes or Native Hawaiian Organizations [...] may occur.” However, 36 CFR 800.3 through 7 is circumvented for PC activities and there is no step in the PC to determine and document the area of potential effects, which under the regulations is done “in consultation with the SHPO/THPO” (36 CFR 800.4(a)(1)). This underscores the PC process’s lack of compliance with Section 106 of the National Historic Preservation Act (NHPA).
- *Section III.A. Available Alternative Compliance Approaches.* Proposes that the federal agency may proceed with an undertaking that in whole or part meets the conditions in Appendices A-2, B-2, or C-2 provided “it documents the manner in which it has satisfied such conditions, exclusions, or requirements.” What information must this documentation minimally include, where is it kept on file, to whom is it made available, and under what circumstances?
- *Section III.C “Use of Qualified Authorities.”* There will be no third-party monitoring of the agency's use or selection of a “qualified authority” in project planning. The PC relies too heavily (and naively) on the federal agency’s ability to use “reasonable judgment” in deciding whether to use a qualified authority to fulfill the intent of the National Historic Preservation Act. Agencies are reluctant to hire qualified professionals either in-house or as a contractor, and instead pass on the cost and responsibility of doing so to applicants/grantees. Qualified authorities, including qualified professionals meeting the Secretary of the Interior’s Professional Qualifications Standards, are absent from key decision points in the PC process which can and will result in adverse effects (treatments to historic properties that do not meet the Secretary of the Interior’s Standards for the Treatment of Historic Properties).
- The draft PC relies heavily on non-preservation professionals (and non-building construction specialists) to interpret and apply it as intended. Responsible entity staff often rely too heavily on SHPO staff to make decisions about projects involving historic properties. Misinterpretation and misapplication of the PC could have very detrimental effects, and with no oversight, these effects will not be realized until after the project’s completion.
- The draft PC eliminates consultation with the public, THPOs, SHPOs, and other stakeholders.
- The draft PC makes no provision for training agency staff to use and interpret the PC. In our experience, federal agency guidance and training on Section 106 compliance has been minimal or absent, leaving SHPOs to fill the gaps. The ACHP is asking SHPOs to trust that federal agencies will conduct adequate training and oversight when that hasn’t occurred in the past nor currently.
- The draft PC assumes that federal agencies—and, increasingly, authorized representative agencies/grantees—have the skills to classify property types and make decisions about whether the nature of the proposed work is exempt from review. In practice, often the least experienced employees are tasked with the environmental review “screening” for their agency, and the SHPO

receives poor-quality, incomplete submittals, requiring the SHPO to conduct the research on behalf of the project proposer.

- *Section V. Unanticipated Discoveries.* Includes provisions for the discovery of “unidentified historic properties or unanticipated effects [...] to historic properties”, but by circumventing 36 CFR 800. 3 through 7, it is unclear how such properties or effects would or could be identified during implementation of the undertaking, and no mention of a qualified authority is included.
- *Section VI. Dispute Resolution.* Includes provision for a person (notably not an agency, tribe, SHPO, or organization) to file a dispute over implementation of the PC or its use on a particular undertaking but it is not apparent. Given the paucity of reporting requirements and the long lag time between project implementation and required reporting, how can transparency be expected for undertakings carried out under this PC which would allow for public awareness to file a dispute in a window during which the outcome may still result in adequate consideration of a historic property?
- *Section VIII. Amendment.* The lack of inclusion of SHPOs and tribes in the required consultation step to amend this PC is particularly problematic.
- *Section X.A. Reports and Meetings.* The reporting requirements (only requiring examples, and only during the first four years, no minimum information specified, with triennial reporting after that) is completely inadequate to allow for sufficient transparency and oversight (by ACHP, SHPOs and tribes, and the public) to ensure the PC is working as intended. At a minimum, justification should be provided for each undertaking to address how it complies with Section 106 of the NHPA.
- The term “rehabilitation” as defined in the PC differs from its use in the Secretary of the Interior’s Standards for the Treatment of Historic Properties; this should be made clear.
- *Appendix A-1.2a.* Precludes the identification of previously unidentified, eligible historic properties (e.g., “a building whose eligibility for inclusion in the National Register is not known”) and can result in removal of character-defining features of such a building. In addition, a building may be designed with more than one primary façade, or the current and historic primary façade may differ due to changes in orientation or access of circulation networks in association with the building. Without a qualified authority to identify these nuances, character-defining features, including doors, windows, roof features, chimneys, and siding, can and will be lost. Similarly, under 3(d), the PC allows for work on skylights, atriums, courtyards, or lightwells – all of which may be character-defining features - or installation of new ones, without requiring that such work meets the Secretary of the Interior’s Standards for the Treatment of Historic Properties. There are other examples throughout the appendices which can and will result in the inappropriate replacement or removal of character-defining features of historic properties. Efforts to exclude these in the PC, such as the caveat “not including replacement or removal of any element that is a character-defining feature of a historic property”, is insufficient since most of the available documentation on historic properties does not specify their character-defining features, and without the decision-making involvement of a qualified authority, it is unclear how such features will be identified, assessed, and protected.

The MN SHPO welcomes efforts to seek ways that focus our activities on protecting historic resources that are most threatened by development pressures, federal activities, natural disasters, and climate

changes. However, the draft PC compromises the State Historic Preservation Officer's responsibility to ensure that Minnesota's historic properties are taken into consideration at all levels of planning and development (NHPA Section 302303(b)).

Sincerely,

A handwritten signature in blue ink, appearing to read 'Amy Spong', with a stylized, cursive script.

Amy Spong  
Director and Deputy SHPO  
Minnesota State Historic Preservation Office

Cc: NCSHPO Executive Director Erik Hein  
MN Department of Administration Commissioner Tamar Gronvall, SHPO

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October 9, 2024

The Honorable Sara C. Bronin  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

RE: The Advisory Council of Historic Preservation (ACHP) Draft Program Comment  
on Accessible, Climate Resilient, Connected Communities

Dear Chair Bronin:

The Mississippi State Historic Preservation Office (MS SHPO) respectfully offers the following comments, in accordance with our responsibilities under the National Historic Preservation Act and 36 CFR Part 800.

MS SHPO has experience developing program alternatives with many federal agencies, and we understand the challenges that ACHP faces in its advisory role. However, the current proposed draft program comment is unacceptable and should not be adopted as written. Further, it is the opinion of the SOI-qualified professional staff of MS SHPO that the proposed program alternative is not appropriate to fulfill the requirements of Section 106 and 36 CFR Part 800.

The current draft includes multiple concerns of varying severity. Our comments will address the most apparent issues, rather than offering line-by-line edits.

The document prescribes project severability in Section II.E.2, allowing federal agencies to apply the program comment to some parts of a project, but not others. MS SHPO has repeatedly and consistently rejected the notion of severability, as we do not believe it is allowable under the NHPA and 36 CFR Part 800. This is a notion shared by other SHPOs and addressed in NCSHPO's redline of the draft comment.

In Section III.D, the comment states that federal agencies will not be required to make determinations of eligibility. However, the document also addresses character defining features. Identifying character defining features is not a neutral, standardized action; it is part of a determination. Even saying that a project is subject to Appendix A because the property is less than forty-five years old is an eligibility determination in this context, because properties under forty-five years old are exempted because they are typically not eligible.

Appendix A-1.4, concerning emergency work, needs revision for clarity. The definition given in the draft program comment is that an emergency is an "imminent threat to life, health, safety, or property." However, the appendix addresses different kinds of

undertakings differently; falling plaster has to threaten life specifically, but masonry merely requires threat to property. These kinds of differentiations complicate emergency management without a clear benefit. A better solution might be to delete the examples and rely on 36 CFR Part 800.12 more directly.

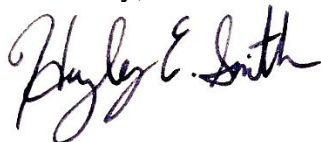
The draft comment fails to account for federal agencies that delegate to applicants and subapplicants, which encompasses some of the agencies with the highest number of subject undertakings. The text of the program comment appears to drastically change the roles and responsibilities of the parties involved. It is, of course, within the scope of a program alternative to change which parties have certain responsibilities. However, the comment as written almost entirely removes the authority of the SHPO, cutting them out of the proposed activities. A change such as this is not appropriate in a program alternative that can be applied to incredibly broad swaths of federal activity.

In line with preventing this overapplication, we concur with NCSHPO that the stipulations related to transportation should be removed. Compared to other programming, transportation typically requires more engagement from varying stakeholders with overlapping interests and responsibilities. It is more heavily covered by existing, functional program alternatives than perhaps any other sector. Adding transportation stretches the bounds of what one program comment should handle and threatens the balance that has developed among the Federal Highway Administration, state departments of transportation, local entities, and SHPOs.

As such, we urge the ACHP to, at minimum, provide a substantially altered second draft. Our preference would be to abandon this proposed program comment entirely, handling the issue with another, more restricted comment or with existing alternatives. However, we will continue to consult whenever the option is afforded to us.

If you have any questions, please do not hesitate to call me at (601) 576-6941 or Deputy State Historic Preservation Officer Barry White at (601) 576-6953.

Sincerely,

A handwritten signature in black ink that reads "Hayley E. Smith". The signature is written in a cursive, flowing style.

Hayley E. Smith  
Chief of Preservation Planning

FOR: Katie Blount  
State Historic Preservation Officer





Montana State Historic Preservation Office  
225 N. Roberts Ave.  
P.O. Box 201201  
Helena, MT 59620-1201  
406-444-7715

October 9, 2024

The Honorable Sara Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308MT  
Washington, DC 20001

Dear Chair Bronin,

Thank you for the opportunity to comment on the proposed Program Comment on Accessible, Climate Resilient, and Connected Communities (PC). The Montana State Historic Preservation Office (MTSHPO) consults in good faith with others under Section 106 of the National Historic Preservation Act of 1966 (NHPA). Last year, MTSHPO reviewed 527 undertakings, with an average response time of 15.7 days. Thanks to the 73 active Programmatic Agreements (PA) we have with 24 agencies, we eliminate 100s of reviews annually.

MTSHPO values streamlined consultation, especially as federal agencies fund a growing number of essential projects. Beyond streamlining that benefits MTSHPO and others, our *agreements* reflect MTSHPO-Agency consensus, clarify participant responsibilities, and are refined cyclically to function better for Montana. MTSHPO believes the proposed PC lacks the clear scope and explicit language of PAs we draft with agencies, Tribal Historic Preservation Offices, and Montana stakeholders. We believe the PC would be less likely than our own nuanced PAs to result in decisions that consider impacts to Montana's historic properties and the varied communities that value them.

The PC gives agencies the choice to apply the PC in place of existing program alternatives. The outright lack of federal cultural resources staff and the high turnover rates at agencies, combined with unprecedented federal funding and pressure to spend it, would command agencies to use a PC that MTSHPO believes would supersede the PC's regulatory framework and undermine Congress's intent under the NHPA. Underlying MTSHPO's concerns is that the precedent-setting, twenty-year, unilaterally extendable PC will normalize a lessened regard for resources.

Below are MTSHPO's specific comments on the PC's draft language. We look forward to working with the ACHP to streamline Section 106 review by developing program alternatives with clear and defensible language that recall the NHPA's intent. Thank you for your consideration.

Respectfully,

Pete Brown  
State Historic Preservation Officer  
406.444.7718  
pebrown@mt.gov

cc: Erik Hein, Executive Director, National Conference of State Historic Preservation Officers (NCSHPO)

Enclosure

Montana SHPO's Comments on the ACHP's Proposed Program Comment on Accessible, Climate Resilient and  
Connected Communities

MAIN TEXT

*II.C.1* The decision to abandon previously established PAs and MOAs to follow this PC should occur when all signatories of the existing agreement agree to do so not when discussions might happen and then the agency unilaterally decides to move forward with the PC. Additionally, per the language used in this section, agencies would be signing on for life with a determined class of undertakings. This contradicts II.E.1.

*II.E.2* This definition allows segmentation of an undertaking, which is generally not how undertakings are currently reviewed. How can anyone truly evaluate the effects of a project when they are limited to looking at a single building elevation?

*II.E.3.c* How is this effective if, as is typically the case, sites of religious and cultural significance to Tribes and NHOs aren't formally registered and/or there's no file search requirement? Without consulting the THPO, how could federal agencies be aware of these resources?

*III.A.2* Documents how and shares with whom?

*III.B.2* How are federal agencies supposed to know if there are "historic properties of religious and cultural significance to Indian Tribes or Native Hawaiian Organizations" occurring within the project area? / File searches would likely be required. What if federal agencies perform file searches with the THPO, or with THPOs who have access to a SHPO's database? Are all THPOs staffed all the time to perform these and if so, are their databases as current as a SHPO's? What if a THPO is staffed to perform file searches at one point and that ability changes? If a THPO doesn't respond to a file search request, it does not mean the Tribe has no interest in an undertaking. While a SHPO can support or augment what THPOs can provide in file searches, SHPOs do not necessarily have information on all tribally significant places. There should be a process and contingencies described for THPO variability relative to file searches. The easiest process would be to require a File Search request with both THPOs and SHPO. / If an agency decides that there are no historic properties within the project area would any consultation with Tribes or NHOs occur at all?

*III.C* Any decision regarding the use of this PC and the potential effects on historic properties not significant to Tribes or NHOs should be required to be made by a qualified professional.

*III.D* There are no undertakings identified in the Appendices that would not require evaluation of a property of historic age. Any time the Appendices mention a character-defining feature or space or the primary façade, it indicates that an evaluation of eligibility is at least being made internally at the federal agency without consultation because those pieces of a building or site cannot be identified without one. / Eligibility determinations in addition to survey and recording previously unrecorded sites should be required.

*V.B* Needs to include reference to individual state burial laws as NAGPRA only applies on Federal lands. / A policy statement is not legislation – a federal agency is not required to be "guided" by the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects but rather they are required to comply with NAGPRA or other state burial laws when applicable, which is legislation.

*VI* How would SHPOs even know there is an issue if we're not seeing any documentation of specific projects taking place in our state?

*VII* This PC should at most last 10 years / A 20-year duration will establish this as normal and the next generation of preservationists will come of age with it in place. In 2044, few people will be knowledgeable of how it used to be and therefore will be less likely to oppose its indefinite continuation. Ending this would be a shock to agencies used to the quick and cheap route.

*VIII* Amendments should be consulted on with THPOs and SHPOs

*VIII.A and B* Neither the Chair nor the Executive Director of the ACHP should be allowed to unilaterally amend this PC – all amendments should go through the proper channels which includes a member vote and consultation with agencies, THPOs, and SHPOs.

*IX* It is unlikely that the ACHP will be able to keep track of every project falling under this PC happening in every state, so it is unclear how the ACHP would ever make that determination / Furthermore, because SHPOs and THPOs are cut out of the annual reporting, they would not have any idea as to if agencies are using this PC correctly.

*X.A* Federal Agency Annual Reports should be made available to SHPOs and THPOs and should be required annually for the life of the PC

*X.B* Unsure as to what discussions will occur at these meetings if SHPOs and THPOs are not receiving any information as to the projects taking place in their state.

*X.C* The ACHP report should be provided annually for the first 5 years of the PC, minimum and be required to be written only.

*XI* The definition for “Economic Feasibility” is concerning in that it gives agencies the option to claim it is not economically feasible to do consultation – the impacts that this text could have on Section 106 consultation outside of this PC need to be considered / The definition of “Green Infrastructure” needs to be further refined / The definition of “Previously Disturbed Ground” and “Previously Disturbed Right-of-Way” should include a requirement for an SOI qualified person or SHPO to make those calls of not being concerned due to previous disturbance / The definitions for both “Qualified Authority” and “Qualified Professional” need to be clearer and how they relate to each other needs to be addressed / The definition of “Substitute Building Materials” should be based on the NPS definition and include reference to Preservation Brief 16

## APPENDICE COMMENTS

If character-defining features are going to be referenced, then an evaluation of eligibility needs to be occurring – how is one to know if something is a character-defining feature if they have no clue if the property in question is significant?

These appendices also allow for many unilateral decisions to be made by agencies without consultation – considering high turnover of cultural resource staff at federal agencies and the systemic lack of training on Section 106 processes for said staff, would this end well?

*A-1.1.a* More information needs to be provided on how this is meant to be interpreted – element needs to be defined (are we talking about the material itself, the feature, etc.?)

*A-1.1.c* Consideration needs to be given to how these activities would impact a cultural/historic landscape (these can stand alone or contribute to a historic property) – many of these could be adverse effects

*A-1.1.c.vi* Being within 10 feet of a building does not mean there is less of a chance for archaeology to exist – in fact it can be the opposite in some cases

*A-1.1.d.ii* There is too much ground disturbance for these activities to be exempted

*A-1.2.a* Regarding buildings that “the federal agency or another federal agency has determined to not be a historic property within the preceding ten years,” undertakings should only be allowed if they received concurrence from a

SHPO or THPO / buildings should not be segmented like this as it takes out the consideration of cumulative effects but also character-defining features are not limited to the “primary façade” – buildings are not listed on the NR or eligible for the NR just for their front façade, so why are we evaluating projects that way / exemptions should not apply to buildings that have previously been determined to be a historic property nor should they apply to buildings that have not been evaluated as to if they are a historic property or not

*A-1.2.a.iv* How many projects are likely to occur where the roof is not affecting a “primary façade” and would not be seen from the “primary right-of-way”?

*A-1.2.a.v* How many projects are likely to occur where ADA improvements are not affecting a “primary façade”?

*A-1.2.a.x* Being within 10 feet of a building does not mean there is less of a chance for archaeology exist – in fact it can be the opposite in some cases

*A-1.2.a.xi* Chimneys – regardless of if they are on the “primary façade” can be extremely important contributing features to a historic property – this should be removed as an exemption

*A-1.2.b.iii* Should reference applicable NPS Bulletins

*A-1.2.b.iv* Should reference applicable NPS Bulletins

*A-1.2.c* There is too much ground disturbance for these activities to be exempted

*A-1.2.d* Previously painted surfaces does not mean that the surface was painted historically – change previously to historically

*A-1.2.e.iii* This activity could have too great of an adverse effect to be exempted

*A-1.3* What interior space would then even be visible from the “primary right-of-way” at all?

*A-1.3.a* Primary spaces are dependent on building type and there can be character-defining features not in “primary spaces”

*A-1.5.e* Transfer, sale or lease out of federal control should be removed as an exemption

*A-2* The use of “qualified authority” and “qualified professional” are both specified in different instances, but it is confusing as to why that is based on the definitions within this document / Only activities that would result in No Historic Properties Affected should be considered for exemptions – if an activity has the potential to be a No Adverse Effect determination then it should be consulted on fully

*A-2.1.a* It should be specified that previous survey needs to cover 100% of the APE to count for this / not surveying for unrecorded resources will not only greatly inhibit historic property identification but it disproportionately will affect properties that would be coming of age now and as the 50-year mark moves forward

*A-2.2.a* There is no such determination as a “minimal adverse effect” it either is an adverse effect or it is not

*B-1* This appendix is similar to Appendix A-1, please refer to those comments for the applicable activities restated in this appendix

*B-1.1.c.ix.a and b* If these activities require the use of heavy machinery they should not be exempted

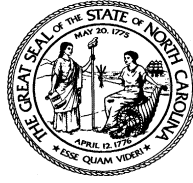
*B-1.3.a.i and ii* If this is going to allow an increase in thickness of walls there should be parameters

*B-2* This appendix is extremely similar to Appendix A-2, please refer to those comments for the applicable activities restated in this appendix

*C-1 and C-2* These appendices should be entirely removed from this PC as it does not relate to the other two building focused appendices / these appendices also do not account for historic downtowns that were designed specifically for automobile use rather than public transportation

*C-1.2.b.v* This activity should not be exempt in Historic Districts

*C-1.3* These activities need to be considered in the context of cultural/historic landscapes (stand alone or could be contributing to a historic property or Historic District)



**North Carolina Department of Natural and Cultural Resources  
State Historic Preservation Office**

Ramona M. Bartos, Administrator

Governor Roy Cooper  
Secretary D. Reid Wilson

Office of Archives and History  
Deputy Secretary Darin J. Waters, Ph.D.

October 4, 2024

The Honorable Sara Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street, NW, Suite 308  
Washington, DC 20001

Re: Chair-proposed Program Comment on Accessible, Climate-Resilient, and Connected Communities

Dear Chair Bronin:

Thank you very much for the opportunity to provide feedback for your Chair-proposed Program Comment on Accessible, Climate-Resilient, and Connected Communities.

Our office wishes to endorse the September 27, 2024, comments of the National Conference of State Historic Preservation Officers, and likewise urge the Council to consider paring down the proposed draft to deal with housing matters only, and to work cooperatively with the US Department of Transportation on their draft national prototype agreement we understand is currently under development.

We also wish to make the following observations:

1. **Contrary to ACHP's own guidance re: Program Comment development.** The Advisory Council's own guidance on Program Comments (found at <https://www.achp.gov/program-comment-questions-and-answers>) provides that Program Comments are not suited for "classes of undertakings or programs that are likely to be highly controversial in nature." Transportation projects – large-scale or not – count among the most controversial of any undertaking under Section 106, often because of the irreversible and wide-scale changes they may make to a community's historic places and resources, and thereby require the greatest attentiveness to the public consultation process. Independent of federal Section 106, local oversight arising under state law or home rule to protect historic places may conflict with other parts of the proposed comment, fostering unfortunate regulatory confusion.

Additionally, we, like other preservation partners, note that development of this Program Comment has not yet addressed all of the ACHP's [own ten guidelines for seeking a program alternative](#), including program comments; these guidelines were derived from the ACHP's own 2021 Program Comment Review Panel.

Such information will be vital to the Council's deliberations as to whether to approve this Program Comment or not, just as it would be for an agency-initiated request.

2. **No meaningful mitigation; no means for public to provide input.** Meaningful mitigation in case of adverse effects to historic resources is not provided in the draft comment, and is merely presumed, and the public's input as consulting parties would be eliminated, contrary to the ACHP's own guidance in its [Citizens' Guide to Section 106 Review](#) as well as the National Historic Preservation Act itself.

3. **“Historic preservation can be achieved without blunting progress.”** In 1966, during one of the Congressional hearings that considered the legislation that ultimately became the National Historic Preservation Act, Senator Edward Muskie shared his vision of what this law would accomplish:

“Historic preservation can be achieved without blunting progress. In truth, historic preservation will enrich our progress. With creative planning, the past and the future can live as neighbors and contribute jointly to the quality of civilization.

“...In a changing, growing society, our landmarks take on increasing importance. They lend stability to our lives. They are a point of orientation. They establish values of time and place and belonging. They are a humanizing influence.

“During the 20 decades of nationhood, and before, American ingenuity has created charming neighborhoods and streets, restful village greens, bustling market places, and other sites to meet our needs.

“I doubt that any of us question our ability to save the best of these, and to usefully blend them into the fabric of new construction. The only factor that is questioned is our resolve to do so.”

(Hearing Before the Subcommittee on Parks and Recreation of the Committee on Interior and Insular Affairs, United States Senate, 89<sup>th</sup> Congress, Second Session on S. 3035 and S. 3098, June 8, 1966, pgs. 10-11).

That desire to harmonize preservation with progress meant ultimately Section 106 was included in the National Historic Preservation Act, requiring federal agencies to consider the effect of their proposed activities on historic places, an indeed revolutionary requirement given the context of the loss of many communities’ vital historic fabric and historic neighborhoods *without* public consultation for construction of national road networks and urban renewal projects from the 1930s forward to the 1960s.

4. **States and SHPOs are fundamental participants in the Section 106 process.** State Historic Preservation Officers (SHPOs) have been fundamental participants in the Section 106 process, when in 1967, the Advisory Council on Historic Preservation itself drafted and passed its first procedures to handle review of federal projects under Section 106. ACHP’s first executive director Robert Garvey crafted those procedures, recognizing that the participation of “State Liaison Officers”, as SHPOs were then known, was “desirable” to gauge the public interest and local opinion in individual locales to inform the consultation process with agencies. (Glass, *The Beginnings of a New National Historic Preservation Program, 1957 to 1969*, AASLH and NCSHPO, 1990, pg. 44).

That requirement for Federal agencies to consult with SHPOs, and SHPOs to consult with the agencies, is now codified in the National Historic Preservation Act.

5. **Reciprocal responsibilities for consultation.** The National Historic Preservation Act *requires* State Historic Preservation Officers to **“consult with appropriate Federal agencies...on— (A) Federal undertakings that may affect historic property; and (B) the content and sufficiency of any plans developed to protect, manage, or reduce or mitigate harm to that property....”** (54 USC 302303(9), emphasis supplied.)

In *reciprocal* fashion, the same Act requires federal agencies to do the same regarding Section 106, in so much as the agency’s preservation program “shall ensure” among other things that “the agency’s procedures for compliance with [Section 106]— (A) are consistent with regulations promulgated by the

NC HPO comments RE: Chair-proposed Program Comment on Accessible, Climate-Resilient, and Connected Communities

Council ...; (B) provide a process for the identification and evaluation of historic property for listing on the National Register and the development and implementation of agreements, ***in consultation with State Historic Preservation Officers, local governments, Indian tribes, Native Hawaiian organizations, and the interested public, as appropriate***, regarding the means by which adverse effects on historic property will be considered....” (54 USC 306102(b)(5), emphasis supplied.)

In considering this Chair-initiated Program Comment proposal, we urge the Council as a whole to reflect on its legislative origins and its duty under the National Historic Preservation Act, among others, to “recommend measures to ***coordinate activities of Federal, State, and local agencies and private institutions and individuals*** relating to historic preservation” (54 USC 304102(a)(1), emphasis supplied) and to consider as a viable alternative what has been suggested by the National Conference of State Historic Preservation Officers in its correspondence to you on September 27, 2024 on this matter.

Sincerely,

A handwritten signature in blue ink, appearing to read 'RM Bartos', is positioned above the typed name.

Ramona M. Bartos, Deputy  
State Historic Preservation Officer

CC: Dr. Darin J. Waters, State Historic Preservation Officer of North Carolina  
Renee Gledhill-Earley, NC HPO  
Erik Hein, NCSHPO





September 27, 2024

The Honorable Sara Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

Dear Chair Bronin:

Over many decades, the National Conference of State Historic Preservation Officers (NCSHPO) has worked with the Advisory Council on Historic Preservation (ACHP) in the development of Section 106 program alternatives, as outlined in 36 CFR 800. As statutory members of the Council, we have consistently approached the development of these alternatives with an open and collaborative mind – always seeking to help find the right balance between historic preservation, federal agency needs, and the public benefit. While we may not have always agreed as to the ultimate approach taken, we could always count on our overall pursuit of the same goals, namely, a shared reverence for the spirit and purposes of the National Historic Preservation Act (NHPA) underscored by mutual professional respect.

In this vein, we want you to know that we have taken your Chair-proposed Program Comment on Accessible, Climate Resilient, Connected Communities, as seriously as we would any proposed program alternative. We have given it careful thought, subjected it to a great deal of analysis, and solicited the input of our Board and membership at large. We did so with a mind to help to produce something that could work – in a spirit of collaboration. To that end, we include for you our markup of the draft document in the way of a path forward in lieu of the draft Program Comment as currently proposed.

We trust that this markup will best address the ability to explain the detailed edits we think would be required not only to make the work more effectively, but also to comply with existing laws and regulations. Two key points worth highlighting, however, are:

1. **Transportation programs and related undertakings should be removed.** To keep the scope of the Program Comment reasonable and more focused, we think that transportation activities should be removed and, if necessary, considered in a separate document. More importantly, however, transportation projects are the most likely to be covered by a myriad of other existing agreements. They are likewise among the most likely undertakings to be publicly controversial, something ACHP's own guidance dictates are most usually not appropriate for the program comment approach.

Importantly, this Program Comment as currently conceptualized would in fact make the project delivery process more cumbersome and unnecessarily complex. The Chair-proposed Comment draft also raises a number of troubling legal and jurisdictional questions. Moreover, we have met with the Department of Transportation about their current preparation of a Prototype Programmatic Agreement that would address many of the items considered by this Program Comment while allowing these matters to be more responsibly integrated into existing

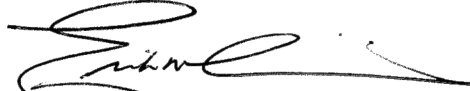
procedures. This Prototype Programmatic Agreement approach also has the support of the White House.

2. **The necessary level of consultation on some undertakings should be restored.** While we appreciate that there are a number of proposed undertakings for which little or no consultation may be appropriate because we would expect no adverse effect, several aspects of the proposed process set forth in the proposed Comment are problematic without necessary consultation otherwise required by Section 106.

The casual elimination of all consultation with not only SHPOs but moreover the public itself as an efficiency measure is in direct contravention with the clear purposes and requirements of the NHPA and, in our view, eliminates the opportunity to seek and implement creative, cost-effective, constituent-oriented solutions to complex preservation problems. We have attempted to bring some more balance to this aspect, and to restore consultation, in some cases, where it would lead to better preservation outcomes while still advancing project goals.

We look forward to continued discussion with the full Council about this proposal. As previously noted, we urge the Council the strongest terms possible to follow the best practices and procedures it recommends to other federal agencies who wish to pursue Program Comments. If the Council itself fails to adhere to its own guidance for initiation of Program Comments as it would require for a public agency, we believe that that fundamental credibility and mission of the ACHP would be significantly and unfortunately undermined.

Sincerely,

A handwritten signature in black ink, appearing to read 'Erik M. Hein', with a stylized, flowing script.

Erik M. Hein  
Executive Director

**Note: This Redline/Markup of the ACHP's Proposed Program Comment is a work in progress by the National Conference of State Historic Preservation Officers, dated September 11, 2024, and is subject to change. It is offered for discussion and educational purposes.**

## DRAFT PROGRAM COMMENT ON

### ~~ACCESSIBLE, CLIMATE RESILIENT, AND CONNECTED COMMUNITIES~~ Certain Housing-Related and Climate-Smart Building Related Undertakings

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 C.F.R. § 800.14(e), and went into effect on that date. It provides all *federal agencies* with an alternative way to comply with their responsibilities under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations, 36 C.F.R. part 800 (Section 106), regarding the *effects* of certain *housing-related, climate-smart building-related, and activities, climate-friendly transportation infrastructure related activities.*

## I. INTRODUCTION

### A. Background

The development of this Program Comment is driven by the need to harmonize policies and procedures for the preservation of our nation's historic places with other national policy efforts designed nation's pressing needs to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce its energy use and greenhouse gas emissions, improve climate resilience, and to cut energy costs; and to decarbonize its transportation sector — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

~~Recognizing these needs~~ This Program Comment builds upon the principals identified in the ACHP's, in 2023, the ACHP adopted its Housing and Historic Preservation Policy Statement (Housing Policy Statement) and its Climate Change and Historic Preservation Policy Statement (Climate Change Policy Statement), both adopted in 2023. These policy statements which commit the ACHP to "...to encourage both rehabilitation of historic housing (including historic public housing) and adaptation of historic buildings not originally built for housing, and to "... to define more clearly connections between climate change and historic properties, to articulate the policy principles the ACHP will integrate into the Section 106 process, and to guide public-serving institutions on how they may acknowledge, plan for, mitigate, and adapt to climate change impacts on historic properties."

explore new opportunities to use program alternatives to enable federal agencies to advance historic preservation while meeting the nation's housing and climate goals. These policy statements reflect increasing public awareness that historic preservation strategies — and historic properties themselves — can play an important role in addressing the three interrelated sectors covered in this Program Comment.

Following these policy statements, the ACHP developed this government-wide Program Comment to help harmonize the need for preservation of our historic resources with the need to accelerate the review of projects carried out, permitted, licensed, funded, assisted, or approved by federal agencies to rehabilitate existing housing or create new housing in existing buildings, and to maintain and update buildings and their immediate environs in response to climate concerns, and to rehabilitate or develop new climate friendly transportation infrastructure.

**Commented [EH1]:** The Program Comment should be titled to cover the types of undertakings it applies to rather than desired community characteristics.

**Commented [EH2]:** Suggest reducing the scope to exclude transportation, to instead focus on only buildings. Transportation projects are most frequently covered through other programmatic means, have other inter-connected processes and procedures, and would be disrupted by the addition of this Program Comment as written. If this is deemed an integral component, would recommend a separate agreement document.

**Commented [EH3]:** As written, the aim of the Program Comment fails to prioritize the ACHP's primary goal of promoting the preservation, enhancement, and sustainable use of our nation's diverse historic resources. The Policy Statements this is built from aim to harmonize and further preservation. This document, as written, treats preservation as something to be simply set aside in favor of other policy goals. That is not an appropriate position, in our view, of the ACHP. We suggest a careful read to re-state the need to harmonize policy goals instead of making preservation simply-subordinate.

**Commented [EH4]:** This language comes directly from the Policy Statements for accuracy.

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## B. Current Federal Agency Action

Every day, federal agencies propose to carry out, permit, license, fund, assist, or approve undertakings covered by this Program Comment, and when they do, they must comply with Section 106 of the National Historic Preservation Act. While the federal government's role in supporting housing rehabilitation and production, ~~and—~~ climate-smart buildings, ~~and climate friendly transportation~~ is difficult to quantify, an overview of current federal agency actions and investments offers insight into the scope and scale of undertakings covered by this Program Comment.

In the area of housing, federal agencies support housing for millions of Americans and preserve the viability and affordability, upgrade the energy efficiency, and enhance the climate resiliency of the nation's housing stock. The Department of Housing and Urban Development (HUD), for example, supports ~~one+~~ million housing units across 190,000 public housing buildings, with HUD spending nearly \$9 billion annually in capital and operating funds on these units, over half of which were built before 1975. HUD also provides billions ~~of dollars~~ annually through the Community Development Block Grant and HOME Investments Partnership programs. In addition, the Department of Defense provides over one million units to Military Service members, including 846,000 units in military- owned barracks, while the Rural Housing Service of the Department of Agriculture provides loans to support affordable multifamily developments in rural areas and currently has over 400,000 units in its portfolio, including 17,000 units that support farm laborers. Thousands of projects are funded by other federal agencies working to ensure all Americans have safe, habitable, and affordable housing.

In the area of climate-smart buildings, federal agencies have long undertaken projects that seek to reduce energy cost burdens, cut climate pollution, and boost climate resilience of the nation's building stock. The Inflation Reduction Act — the largest climate bill in history — and the Bipartisan Infrastructure Law have accelerated these efforts. The Environmental Protection Agency \$27 billion Greenhouse Gas Reduction Fund, for example, finances zero emissions building projects and clean technology deployment nationally, including in low-income and disadvantaged communities. The Climate Smart Buildings Initiative is catalyzing more than \$8 billion of private sector investments by 2030 to perform energy efficiency upgrades in federal buildings. The \$1 billion HUD Green and Resilient Retrofit Program invests in energy efficiency, electrification, clean energy generation, climate resilience, and low-embodied-carbon materials in HUD-assisted multifamily housing. And the Department of Energy Efficiency and Conservation Block Grant Program is assisting states, local governments, and Tribes in implementing strategies to reduce energy use, to reduce fossil fuel emissions, and to improve energy efficiency, including for residential and commercial buildings.

~~In the area of climate friendly transportation, the federal government's project portfolio — from sidewalks and bike lanes, to bus shelters and light rail — spans multiple Department of Transportation operating administrations as well as other federal agencies, including those that might fund such projects (such as HUD and the Environmental Protection Agency) or build such projects (such as the Department of Agriculture and the Department of Interior). Through the Bipartisan Infrastructure Law and other recent actions, the federal government is currently making significant investments to reduce greenhouse gas emissions and bolster the resilience of America's transportation infrastructure. This includes \$91 billion over five years for public transportation projects, including for transit accessibility, transit oriented development, and expanded transit service. It also includes \$66 billion to improve the nation's rail systems, representing the largest investment in passenger rail since the creation of Amtrak, and additional funding for pedestrian and bike infrastructure, recreational trails, Safe Routes to School, and more. Other funding includes billions \$7.5 billion over five years for electric vehicle charging infrastructure, \$8.7 billion over~~

~~five years for transportation infrastructure resilience, and \$2 billion to reduce the lifecycle emissions of transportation construction projects by investing in materials with lower levels of embodied carbon emissions compared to industry averages.~~

Many types of activities relating to these and other federal agency programs and investments require Section 106 review.

### C. Prior ACHP Action

The ACHP's statutory duties under the National Historic Preservation Act include advising the President and Congress, ~~and state and local governments~~ on historic preservation policy issues and overseeing the Section 106 ~~process~~.

In its advising capacity, ~~advised the President, Congress, and state and local governments on housing since at least 1995, when the ACHP - it~~ issued its first policy statement on affordable housing in 1995. It updated this policy statement in 2006, and again in 2023 ~~by broadening the scope to cover all housing~~. The Housing Policy Statement states that Section 106 reviews must "be grounded in a flexible yet consistent approach to ensure that housing can be developed expeditiously while still preserving the historic qualities of affected historic properties." Also in 2023, the ACHP advised on climate change and historic preservation through its Climate Change Policy Statement. It urges action on building reuse and energy-and-emissions-saving retrofits of older and historic buildings (including enhanced electrification and increased energy efficiency standards). It also supports expediting Section 106 review of projects addressing climate change, including clean energy and climate-friendly transportation projects.

In its oversight of the Section 106 process, the ACHP has also issued or participated in other program alternatives to create tailored review processes for certain programs and undertakings relevant to this Program Comment. At the request of Department of Defense, for example, the ACHP has issued six program comments specifically related to housing, which cover housing developed under specific congressionally appropriated programs, housing constructed during specific eras, and housing designed and built with similar form, style, and materials. The ACHP has also recently been a signatory to several statewide programmatic agreements with HUD related to projects and programs subject to 24 C.F.R. Parts 50 and 58. Prior program comments addressing housing have reduced the operational and maintenance costs of historic housing, made homes more comfortable for occupants, and facilitated the preservation and reuse of existing buildings.

With regard to climate-smart buildings, ACHP has issued several program comments, along with an exemption for the General Services Administration's routine operations and maintenance. The ACHP has also signed a Department of Energy Prototype Programmatic Agreement for weatherization activities and a Nationwide Programmatic Agreement Regarding Climate Resiliency and Sustainability Undertakings on Department of Homeland Security Owned Facilities, which cover a broad range of energy efficiency, water efficiency, and climate adaptation- related undertakings. ~~Prior program alternatives incorporating climate-smart building strategies have reduced the operational and maintenance costs of historic buildings, made such buildings more comfortable for occupants, and facilitated the preservation and reuse of historic buildings.~~

~~With regard to climate friendly transportation, the ACHP has issued two program comments specifically related to transportation projects, along with a government wide exemption for certain electric vehicle supply equipment. In addition, the ACHP has been a signatory to statewide programmatic agreements with the Federal Highway Administration, state historic preservation offices, and state departments of transportation, covering a range of transportation related activities. To the extent prior program alternatives have addressed climate friendly transportation projects, they have facilitated such projects while upholding historic preservation values.~~

**Commented [EH5]:** Deleted to support the relocation of transportation, if pursued, into a separate effort.

**Commented [EH6]:** According to the NHPA, the Council advises the President and Congress on matters of historic preservation, but regarding state and local governments, the ACHP's role as stated is to advise on the "dissemination of information pertaining to those activities." (historic preservation). It advises state and local governments specifically in drafting legislation relating to historic preservation, and it informs and educates as to the Council's authorized activities - but it doesn't advise them broadly on historic preservation policy issues. Its role with state and local governments, therefore is not the same as it is with the President, Congress and as otherwise specified for federal agencies.

**Commented [EH7]:** The one piece missing in this section is an acknowledgment that some of these programs involve the delegation of 106 to grant recipients or pass-thru entities. We think the ACHP should carefully review and consider the impact of this Program Comment on those types of undertakings - or - perhaps limit this agreement to direct federal agency undertakings. It is unclear whether this would help or further complicate/frustrate the delegation processes, grant programs, etc.

**Commented [EH8]:** To make this assertion, we recommend the inclusion of some data points - that said, for this to be a good talking point for the ACHP, the actual preservation of resources should be included in the data.

<sup>z</sup> DRAFT FOR PUBLIC COMMENT – DATED 8/8/2024

This Program Comment is guided in part by the mechanisms, provisions, and approaches in prior program alternatives that are most consistent with the ACHP's recently adopted Housing Policy Statement and Climate Change Policy Statement. In expanding beyond the scope of these prior program alternatives, this Program Comment ~~creates~~ offers an alternative ~~a consistent and holistic~~ approach for Section 106 review across the federal government for certain undertakings, reducing complexity and equipping federal agencies to more effectively and efficiently preserve and protect our nation's historic resources while addressing other critical policy ~~the nation's~~ needs.

#### D. Justification

Many types of ~~activities-undertakings~~ relating to the programs identified in Section I.B. of this Program Comment, and other similar programs, require review under Section 106 of the National Historic Preservation Act. Recognizing the extent, and in some cases the increasing extent, of federal action in the housing ~~and~~ ~~building~~ ~~and transportation~~ sectors, and the volume and repetitive nature of such action, the ACHP has issued this Program Comment to clarify ~~preferred alternative~~ approaches to reviewing these covered undertakings. In doing so, this Program Comment enables federal agencies to ~~focus on preservation and consultation for other undertakings with greater potential for adverse effects on historic properties, reducing taxpayer costs and facilitating project delivery while enabling the production and rehabilitation of housing, the preparation of buildings to be climate resilient, and the reduction of energy use and greenhouse gas emissions in the building and transportation sectors.~~

~~This Program Comment also aims to leverage the embodied carbon in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for construction materials that currently account for more than 15 percent of annual global greenhouse gas emissions, and in turn slowing down climate change and its impacts on our most cherished places.~~

#### E. Goals

This Program Comment aims to promote actions that, consistent with the National Historic Preservation Act, 54 U.S.C. § 300101(1), “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”

More specifically, this Program Comment aims to achieve objectives laid out in ACHP policy statements, to advance historic preservation goals, and to ~~help satisfy~~ ~~harmonize them with~~ the nation’s pressing needs to expand access to housing ~~and to~~ facilitate climate-resilient and ~~zero lower~~ emissions buildings, ~~and promote climate friendly transportation. It does so in recognition of three critical facts: that the United States has an aging housing stock, with half of existing housing units built before 1979; that more than a third of greenhouse emissions comes from the building sector, and buildings use 75% of the electricity generated annually; and that transportation sector is the largest source of greenhouse gas emissions in the United States, responsible for about one third of all emissions.~~

~~This Program Comment also aims to leverage the embodied carbon in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for construction materials that currently account for more than 15 percent of annual global greenhouse gas emissions, and in turn slowing down climate change and its impacts on our most cherished places.~~

~~Ultimately, this Program Comment aims to benefit the people who live in the housing, work in the buildings, and move using the climate friendly transportation infrastructure projects being carried out, permitted, licensed, funded, assisted, or approved by federal agencies.~~

**Commented [EH9]:** This is unintentionally negative -it should be reworded to suggest that it will leave agencies to focus resources for consultation and preservation on more complex projects with a potential to adversely impact historic properties.

**Commented [EH10]:** Repetitive - it is repeated in the goals section, where it is more appropriate.

**Commented [EH11]:** Although net-Zero is a laudable goal, substituting lower emissions offers a more reasonable objective.

**Commented [EH12]:** Given these are not goals, they would be better suited in the justification. This data, however should be accompanied by the full story - that percentage of the building sector that historic buildings represent.

**Commented [EH13]:** Again, not a goal statement, but a justification. Moved above.

**Commented [EH14]:** Recommend omitting this statement as it includes nothing about preservation, and seems unnecessary.

## II. SCOPE

### A. Overall Effect



This Program Comment provides an alternative way for *federal agencies* to comply with their Section 106 responsibility to take into account the *effects on historic properties* of their covered *undertakings*. The issuance of this Program Comment at the ACHP's own initiative, by default, provides serves as also provides the ACHP a our reasonable opportunity to comment regarding covered *undertakings*.

#### B. Effect on Other Applicable Laws

This Program Comment does not modify, preempt, or replace any other federal or Tribal laws, or any applicable and/or additional federal, state, local, or Tribal laws or regulations including local historic preservation review or zoning ordinances, building codes or permitting requirements.

#### C. Effect on Existing Agreements

A *federal agency* that already has a Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must either:

1. Follow this Program Comment, rather than such MOA or PA for a class of covered *undertakings* for the life of this Program Comment. Before making a decision to do so, the *federal agency* must first consult with the signatories of such MOA or PA and then provide them written notice of the decision seek their consent to apply this Program Comment to a class of covered *undertakings*; or
2. Continue to implement the existing MOA or PA regarding such covered *undertakings*, rather than this Program Comment.

*Federal agencies* may pursue amendments to such MOAs or PAs per their stipulations, to incorporate, in whole or in part, the terms of this Program Comment. *Federal agencies* may also consider terminating such MOA or PA and follow this Program Comment to satisfy their Section 106 responsibility for the covered *undertakings*.

A federal agency that already has a Section 106 program comment or program comments in effect for covered undertakings must follow the terms of those program comments to the extent those program comments address the undertakings covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of other program comments. Federal agencies may propose to the ACHP amendments to existing program comments following the amendment procedures in those program comments, to incorporate, in whole or in part, the terms of this Program Comment.

#### D. Effect on Tribal Lands

This Program Comment does not apply on *Tribal lands*, or to activities that may affect *historic properties* located on *Tribal lands*, unless the *Indian Tribe*, *Tribal historic preservation officer*, or a designated representative of the *Indian Tribe* has provided prior written notification to the Executive Director of the ACHP that the Tribe allows the use of the Program Comment on the Tribe's lands. *Indian Tribes* can agree to such use of the Program Comment by issuing an authorization for such use in a format substantially similar to the format contained in Appendix D to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on those *Tribal lands* on the date of receipt by the Executive Director of the ACHP, who must ensure notice on such authorization is included on the website of the ACHP. The *Indian Tribe*, *Tribal historic preservation officer*, or designated representative of the *Indian Tribe* may terminate the *Indian Tribe's* authorization to use this Program Comment by notifying the Executive Director of the ACHP in writing. Such a termination will be limited to the Program Comment's applicability to *undertakings* that would occur on or

**Commented [EH15]:** Given the unprecedented reach of this Program Comment, it could be easy for a grant recipient, for example, to misunderstand that while they may not be subject to Section 106, local preservation ordinances and review processes may apply. This should be stated here for clarity.

**Commented [EH16]:** An Agency should not be able, at their own discretion, decide which legally binding agreement to utilize without consent of the other signatories. If consent is not provided then, if the Agency really wants to proceed, they always have the option of terminating their agreement and following the Program Comment. This, at least, provides clarity as to which process will be followed and when. It also would serve to pressure signatories and the agency to work together - which is a good thing.

**Commented [EH17]:** Why is it that a Program Comment in effect must be followed, but another Program Alternative (even signed agreements) can be disregarded? This doesn't make sense.



affect *historic properties* on the *Tribal lands* under the jurisdiction of the *Indian Tribe*.

#### E. Standard Section 106 Review

A *federal agency* must follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7 or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative, if:

1. The *federal agency* elects, for any reason, not to utilize this Program Comment for an *undertaking* for which alternative compliance approaches are prescribed in Section III of this Program Comment.
2. ~~The undertaking or components of an undertaking that include activities not listed in the Appendices, meaning the undertaking would be subject to the Section 106 review process, but the federal agency could incorporate use of this Program Comment in its review of the entire undertaking.~~
3. The *undertaking* would occur on or have the potential to affect the following *historic properties*:
  - a. Any National Monument, National Historic Site, National Historic Trail, National Historical Park, National Military Park, National Battlefield, National Battlefield Park, or National Battlefield Site.
  - b. Any site, object, *building*, or structure individually designated as a *National Historic Landmark* or designated as a *contributing property* to a *National Historic Landmark* district, or found within the boundaries of a *National Historic Landmark* archaeological district.
  - c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*.

**Commented [EH18]:** We do have a concern about how an undertaking would be defined. Usually, an entire rehab, for example, is the undertaking and 106 pathways are built around that undertaking. What is being contemplated here, it seems, is a possibility that undertaking would be broken down into components where this Program Comment would apply to certain aspects of a larger undertaking, but another programmatic instrument would cover the rest. Project segmentation is not traditionally permitted in the 106 process. The consequences here are hard to calculate....

### III. ALTERNATIVE COMPLIANCE APPROACHES

#### A. Available Alternative Compliance Approaches

This Program Comment authorizes alternative compliance approaches for covered *undertakings*, as follows:

1. For *undertakings* or components of *undertakings* ~~with no or minimal potential to adversely affect historic properties~~, as set forth in Appendix A-1, B-1, or C-1 of this Program Comment, a *federal agency* may proceed with the *undertaking* without conducting further review under Section 106.
2. For *undertakings* or components of *undertakings* for which the *federal agency* satisfies certain conditions, exclusions, or requirements, as set forth in Appendix A-2, B-2, or C-2 of this Program Comment, a *federal agency* may proceed with the *undertaking* if it satisfies the conditions, exclusions, or requirements prescribed in those Appendices, and it documents the manner in which it has satisfied such conditions, exclusions, or requirements.

**Commented [EH19]:** We are not comfortable characterizing the undertakings listed as having no or minimal potential to adversely affect historic properties. In some cases, the undertakings will indeed have an adverse effect as defined in 36 CFR 800.5, putting this at odds with the ACHP's own regulations.

## B. Consultation with Indian Tribes and Native Hawaiian Organizations

The United States government has a unique legal and political relationship with *Indian Tribes* as set forth in the Constitution of the United States, treaties, statutes, court decisions, and Executive Orders. The United States recognizes the right of *Indian Tribes* to self-government. Tribes exercise inherent sovereign powers over their members and territories. The ACHP drafted this Program Comment with a commitment to strengthening the government-to-government relationship between the United States and *Indian Tribes*.

### 1. Potential Effects on Properties of Significance to Indian Tribes and Native Hawaiian Organizations

It is important to recognize that while this Program Comment was drafted to limit impacts on *historic properties*, such as sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, covered *undertakings* could directly or indirectly affect such properties.

### 2. Consultation-Related Obligations

If the *federal agency*, based on the location of the *undertaking* and the *area of potential effects*, determines that an *effect* on the *historic properties* of religious and cultural significance to *Indian Tribes* or *Native Hawaiian Organizations*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, may occur, it must make a reasonable and good faith effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* and invite them to *consult to assess whether use of the Program Comment for the subject undertaking is appropriate*. The *federal agency's* consultation effort should be informed by and be conducted in accordance with the National Historic Preservation Act, the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects, including by recognizing the special expertise of holders of Indigenous Knowledge.

The *federal agency's* effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* should be informed by, but not limited to the following: the knowledge and expertise of agency Tribal liaison staff, historic maps, information gathered from previous consultations pursuant to Section 106, databases of *Indian Tribes* and *Native Hawaiian Organizations* where accessible and appropriate, the Bureau of Indian Affairs Tribal Leader List, U.S. Department of the Interior Native Hawaiian Organization List, the National Park Service Tribal Historic Preservation Program contact database, National Association of Tribal Historic Preservation Officers, the U.S. Housing and Urban Development Tribal Directory Assistance Tool, *state historic preservation officer databases*, and other resources.

### 3. Effect of Finding of Potential Effect on Certain Properties

Should it be determined through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could potentially result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including a

**Commented [EH20]:** The whole process for determining an APE is unclear in this document since the undertaking are framed as not needing review.

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**Commented [EH21]:** What if the tribe disagrees?

**Commented [EH22]:** It should be acknowledged that off of tribal lands, where there is no THPO, some tribes do rely upon the SHPO for support.

Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* may not use this Program Comment and must instead follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative.

#### 4. Confidentiality-Related Obligations

Consistent with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, *federal agencies* should consider information regarding *historic properties* with traditional religious and cultural significance to *Indian Tribes* or *Native Hawaiian Organizations*, Tribal identified sacred sites, and Indigenous Knowledge shared with the *federal agency* by *Indian Tribes* or *Native Hawaiian Organizations* as sensitive, unless otherwise indicated by the *Indian Tribe* or *Native Hawaiian Organization*. *Federal agencies* should clearly inform *Indian Tribes* and *Native Hawaiian Organizations* of any limitations on the agency's ability to keep sensitive information confidential. *Federal agencies* must keep sensitive information provided by *Indian Tribes* or *Native Hawaiian Organizations* confidential to the extent authorized by applicable federal, State and local laws, such as Section 304 of the National Historic Preservation Act. *Federal agencies* are encouraged to use best practices on confidentiality delineated in the 2023 Interagency Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites when implementing this Program Comment.

**Commented [EH23]:** Note state and local laws on confidentiality exist.

#### C. ~~The Use of Consultation with Qualified Authorities and Use of Qualified Professionals~~

~~Some Undertakings~~ covered by this Program Comment ~~do not~~ require the use of a *qualified authority*, ~~and some do not, except where explicitly stated, or except where, in the reasonable~~ When not required, nothing is meant to prevent the judgment of ~~the~~ a *federal agency* in consideration of various factors, ~~that~~ the use of a *qualified authority* is necessary to fulfill the intent of the National Historic Preservation Act or necessary or useful to inform the *federal agency's* decision-making.

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**Commented [EH24]:** Since some things do require a qualified authority, it isn't always a choice.

When the *federal agency* ~~chooses to use~~ consults with a *qualified authority*, the type of *qualified authority* must be appropriate to the circumstances. For example, a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects* to *historic properties* of religious and cultural significance to the *Tribe* or to *Native Hawaiians*, respectively, should be consulted to inform the identification, *effects* determination, and other matters involving *historic properties* significant to that *Indian Tribe* or *Native Hawaiian Organization*. As another example, determinations regarding architectural resources and structures must be made by ~~a qualified professional~~ an *individual* meeting such professional standards for historic architecture or architectural history established by the Secretary of the Interior. An individual meeting the Secretary of Interior's standards for archaeology would similarly be used for determinations concerning archaeological resources.

#### D. Determinations of Eligibility

~~Undertakings covered by this Program Comment, due to their nature and potential effects, do not require a federal agency to determine whether an involved or affected property is a historic property except where explicitly stated.~~

**Commented [EH25]:** This isn't really accurate and, in our view, adds more confusion. The very applicability of 106 rests upon whether a historic property is present. Evaluating primary facades requires a knowledge whether or not the property is historic.

#### IV. ASSISTANCE TO CONSULTING PARTIES

This Program Comment does not require a *federal agency* to pay any consulting party for providing its views or comments in response to 36 C.F.R. part 800 responsibilities, including invitations to consult in a Section 106 review; to respond to the proposed *area of potential effects*, scope of identification efforts, eligibility findings, assessment of *effect*; or to consult to seek ways to resolve any *adverse effects* or to develop a memorandum of agreement or programmatic agreement to conclude the Section 106 review finding or determination. If, however, a *federal agency* asks an *Indian Tribe*, *Native Hawaiian Organization*, or any consulting party to do more than the activities listed in the preceding sentence in connection with this Program Comment, the *federal agency* or its applicant, grantee, or permittee, if applicable, ~~must~~ may enter into an appropriate arrangement to provide the *Indian Tribe*, *Native Hawaiian Organization*, or consulting party reasonable payment for such services, if and to the fullest extent the *federal agency* has the authority to enter into such an arrangement and pursuant to its policies and procedures, or where otherwise prohibited by other laws, regulations or statutes. Examples of services include requests to:

- A. Conduct an archaeological, ethnographic, or other inventory or field survey to identify *historic properties* that may be affected by the *undertaking*.
- B. Perform a *records check* on behalf of the *federal agency*.
- C. Conduct research and make preliminary assessments of National Register eligibility on behalf of a *federal agency*, as opposed to responding to determination of eligibility.
- D. Provide an assessment of the potential *effects* of the *undertaking* on *historic properties*, as opposed to responding to such an assessment.
- E. Carry out *mitigation measures*, including conducting additional research or monitoring ground disturbing activities as part of a mitigation plan.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, evaluation, or mitigation efforts.
- G. Design or develop a specific plan or specifications for an *undertaking* that would meet the Secretary of the Interior's Standards for Rehabilitation or otherwise avoid, minimize, or mitigate *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.
- I. Contribute substantially to any of the above activities carried out by a third party.

A request during consultation by an *Indian Tribe* or *Native Hawaiian Organization* to conduct such services itself does not preclude reasonable payment for services simply because the request was made during consultation. A *federal agency* or its applicant, grantee, or permittee, if applicable, must consider entering into an arrangement, in accordance with this Section, with any *Indian Tribe* or *Native Hawaiian Organization* making such a request.

**Commented [EH26]:** If this applies everywhere except tribal lands, and no qualified authority is necessary, and no determination of eligibility is required, what consultation would ever take place? As written the only consultation explicitly stated above seems to be whether or not the a tribe agrees the Program Comment should be used - and only after the agency has already determined a historic property may exist. If an agency says there isn't one, can they proceed without even asking a tribe whether the program comment may be used?

**Commented [EH27]:** We realize the intent, but by saying "must," it prevents payment to entities potentially and appropriately authorized by a consulting party.

**Commented [EH28]:** The NPS HPF Manual, for example, prohibits certain payments for services of grant recipients.

## V. UNANTICIPATED DISCOVERIES

### A. Immediate Response Requirements

If previously unidentified *historic properties* or unanticipated *effects*, including visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of the *undertaking*, the *federal agency* must immediately halt all activity that could affect the discovery and institute interim measures to protect the discovery from looting, vandalism, weather, and other threats. The *federal agency* must then follow the procedures set forth in 36 C.F.R. § 800.13(b); for sites with potential religious and cultural significance to *Indian Tribes* or *Native Hawaiian* organizations, the *federal agency* must request, and incorporate, if provided, the special expertise of *Tribes* or *Native Hawaiian Organizations* and the information provided by designated holders of Indigenous Knowledge and must follow those procedures accordance with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and for sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow these procedures in accordance with the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. A *federal agency* that has *historic property* discovery procedures in existing management plans pertaining to *historic properties* should follow such existing procedures.

### B. Response to the Discovery of Human Remains, Funerary Objects, Sacred Objects, or Items of Cultural Patrimony

The *federal agency* must ensure that in the event human remains, funerary objects, sacred objects, or items of cultural patrimony are discovered during implementation of an *undertaking*, all work within **an appropriate buffer zone, or a minimum of 50 feet (whichever is greater)** of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, local law enforcement, and coroner/medical examiner in accordance with any applicable state statute(s) must be immediately contacted. The *federal agency* must be guided by the principles within the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. The *federal agency* must comply with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 C.F.R. part 10, in regard to any human remains, funerary objects, sacred objects, or items of cultural patrimony found on federal or Tribal land.

## VI. DISPUTE RESOLUTION

Any person may file a dispute over the implementation of this Program Comment or its use for any particular *undertaking*, by filing a notice with the relevant *federal agency*, including the *federal agency's* federal preservation officer, with a copy to the consulting parties involved in the *undertaking* and any relevant *Tribal historic preservation officer* or *state historic preservation officer*. Objecting parties may include but are not limited to *Indian Tribes*, *Tribal historic preservation officers*, *state historic preservation officers*, *Native Hawaiian Organizations*, local governments, preservation organizations, owners of historic properties, and members of the public. The *federal agency* must consult with the objecting party to resolve the dispute for not more than 60 *days*. Any disputes over the evaluation of unanticipated discoveries must be resolved in accordance with the requirements of 36 C.F.R. § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 *days*, the *federal agency* ~~may~~ shall forward to the ACHP all documentation relevant to the objection, including the *federal agency's* proposed resolution if any, request

**Commented [EH29]:** It should be acknowledged that many undertakings proposed here would not require consultation - so it is unclear how a dispute would even surface.

the ACHP to provide within 30 *days* its advisory comments to resolve the dispute, and take the ACHP's comments into account before finalizing its approach to complying with Section 106. The *federal agency* must notify the objecting party and any relevant *Tribal historic preservation officer* or *state historic preservation officer* regarding its approach to complying with Section 106 for an *undertaking* that is the subject of a dispute. ~~The federal agency's decision regarding the resolution will be final.~~ Following the issuance of ~~its~~ ACHP's final decision, the *federal agency* may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

The ACHP must monitor such disputes, and from time to time, the Executive Director of the ACHP may issue advisory opinions about the use of this Program Comment to guide *federal agencies*.

## VII. DURATION

This Program Comment will remain in effect from the date of adoption by the ACHP through December 31, ~~2044~~2034, unless prior to that time the ACHP withdraws the Program Comment in accordance with Section IX of this Program Comment. On any date during the six-month period preceding the expiration date, the ~~ACHP Chair~~Council may amend the Program Comment to extend its duration in accordance with Section VIII.A. of this Program Comment. If an *Indian Tribe* authorizes the use of this Program Comment on its *Tribal lands* in accordance with Section II.D. of this Program Comment, such authorization will be in effect from the date of the issuance of the authorization until the termination of such authorization by the *Indian Tribe* or the expiration or withdrawal of this Program Comment, whichever is earlier.

## VIII. AMENDMENT

The ACHP may amend this Program Comment after consulting with *federal agencies*, *state and tribal historic preservation officers*, and other parties as it deems appropriate and as set forth below.

### A. Amendment by the Chair, ACHP

~~The Chair of the ACHP, after notice to the rest of the ACHP membership and federal agencies may amend this Program Comment to extend its duration. The ACHP must notify federal agencies and publish notice in the Federal Register regarding such amendment within 30 days after its issuance.~~

### B.A. Amendment by the Executive Director, ACHP

The Executive Director of the ACHP, after notice to the ACHP membership and other *federal agencies* may amend this Program Comment to adjust due dates and make corrections of grammatical and typographical errors. The ACHP must notify *federal agencies* and publish notice in the Federal Register regarding such amendments within 30 *days* after their issuance.

### C.B. All Other Amendment by Council Amendments

Amendments to this Program Comment not covered by Sections VIII.A. or VIII.B. of this Program Comment will be subject to ACHP membership approval.

**Commented [EH30]:** The ACHP has final decision on compliance, not an agency. The agency can certainly proceed with their undertaking anyway, after the ACHP comments... but an agency should not have the final say on the compliance with an ACHP process.

**Commented [EH31]:** 20 years is too long... definitions alone will change drastically which will impact the scope of this PC. At very least it should expire but have a provision for the membership to vote to extend.

**Commented [EH32]:** We would also like to advocate for a 5 year probational term, perhaps with a provision that permits its automatic renewal for another 5 years if no objections raised by the Council.

**Commented [EH33]:** We do not support the extension of such a sweeping document by the Chair. This should require a vote of the Council.



## IX. WITHDRAWAL

If the ACHP determines that the consideration of *historic properties* is not being carried out in a manner consistent with this Program Comment, the ACHP membership may vote to withdraw this Program Comment. The Chair of the ACHP must then notify *federal agencies, state and tribal historic preservation officers*, and publish notice in the Federal Register regarding withdrawal of the Program Comment within 30 days of the decision to withdraw. If this Program Comment is withdrawn, *federal agencies* must comply with the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative for individual *undertakings* covered by this Program Comment.

**Commented [EH34]:** Another reason why the section on Determinations should be removed - if you take away the need to identify historic properties, how would a failure of consideration even play out?

## X. REPORTS AND MEETINGS

### A. Federal Agency Annual Reports

The *federal agencies* that use this Program Comment must provide annual reports regarding the use of this Program Comment during the previous reporting period, ending June 30 annually, to the ACHP, as provided in this Section. Each agency's annual report must: provide examples of *undertakings* covered by Section III.A.1. of this Program Comment; provide *general locational and statistical* information about the manner or extent to which the agency *utilized the Program Comment*, satisfied the conditions, exclusions, and requirements to proceed with the *undertakings* covered by Section III.A.2.; identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; include an assessment of the overall effectiveness of the Program Comment in meeting its intent; and summarize professional assistance and compliance monitoring activities. Annual reports are due on September 30 of each year, starting September 30, 2025 and ending September 30, 2030. *The ACHP will make all federal agency reports publicly available.*

**Commented [EH35]:** For reports to be useful, they must include some locational information (state, county, etc.) and some quantifiable data about the volume and types of undertakings.

For the remaining duration of this Program Comment, the *federal agencies* that use this Program Comment must provide reports regarding the use of this Program Comment during the previous reporting period, ending June 30 triennially, to the ACHP, as provided in this Section. Each agency's triennial report must be submitted either as part of *federal agencies'* report to the ACHP pursuant to Executive Order (EO) 13287, "Preserve America," or, for *federal agencies* not otherwise required to submit such report to the ACHP, as a stand-alone triennial report. Each agency's triennial report must: identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; and include an assessment of the overall effectiveness of the Program Comment in meeting its intent. Triennial reports are due on September 30 of every third year, starting September 30, 2032. *The ACHP will make all federal agency reports publicly available.*

In any report required by this Section, *or in response to such a report*, the ACHP encourages *federal agencies and/or state and tribal historic preservation officers* to also propose for ACHP consideration amendments and refinements to this Program Comment ~~based on their experience implementing it.~~

In any report required by this Section, a *federal agency* must include in its report the activities, if any, of entities to which it has delegated legal responsibility for compliance with Section 106 in accordance with federal law.

## B. Annual Meetings

By January 31, 2026 and for four years thereafter, the ACHP must schedule an annual meeting and invite *federal agencies, Indian Tribes, state historic preservation officers, Tribal historic preservation officers, Native Hawaiian Organizations* and others it deems appropriate, to discuss implementation of the Program Comment. At the meeting, attendees will have an opportunity to provide their views on the overall effectiveness of the Program Comment in meeting its intent and purpose. Such views may inform decisions such as those regarding amendments to the Program Comment. Annual meetings may take place in-person, by phone, virtually using electronic meeting platforms, or any combination of such means.

**Commented [EH36]:** We suggest at least biannual after the four year term.

## C. ACHP Reports

~~At any time, but at least once during the initial three-year period~~Each year through 2030 during which this Program Comment is being used, and every three years thereafter, ACHP staff must make publicly available ~~provide~~ a written ~~or oral~~ summary of information received from *federal agency* reports, annual meetings, or other sources about the utility of this Program Comment and make any recommendations for amendments to the ACHP membership. The ACHP may ask for and the federal agencies must provide additional information upon request if their reports are deemed by ACHP staff to be insufficient for demonstrating usage of the Program Comment.

## XI. DEFINITIONS

For purposes of this Program Comment, the following definitions apply, and beginning in Section II of this Program Comment, such words are *italicized* for convenience:

*Abatement* means acting or actions to eliminate, lessen, reduce, or remove.

*Adverse effect*, as provided in 36 C.F.R. § 800.5(a)(1), means an action that may alter, directly or indirectly, any of the characteristics of a *historic property* that qualify the property for inclusion in the National Register of Historic Places in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association; and it includes reasonably foreseeable *effects* caused by the *undertaking* that may occur later in time, be farther removed in distance or be cumulative.

*Area of potential effects*, as provided in 36 C.F.R. § 800.16(d), means the geographic area or areas within which an *undertaking* may directly or indirectly cause alterations in the character or use of *historic properties*, if any such properties exist, and is influenced by the scale and nature of an *undertaking* and may be different for different kinds of *effects* caused by the *undertaking*.

~~*Bicycle lane* means a portion of a roadway that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists.~~

~~*Bicycle parking* means a designated area to store a bicycle, whether personal or shared, including bicycle racks and dedicated bicycle docks used in a shared system.~~

~~*Bicycle rack* means a rack for a personal or shared bicycle, e-bicycle, or scooter that is typically u-shaped.~~

~~*Bicycle rail* means a traffic control device that provides a protective barrier between motor vehicle travel lanes and protected bicycle lanes or cycle tracks.~~



~~*Bulb-out* means feature that extends the line of the curb into the traveled way, reducing the width of the street, also known as curb extensions or bump outs.~~

*Building* means a constructed work created principally to shelter any form of human activity, including mobile and manufactured homes and *climate-friendly transportation facilities* that are *buildings*.

*Building energy control system* means a *mechanical system* enabling a *building* occupant to manage or monitor energy use and all components of such system, including but not limited to programmable thermostats, digital outdoor reset controls, occupancy sensors, Underwriters Laboratories listed energy management systems or *building* automation systems, demand response and virtual power plant technologies, smoke and carbon monoxide detectors, and related technologies.

*Character-defining feature* means an element of a *historic property* that demonstrates or includes the characteristics of a *historic property* that qualify the *historic property* for inclusion in the National Register of Historic Places, including elements that contribute to the *historic property*'s overall shape, materials, craftsmanship, decorative details, interior spaces and features, as well as the various aspects of its site an environment~~style, design, and decorative details.~~

*Clean energy technologies* means *solar energy systems*, ~~*wind energy systems*~~, battery energy storage systems, ~~*geothermal systems*~~, and microgrids serving a *building* or *buildings*, ~~or serving a *climate friendly transportation facility*.~~

~~*Climate friendly transportation infrastructure* means pedestrian, bicycle, micromobility vehicle, bus (including bus rapid transit), and rail infrastructure.~~

~~*Climate friendly transportation facility* means a building or structure used for bicycle parking, micromobility parking, a bus station, a bus rapid transit station, or a rail station.~~

*Climate-smart building* means a *building* that is energy efficient, electric, uses clean energy, and is resilient.

*Climate resilience* is defined as the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

*Community solar system* means a solar photovoltaic *installation* with up to 5 megawatts nameplate capacity and delivering at least 50% of the power generated from the system to *buildings* within the same utility territory as the facility.

*Cool pavement* means paving materials that reflect more solar energy, enhance water evaporation, or have been otherwise modified to remain cooler than conventional pavements.

*Contributing property*, as provided in National Register Bulletin 16A, "How to Complete the National Register Registration Form," means a *building*, structure, object, or site, as applicable, within the boundaries of a *historic district* that adds to the historic associations, historic architectural qualities, or archaeological values for which a property is significant because it was present during the period of significance, relates to the documented significance of the property, and possesses historic integrity or is capable of yielding important information about the period; or it independently meets the criteria for the National Register of Historic Places.

~~*Cycle track* means a bicycle facility that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use of bicyclists.~~

**Commented [EH37]:** Geothermal systems can require a great deal of ground disturbance.... So they don't really fit, unless more specifics/parameters or qualifiers are included.

*Day* means calendar *day*, taking place from one midnight to the following midnight.

*Economic feasibility* means the viability, suitability, and practicality of a proposed *undertaking weighed against the potential impact to a historic property and* in light of a range of *other* considerations, including estimated construction costs (including the cost of *building material and labor*), *material availability and lifecycle*, estimated operational costs, available budget, and *timelines for compliance review processes to the extent they impact financial conditions for the undertaking* long-term sustainability of a project.

**Commented [EH38]:** This is not an appropriate metric for economic feasibility. This suggests wide latitude for an agency to discount consultation as simply too expensive. This really goes against the heart of the ACHP's core values.

*Effect*, as provided in 36 C.F.R. §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative alteration to the characteristics of a *historic property* qualifying it for inclusion in or eligibility for the National Register of Historic Places.

*Electrification* means the *replacement* or conversion of an energy-consuming device or system from non-electric sources of energy to electricity; or the *replacement* or conversion of an inefficient electric appliance to an efficient electric appliance.

~~*Electric vehicle supply equipment or EVSE* means conductors, including the ungrounded, grounded, and equipment grounding conductors and the electric vehicle (EV) connectors, attachment plugs, and all other fittings, devices, power outlets, or apparatus installed specifically for the purpose of delivering energy from the premises wiring to the EV. There are three levels of EVSE: i. Level 1: Refers to a freestanding or wall-mounted charging structure that delivers a 110/120V charge, replenishing an EV battery at a rate of 4 to 6 miles of range per hour of charging time. Charging an EV at level 1 typically takes between 7 and 20 hours depending on the size of the vehicle's battery. ii. Level 2: Refers to a freestanding or wall-mounted charging structure that delivers a 208/240V charge, replenishing an EV battery at a rate of 10 to 20 miles of range per hour of charging time. Charging an EV at level 2 typically takes between 2 and 5 hours depending on the size of the vehicle's battery. iii. Level 3 (also known as Direct Current (DC) Fast Charging): Refers to a freestanding or wall-mounted structure capable of being networked that is designed to charge vehicles more quickly than level I or level II with an electrical output ranging between 40 kW-500 kW delivering 50-1000 volts of direct current to the EV battery. Converts AC power to DC within the charging station and delivers DC power directly to the battery. DC fast charging can typically replenish an EV battery at a rate of 50 to 200 miles of range per 30 minutes of charging time.~~

*Emergency situation* means any of the following *as defined by 36 CFR 800.12*: occurrence of a natural catastrophe, such as a hurricane, wildfire, flood, or excessive heat; declaration of emergency by the President, an *Indian Tribe*, governor, or a chief elected official of a territory or city; or recognition or report of a sudden, serious, and imminent threat to life, health, safety, or property.

~~*EVSE criteria* means (1) take place in existing parking facilities with no major electrical infrastructure modifications and are located as close to an existing electrical service panel as practicable; (2) use reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimize ground disturbance to the maximum extent possible, and ensure that it does not exceed previous levels of documented ground disturbance; (4) use the lowest profile equipment reasonably available that provides the necessary charging capacity; (5) place the EVSE in a minimally visibly intrusive area; and (6) use colors complementary to surrounding environment, where possible.~~

*Federal agency* means an agency as defined by 5 U.S.C. § 551(1), and includes state, local, or Tribal government officials who have been delegated legal responsibility for compliance with Section 106 in accordance with federal law.

~~*Flex post means flexible bollards or delineators used to separate motor vehicle traffic from a bicycle lane, protected bicycle lane, or cycle track, and designed to withstand being hit or run over by motor vehicles.*~~

*Green infrastructure* means the range of measures that use plant or soil systems, *permeable ground surface materials*, stormwater harvest and reuse, or landscaping to store, infiltrate, and evapotranspire stormwater and reduce flows to sewer systems or to surface waters, including but not limited to rain gardens, bioswales, bioretention facilities, and other ecosystem services and nature-based solutions used to treat stormwater as close to the source as possible and improve resiliency.

*Greenhouse gas* means gas that traps heat in the atmosphere, including but not limited to carbon dioxide, methane, nitrous oxide, and fluorinated gases (such as hydrofluorocarbons).

*Ground disturbance* means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils that are not *previously disturbed ground*.

*Ground surface material* means any hard material typically used to cover soils for transportation purposes, including but not limited to asphalt, concrete, pavers, cobblestones, Belgian blocks, bricks, gravel surface or base, or wood.

*Hazardous material* means lead, lead-containing material (including lead-based paint), asbestos, asbestos-containing material (including floor tile, plaster, insulation, glazing putty, roofing material, and flashing material), radon, and other similar materials detrimental to human health and safety.

*High friction surface treatment* means application of very high-quality aggregate to the pavement using a polymer binder to restore or maintain pavement friction at existing or potentially high crash areas.

*Historic building* means a *building* included in, or eligible for inclusion in, the National Register of Historic Places, as an individually listed property or as a *contributing property* to a *historic district*.

*Historic building material* means *building material* used in the construction of a *historic building* and installed during the period of significance, and any pre-existing *in-kind replacement* of same.

*Historic district* means a geographically definable area that possesses a significant concentration of *historic buildings*, associated *buildings* and structures, *sites* and objects united historically by plan or physical development that are *historic properties*.

*Historic property*, as provided in 36 C.F.R. § 800.16(l), means any prehistoric or *historic district*, site, *building*, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural importance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

*Housing* means any *building* containing one or more dwelling units, including but not limited to multi-unit apartment *buildings*, single-family homes, administrative and employee dwelling units, and recreation residences, in a variety of *building* types and configurations, including but not

**Commented [EH39]:** There should be some limiting factors... bioretention facilities can involve a great deal of ground disturbance. "Other ecosystem services and nature-based solutions" are too broad. Perhaps size limits? Depth?

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limited to *buildings* served by an elevator or elevators, “walk-up” *buildings*, rowhouses, semi-detached homes, mobile and manufactured homes, and freestanding homes.

*Indian Tribe*, as provided in 36 C.F.R. § 800.16(m), means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*In-kind building materials* means new *building materials* that are identical to *historic building materials* in all possible respects, including their composition, design, color, texture, and other physical and visual properties.

*In-kind replacement* means *replacement* of historic or existing *building materials* with *in-kind building materials*.

*Installation* means the action or process of placing or fixing something, including but not limited to materials, *mechanical systems* and components, appliances, and equipment, or of being installed, in a particular location.

*Lowest profile equipment* means EVSE that is the smallest height and width possible that meets the EV charging needs.

*Maintenance and repair* means activities required to maintain in an operational state, or to bring back to operating condition by *repair* or *replacement* of obsolete, broken, damaged, or deteriorated features, elements, materials, and systems.

*Mechanical system* means any heating, cooling, indoor air quality, ventilation, dehumidification, air conditioning, plumbing, or electrical system, and the individual elements and components of each system.

~~*Micromobility vehicle* means small, lightweight vehicles such as e-bicycles and scooters, which can be human-powered or electronic, privately owned or shared, and operate at low to moderate speeds of 15 to 30 miles per hour.~~

~~*Micromobility parking* means an area to store for *micromobility vehicles*, whether private vehicles or shared vehicles, including dedicated bicycle docks used in a shared system.~~

~~*Minimally visibly intrusive* means that the EVSE is partially visible but does not detract from the views from or to historic properties.~~

*Mitigation measures* means any existing, new, or updated materials or actions that serve to address, compensate for, or otherwise resolve *adverse effects* on *historic properties*, and may include research reports, historical documentation, recordation, and other materials and activities.

*National Historic Landmark*, as provided in 36 C.F.R. § 800.16(p), means a *historic property* that the Secretary of the Interior has designated a *National Historic Landmark*.

*Native Hawaiian*, as provided in 36 C.F.R. § 800.16(s)(2), means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

**Commented [EH40]:** The only place in the whole document this term is used is in reference to providing assistance to consulting parties. Since there is no consultation taking place, it is unclear how this would apply. Moreover, there does not appear to be any mitigation offered or stated anywhere for adverse effects.

*Native Hawaiian Organization*, as provided in 36 C.F.R. § 800.16(s)(1), means any organization which serves and represents the interests of *Native Hawaiians*; has as a primary and stated purpose the provision of services to *Native Hawaiians*; and has demonstrated expertise in aspects of historic preservation that are significant to *Native Hawaiians*.

~~Parking facilities mean buildings, structures, land, rights-of-way, facilities, or areas used for parking of motor vehicles.~~

*Permeable ground surface materials* means permeable pavement, permeable pavers, porous flexible pavement, or other material or system that provides a hard surface, while allowing water to flow through to the underlying soils instead of into the storm sewer.

*Potentially historic ground surface materials* means any *ground surface material* comprised of pavers, cobblestones, Belgian blocks, bricks, or wood that are 45 years or older.

*Previously disturbed ground* means soils ~~as determined by a~~ *qualified authority* not likely to possess intact and distinct soil horizons and have a reduced likelihood of possessing *historic properties* within their original depositional contexts in the area and to the depth to be excavated, and does not mean plowed soils or historic urban deposits, including *previously disturbed right-of-way*.

*Previously disturbed right-of-way* means areas ~~as determined by a~~ *qualified authority* where previous construction or other activities have physically altered soils within the three-dimensional *area of potential effects* to the point where there is likely no potential for an archaeologically significant property to remain, including but not limited to: the entire curb-to-curb roadway, existing sidewalks, existing drains, and parking areas, including the prepared substrate constructed to support the infrastructure down to undisturbed or intact soil or subsoil. ~~As-built drawings and plans can be used to help determine the vertical and horizontal dimensions of the previously disturbed areas.~~

*Primary façade* means the exterior façade of a *building* which serves as the front or the major entry point of the *building*, provided that a determination of the *primary façade* ~~is made in consultation with the relevant State Historic Preservation Officer, can~~ depends on a variety of factors, and one *building* may have more than one *primary façade* ~~and or secondary façade.~~

*Primary right-of-way* means the ~~street, driveway or~~ corridor, open to the public for transportation purposes, from which a person may best view the *primary façade* of a *building* or, if the *primary façade* is not visible from the public *right-of-way*, the corridor nearest the façade(s) through which people enter the *building*.

*Primary space* means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other space that contains a *character-defining feature* of a *historic building* ~~or historic climate friendly transportation facility identified in consultation with the relevant State Historic Preservation Officer.~~

~~Protected bicycle lane means a bicycle facility that is physically separated from motor vehicle traffic and is distinct from the sidewalk for the exclusive use by and increased safety of bicyclists.~~

*Qualified authority* means a ~~qualified professional~~ *State or Tribal Historic Preservation Officer*, or a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects* to *historic properties* of religious and cultural significance to their *Indian Tribe* or to *Native Hawaiians*, respectively.

*Qualified professional* means a person who meets the relevant standards ~~for the appropriate~~

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**Commented [EH41]:** None of this is accurate in terms of quantifying the potential for archeological or human remains. Parking lots, for example, frequently exist over existing archaeological and human remains as a means of protection. Further disturbance would need to be managed appropriately - so the assumption can't be that the presence of these types of features would mean there is likely no potential for the presence of these resources.

**Commented [EH42]:** These alone cannot be relied upon. Particularly older as-built plans can show an area of disturbance but may include no information about the presence of cultural resources.

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**Commented [EH43]:** The definition in the previous draft of "Primary view" included language noting it could include views of secondary sides, rear elevations, etc., which sounded more specific. "Depending on a variety of factors" is too broad - and since this PC eliminates consultation, who would make this call? There must be consultation to determine appropriate primary views.

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**Commented [EH44]:** We like the inclusive concept of Qualified Authority to allow for tribal and NHO involvement. However, qualified professionals, as defined below, are not "authorities" and should not be added here. The omission of SHPOs is concerning.

corresponding discipline outlined in the Secretary of the Interior’s Professional Qualifications Standards, as amended and annotated.

*Recognized design manual* means one of the following: Federal Highway Administration Manual on Uniform Traffic Control Devices, American Association of State Highway and Transportation Officials A Policy on Geometric Design of Highways and Streets, National Association of City Transportation Officials (NACTO) Urban Street Design Guide, NACTO Urban Bikeway Design Guide, NACTO *transit* Street Design Guide, NACTO Bike Share Station Siting Guide, or NACTO Urban Street Stormwater.

*Records check* means a search of relevant *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, and *federal agency* files, records, inventories, and databases, local preservation and/or planning office records, ~~or and~~ other sources recommended by such parties, for information about whether *historic properties*, including properties with traditional religious and cultural significance to one or more *Indian Tribes* or *Native Hawaiian Organizations*, are known to or may exist within an area of potential effects.

*Reduce energy use or greenhouse gas emissions* means to take an action that: lessens either the amount of energy used or *greenhouse gas* emitted to perform the same task or produce the same result; replaces an energy production source reliant on fossil fuels with a clean energy technology or upgrades a clean energy technology; or achieves *electrification*.

*Rehabilitation* means the act or process of making possible ~~an efficient~~ compatible use for a property through *repair*, alterations and additions while preserving those portions or features that convey its historical, cultural or architectural values.

*Replacement* means substitution of new element for an existing element, either in-kind or which may require a change in size, dimension, location, and configuration, in order to improve the function and condition of the element or the broader system of which the element is a part.

*Secondary Façade* means a façade that, in consultation with the appropriate *qualified authority* and other stakeholders, there is concurrence that they are appropriate for more liberal alteration.

*Solar energy system* means any addition, alteration, or improvement which is designed to utilize solar energy either of the active type based on mechanically forced energy transfer or of the passive type based on convective, conductive, or radiant energy transfer, or some combination of these types to reduce the energy requirements of that structure from other energy sources, including but not limited solar hot water equipment, *community solar systems*, and solar photovoltaic equipment and all components.

*State historic preservation officer*, as provided in 36 C.F.R. § 800.16(v), means the official appointed or designated pursuant to Section 101(b)(1) of the National Historic Preservation Act to administer the state historic preservation program or a representative designated to act for the *state historic preservation officer*.

*Substitute building materials* “building materials that have the potential to match the appearance, physical properties, and related attributes of historic materials well enough to make them alternatives for use in current preservation practice when historic materials require replacement.” ~~“from PB16 means modern, industry standard, natural, composite, and synthetic materials that simulate the appearance, physical properties, and related attributes of historic materials well enough to make them alternatives for use when historic building materials require replacement.”~~

*Technical feasibility* means the viability, suitability, and practicality of a proposed *undertaking* in

**Commented [EH45]:** Without this clause, you are setting up an expectation of a grant recipient proceeding with something allowed under the Program Comment but may be prohibited or process restricted by a local ordinance.

**Commented [EH46]:** There is a problem here if this PC is meant to apply to public grant recipients, for example. The presence of archaeological and other historic property data may be restricted... so a records check, depending upon how it is completed, may not reveal the necessary information.

**Commented [EH47]:** Again - nothing in the Program Comment about the establishment of an APE.

**Commented [EH48]:** The actual definition of rehabilitation as provided by the NPS should be used here to eliminate confusion.

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**Commented [EH49]:** This is the definition of Substitute Building Materials as defined by the NPS. What appears to be proposed here is what the Army has defined as Imitative Substitute Materials - which is a term of their own invention. If the intent is for the latter, that term should be used to avoid confusion and make the distinction that what is being permitted is a more liberal use of material.



light of a range of considerations, including health, safety, energy efficiency, climate resiliency, durability of materials, and sound professional judgment (including architectural, archaeological, or engineering judgment).

~~Transit means mass transportation by a conveyance (including a bus, railcar, locomotive, trolley car, or light rail vehicle) that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation.~~

~~Transit oriented development building means a building within one half mile of an existing or planned transit stop to be developed or redeveloped as part of a federal program or project to promote transit oriented development.~~

*Tribal historic preservation officer*, as provided in 36 C.F.R. § 800.16(w), means the Tribal official appointed by the *Indian Tribe's* chief governing authority or designated by a Tribal ordinance or preservation program who has assumed the responsibilities of the *state historic preservation officer* for purposes of Section 106 compliance on *Tribal lands* in accordance with Section 101(d)(2) of the National Historic Preservation Act.

*Tribal lands*, as provided in 36 C.F.R. § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

*Undertaking*, as provided in 36 C.F.R. § 800.16(y), means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a *federal agency*, including those carried out by or on behalf of a *federal agency*; those carried out with federal financial assistance; and those requiring a federal permit, license or approval.

*Zero emissions building* means a *building* that is highly energy efficient, does not emit *greenhouse gases* directly from energy use, and is powered solely by clean energy, as further defined in the National Definition of a Zero Emissions Building.

## APPENDIX A-1: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Site Work

The following activities do not require further Section 106 review when conducted in areas ~~adjacent to or~~ on the same lot as *housing*:

a. *Rehabilitation, replacement, installation*, and removal of any of the following *elements* less than 45 years old ~~or on or adjacent to a building 45 years old or newer~~, provided ~~there is concurrence of the State Historic Preservation Officer, Tribe or NHO that such activity exclusively affects previously disturbed ground, or creates no new ground disturbance, or has a low likelihood of impacting historic properties as specified below:~~

i. ~~Repair and/or in-kind replacement of~~ *Concrete* and asphalt ground surfaces such as streets, parking areas, driveways, and walkways, including ~~repaving, restriping, replacing~~ *Replacing* such surfaces with *permeable ground surface materials*, and reducing surface size, but not changing vertical alignment or expanding surface size, ~~provided previous surface is not a character-defining feature of a historic property.~~

ii. ~~Recreational~~ *P*ark, playground, and sports equipment such as platforms, guardrails, handrails, climbers, ramps, stairways, ladders, balance beams, fitness equipment, rings, rolls, un- mechanized merry-go-rounds, seesaws, slides, swings, benches, netting, basketball hoops, drinking fountains, and *ground surface materials*, but not *buildings*.

**Commented [EH50]:** Installation suggests putting something in that was not previously present. One could argue there was some previous ground disturbance, based on the definition provided, so the installation of a new paved parking lot, driveway, etc. could be undertaken with no consultation. This is, in some cases, problematic.

**Commented [EH51]:** In other words, the elements are less than 45 years old but they can be part of a resource that is a historic property. Throughout this section, however, there are attempts to qualify "unless a character-defining feature of a historic property." If a DOE isn't required, how would anyone even know this? Also, this would cover federally owned buildings as well as grant delegated projects, correct? So even more questionable - how would a grant recipient know?

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**Commented [EH52]:** Restriping isn't an undertaking, is it?

iii. Fencing, but not *replacement* or removal of fencing that is a *character-defining feature* of a *historic property*.

iv. Wayfinding, address, and identification signage.

v. Lighting, such as *building-mounted* lighting and freestanding lighting in parking areas, along driveways or walkways, or in park and playground areas, and including relamping and rewiring, but not including *replacement* or removal of lighting that is a *character-defining feature* of a *historic property*.

vi. Water feature, such as decorative fountains, including replumbing, but not *replacement* or removal of a water feature that is a *character-defining feature* of a *historic property*.

vii. Curb, gutter, steps, ramp, and retaining wall, but not a retaining wall that is a *character-defining feature* of a *historic property*.

b. *Maintenance, repair, and in-kind replacement* of any element listed in Section 1.a. of this Appendix.

c. Any of the following landscaping, grounds, and water management activities:

i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.

ii. Planting of grass, shrubs, and other plants, and xeriscaping, provided there is no historic landscape present.

~~iii.~~ ~~Replacement~~ of a tree in its existing location, provided it is not a character defining element of a historic landscape and

~~iii-iv.~~ ~~planting of a new tree within 40 feet of the building,~~ provided there is no historic landscape present.

~~iv-v.~~ Removal of grass, shrubs, other plants, provided there is no historic landscape present; invasive species, dead plant and tree material, and diseased or hazardous trees.

~~v-vi.~~ Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.

~~vi-vii.~~ *Maintenance, repair, rehabilitation, replacement, and installation of green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*.

d. *Maintenance, repair, rehabilitation, replacement, and removal of the following elements serving housing*, provided such activity exclusively affects *previously disturbed ground*, ~~or~~ creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, or other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, natural gas, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Vault toilets.

e. Test borings, soil sampling, ~~well drilling~~, or perc tests less than eight inches in diameter that do

**Commented [EH53]:** These aren't undertakings requiring review - do they need to be here?

**Commented [EH54]:** There needs to be a qualifier here about extent of ground disturbance both existing and required. Small trees may be fine... but the planting of larger ones should be tied to a knowledge there are no suspected archeology or human remains.

**Commented [EH55]:** The replacement of a sewer, septic and leaching system is pretty invasive - hard to limit ground disturbance. This should have some limits and may require some sort of check whether or not there is a potential for archaeological resources first.



~~not~~ impact ground surface materials 45 years or older or known historic properties.

f. Installation and removal of temporary construction-related structures, including scaffolding, barriers, screening, fences, protective walkways, signage, office trailers, and restrooms.

## 2. Work on the Building Exterior

The following activities do not require further Section 106 review when conducted on ~~or near~~ the exterior of housing:

a. Rehabilitation, replacement, and installation of the following elements: on a building less than 45 years old and not known after a records check to be a historic property ~~or located in a national register listed or eligible, or locally designated historic district~~; on a building the appropriate qualified authority ~~federal agency or another federal agency~~ has determined to not be a listed or eligible historic property within the preceding ~~ten-five~~ years; ~~or on the non-primary façade of a historic building or on the non-primary façade of a building whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the primary right of way~~:

- i. **Doors**, including insulated exterior doors and basement bulkhead doors.
- ii. **Windows**, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings or window louvers.
- iii. Canopies, awnings, and solar shades.
- iv. **Roofing**, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.
- v. Improvements that address the requirements of the Americans with Disabilities Act, such as ramps and railings.
- vi. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.
- vii. **Solar energy systems**.
- viii. Elevator systems.
- ix. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- x. **Foundations** and seismic and structural repairs, with ground disturbance limited to ~~areas within 10 feet of the building~~ previously disturbed ground.
- xi. Chimneys.
- xii. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.
- xiii. **Siding**.
- xiv. **Energy and water metering devices**.

b. Maintenance, repair, and in-kind replacement activities on any building, **including**:

- i. Maintenance, repair, and in-kind replacement of any element listed in Section 2.a. of this

**Commented [EH56]:** The other items are testing related... drilling a well is a final action and rather negates the ground-disturbance clause. Maybe, just maybe if it was within a certain distance of an existing well, or replacing an existing...

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**Commented [EH57]:** Many of these exterior modifications, as proposed, would allow replacement of potentially character defining features or installation of major elements, such as solar panels - simply because the status of the building is unknown, or if it is not visible from the primary right of way, or not on a primary façade. While in some cases this may be OK, this must be evaluated in consultation. So unless this is fleshed out further, this should be limited to newer buildings, etc.

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**Commented [EH58]:** Undertaking?

**Commented [EH59]:** Reference to NPS Bulletins on how to do this work would enhance this point.

Appendix.

ii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.

iii. Repointing of mortar joints with mortar ~~similar matching~~ in composition, joint profile, color, hardness, and texture of existing mortar.

iv. Removal of exterior paint or graffiti using non-destructive means, limited to hand scraping, low-pressure water wash of less than 500 psi, heat plates, hot air guns, and chemical paint removal.

c. *Maintenance, repair, rehabilitation, replacement, installation* and removal of any of the following elements ~~on or near a building~~, provided that such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from ~~the a primary right-of-way of either the subject building or an adjacent historic property~~;

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.

ii. Below-ground utilities, including underground water, ~~sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems~~.

iii. Foundation vents, if painted or finished to match the existing foundation material.

iv. *Green infrastructure*.

v. Gray water systems.

d. Paint on previously painted exterior surfaces.

e. *Rehabilitation, replacement, and installation of clean energy technologies*, provided that:

i. Such technology is located either outside the boundaries of a *historic district*, ~~on a flat roof, or on the a non-primary secondary~~ *façade side* of *historic housing*, ~~or and~~ in a location not otherwise visible from the *primary right-of-way*; and is located on the same lot as or on an adjacent lot to that *housing*, ~~or in the case of a community solar system, in a lot within two blocks or two thousand feet (whichever is longer) of the housing served~~;

ii. Such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*;

iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted *solar energy system* may be visible from the *primary right-of-way* if it is ~~on a flat roof~~, installed with methods that do not irreversibly damage historic materials, ~~sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on and a flat roof~~ has a profile with a slope not to exceed 20%.

f. *Maintenance, repair, or in-kind replacement of clean energy technologies*.

g. *Abatement of hazardous materials* where *effects* of the *abatement* are reversible or temporary or not visible from ~~the a primary right-of-way~~, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal or replacement of ~~windows on the character-defining features on a~~ primary

**Commented [EH60]:** Similar is too broad. Given the potential for serious masonry damage if the wrong mortar is selected, this needs to be more specific.

**Commented [EH61]:** “or near” needs to be further quantified.

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**Commented [EH62]:** We have to account for impacts to any adjacent historic properties.

**Commented [EH63]:** Installation of sewer, septic and leaching systems involves a great deal of ground disturbance... it is not really the same as replacing and repairing elements. May want to consider eliminating installation of new for some of these.

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**Commented [EH64]:** Community solar systems have too many variables that either need to be further fleshed out or omitted from this document.

façade of historic housing or housing ~~whose eligibility for inclusion in the National Register is not known~~; or ~~windows features~~ 45 years or older.

**Commented [EH65]:** Eligibility should guide decision-making.

### 3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of housing, and do not result in physical changes visible from ~~the a primary right-of-way~~ or a primary space:

a. *Maintenance, repair, rehabilitation, replacement, and installation, and abatement of hazardous materials*, that take place entirely within the interior of ~~the housing and: in an individual housing unit; in any interior location of housing~~ less than 45 years old and not known after a *records check* to be a *historic property*; on housing the ~~state historic preservation officer, federal agency or another federal agency~~ has determined to be not a *historic property* within the preceding ~~ten-five~~ years; or in any interior space within historic housing that ~~is not~~ has not been identified as a *primary space* ~~and is devoid of character-defining features.~~ Example activities covered by this Section 3.a. include: removal, alteration (including of width, height, and location), and construction of interior walls; alteration of floors and flooring (including of material, pattern, and texture); alteration of ceilings (including of material, lighting, and height); *installation of mechanical systems* and fire alarm, fire suppression, and security systems and equipment; insulation and air sealing; removal and *installation* of equipment and fixtures (including bathroom, kitchen, and lighting equipment and fixtures); *replacement* and refurbishment of elevator cabs, system-wide upgrades to elevator *mechanical systems*, *installation of building energy control systems*; and *installation* of code-required signage; removal, alteration, and construction of stairs ~~(when not a character-defining feature)~~; cosmetic improvements; and improvements to address the requirements of the Americans with Disabilities Act.

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**Commented [EH66]:** Generally, we are not in favor of listing examples unless they are similar enough to paint a clear picture. In this case, the examples amount to a potential gut-rehab. This section should include a list of potential activities, rather than general examples.

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b. *Rehabilitation, replacement and installation* of any of the following elements, in any location other than the ~~locations identified in Section 3.a. of this Appendix~~, if such activity does not result

**Commented [EH67]:** This is confusing.... 3a applies to housing in buildings less than 45 years old, on housing determined not a historic property, or on any historic property as long as not in a primary space. What does this section apply to.... ?

in physical changes visible from ~~the~~ <sup>a</sup> *primary right-of-way* and has no visual *effect* on the *primary spaces* of historic housing:

- i. *Mechanical systems*, including but not limited to heating, ventilating, and cooling components such as heat pumps, electric furnaces and boilers, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, ventilation systems, and refrigeration lines; and fire alarm, fire suppression, and security systems and equipment.
- ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.
- iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.
- iv. Electronic ignition devices.
- v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.
- vi. **Water** conservation measures, such as low flow faucets, toilets, shower heads, urinals, and distribution device controls.
- vii. **Light fixtures**, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
- viii. *Building energy control systems*.
- ix. **EnergyStar** (or similarly rated) appliances.
- x. Battery energy storage systems.
- xi. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, where such insulation can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.
- xii. Spray foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch *historic building materials* and can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.
- xiii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.

c. *Maintenance, repair, and in-kind replacement* of any of the elements listed in Section 3.b., *of* any *building* element, **including any existing improvement** that addresses the requirements of the Americans with Disabilities Act, and any cosmetic or decorative features of the *housing*.

d. *Maintenance, repair, in-kind replacement, and rehabilitation* of a skylight, atrium, courtyard, or lightwell; and *installation* of a new skylight, atrium, courtyard, or lightwell that will not be visible

**Commented [EH68]:** Undertakings?

**Commented [EH69]:** Should not include replacement of historic light fixtures that are character-defining.

**Commented [EH70]:** Undertakings?

**Commented [EH71]:** As written the intent of this section is confusing... are we talking about maintenance, repair and in-kind replacement of all of these elements? Or is the intent to waive review for installation of new ADA, cosmetic or decorative features?

from ~~the a~~ primary right-of-way and will not result in interior reconfigurations to *primary spaces* or removal of *historic building materials* in *primary spaces*.

e. *Abatement of hazardous materials* where *effects* of the *abatement* are reversible or temporary or not visible from ~~the a~~ primary right-of-way, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal or replacement of: ~~windows-character-defining features on the primary façade~~ of *historic housing* or *housing* whose eligibility for inclusion in the National Register is not known; or ~~windows-features~~ 45 years or older.

#### 4. Emergency Work

The following activities related to the exterior or interior of any *historic housing* do not require further Section 106 review when such work relates to an *emergency situation* and takes place within 30 *days* of the occurrence of the *emergency situation* and otherwise complies with 36 C.F.R. § 800.12:

- a. Temporary stabilization that causes no permanent damage to *historic housing* or any other *historic property*, including *installation* of temporary bracing, shoring and tarps.
- b. Emergency *repair* of masonry, concrete, or *building* façade cracks or falling elements.
- c. Emergency *repair* of falling plaster or other elements that pose an immediate and imminent health and safety hazard.
- d. *Abatement of hazardous materials* required to address an *emergency situation*.
- e. *Replacement* and demolition of a deteriorated or damaged mobile or manufactured home.

#### 5. Other Activities

The following activities do not require Section 106 review:

- a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of *housing*.
- b. Feasibility studies related to energy efficiency improvements, *electrification*, improvements incorporating *clean energy technologies*, and other topics relating to *building* energy use.
- c. Leasing, refinancing, acquisition, or purchase by the *federal agency of housing*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- d. Transfer, lease, or sale of a federal government-owned *housing* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

~~e. Transfer, lease, or sale out of federal ownership or out of federal control of historic housing; provided there are adequate and legally enforceable restrictions or conditions (such as in a deed~~

**Commented [EH72]:** If it is covered by 800.12 do we need them in an agreement document?

**Commented [EH73]:** These aren't undertakings

**Commented [EH74]:** Just clarifying....Are we saying that leasing, refinancing, acquisition and purchase does not require 106 but the activities do - and then this Program Comment would apply?

**Commented [EH75]:** Transfer, sale or lease out of federal control should go through standard 106 consultation.

~~covenant) to ensure long-term preservation of the property's historic significance in accordance with 36 C.F.R. § 800.5(a)(2)(vii).~~

~~f. Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment satisfying the EVSE criteria.~~

**Commented [EH76]:** There is already an EVSE exemption

## APPENDIX A-2: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

### 1. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to housing or on the same lot as housing, after the satisfaction of the identified conditions, exclusions, or requirements:

a. Replacement, installation, or removal of any of the ~~following~~ elements ~~listed in Sections 1.a, 1.d or 1.e of Appendix A-1~~ which are either less than 45 years old and create new ground disturbance in previously undisturbed soils, or 45 years or older; if

i. ~~Appropriate a-qualified authority~~ makes a written determination that such activity will have no adverse effects on any historic property; or

~~a-ii.~~ if the area of potential effects has been previously field surveyed (acceptable to current state or Tribal standards ~~or~~ within the past ten years) and, if applicable, has been subject to consultation with State and/or Tribal Historic Preservation Officers, -Indian Tribes and Native Hawaiian Organizations without such survey or consultation identifying any historic properties:

i. ~~Any of the elements listed in Sections 1.a. and 1.d. of Appendix A-1, including character-defining features of such elements;~~

ii. ~~Test borings, soil sampling, well drilling, or pere tests more than eight inches in diameter, or that impact ground surface materials 45 years or older or known historic properties;~~

b. Planting of a new tree 40 feet or more from a building or replacement or installation of green infrastructure either in previously disturbed ground, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the building, if:

~~b-i.~~ ~~a-Appropriate~~ qualified authority has made a written determination that such planting will have no adverse effects on any historic property.

### 2. Work on the Building Exterior

The following activities do not require further Section 106 review when conducted on, or in the case of clean energy technologies near (as further provided below), the exterior of housing, after the satisfaction of the identified conditions, exclusions, or requirements:

a. Rehabilitation, replacement, and installation of the ~~following~~ elements ~~listed in Section 2.a. of Appendix A-1~~ on the exterior of: buildings 45 years or older if:

i. ~~a-qualified authority~~ Appropriate qualified authority determines that the building is not a historic property; or

~~a-ii.~~ ~~buildings 45 years or older determined by a qualified authority to be a historic property~~ Appropriate qualified authority determines the building is a historic property and a ~~y, if a~~ qualified professional makes a written determination that such installation or replacement will have no or minimal adverse effects, pursuant to 36 CFR 800.5 ~~s~~ on any character-defining feature of a historic building and, once complete, verifies the work was completed as intended;

i. ~~Any of the elements listed in Section 2.a. of Appendix A-1, including elements in~~

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Commented [EH77]: Although present in definition, this seems to be the first mention of an APE. The document does not seem to include a procedure for determining the APE.

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Commented [EH78]: This document structure is confusing, the subject conditions, exclusions and requirements should be identified clearly as such... but it is also hard to determine exactly how this section contrasts with A-1....Is there an easier way to structure this?

Commented [EH79]: This is odd - For this to apply, no historic properties would be present or there would be no adverse effect.... How would the removal of character-defining features not be an adverse effect? 36 CFR 800 is pretty clear.....

Commented [EH80]: Included in 1.a - easier to understand

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~~locations other than those identified in that Section.~~

Commented [EH81]: Moved to 2a for clarity.

~~b. Rehabilitation, replacement, or installation of any of the following elements listed in Section 2.c of Appendix A-1 or, in the case of clean energy technologies, when located or configured in a manner other than that identified in Section 2.e. of Appendix A-1 near (as further provided below); a building, which creates new ground disturbance on previously undisturbed ground, if:~~

~~b.i. ~~a~~ Appropriate qualified authority makes a written determination that such activities will have no adverse effects on any historic property:~~

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~~b.ii. ~~when located or configured in a manner other than that identified in Section 2.e. of Appendix A-1.~~~~

Commented [EH82]: Moved for clarity

c. Replacement of exterior historic building materials of historic housing with in-kind or substitute building materials after the federal agency, with the assistance of ~~a~~ the appropriate qualified authority, conducts the following selection procedure:

i. Characterize existing historic building materials in terms of condition, design, material properties, performance (including insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other hazardous materials;

ii. Next, determine, based on an evaluation of technical feasibility and economic feasibility, if historic building materials can be repaired or if they must be replaced;

iii. Next, if replacement is required, identify potential in-kind and substitute building materials and evaluate their technical feasibility and economic feasibility;

iv. Finally, based on such evaluation, select the most appropriate in-kind or substitute building material;

provided, however, that a federal agency may only utilize this selection procedure if such replacement or demolition does not create ground disturbance, creates ground disturbance exclusively on previously disturbed ground, or, in the opinion of a qualified authority, has no adverse effects on any historic property.

Commented [EH83]:

Commented [EH84R83]: Reference to the SOI Standards for Substitute Materials would enhance this section.

d. The abatement of hazardous materials, where such activity is irreversible or permanent or will be visible from the primary right-of-way, create new ground disturbance, or result in the permanent removal or replacement of: windows on the primary façade of a historic building or a building whose eligibility for inclusion in the National Register is not known; or windows 45 years or older, if the appropriate qualified authority makes a written determination that such activity will have no adverse effects on any historic property.

### 3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of housing, after the satisfaction of the identified conditions, exclusions, and requirements:

a. In addition to those activities listed in Section 3 of Appendix A-1, maintenance, repair, rehabilitation, replacement, and installation, and the abatement of hazardous materials, where such activity results in physical changes to a historic building visible from the primary right-of-way or has a visual effect on the primary spaces of a historic building, ~~i~~:

~~a.i. if a qualified authority makes a written determination that such activity has no adverse effects on any historic property.~~

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## APPENDIX B-1: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Site Work

The following activities do not require further Section 106 review when they are conducted in areas adjacent to a building or on the same lot as a building, and when conducted primarily to reduce energy use or greenhouse gas emissions of the building or to enhance climate resilience of the building:

a. Rehabilitation, replacement, installation, and removal of any of the following elements less than 45 years old, provided such activity exclusively affects previously disturbed ground or creates no new ground disturbance, and not including replacement or removal of any element that is a character-defining feature of a historic property:

i. Fencing.

ii. Lighting, such as building-mounted lighting and freestanding lighting in parking areas, along driveways and walkways, in park and playground areas, and in other areas, and including relamping and rewiring.

iii. Water feature, such as decorative fountains, including replumbing.

iv. Curb, gutter, steps, ramp, and retaining wall.

b. Maintenance, repair, and in-kind replacement of any element listed in Section 1.a. of this Appendix.

c. Any of the following landscaping, grounds, and water management activities where the existing landscape or elements are not historic or a character defining feature of a historic property:

i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.

ii. Planting of any of the following that are native, naturalized, drought-adapted, drought-resistant, drought-tolerant, water-wise, or xeric: grass, shrubs, and other plants; and xeriscaping.

iv. Replacement of a tree in its existing location and planting of a new tree within 40 feet of the building.

v. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.

vi. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a character-defining feature of a historic property.

vii. Maintenance, repair, rehabilitation, replacement, and installation of green infrastructure either in previously disturbed ground, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the building.

viii. Removal of concrete or asphalt ground surfaces or replacement of such surfaces with permeable ground surface materials.

ix. The following activities conducted to address fire threats within 200 feet of a building or auxiliary structure:

**Commented [EH85]:** What does adjacent mean?

**Commented [EH86]:** This is entirely too broad of a definition or category of undertakings. It seems odd that the first category of undertakings is housing (a property type), and the second category is a wide range of possible undertakings being completed to meet a policy goal (a program?) One is more specific (and in our view, better for a program alternative), and the other is more broad though the actions are similar. It makes for a tedious agreement document.

**Commented [EH87]:** So again - we have an element that itself may be less than 45 years old but is on a property that is more than 45 years old, and historic. The intent here should be clarified - are we talking about buildings, elements, or both?

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**Commented [EH88]:** Are these really undertakings that would be primarily to reduce energy use, greenhouse gas emissions or improve climate resilience? Fencing? Fountains? Maybe lighting if the type of lighting chosen were energy efficient....

**Commented [EH89]:** What about historic landscapes... or landscapes that themselves may be character-defining features?

**Commented [EH90]:** None of these are a real problem - but what do they have to do with energy reduction, emissions reduction or climate resilience? These are just general maintenance tasks. Are they even undertakings?

a. Disposal of heavy accumulations of ground litter and debris.

b. Removal of small conifers growing between mature trees, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*.

d. *Maintenance, repair, rehabilitation, replacement* and removal of the following elements, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Vault toilets.

e. Test borings, soil sampling, ~~well drilling~~, or perc tests less than eight inches in diameter that do not impact *ground surface materials* 45 years or older or known historic properties.

f. *Installation* and removal of temporary construction-related structures, including scaffolding, barriers, screening, fences, protective walkways, signage, office trailers, and restrooms.

## 2. Work Related to the Building Exterior

The following activities do not require further Section 106 review when they are conducted on or near the exterior of a *building* and when they are conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building*, or to enhance the *climate resilience* of the *building*:

a. *Rehabilitation, replacement, and installation* of any of the following elements: on a *building* less than 45 years old and not known after a *records check* to be a *historic property* ~~or located in a national register listed or eligible, or locally designated historic district~~; on a *building* ~~the an appropriate qualified authority federal agency or another federal agency~~ has determined to not be a *historic property* within the preceding ~~ten-five years~~; ~~or on the non-primary façade of a historic building or on the non-primary façade of a building whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the primary right of way~~.

i. Doors, including insulated exterior doors.

ii. Windows, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.

iii. Canopies, awnings, and solar shades.

iv. Roofing, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; white roofs or cool roofs; and green, sod, or grass roofs.

v. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.

vi. ~~Solar energy systems~~.

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Commented [EH91]: Again, we do not support the replacement of these components on historic buildings without any consultation.

Commented [EH92]: Isn't this covered under "e" below?

vii. Elevator systems.

viii. Chimneys.

ix. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, and frieze board vents.

x. Siding.

xi. Energy and water metering devices.

b. *Maintenance, repair, and in-kind replacement* of the following elements on, or in the case of *clean energy technologies* near (as further provided below), any *building*:

i. Any element listed in Section 2.a. of this Appendix.

ii. *Clean energy technologies*.

iii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.

iv. Repointing of mortar joints with mortar similar-matching in composition, joint profile, color, hardness, and texture of existing mortar.

c. *Maintenance, repair, rehabilitation, replacement, installation, and removal* of any of the following elements on or near a building, provided that such activity *exclusively affects previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the a primary right-of-way of either the subject building or an adjacent historic property:

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Foundation vents, if painted or finished to match the existing foundation material.

iv. *Green infrastructure*.

v. Gray water systems.

d. Paint on previously painted exterior surfaces.

e. *Rehabilitation, replacement, and installation of clean energy technologies*, provided that:

i. Such technology is located either outside the boundaries of a *historic district*, on a flat roof, or on the non primary a secondary facade side of a historic building, or in a location not otherwise visible from the a primary right-of-way; and is located on the same lot as or on an adjacent lot to that *building or buildings*, or in the case of a community solar system, in a lot within two blocks or two thousand feet (whichever is longer) of the building or buildings served:

ii. Such activity *exclusively affects previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the a primary right-of-way;

**Commented [EH93]:** Near needs to be quantified

**Commented [EH94]:** We have to account for impacts to any adjacent historic properties.

**Commented [EH95]:** As previously noted, installing sewer, septic and leaching systems can produce a lot of ground disturbance. May want to consider eliminating installation of new.

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**Commented [EH96]:** The way this is worded as an “or,” a community solar system could be installed offsite within two blocks in a historic district. There should be some qualifiers added regarding location and visibility.

~~iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted solar energy system may be visible from the primary right-of-way if it is on a flat roof, installed with methods that do not irreversibly damage historic materials and has a profile with a slope not to exceed 20%.~~

~~iii. Notwithstanding Section 2.e.i. of this Appendix, a roof mounted solar energy system may be visible from the primary right of way if it is installed with methods that do not irreversibly damage historic materials, sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.~~

### 3. Work Related to the Building Interior

The following activities do not require further Section 106 review when they are conducted in the interior of a building and when they are conducted primarily to *reduce energy use or greenhouse gas emissions* of the building, or to enhance the *climate resilience* of the building:

a. *Maintenance, repair, rehabilitation, replacement, and installation* of any of the following elements:

i. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, where such insulation can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.

ii. Spray foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch *historic building materials*, and can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.

iii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.

b. *Maintenance, repair, rehabilitation, replacement and installation* of any of the following elements, if such activity does not result in physical changes visible from the *primary right-of-way*, and has no visual *effect* on the *primary spaces* of a historic building:

i. *Mechanical systems*, including but not limited to heating, ventilating, and cooling components such as furnaces, heat pumps, electric furnaces, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, heat pumps, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, and refrigeration lines.

ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.

iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.

iv. Electronic ignition devices.

v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.

vi. Water conservation measures, such as low flow faucets, toilets, shower heads, urinals,

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Commented [EH97]: Undertaking?

and distribution device controls.

vii. Light fixtures, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.

**Commented [EH98]:** Should not allow for replacement of historic light fixtures that are character-defining.

viii. Building energy control systems.

ix. EnergyStar (or similarly rated) appliances.

**Commented [EH99]:** Undertaking?

x. Battery energy storage systems.

#### 4. Other Activities

The following activities do not require Section 106 review:

a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of buildings.

b. Feasibility studies related to energy efficiency improvements, electrification, improvements incorporating clean energy technologies, and other topics relating to building energy use.

**Commented [EH100]:** Not undertakings....

c. Leasing, refinancing, acquisition, or purchase by the federal agency of energy efficiency, electrification, and clean energy technologies, provided that any changes in use or any physical activities related to the maintenance, repair, rehabilitation, replacement, or installation of such technologies must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

**Commented [EH101]:** Just clarifying....Are we saying that leasing, refinancing, acquisition and purchase does not require 106 but the activities do - and then this Program Comment would apply?

~~d. Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment satisfying the EVSE criteria.~~

## APPENDIX B-2: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

### 1. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to a building or on the same lot as a building, and when conducted primarily to reduce energy use or greenhouse gas emissions of the building or to enhance climate resilience of the building, after the satisfaction of the identified conditions, exclusions, or requirements:

a. Rehabilitation, replacement, installation, and removal of any element listed in Section 1.a of Appendix B-1, or in 1.d or Appendix B-1, of the following elements which are either less than 45 years old and create new ground disturbance in previously undisturbed soils, or 45 years or older, if:

i. a qualified authority makes a written determination that such activity will have no adverse effects on any historic property; or

a-ii. if the area of potential effects has been previously field surveyed (acceptable to current state or Tribal standards or within the past ten years) and, if applicable, has been subject to consultation with a State or Tribal Historic Preservation Officer, Indian Tribes and Native Hawaiian organizations without such survey or consultation identifying any historic properties

i. Any element listed in Section 1.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section;

ii. Any element listed in Section 1.d. of Appendix B-1, unrestricted by any limiting conditions found in such Section;

b. Planting of a new tree 40 feet or more from a building, or replacement or installation of green infrastructure either in previously disturbed ground, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the building, if:

b-i. a qualified authority makes a written determination that such planting will have no adverse effects on any historic property.

### 2. Work Related to the Building Exterior

The following activities do not require further Section 106 review when conducted on, or in the case of clean energy technologies near (as further provided below), the exterior of a building, and when conducted primarily to reduce energy use or greenhouse gas emissions of the building or to enhance climate resilience of the building, after the satisfaction of the identified conditions, exclusions, or requirements:

a. Rehabilitation, replacement, and installation of the following elements any element listed in Section 2.a. of Appendix B-1 visible from the a primary façade or primary right-of-way and on the exterior of: buildings 45 years or older if:

i. an appropriate qualified professional authority determines that the building is not a historic property; or

a-ii. buildings 45 years or older determined by an appropriate qualified professional authority to be a historic property; if a qualified professional makes and they make a written determination that such installation or replacement will have no or minimal adverse

Commented [EH102]: Define adjacent

Commented [EH103]: As with the other section, this would read better if the elements were listed first in the text and then the conditions called out. Instead of the other way around.

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Commented [EH104]: It is entirely too confusing to attempt to waive limiting conditions in a section articulating conditions for approval.

Commented [EH105]: Same as above

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effects on any character-defining feature of a historic building; provided, however, that ~~an~~ the analysis of adverse effects, following 36 CFR 800.5 must consider technical feasibility and economic feasibility, ~~including long-term operational costs and climate resilience of the building upon which elements are installed or replaced;~~

~~i.iii. Any element listed in Section 2.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section.~~

b. Rehabilitation, replacement, or installation of any of the ~~following elements~~ elements listed in Section 2.c. of Appendix B-1 or *clean energy technologies* when located or configured in a manner other than identified in Section 2.c. of Appendix B-1 on or near a building, which create new ground disturbance on previously undisturbed ground if:

~~b.i. A qualified authority makes a written determination that such activities will have no adverse effects on any historic property.~~  
~~building, which create new ground disturbance on previously undisturbed ground, if a qualified authority makes a written determination that such activities will have no adverse effects on any historic property.~~

~~i. Any of the elements listed in Section 2.c. of Appendix B-1.~~

~~ii. Clean energy technologies, when located or configured in a manner other than that identified in Section 2.c. of Appendix B-1.~~

c. Replacement of historic building materials of historic housing with in-kind or substitute building materials to improve energy efficiency after the federal agency, with the assistance of a *qualified professional authority as needed*, conducts the following selection procedure:

- i. Characterize existing *historic building materials* in terms of condition, design, material properties, performance, safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*;
- ii. Next, determine, based on an evaluation of *technical feasibility* and *economic feasibility*, if *historic building materials* can be *repaired* or if they must be replaced;
- iii. Next, if *replacement* is required, identify potential in-kind and *substitute building materials* and evaluate their *technical feasibility* and *economic feasibility*;
- iv. Finally, based on such evaluation, select the most appropriate in-kind or substitute building material;

provided, however, that a federal agency may only utilize this selection procedure if such replacement or demolition does not create ground disturbance, exclusively affects previously disturbed ground, or, in the opinion of a *qualified authority*, has no adverse effects on any historic property.

### 3. Work Related to the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of a building, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the building or to enhance *climate resilience* of the building, after the satisfaction of the identified conditions, exclusions, or requirements:

a. In addition to those activities listed in Section 3 of Appendix B-1, *maintenance, repair, rehabilitation, replacement, and installation*, and the *abatement of hazardous materials*, where

**Commented [EH106]:** This is too general. Operational costs should already be considered as a part of the economic feasibility. Considering climate resilience... this entire suite of undertakings is supposedly already being considered as a part of climate resilience.... Repetitive. Though that term is problematic as it is substantively broad.

**Commented [EH107]:** Again, this is confusing.... Waiving limiting conditions in a section articulating limiting conditions is just deliberately confusing. Beyond that, this provision essentially lets an agency do anything to the exterior of a historic property without review as long as its in the name of energy efficiency and, in their own determination, has "minimal adverse effects". We suggest citing 36 CFR 800.5 as the process that should be followed to assess adverse effects. Also... is there a reason this provision, which is nearly identical, contains the technical and economic feasibility provision while the Housing provision does not? Inconsistent....

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such activity results in physical changes to a historic *building* visible from the *primary right-of-way* or has a visual *effect* on the *primary spaces* of a historic *building*, if,

a.i. a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*.

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## ~~APPENDIX C-1: CLIMATE-FRIENDLY TRANSPORTATION-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW~~

### ~~1. Work on Ground Surfaces~~

~~The following activities do not require further Section 106 review, provided they do not result in the demolition or removal of potentially historic ground surface materials, and they are located entirely within the previously disturbed right of way:~~

~~a. Maintenance, repair, rehabilitation, replacement, and installation of the following elements when used for or incorporated into pedestrian, bicycle, micromobility vehicle, or transit infrastructure:~~

~~i. Ground surface material, including installation of slurry seals, overlays, and seal coatings; sealing and repairing cracks; milling and re-paving; repair of potholes; and restoration after utility installation.~~

~~ii. Curb.~~

~~iii. Sidewalk.~~

~~iv. Bulb out.~~

~~v. Ramp.~~

~~vi. Crosswalk, including a raised crosswalk across a roadway and a raised intersection.~~

~~vii. Mark on the ground surface for visibility and delineation, including striping for bicycle lanes, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, bicycle parking, micromobility parking, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.~~

~~viii. Detectable warning on or before a curb, entry point, crosswalk, or accessible facility.~~

~~ix. Island, including a pedestrian island to reduce crossing distance or improve visibility, and a corner island to separate bicycles from motor vehicles or enable a protected bicycle queuing area or motor vehicle waiting zone.~~

~~b. Maintenance, repair, rehabilitation, replacement, and installation of the following ground surface materials and elements:~~

~~i. High friction surface treatment.~~

~~ii. Cool pavement.~~

~~iii. Permeable ground surface materials.~~

~~iv. Rumble strip.~~

~~vii. Traffic calming device, such as speed hump, speed table, raised crosswalk, and raised intersections.~~

~~c. Elevation of no more than 10 inches of the existing ground surface to maintain, create, or connect pathways for pedestrians, bicyclists, or micromobility vehicle users, or to facilitate boarding and disembarking at transit facilities.~~

**Commented [EH110]:** The rest of this document is either building or building-related. To maintain focus, we are not in favor of including transportation related activities. Many of these actions are already covered in existing processes that allow for more community engagement - which is appropriate. At minimum, if the sense is the ACHP must proceed with something, this should be a different document.

## ~~2. Work Involving Fixtures and Equipment~~

The following activities do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials or historic building materials*, they are located entirely within the *previously disturbed right of way*, and they follow the specifications of a *recognized design manual* (if and to the extent covered in any such manual):

~~a. Maintenance, repair, rehabilitation, replacement, and installation of the following elements when used for or incorporated into pedestrian, bicycle, micromobility vehicle, or transit infrastructure:~~

~~i. Bicycle rack.~~

~~ii. Micromobility parking corral.~~

~~iii. Bicycle rail or wheel stop no taller than 6 inches.~~

~~iv. Flex post no taller than 36 inches and no larger in circumference than 22 inches.~~

~~v. Bollard no taller than 48 inches and no larger in diameter than 12 inches.~~

~~vi. Concrete or stone block no taller than 24 inches and no wider than 6 inches, to protect bicycle parking or micromobility parking or to delineate a pedestrian pathway.~~

~~vii. Sign, signal, traffic control device, and signalization, including any such elements that address the requirements of the Americans with Disabilities Act.~~

~~viii. Ticket dispensing structure, fee collection structure, interpretive wayside exhibit structure, and single post metal or wooden sign 5 feet or less in height and 2 square feet or less in cross-section area, not including provisions for solar power.~~

~~ix. Camera, intelligent transportation systems, and other technological equipment limiting, removing, or identifying unauthorized traffic from pathways dedicated to walking, biking, micromobility vehicle use, or transit use.~~

~~x. Temporary construction fencing, but not grading, creating a soil borrow pit, or other significant excavation.~~

~~b. Maintenance, repair, rehabilitation, replacement, and installation of street furniture, including the following elements, provided that such activity does not result in the removal of historic street furniture:~~

~~i. Bench.~~

~~ii. Table.~~

~~iii. Freestanding planter.~~

~~iv. Street light.~~

~~v. Shelter for transit users with a combined dimension (length plus width plus height) less than 30 linear feet and with advertising space no greater than 24 square feet visible at any one time; and maintenance, repair, and in-kind replacement of any other such shelter.~~

~~e. Maintenance, repair, rehabilitation, and in-kind replacement of the following elements:~~

- ~~i. Catenary system;~~
- ~~ii. Tracks, including ballasts and ties;~~
- ~~iii. Camera, mast, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.~~

### 3. Work Relating to Vegetation and Landscapes

~~The following activities occurring within the same right-of-way or on the same lot as climate-friendly transportation infrastructure do not require further Section 106 review, provided they do not result in the demolition or removal of potentially historic ground surface materials, and further provided that they exclusively affect previously disturbed ground or create no new ground disturbance:~~

~~a. Any of the following landscaping, grounds, and water management activities:~~

- ~~i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.~~
- ~~ii. Planting of any of the following that are native, naturalized, drought adapted, drought-resistant, drought-tolerant, water-wise, or xeric: grass, shrubs, and other plants; and xeriscaping.~~
- ~~iii. Replacement of a tree in its existing location and planting of a new tree on, along, or within a street that already has street trees.~~
- ~~iv. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.~~
- ~~v. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a character-defining feature of a historic property.~~

~~b. Maintenance, repair, rehabilitation, replacement, or installation of green infrastructure or landscaping to delineate pedestrian pathways or bicycle lanes, provided such green infrastructure or landscaping follows the specifications of a recognized design manual (if and to the extent covered in any such manual).~~

### 4. Work on Bridges

~~The following activities related to a bridge built to serve pedestrian, bicycle, micromobility vehicle, or transit use do not require further Section 106 review, provided they do not result in the demolition or removal of potentially historic ground surface materials; further provided that they exclusively affect previously disturbed ground or create no new ground disturbance; and further provided that the bridge is: either less than 45 years old and not known after a records check to be a historic property, or has been determined by the federal agency or another federal agency to not be a historic property within the preceding ten years:~~

- ~~a. Maintenance, repair, rehabilitation, and in-kind replacement of drains, joints, joint seals, concrete decks, parapet, rail, concrete, steel elements, bearings, retaining walls, and bridge machinery.~~
- ~~b. Cleaning and washing.~~

- ~~e. Conducting electrochemical extraction and cathodic protection.~~
- ~~d. Mitigating cracks, including pin and hanger replacement and other retrofits.~~
- ~~e. Implementing countermeasures against scour.~~

#### 5. ~~Other Activities~~

The following activities do not require Section 106 review:

- a. ~~Leasing, refinancing, acquisition, or purchase by the federal agency of:~~
  - ~~i. A railway right of way for the maintenance, development, or expansion of either rail to-trail pathways or passenger rail service;~~
  - ~~ii. A transit oriented development building; or~~
  - ~~iii. Fleets of bicycles, hybrid or electric vehicles, or electric locomotives,~~

~~provided that any physical activities related to such properties must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.~~
- ~~b. Transfer, lease, or sale of a federal government owned climate friendly transportation facility or transit oriented development building from one federal agency to another federal agency, provided that any changes in use or any physical activities related to the maintenance, repair, rehabilitation, replacement, or installation of such facility must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.~~
- ~~c. Transfer, lease, or sale out of federal ownership or out of federal control of a historic climate friendly transportation facility or transit oriented development building, provided there are adequate and legally enforceable restrictions or conditions (such as in a deed covenant) to ensure long term preservation of the property's historic significance in accordance with 36 C.F.R. § 800.5(a)(2)(vii).~~
- ~~d. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, micromobility vehicle, or transit uses, including "play streets," "school streets," "safe route to school" streets, or "open streets," provided that any physical activities related to such decisions, including but not limited to the maintenance, repair, rehabilitation, replacement, or installation of streets for the purpose of limiting motor vehicle access, must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.~~
- ~~e. Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment satisfying the EVSE criteria.~~

## ~~APPENDIX C-2: CLIMATE-FRIENDLY TRANSPORTATION-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS~~

~~The following activities do not require further Section 106 review after the satisfaction of the identified conditions, exclusions, or requirements:~~

### ~~1. Work on Ground Surfaces~~

~~The following activities do not require further Section 106 review, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:~~

- ~~a. Elevation of the existing ground surface by more than 10 inches, or that will result in the demolition or removal of *potentially historic ground surface materials*: to maintain, create, or connect pathways for pedestrians, bicyclists, or *micromobility vehicle* users, or to facilitate boarding and disembarking at *transit* facilities.~~

### ~~2. Work Involving Fixtures and Equipment~~

~~The following activities do not require further Section 106 review, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:~~

- ~~a. Any activities listed in Section 2.a. of Appendix C-1 that will result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials*, or create new *ground disturbance* in previously undisturbed soils, or result in the removal of historic street furniture.~~
- ~~b. *Rehabilitation, replacement, and installation* of a shelter for *transit* users with a combined dimension (length plus width plus height) 30 linear feet or more, or with advertising space more than 24 square feet visible at any one time.~~
- ~~c. *Installation* of the following new elements that will result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials* or that create new *ground disturbance* in previously undisturbed soils:~~
  - ~~i. Catenary system.~~
  - ~~ii. Tracks, including ballasts and ties.~~
  - ~~iii. Camera, mast, wiring, and other equipment and fixtures used for automatic traffic enforcement, to monitor motor vehicle traffic, or for security purposes.~~

### ~~3. Work Relating to Vegetation and Landscapes~~

~~The following activities do not require further Section 106 review, even if they create new *ground disturbance* in previously undisturbed soils, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:~~

- ~~a. Planting of a new tree on, along, or within a street that has not previously had street trees, or in other locations where such planting is intended to improve the experience for pedestrians, bicyclists, *micromobility vehicle* users, or *transit* users.~~
- ~~b. *Maintenance, repair, rehabilitation, replacement, or installation* of *green infrastructure* and landscaping related to pedestrian pathway or *bicycle lane* delineation that will result in the~~

~~demolition or removal of potentially historic ground surface materials or will create new ground disturbance.~~

#### ~~4. Work on Bridges~~

~~The following activities do not require further Section 106 review, even if they create new ground disturbance in previously undisturbed soils, if a qualified authority makes a written determination that such activity will have no adverse effects on any historic property:~~

~~a. Activities listed in Section 4 of Appendix C-1 and conducted on historic bridges.~~

~~b. Rehabilitation, replacement, or installation of a bridge built to serve pedestrian, bicycle, micromobility vehicle, or transit use.~~

**APPENDIX D: FORMAT FOR AUTHORIZATION BY AN INDIAN TRIBE FOR USE OF THIS PROGRAM COMMENT ON ITS TRIBAL LANDS**

On behalf of [NAME OF INDIAN TRIBE] and as a duly authorized representative of such Tribe, I authorize federal agencies to utilize the Program Comment on Housing on the Tribal Lands of the [NAME OF INDIAN TRIBE]. This authorization is in effect until the withdrawal or termination of the Program Comment or on the date of receipt by the Executive Director of the Advisory Council on Historic Preservation that [NAME OF INDIAN TRIBE] has rescinded its authorization, which it may do at any time.

For further information, please contact: [Tribal Contact; Name and Contact Information].

Signed by:

[Signature]

Name:

Title:

Date:

Acknowledged and accepted by the ACHP:

[Signature – leave blank]

Name:

Title:


Date:

## [External] NESHPO's comments on ACHP's PC for Accessible, Climate-Resilient, and Connected Communities

Gillespie, Betty <Betty.Gillespie@nebraska.gov>

Tue 10-Sep-24 12:58 PM

To:Program Alternatives <program\_alternatives@achp.gov>

 1 attachments (18 KB)

NESHPO comments on ACHP draft PC on Housing and Buildings.docx;

Good afternoon,

Please find attached the Nebraska SHPO's comments on the draft PC provided by ACHP on "Accessible, Climate-Resilient, and Connected Communities." We will likely have more comments following the September 11<sup>th</sup> meeting but for now this is a good representation of our comments, questions, and concerns.

Best,

**Betty Gillespie (She/Her) | Interim Deputy SHPO & Review and Compliance Coordinator**

**I will be out of the office Sep 17<sup>th</sup> – Sep 30<sup>th</sup> with no email access**



P: 402-805-7392

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1500 R Street, Lincoln, NE 68508

history.nebraska.gov





Below are comments the Nebraska SHPO has on the proposed Program Comment on housing and climate change.

- General: Transportation should be removed completely from the PC to reduce the scope of the document having it instead focus solely on building/housing related projects.
- Title, Page 1: The Program Comment title should be change to reflect the undertaking and not the desired outcome. We support NCSHPO's proposed title: Certain Housing-Related and Climate-Smart Building Related Undertakings.
- Introduction – Section A Page 1: The background should be re-read and re-worded to better reflect the goal of promoting the preservation, enhancement, and sustainable use of our historic resources. We support NCSHPO's edits in this section.
- Page 2: Remove the 2<sup>nd</sup> full paragraph to support our request that transportation projects be removed from this PC and pursued in a separate effort.
- I.C, Page 2: remove “and state and local governments” from the first sentence as ACHP's role with state and local governments is not the same as it is with the President, Congress, and as otherwise specified for federal agencies.
- I.C, Page 3: remove the 4<sup>th</sup> full paragraph.
- I.D, page 4: The paragraph is repetitive, remove most of the last sentence. We support the NCSHPO's suggested edits in this section.
- I.E, page 4: Many things stated in this section are not goals but justifications and could be moved to earlier sections in the PC. Remove the last paragraph from the section.
- II.B, page 5: include a statement about still needing to follow local zoning and building ordinances as an applicant may still be subject to them.
- II.C.1, page 5: We would like to see this whole option to be removed, as an agency should not be able to decide on their own which legally binding agreement to utilize without consent of the other signatories. As a potential edit to keep the option rather than remove, we suggest taking out “provide them written notice of the decision” and replace it with “seek their consent.
- II.C, page 5: The last paragraph in this section just does not make sense. Why does this need to be followed but other alternatives can be disregarded?
- II.D, page 5: Would like to see more clarification about TCPs and how this could affect them. What if Historical Tribal land is not on current tribal land?
- II.E.2, page 6: We are concerned about how undertaking would be defined here. What it looks like is being said here is that an undertaking (normally the whole project) could be broken down into components where the PC would be applied to certain aspects and other programmatic instruments could cover others. Sectioning out elements of a project is not normally permitted/allowed with Section 106 projects. We are concerned about the potential consequences of this. Ultimately, we recommend removing this whole item.
- III.A.1 (and throughout document), page 6: Nebraska SHPO does not like the use of “minimal potential to adversely affect historic properties” being used. We request that this term should be removed throughout the PC.
- III.A.2, page 6: Who receives that documentation & concurs with them? More clarification.
- III.B.2, page 7: What if the tribe disagrees?
- III.C, page 8: There should always be a qualified authority, it should not be a choice.

- III.D, page 8: Simply, what? This whole section should be removed as it is not accurate and it just adds confusion. We agree with the NCSHPO comments and edits to this section.
- IV, page 9: We concur with NCSHPO's comment and concerns on this section. Based on the narratives written in the previous sections, what would be the point of consultation?
- VII, page 11: 20 years is simply too long. We recommend the duration be no longer than 10 years.
- VIII.A, page 11: This seems too sweeping of a statement of power. This type of decision should be left to the board to vote on. Either remove the section or rewrite to include voting power by the board.
- IX, page 12: How is there any consideration when Section III.D exists? Further indication that III.D (Determinations) should be removed.
- X.A, page 12: Annual reports should be given the full life of the PC, not just for the beginning period. Additional information such as location should also be provided in those reports.
- XI, pages 13-20: Definitions related to transportation projects should be removed.
- XI, page 18: The definitions for "primary façade" and "primary right-of-way" should be re-evaluated to account for buildings that might have more than one primary façade and more than one primary right-of-way, aka, corner buildings. As these definitions stand they are too broad.
- XI: Definitions NE SHPO has concerns with and would like to see further expansion on are:
  - Hazardous material
  - Maintenance and repair
  - Primary façade
    - Potentially add "Secondary Façade"
  - Primary right-of-way
  - Primary space (more specificity, add main staircases)
  - Replacement
  - Substitute building materials (add the word "appropriate")
- XI, page 18: NE SHPO supports NCSHPO's recommendations for the definition of "Qualified authority" to specify State or Tribal Historic Preservation Officer.
- Appendix A-1.1, page 21: We support and concur with NCSHPO's comments and recommendation in this section.
- A-1.2, page 22: Our SHPO sees many of the proposed modifications in this section potentially resulting in the replacement of character defining features. We are also not in support of the argument that just because something is "unknown" it is not potential eligible for listing. The lack of acknowledging secondary facades or primary spaces also has us concerned with some proposed excluded work. The listed building elements we would either want seen removed from this section or better fleshed out/defined are the following:
  - Doors
  - Windows
  - Roofing
  - Solar Systems
  - Elevator systems
  - Chimneys
  - Siding

- A-1.2.c, page 23: Is this for all buildings or only sum? There should be action taken to account for surrounding buildings.
- A-1.2.e.iii, page 24: Would want to see something about have a “set back” for the panels added.
- A-1.3.a, page 24: All potential activities should be listed not just a general example. The lack of definitions about “primary” things is a further issue here.
- A-1.3.b, page 24: This is just confusing
- A-1.3.c, page 25: This is confusing and too broad. Should be reworked to be more focused on the purpose/goal of this item.
- A-1.5.e, page 26: Needs to be removed as the transfer, sale, or lease of federal control should go through standard 106 consultation. This helps identify who will hold the covenant, usually SHPOs.
- A-1.5.f, page 27: Remove as it relates to transportation.
- A-2: This whole section of the document is confusion. All conditions, exclusions, and requirements should be identified clearly. Can a better way be found to execute this appendix?
- A-2.1.a.i, page 28: NE SHPO is confused by this whole section. We concur and support NCSHPO’s edits to this section.
- A-2.2, page 28-29: NE SHPO concurs with and supports all of NCSHPO’s edits to this section.
- B-1.1, page 30: Please define “adjacent.”
- B-1.1 page 30: For how short this introduction to the section is, this feels way to broad of a category of undertakings. Why is “housing” called out but this section is for “buildings.” Housing is a category of building, why does it get to be its own but all other categories fall under “buildings?” Not all building’s are the same and not all of their features can be treated the same.
- B-1.2.a, page 31: NE SHPO does not support the last statement in this section. It should be removed as consultation should be required.
- B-1.2, page 31: Statements made about the previous appendix apply to this section as well.
- B-1.2.e.iii, page 33: Our office concurs with and supports NCSHPO’s edits to this section.
- B-2, page 35: Similar to the other sections, it would be better if elements were listed first then conditions.
- B-2.2.a, page 35: Our office does not support this section and is apposed, again, to the use of “minimal adverse effect.” We highly support the edits NCSHPO’s suggests for this section.
- B-2.3.a, page 36: Simply, no.
- C-1, page 37 – 40: Remove completely as the focus of this PC should only be on buildings and housing and not transportation, to keep the scope of the PC more focused.
- C-2, page 41- 42: Should be removed for the same reason as C-1.



# State of New Jersey

## DEPARTMENT OF ENVIRONMENTAL PROTECTION COMMUNITY INVESTMENT AND ECONOMIC REVITALIZATION HISTORIC PRESERVATION OFFICE

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**PHILIP D. MURPHY**

*Governor*

**SHAWN M. LATOURETTE**

*Commissioner*

**TAHESHA L. WAY**

*Lt. Governor*

October 3, 2024

HPO-J2024-040

The Honorable Sara Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001  
Sent via email to: [program\\_alternatives@achp.gov](mailto:program_alternatives@achp.gov)

Re: ACHP's Proposed Program Comment for Accessible, Climate-Resilient, and Connected Communities

Dear Chair Bronin,

Thank you for providing the opportunity to comment on the ACHP's Proposed Program Comment for Accessible, Climate-Resilient, and Connected Communities. The New Jersey Historic Preservation Office (NJHPO) has reviewed the proposed program comment. While we support efforts to streamline Section 106 consultation for projects that have little to no potential to cause effects to historic properties, we have several concerns about the draft Program Comment. These concerns are outlined in more detail below:

### General Concerns

- The breadth of the Program Comment is inconsistent with the requirements of the National Historic Preservation Act (the Act). The Act 54 U.S.C. § 302303 requires State Historic Preservation Officers to consult with appropriate Federal agencies on undertakings that may affect historic properties and consult on the content and sufficiency of plans developed to protect, manage, or reduce or mitigate harm to that property. The current draft of the Program Comment allows federal agencies to exempt overly broad categories of projects from review and comment by State Historic Preservation Officers.
- The draft Program Comment removes the voice and knowledge of state and local governments, local organizations, and the public out of the federal decision-making process which is counter to the spirit and intent of the National Historic Preservation



Act. It is also counter to one of the primary tenets of the Section 106 consultation process – that the views of the public are essential to informed federal decision-making.

State and local governments, local organizations, and the public often have knowledge of local properties that the federal government does not have. For example, in NJ, there was a transportation project that would reconfigure existing roadways to link to segments of interstate highway. A house within the project's area of potential effects (APE) that was proposed for acquisition and demolition as part of the project was determined not to be significant in an architectural survey of the APE. However, through public involvement, we learned this was actually a patterned brickwork house, a historically significant house type unique to the Delaware Valley, and were able to document the house and its history and develop meaningful mitigation. Had the voices of the public been excluded from the consultation process, any knowledge and consideration of this resource would have been lost. This is especially true for under-represented communities where resources important to those communities are often significant for their association with important events or people in our past. This information is not always captured in existing surveys which tend to be overly reliant on Criterion C for significance.

- The Program Comment would result in lack of transparency in the federal decision-making process. Because the Program Comment could be used by any federal agency for a large number of project types, it would not be possible for anyone to identify which federal agency was applying the provisions of the Program Comment for a particular project. Furthermore, the reporting requirements in the Program Comment further contribute to this lack of transparency. Essentially, the Program Comment will allow federal agencies to make decisions in secret without accountability to the citizens who may be concerned about the projects being undertaken.
- The provisions of the Program Comment appear to facilitate projects by allowing federal agencies to proceed with these undertakings without consultation. However, given the breadth of the project types covered and the lack of specificity in its provisions, we are concerned that there is great potential for abuse. As currently drafted, federal agencies could define any project as housing-related or climate-change related and exempt the project from review under Section 106 without recourse.
- It is unclear how use of the Program Comment will be handled by delegated authorities and pass-thru entities.
- The Program Comment could create confusion since a project may be exempt from Section 106 consultation under the Program Comment, but still require compliance with state law and local ordinance. As currently drafted, the Program Comment may potentially create a situation where different preservation standards could apply to different aspects of the same project. This could lead to confusion, more complex project reviews, and potentially, project delays.
- The provisions outlined in the Appendices raise significant concerns about the future of historic preservation. As currently structured, these provisions allow a general exemption from review for qualifying activities on most properties or features that are 45 years old or younger. This conflation of properties and features complicates matters, as they do not hold equal status. While the intent behind structuring the Program Comment around these properties is understandable—since they are typically not considered





historic properties, except in very specific circumstances—the identified actions, if executed, could severely impact the integrity of historic properties. Consequently, there is a disconnect between the application of this Program Comment and the *Standards*. Furthermore, the broad scope of the Program Comment raises questions about whether any property interacting with it would retain sufficient integrity to be evaluated as a historic property in the future.

- The Program Comment may undercut property owner’s ability to take advantage of Federal and State Historic Rehabilitation Tax Credits.

In NJ, there have been several projects that have combined the use of U.S. Housing and Urban Development (HUD) funds with the Federal Historic Rehabilitation Tax Credit and the Low-Income Housing Tax Credit programs. These projects involved the Lawnside School in Lawnside, NJ, the Springside School in Burlington Township, NJ; and the Duffy School in Florence, NJ. All of these schools were rehabilitated and adaptively reused for affordable senior housing. These projects initially had a HUD funding component and involved a substantial number of interior changes to the buildings. These changes required a significant amount of consultation with the NJHPO to ensure that character-defining features were retained while still meeting the goals of the affordable housing project and the requirements of both the Federal Historic Rehabilitation Tax Credit and the Low-Income Housing Tax Credit. If the Program Comment had been used for these projects for the HUD funding, the changes that would have been allowed to happen without Section 106 consultation would have disqualified the projects from the Federal Historic Rehabilitation Tax Credit program.

- The proposed Program Comment does not provide adequate consideration for archaeological resources in project planning and could, in fact, lead to delays in project implementation if resources are discovered during construction without prior planning. The Program Comment exempts activities from review under Section 106 if they are in previously disturbed soils, within 10 feet of a building, or within 10 feet of existing paved areas or in previously disturbed rights-of-way. Seemingly, the purpose of this language is to capture all situations in which there are not likely to be archaeological deposits. However, in any urban environment, one cannot assume that prior construction destroyed all potential for significant archaeological deposits to exist. In New Jersey, there are numerous examples of intact pockets of significant archaeological resources that have been documented in urban environments. For example, in the late 1990s, a project in downtown Trenton involved the removal of additions to the back of a row of townhouses and the construction of a new addition in their place. Archaeological survey in advance of the project identified two intact Native American burials in between 2 of the neighboring townhouses. Each burial was within 10 feet of a building. Under the ACHP’s proposed Program Comment, these Native American burials would either would have been destroyed without having been identified or they would have been discovered during construction and caused major delays to project implementation. The definitions of previously disturbed ground and previously disturbed right-of-way are too broad and should be amended.

### Comments on Specific Sections

- II.C.1
  - Notes that the federal agency must first consult with the signatories of a Memorandum of Agreement (MOA)/Programmatic Agreement (PA) and then





provide notice of decision to use the Program Comment. What if the signatories object?

- II.C.2
  - The use of existing MOAs/PAs alongside the existence of the Program Comment will likely cause significant confusion due to the lack of clarity regarding which provisions of which agreement will be applicable or take precedence.
- II.E.2
  - This is incredibly confusing. This also sounds a lot like segmentation. Would the undertaking be broken down into components where this Program Comment would apply to certain aspects of a larger undertaking, but another PA would cover the rest? There is a strong potential for this to go awry.
- III.C
  - This references the standard of “reasonable judgement.” How is this quantifiable?
  - The Program Comment proposes the use of “Qualified Authorities” and “Qualified Professionals” on behalf of federal agencies who meet the Secretary of the Interior’s Professional Qualification Standards. It is unclear whether the use of these “Qualified Authorities” and “Qualified Professionals”, and by extension, the reviews conducted in accordance with the Program Comment, will be at the national level or the local level.
  - There is a concern with the use of non-local “Qualified Authorities” and “Qualified Professionals” who may not be familiar with local historic properties, historic contexts, regulatory requirements, etc. as these may differ depending on where an undertaking is implemented. This is further concerning if these “Qualified Authorities” and “Qualified Professionals” are exempting certain undertakings from further review while lacking local expertise to fully understand the local historic preservation landscape. For example, archaeological survey and site identification standards vary state-to-state.
- III.D
  - This provision directly conflicts with Section 106. Unless a federal agency knows what historic properties are within the area of potential effects, why they are eligible for listing on the National Register of Historic Places, and what their character-defining features are, it is not possible to determine the effect of the project on those properties.
- V
  - There is a direct conflict between III.D and V. III.D, which generally exempts federal agencies from determining whether historic properties are present, unless otherwise specified. This leaves treatment to previously unidentified historic properties that are identified during implementation to be covered under V (Unanticipated Discoveries). Handling unanticipated discoveries is a time consuming and costly treatment. The purpose of Section 106 is to address these issues to avoid handling them as unanticipated discoveries, as this is not an appropriate treatment and is a means of last resort.
- VI
  - If undertakings do not require consultation and reporting is only a general accounting of activities that have taken place, how would disputes even arise?
- VII
  - Twenty (20) years is too long a timeframe for this agreement. If adopted, it should be a pilot program to test its effectiveness, given the sweeping scope of this Program Comment
- XI





- “Climate-friendly” is used throughout, but it is unclear what this means. How many undertakings could be forced under this umbrella term simply by using it?
- “Previously disturbed ground” and “Previously disturbed right-of-way” presents a number of issues. These are not agreed-upon standard site conditions and reasons for which this definition could be used to exempt undertakings may not be consistent with the local interpretation of these definitions.
  - Case in point, using the definition of “Previously disturbed right-of-way” a resource like the Halsey Street Cemetery in Newark would not have been identified or addressed, as it was located below an existing parking lot. Through careful archaeological survey during project planning, 335 graves were discovered, disinterred, and reinterred in accordance with a human remains treatment plan. Under the draft Program Comment, resources like this would have to be treated as an Unanticipated Discovery and would create significant project delays.
  - Additionally, in many cases, it is not defined who is making these decisions to apply these definitions.
- Appendices - Because many of these comments are repetitive, I have classified them under the general heading that are used throughout.
  - Site Work
    - Who is determining the application of “previously disturbed ground?” This stipulation should specifically qualify that the “Qualified Authorities” and “Qualified Professionals” reviewing the proposed undertaking must meet the Secretary of the Interior’s *Professional Qualification Standards* for archaeology, as the evaluation outlined deals with archaeological issues related to the proposed undertaking.
    - This conflates addressing rehabilitation/replacement of features less the 45 years of age, but also includes installation. Under these conditions, new features could be added to historic properties in direct conflict with the *Standards*.
    - A number of ground disturbing activities are outlined that don’t even address the issue of “previously disturbed ground” but could create ground disturbance in archaeologically sensitive areas.
    - Under this heading, historic sewer systems could be exempted from further review, because they generally “serve housing”
      - How do you limit ground disturbance in these situations?
      - There are number of existing sewer systems that qualify as historic properties. Why would effects to these systems not warrant consideration?
      - In New Jersey, the New Jersey Department of Environmental Protection’s Division of Water Quality retains delegated authority from the United States Environmental Protection Agency (EPA) for projects receiving certain EPA-funded infrastructure funding. The use of the provision on certain undertakings would be in direct conflict with the delegated authority from EPA for the identification, evaluation, and treatment of water and sewage infrastructure-related historic properties.





- In situations where the federal agency is allowed to proceed based on clearance from a “Qualified Authority,” it is unclear what standards and metrics are being utilized to make these assessments. Essentially, as long as they have a written signoff from someone under this category, they can proceed. This is incredibly vague and can lead to abuse.
- Work on Building Exterior
  - This essentially reads as sanctioned facadism, which does not meet the Secretary of Interior’s Standards for the Treatment of Historic Properties.
  - The draft Program Comment introduces the term “minimal adverse effects” which is not defined in the draft Program Comment and does not exist in the Advisory Council on Historic Preservation’s regulations. In addition, in spite of acknowledging adverse effects to irreplaceable historic resources, the draft Program Comment does not discuss or offer any mitigation.
- The inclusion of Climate-Friendly Transportation-related activities as an appendix seems incongruous with the rest of the document. Furthermore, many of these provisions are already covered by our existing state-level agreement documents and are redundant. Also, many of the provisions fail to recognize situations in which the elements listed in the Program Comment are themselves character-defining features of a historic property. The HPO recommends removing Transportation from this Program Comment.

In light of the many issues with the proposed Program Comment, we urge the Advisory Council on Historic Preservation to withdraw this draft Program Comment on Accessible, Climate-resilient, and Connected Communities and initiate the process outlined in the ACHP’s own regulations to engage with SHPOs, THPOs, archaeologists, local governments, and other stakeholders to develop a program alternative that balances historic preservation goals with the goals of addressing housing and climate-related undertakings.

Thank you for the opportunity to review and comment on the draft Program Comment on Accessible, Climate-resilient, and Connected Communities. Please do not hesitate to contact me if you have any questions or would like to discuss any of these comments in more detail.

Sincerely,



Katherine J. Marcopul, Ph.D., CPM  
Deputy State Historic Preservation  
Officer

Cc: Erik Hein, NCSHPO





Michelle Lujan  
Grisham, Governor

STATE OF NEW MEXICO  
**DEPARTMENT OF CULTURAL AFFAIRS**  
**HISTORIC PRESERVATION DIVISION**

BATAAN MEMORIAL BUILDING  
407 GALISTEO STREET, SUITE 236  
SANTA FE, NEW MEXICO 87501  
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October 7, 2024

The Honorable Sara Bronin, Chair  
Advisory Council on Historic Preservation  
401 F. Street, NW, Suite 308  
Washington, D.C. 20001  
Sent via email to: [Program\\_alternatives@achp.gov](mailto:Program_alternatives@achp.gov)

Re: ACHP's Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities

Dear Chair Bronin:

Thank you for the opportunity to comment on ACHP's proposed Program Comment on Accessible, Climate-Resilient, and Connected Communities. As the New Mexico State Historic Preservation Officer (NM SHPO), I support efforts to streamline Section 106 using program alternatives; however, the proposed comment is too broad and convoluted to implement effectively.

The Program Comment should be revised to clearly list which activities do not require further review in one appendix and which activities must satisfy conditions, exclusions, or requirements in another appendix. The use of two Appendices and two Sub-Appendices and references back to various sections is extremely difficult to follow. Furthermore, I recommend removing the transportation programs and focusing the program comment on housing. The NM SHPO currently has an effective programmatic agreement with FHWA/NMDOT that includes some of the exemptions listed in Appendix C-1, but we do not have a PA for housing.

While an agreement for housing would help streamline Section 106, care must be taken to limit the exemptions to those activities that have minimal potential to affect historic properties; an important distinction from the draft program comment which authorizes undertakings or components of undertakings with no or minimal potential to adversely affect historic properties. The use of the term "minimal potential to adversely affect historic properties" seems to go against recent guidance from the ACHP that exemptions should have no or little potential to affect historic properties. In addition, the inclusion of installation as an action under many of the activities within previously disturbed ground or disturbed rights-of-way is problematic for NM due to the many significant archaeological sites within highway rights-of-way and in urban environments. Many of those archaeological sites include unmarked human burials.

A qualified professional meeting the Secretary of the Interior's Standards should be required to review an undertaking that has the potential to affect any site, object, building, structure, or

historic district listed in the National Register of Historic Places. This includes historic buildings or structures less than 45 years old, within known archaeological sites, or areas with high potential for significant archaeological deposits. Many federal agencies do not have qualified professionals meeting the SOI standards for the applicable discipline, and in these instances consultation with the SHPO should be required.

### **Specific Comments:**

**II.E.2 and III.A.1.** What is meant by components of an undertaking? I'm also confused by what II.E.2 is intended to do.

**III.C. The Use of Qualified Authorities.** I'm not sure why we need a term that doesn't exist within 36 CFR Part 800 and the definition and intent of the term is not clear. The definition of a qualified authority seems to mean a person recognized by an Indian tribe or Native Hawaiian Organization to have the expertise identify, evaluate, assess, and treat properties of religious and cultural significance. Yet, in Appendices A-2, B-2 and C-2, a Qualified Authority must make a determination on whether the activity is covered under the program comment. An individual meeting the Secretary of the Interior Qualified Professional Standards should make this determination. Furthermore, the use of a qualified professional should not be limited to historic architecture or architectural history. Many of the activities listed in the appendices have the potential to affect eligible archaeological sites.

**II. D. Determinations of Eligibility.** This program comment does not require a federal agency to determine whether an involved or affected property is a historic property, except where explicitly stated. If no determinations of eligibility are required, how would the federal agency determine that the undertaking would have minimal potential to adversely affect the property? This is also why the program comment should only include activities with no or little potential to affect a historic property.

**VII. Duration.** The duration of this proposed Program Comment is too long. The maximum duration should be five years to determine the effectiveness of the agreement before extending the term.

**VIII. Amendments.** SHPOs should be consulted regarding any proposed amendments.

**IX. Withdrawal.** SHPOs should be notified of the decision to withdraw from the Program Comment.

**X. Reports and Meetings.** Federal Agency Annual Reports only require "examples of undertakings covered by Section III.A.1." This gives the Federal Agency leeway to determine which undertakings they want to include in their report and does not give the ACHP a full picture of the undertakings that may have been reviewed under the Program Comment. A copy of the report should also be provided to SHPOs, otherwise we will not know which activities have been completed under the agreement.

## IX. Definitions

- **Previously Disturbed ground and previously disturbed right-of-way.** Although this definition does not include historic urban deposits, prehistoric deposits within an urban setting are overlooked and many New Mexico Department of Transportation rights-of-way are previously disturbed ground but still have extant archaeological deposits. In many cases, it is imperative that a SOI qualified archaeologist conduct a records search of our New Mexico Cultural Resource Information System (NMCRIS) to determine if eligible archaeological sites exist or are likely to exist with the APE. Utility work in existing utility corridors throughout the City of Santa Fe routinely uncovers archaeological deposits and ancestral remains. Albuquerque, Las Vegas, and many other communities have eligible archaeological sites and unmarked historic cemeteries within the urban setting. For example, the State of NM General Services Department had to abandon its plans to install carports with solar panels at a state-owned facility due to the presence of an unmarked cemetery in the parking lot and New Mexico Highlands University had to revise plans for the installation of a fire suppression system when unmarked human burials were uncovered in an area of existing trenching. The extent of physically altered soils may not be apparent without testing and as-built drawings and plans are often insufficient to make that determination.
- **Qualified Authority.** As mentioned earlier, the use of this term in the Program Comment is inconsistent with its definition.

## Appendices:

- Appendix A-1.2.a,c,e and A-1.3 requires a records check and the agency knowing the age of a building. As these activities require a records check, they be included in Appendix A-2. Records checks should be performed by an SOI qualified professional.
- The inclusion of “installation” is problematic. The installation of fencing, lighting, etc. on or within a historic property or a property less than 45 years old could cause adverse effects to buildings, archaeological sites and historic districts.
- Many of the exemptions (i.e. Site Work) require a SOI qualified professional to perform a records check to determine if archaeological sites are present within the project area. A records check appears to be limited to determining if a historic building or structure is present.
- Landscaping activities do not appear to consider landscaping that may be character defining features of a historic property.
- Foundations and seismic and structural repairs have the potential to adversely affect eligible archaeological sites even within 10 feet of a building.
- Below-ground utilities, including underground water, sewer, natural gas, electric, telecommunications, drainage improvements, septic systems, and leaching systems. This activity has the potential to adversely affect eligible archaeological sites.
- Rehabilitation, replacement, and installation of clean energy technologies. This activity doesn't consider visual affects to a historic district that may occur even if located outside

the boundaries of a historic district.

- Allowed activities may adversely affect character defining features that may not be on a primary façade or visible from a primary right of way.

We look forward to working with the ACHP on a draft of this program comment or the development of programmatic agreements that allow the SHPOs, tribes, and consulting parties to actively participate in the Section 106 process.

Sincerely,



Michelle M. Ensey

Executive Director/State Historic Preservation Officer

State Archaeologist



**New York State  
Parks, Recreation and  
Historic Preservation**

**KATHY HOCHUL**  
Governor

**RANDY SIMONS**  
Commissioner *Pro Tempore*

October 2, 2024

Honorable Sara C. Bronin  
Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

Re: Draft Program Comment on Accessible, Climate-Resilient and Connected Communities

Dear Chair Bronin:

The New York State Historic Preservation Office (“NYSHPO”) appreciates the opportunity to comment on the draft Program Comment on Accessible, Climate-Resilient and Connected Communities. We recognize the need to streamline the Section 106 of the National Historic Preservation Act (“Section 106”) consultation process and we applaud the ACHP for taking proactive steps to address this need. However, we are concerned that some of the proposed exemptions may cause adverse effects to historic properties and that widespread adoption of this document by federal agencies could decentralize the Section 106 review process to the point of weakening it, and thereby putting historic properties at risk of cumulative effects that could be adverse.

We have specific concerns with the following proposed exemptions, and offer the following comments:

- Appendix A-1, Section 2.a.ii – this could result in inappropriate windows at all secondary facades of buildings individually listed in the State and National Registers of Historic Places (S/NR).
- Appendix A-1, Section 2.a.xi – this could lead to the removal of chimneys that are character-defining features of a building and integral to the original architectural style of the building, for example the Queen Anne or Tudor Revival styles.
- Appendix A-1, Section 3.a – this could allow for the gutting of secondary spaces in individually S/NR listed buildings. Many historic properties have important and highly

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**Division for Historic Preservation**

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intact secondary spaces, and there is not always a clear demarcation between what is considered primary space and what is considered secondary space.

- Appendix A-2, Section 1.a and Section 1.a.ii – this could allow for the removal of character-defining features of a historic property as long as a qualified professional determines that the work would not have an adverse effect. This should not be exempt from SHPO review.
- Appendix A-2, Section 2.a and Section 2.a.i – “minimal” adverse effects is a problematic term that is not defined anywhere in the document and has no apparent legal precedent. We recommend that this term be deleted from the document, or clearly defined.
- Appendix A-2, Sections 2 (building exterior) and 3 (building interior) – we are generally concerned with how these exemptions could result in cumulative effects to historic resources, based on inconsistent interpretations of what type of work does or does not constitute an Adverse Effect.
- Appendix B-1, Section 2.a.ii – same comment as above, for Appendix A-1, Section 2.a.11.
- Appendix B-1, Section 2.a.viii – this could allow for the replacement of character-defining chimneys, which is not appropriate. Additionally, it’s often not clear if a chimney is on a primary façade or a secondary façade; sometimes it’s both.
- Appendix B-2, Section 2.a. – same comment as above, for Appendix A-2, Section 2.a and Section 2.a.i.
- Appendix C-2, Section 1.a - this exemption could allow for the removal of historic ground surface materials, which could be adverse depending on the amount of removal.
- Many of the exemptions fall into the category of our general concern with cumulative effects to historic resources based on inconsistent interpretations of what type of work does or does not constitute an Adverse Effect. Does the ACHP anticipate providing technical guidance in the interpretation of the Secretary’s Standards to multiple federal agencies concurrently?
- Regarding Section VI, Dispute Resolution, how would any potentially interested party know about a particular exempted action being undertaken by a federal agency, if there is no requirement for public notice? If there is no public notice of a proposed exempted undertaking, it would seem then that the only opportunity to file a dispute would be post facto.

We find that many of the proposed exemptions have merit, and in practice would probably help achieve the goal of streamlining reviews. However, we remain concerned with the fundamental premise of inviting all federal agencies to short-cut the Section 106 process for such broad categories of undertakings.

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Thank you for considering the comments of the NYSHPO.

Sincerely,

A handwritten signature in black ink, reading "R. Daniel Mackay". The signature is fluid and cursive, with a large, sweeping "M" at the end.

R. Daniel Mackay  
New York State Historic Preservation Officer  
daniel.mackay@parks.ny.gov

via e-mail only

---

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October 9, 2024

Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

**RE: Program Comment on Accessible, Climate-Resilient, and Connected Communities**

Dear Members of the Advisory Council:

This letter is in response to the Advisory Council's proposed Program Comment on Accessible, Climate-Resilient, and Connected Communities. Ohio's State Historic Preservation Office (SHPO) appreciates the opportunity to provide feedback.

We recognize the importance of climate resilience and affordable housing initiatives, and we understand that there are cases where expediting the Section 106 review process is essential. We appreciate the Advisory Council's efforts to integrate these priorities. However, we believe the proposed Program Comment could compromise the core purpose of Section 106, which is founded on meaningful consultation with SHPOs, Tribal Historic Preservation Offices (THPOs), and the public. Programmatic Agreements, by contrast, have effectively streamlined the Section 106 process for many years, allowing states to address specific needs through tailored agreements while preserving essential consultation.

In Ohio, our SHPO has invested significantly in building strong relationships with our federal, tribal, and community partners. Our office works hard to respond promptly to review requests, particularly when urgency is communicated. During state fiscal year 2024 (July 1, 2023 – June 30, 2024), for instance, the Ohio SHPO completed 4,818 project reviews for 41 federal and 11 state agencies, maintaining an average response time of just under 18 days. Despite a major data breach this past year, our team managed to respond to 98% of reviews within 30 days, exemplifying our dedication to efficient and responsive service.

The National Historic Preservation Act of 1966, developed in response to the Federal Highway Act of 1956, was intended to prevent large-scale demolitions without public input. Section 106 was established not to block projects but to ensure that community voices are heard. However, the proposed Program Comment risks undermining this spirit by reducing SHPO, THPO, and local community involvement and placing oversight solely with a "qualified professional" within the federal agency. In our experience, many federal agencies lack professionals who meet the Secretary of the Interior's Professional Qualification Standards,

which raises concerns about how effectively they will manage complex reviews under the proposed changes.

To illustrate, we frequently see the Department of Housing and Urban Development (HUD) delegate Section 106 review responsibilities to consultants, resulting in requests that bypass essential qualifications or require us to review projects that are not undertakings. Recently, we received a Section 106 request for refinancing under the MAP 223(f) program for a building constructed in 2023—a scenario we encounter often with HUD. Additionally, high staff turnover and delays in annual report notifications, especially with HUD's Community Planning and Development programs, complicate oversight, and exemptions are often expanded beyond their intended scope. If it is the intention of ACHP to provide oversight for the projects exempted under this Program Comment, we are concerned that the ACHP may be unequipped to oversee hundreds of reports for millions of projects accurately.

There are also concerns related to historic tax credit projects, which frequently depend on federal funding for rehabilitation. If a federal agency applies this Program Comment, how would it impact tax credit reviews? Currently, we evaluate these projects under Section 106 as having "No Adverse Effect" if they receive approval from both our state's Technical Preservation Services department and the National Park Service at Part 3. If denied, projects must reopen consultation with our office to address and mitigate any adverse effects.

The inclusion of transportation projects in this Program Comment also seems misaligned with its focus on building rehabilitation. The Ohio SHPO and the Ohio Department of Transportation currently operate under a successful programmatic agreement, now being amended to include reviews by the Federal Railroad Administration. Given the unique challenges of transportation projects ranging from mountainous to plains regions, these projects should be excluded from the program comment.

In a recent SHPO listening session, ACHP Chair Sara Bronin emphasized that "SHPOs need to build trust with federal agencies." Are there specific instances where federal agencies in Ohio have faced challenges with our office? We have invested years in building strong partnerships and strive to be responsive in all interactions. When notified of an emergency project, we work diligently to complete reviews within five days or less, often providing same-day responses.

The ACHP's 2022 strategic plan envisions "a nation in which all Americans understand and appreciate their history, and public policy supports the preservation of historic resources." This vision, however, seems conflicting with Chair Bronin's statement that "the need for housing must trump historic preservation." Similar perspectives were seen during the Eisenhower administration in the 1950s when infrastructure

priorities often overruled community integrity. As historians, we believe it is crucial to remember the past to avoid repeating its mistakes. The stance taken by ACHP in this proposal risks setting a concerning precedent, bypassing the collaborative framework intended for federal agencies to work alongside SHPOs, THPOs, and the public.

While we acknowledge the need to streamline review times, it has been our experience that most federal agencies lack the necessary qualified professionals to meet the requirements under this program comment. Effective consultation with local communities—who possess a richer understanding of their history than federal representatives—is at the heart of Section 106, and this program comment limits their voice. Programmatic agreements have allowed for streamlined, tailored solutions across states, effectively balancing efficiency with community engagement.

In conclusion, while we appreciate ACHP's perspective, we believe there are more effective avenues for streamlining the Section 106 process. We value our partnerships with federal and state agencies, and we have spent many years cultivating a productive relationship with the ACHP. Thank you for considering our concerns. We look forward to continued discussions in the hope of finding a solution that respects the interests of all parties involved.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Welling".

Diana Welling  
State Historic Preservation Officer  
Director, State Historic Preservation Office  
Ohio History Connection



# Oklahoma Historical Society

## State Historic Preservation Office

September 16, 2024

Honorable Sara Bronin  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington DC 20001

Dear Chair Bronin:

After attending the virtual consultation (September 11, 2024) offered by the Advisory Council on Historic Preservation, the Oklahoma State Historic Preservation Office (OKSHPO) offers the following comments on the draft Program Comment on Accessible, Climate Resilient, and Connected Communities.

Overall, the OKSHPO has serious reservations about the adoption of multiple program alternatives. First and foremost, program alternatives are tied to agencies with repetitive (like) management actions with a large inventory of similar historic properties or that have programs that generate a large number of similar undertakings. The program alternative the ACHP seeks is not tied to a specific agency, action, or property type.

Additionally, this Program Comment ties varying project types together that are not related; specifically, the OKSHPO recommends reducing the scope to focus solely on housing and removing transportation from this Program Comment. Transportation projects, many of the ones outlined in this draft Program Comment, are covered by other programmatic documents.

If the transportation component is not removed, the OKSHPO takes exception to the use of the “previously disturbed right-of-way” or “as-built drawings and plans can be used to determine the vertical and horizontal dimensions of the previously disturbed area” to justify excluding an area from review. This is the exact justification recently used in Oklahoma which led the agency to fail to identify significant historic properties in one project’s area of potential effect which has resulted in repeated and continuing adverse effects to a historic property with more than 150 cultural features, including burials. The consequences of using this verbiage cannot be overstated. Field confirmation of disturbances is critical and should be heavily emphasized.

Other items within the draft Program Comment that need addressed include:

1. Many of the agencies that have the potential to use a Program Comment such as this delegate the responsibilities of Section 106 to their grant recipients (local governments) who are not as well versed on Section 106. Perhaps this agreement document could limit this to only federal agencies and not their designees.
2. The role of existing agreement documents needs to be more clearly defined within this program comment. The program comment should not override existing agreements without conferring with the signatories to any existing agreement document. Existing agreement documents cannot be disregarded.



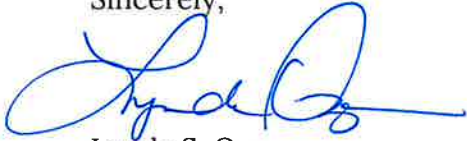
3. What are the provisions for Tribes to disagree with an undertaking and its effect? Additionally, the document eliminates public and state consultation which circumvents the intent of the National Historic Preservation Act. Furthermore, the White House initiatives to be more inclusive of those who are underrepresented is disregarded in this program comment by eliminating the public comment period.
4. Many of the ground disturbing activities provided as exemptions result in considerable ground disturbing activities. Geothermal, retention ponds and the like should not be exempted from review (see Oklahoma example in 4<sup>th</sup> paragraph).
5. As with the Army Program Comments, a reporting mechanism with this Program Comment should be included. How many are utilizing the program comment, how has it "reduced the operational and maintenance costs of historic buildings, how has it made the building more comfortable for occupants, etc." To be useful by the authorities you deem to serve, specifically you called out the White House in your presentation, this information must include states, counties, volume and types of undertakings. SHPOs and THPOs should have access to this information.
6. Reporting mechanisms for this program comment should happen more frequently than every three years and the duration far exceeds other Program Comments (30 years).
7. The Program Comment allows for the federal agency to determine if a building is historic, and therefore if a building requires Section 106 review. What behooves a federal agency to acknowledge that a property is historic? Current regulations create a checks and balance system. Removing the legal Section 106 checks and balance takes us back to 1950 when a road can be built atop a Native American cemetery with complete disregard.
8. The Program Comment exempts a large number of undertakings from Section 106 review while acknowledging the adverse effect those actions may take. This comment provides no solutions or mitigative measure to off-set the harm to the historic resources.

If the Section 106 process were used as intended, the reviews would not be a burden. To be a success, the federal agencies need to supply the official with jurisdiction, be that SHPO or THPO, the necessary documents to complete the review; that action alone will speed up the process. Section 106 is a linear process and when all steps are followed, lead to successful outcomes for all parties.

Bronin letter  
September 17, 2024  
Page 3

SHPOs do the heavy lifting when it comes to Section 106. They are often the ones that shoulder the "blame" when an agency complains. The opinions and thoughts of the SHPOs should be respected and valued.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Lynda S. Ozan', with a stylized, flowing script.

Lynda S. Ozan  
Deputy State Historic  
Preservation Officer

Cc: Erik Hein, NCSHPO



# Oregon

Tina Kotek, Governor

**Parks and Recreation Department**

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October 5, 2024

The Honorable Sara Bronin, Chair  
Advisory Council on Historic Preservation  
401 F St, NW, Suite 308  
Washington, D.C. 20001

**RE: Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities**

Dear Chair Bronin:

The Oregon State Historic Preservation Office appreciates the opportunity to comment on the draft Program Comment on Accessible, Climate-Resilient, and Connected Communities. The draft Program Comment allows all federal agencies that are undertaking housing development, building decarbonization projects, or climate-friendly transportation projects the latitude to assess their effects on historic properties through Section 106 of the National Historic Preservation Act without consultation with State Historic Preservation Offices (SHPOs), the public, or Tribes if certain conditions and requirements are met.

The Oregon SHPO recognizes and applauds the ACHP for addressing historic preservation's role in supporting national policies on affordable housing and climate resiliency. That said, we align with the positions of many of our colleagues, including the National Conference of State Historic Preservation Officers, the American Cultural Resources Association, the National Alliance of Preservation Commissions, the Society for American Archaeology, the U.S. Department of the Interior, and others, in the collective concerns about the draft Program Comment initiated by the chair of the Advisory Council on Historic Preservation (ACHP).

Many of the letters submitted by the entities noted above contain detailed descriptions of the technical and philosophical problems inherent in the draft Program Comment. While the Oregon SHPO agrees with most of these comments, this letter is not meant to cover the same ground. We are going to frame our comments around some of the outcomes we know the ACHP is seeking on behalf of federal agencies with this draft Program Comment. The outcomes below are absolutely reasonable, but as practitioners of Section 106 at the state level, we see some pitfalls that could unintentionally create obstacles to the efficiencies you are seeking.

**Better Consistency in Section 106 Outcomes**

We understand that federal agencies working in many states encounter inconsistencies among the SHPOs they work with. That is no surprise, given the wide variation in capacity, funding, technology, and staffing that characterizes the SHPOs. But we do not think this Program Comment is going to provide that consistency.

Fundamentally, Section 106 is process-driven; it is not outcome-driven. One can build more consistency into the process by consolidating similarities: similar property types, or repetitive actions that have been demonstrated, by monitoring over time, to have no adverse effects to historic properties. Those are precisely the kind of elements that Program Comments are suitable for, according to the ACHP's own guidance. However, in the case of this Program Comment, there are few similarities to reasonably consolidate. The project elements that justify the use of this Program Comment could be built in to essentially any project by any federal agency. There is no consistency in the mission or capacity of the agencies. There is a wide range of property types that could be impacted, including archaeology. The matrix of conditions and requirements and exclusions in the appendices are far too complicated to result in any kind of consistent outcome. The undertakings themselves share some similarities by section, but the effects of the undertakings will not be consistent. Simply said, the expectation of consistent outcomes for the profoundly wide range of projects that could justifiably use this Program Comment is unrealistic.

### **More Latitude for Federal Agencies**

The ACHP's regulations already allow several mechanisms for federal agency latitude in the Section 106 process through its program alternatives. In fact, it is our understanding that the stipulations and exclusions in the draft Program Comment were drawn from existing Programmatic Agreements (PA). Indeed, there are plenty of exclusions in the draft Program Comment that are reasonable and that regularly show up in SHPO-signed PAs around the country. Having said that, exclusions that work in one state may not work in another. That is why the most successful ones are state specific. Oregon is 53% federal land and only 5% of it is surveyed. That ratio will influence what exclusions are and are not appropriate here.

Programmatic Agreements also build in public and tribal participation, which the draft Program Comment eliminates. Oregon has nine federally recognized tribes, and while they may or may not sign PAs, they usually participate in the process. The SHPO represents the state's public interest in the process, and our decisions reflect our strong relationships with Oregon's non-profits and cultural organizations, including constituents representing historically disadvantaged communities. The breadth of federal latitude in our PAs depends on the individual agency, its staff expertise and capacity, and its record over time. Accountability is built into the process in the form of agency training, annual meetings, and annual reporting subject to SHPO review and concurrence.

Plain and simple, latitude comes with check and balances that protect the agency as well as the resources. We are concerned that several areas of the draft Program Comment put federal agencies in an awkward position. Specifically,

#### Appendices A-, B-, and C-1

- Federal agencies are not required to determine eligibility of any building when conducting the listed activities, and they are not required to engage with a "qualified authority." But they still face some decision points based on "character-defining features of historic properties," "ground surface materials 45 years or older," and "known historic properties." They are also required to understand the difference between a primary and non-primary facade, a specific historic building's primary spaces, and to identify historic building materials. Federal agencies are being asked to make decisions based on guesswork, which puts the agency and the integrity of historic buildings at risk.



## Appendices A-, B-, and C-2

- Agencies are required to obtain “written documentation” from a “qualified authority” who must determine that listed actions have no or “minimal adverse effect” on the building, while also conducting an analysis of technical and economic feasibility, “including long-term operational costs and climate resilience of the building.” That’s a heavy lift for even a seasoned architectural historian. Not only is “minimal adverse effect” not a legitimate finding under 36 CFR 800, the expertise needed to conduct the technical analysis falls well outside the skill set of a historian.
- If the agency happens to be a Housing and Urban Development-delegated “Responsible Entity” (RE), which it will be in many cases, it may not have the capacity to find and hire a “qualified authority” who is truly qualified, especially in less-populated states or rural areas. Even in urban areas, REs often rely on the SHPO to do that work for them (or to correct the well-meaning but amateur findings they have attempted).
- The draft Program Comment puts extreme pressure on the administrative record of federal agencies when many of them have antiquated tracking technology and unreliable internal processes. Poorly defined requirements for “written documentation” and annual reports only add to the confusion for the agencies, who will have to rely solely on their record-keeping to defend its decision-making against inquiries or legal action.
- The Program Comment adds multiple layers of confusing circumstances to agencies that are already limited in capacity and expertise, and that have to build in time to comply with the National Environmental Policy Act, the Endangered Species Act, and state and local permitting authorities anyway. Furthermore, many of the activities, even in Appendices A-1 and B-1, would be subject to design review at the local level if the building is designated, which the agency may not know until the last minute, because they are not required to conduct determinations of eligibility and they do not have the SHPO in the mix to alert them.

Finally, the mechanisms meant to avoid adverse effects in this draft Program Comment are fundamentally flawed. They depend on the findings of non-professionals in most cases, and when professionals are required, they are determined “qualified” by the federal agency and are accountable, in the end, by way of the integrity of the agency’s administrative record-keeping, only to another federal agency, the ACHP. Such unilateral federal decision-making contravenes the very intent of Section 106 and calls into question the integrity of any determination that results from the process.

### **Faster Deployment of Federal Initiatives**

Removing SHPO consultation from the Section 106 process may or may not expedite the deployment of the federal projects addressed in the draft Program Comment. But it will almost certainly deprive federal agencies of a layer of expertise that helps them avoid potential pitfalls, surprise encounters, and expensive delays. The SHPOs assist agencies in identifying historic properties, interested parties, tribal concerns and other subject matter experts appropriate to their projects. They fill in the gaps when agencies don’t have the capacity to do that work for themselves. SHPOs have strong relationships with state non-profits and cultural organizations, including constituents representing historically disadvantaged communities. They provide trainings, craft solutions, and more often than not, absorb the political fallout when the agencies stumble. Not consulting with the SHPOs forces federal agencies to fly blind and hope they don’t hit something important. It puts them at risk for inadvertent discoveries, neighborhood pushback, and Tribal tensions.

Unfortunately, the assumptions made in the draft Program Comment reflect a lack of acknowledgement of the role of the SHPOs and the reality of our experience as 106 reviewers. It assumes all federal agencies

will use the Program Comment in good faith. It assumes qualified professionals will be available and appropriately employed. It assumes all federal agencies will be compelled to keep a thorough administrative record based on public expectation. It assumes SHPOs and Tribes will discover (after the fact) bad actors, poor decision-making, and adverse effects “through the grapevine” of our contacts and constituents. Based, unfortunately, on daily experience, SHPOs view these assumptions with skepticism.

There are fifty-nine SHPOs. We encourage the ACHP to push pause on the draft Program Comment and engage us in surveys and conversations to obtain actual data about our on-the-ground experiences, our relationships with federal agencies and Tribes, how program alternatives such as Programmatic Agreements are working, what we use for stipulations and exclusions in our states, and our average review times.

In summary, we want to thank the ACHP for the opportunity to comment on the draft Program Comment and respectfully ask that it be withdrawn and redrafted. We also ask that you please share all the comments you receive with every Council member. We understand most are not Section 106 practitioners and they will benefit from the context presented in the letters to fully understand our concerns.

I know I can speak for my fellow SHPOs when I say that we stand at the ready to assist federal agencies and the ACHP in reaching the goals noted above. But we also have a federal mandate, and a duty to the public we serve, to speak for the cultural heritage in our states, to be at the table, and to do the best we can to protect our special places.

Sincerely,



Christine Curran  
Deputy State Historic Preservation Officer



STATE OF RHODE ISLAND

HISTORICAL PRESERVATION & HERITAGE COMMISSION

Old State House 150 Benefit Street Providence, RI 02903

Telephone 401-222-2678  
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October 9, 2024

Sent via email to: [program\\_alternatives@achp.gov](mailto:program_alternatives@achp.gov)

The Honorable Sara Bronin, Chair  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

Re: ACHP's Draft *Program Comment on Accessible, Climate-Resilient and Connected Communities*

Dear Chair Bronin:

Thank you for the opportunity to comment on the ACHP's proposed *Program Comment on Accessible, Climate-Resilient and Connected Communities*. The Rhode Island Historical Preservation & Heritage Commission (RIHPHC), Rhode Island's State Historic Preservation Office, has reviewed the proposed Program Comment (PC). While we support streamlining Section 106 consultation for certain types of undertakings that have no or minimal potential to affect historic properties, we are concerned about the breadth of the proposed PC.

At its core, the PC eliminates consultation with SHPOs and other defined consulting parties under Section 106 for a broad range of undertakings in the fields of housing, clean energy, and climate-friendly transportation infrastructure undertakings. This is inconsistent with the basic tenets of the National Historic Preservation Act. The elimination of consultation will remove local governments, local organizations, and the public from the decision-making process. This will reduce, if not eliminate, transparency in the federal government's actions that fall under the PC. Further compounding the concern about transparency is the requirement that annual reporting include only "examples of undertakings," without any quantifying information. The PC does not present any checks and balances and there is no clear avenue for SHPOs or any member of the public to be notified of the undertakings that utilized the PC.

RIHPHC endorses the comments and detailed edits on the PC provided by NCSHPO in Erik Hein's letter dated September 27, 2024. We have specific comments on the following sections:

III.A. Both clauses in this section refer to "components of *undertakings*" and seem to indicate that federal agencies can subdivide an undertaking. Is dividing undertakings into components not the definition of "segmentation," which we reviewers continually fight against? This is confusing, deeply concerning and seems to have no legal precedent in the

Section 106 regulations. If this is permitted within the PC, would it be permitted in general practice? It is also unclear how Section II.E.A.2 and this section correlate.

III.C. We recommend that this section be amended to include SHPOs as qualified authorities.

III.D. The PC effectively removes any efforts to identify historic properties except “where explicitly stated,” which is perplexing. It is unclear how some of the principles of the PC can be applied if federal agencies do not know if a property is considered a *historic property*. This is also inconsistent with Section 106 regulations. Sections IIIC and D also devalue the importance of professional qualifications in the Section 106 process.

V.A. The PC states “if previously unidentified *historic properties* or unanticipated *effects*....are discovered during implementation of the *undertaking*, the *federal agency* must immediately halt all activity...” Since this PC removes the survey and identification of historic properties, we fail to see how this could be applied to previously unidentified historic properties.

VI. It is unclear how any person will be able to file a dispute “for any particular undertaking” with the relevant “federal agency” as the consultation process will be eliminated and no one other than the federal agency will be aware of the undertaking (see also comments on annual reporting).

X. The annual reporting only requires that examples of undertakings be submitted; there does not seem to be any requirement for federal agencies to submit a comprehensive and detailed list of undertakings to SHPOs or the public. If this is put into effect, how will anyone beyond the federal agency know what has occurred? In addition, project reviews are an annual reporting metric from the SHPO programs to the National Park Service. This would decrease the numbers reported and devalue the work of our staff.

#### XI. Definitions

- Overall, there are existing and accepted definitions for some of these terms which are not applied and apparently disregarded. We suggest amending this to include definitions accepted by the ACHP and the National Park Service.
- We have concerns with the definition of “primary façade,” which is difficult to understand and will be difficult to apply; it is also not consistent with accepted treatments of historic properties. It is ill-defined who would make the determination of what constitutes the primary façade and since identification of historic properties is not required, what would form the basis for this determination? It is our opinion that this term should not be applied to properties individually listed or eligible to be individually listed in the National Register of Historic Places (however, we note that there is limited opportunity for determinations of eligibility as presented in the PC). Additionally, for these properties, interior spaces are also character-defining. Replacing windows on a non “primary façade” could affect historic interiors and have an adverse effect. Elevations not visible from the public-right-of-way could be considered secondary

- elevations for buildings within historic districts, but they may be as architecturally significant as the street-facing side of the building.
- Records check – It is unclear who would be conducting this work and if sensitive information (such as archaeological sites) could be released to them. This definition also refers to a “search of...other sources recommended by such parties.” These parties include SHPOs and THPOs, but since consultation has been eliminated, it begs the question if these *records checks* would be carried out. Additionally, this definition includes an area of potential effect (APE), however the PC removes identification and consultation for these undertakings, thus eliminating the opportunity to define and implement an APE.
  - For Rehabilitation, substitute materials, etc. – these definitions are not consistent with the National Park Service’s definitions.

The broad scope of the PC means that there are various, unrelated activities listed in the Appendices. It is difficult to understand the various activities, especially as activities to historic and non-historic properties are integrated. We are also concerned that some of the proposed exemptions do not meet the Secretary of the Interior’s Standards. This could negatively impact housing projects that intend to utilize historic tax credit incentive programs which require that projects meet the Standards. Additionally, some of the exempted activities will create tension with state historic preservation laws, which were modelled on the National Historic Preservation Act, and with local historic preservation ordinances. For projects that use both state and federal funding, applying this PC could create enormous confusion, especially for delegated authorities/responsible entities. Further discussion, incorporation of feedback, and consultation with all involved parties is needed to produce a clear list of activities that all agree will not affect historic properties. To this end, as mentioned by others, we suggest removing transportation-related activities/items from this PC and addressing those separately.

Many consulting parties, including federal agencies that comply with Section 106, have provided extensive and thoughtful comments on this PC. We are hopeful that these comments can be incorporated into a revised draft PC, for additional review, and lead to the creation of a final document that continues to consider historic resources and is useful for all consulting parties.

Sincerely,



Jeffrey Emidy  
Executive Director  
State Historic Preservation Officer



Elizabeth Totten  
Principal Historic Preservation Specialist

Copy via email: NCSHPO, [info@ncshpo.org](mailto:info@ncshpo.org)



October 8, 2024

The Honorable Sara Bronin  
Chair, Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001  
Via email to: [program\\_alternatives@achp.gov](mailto:program_alternatives@achp.gov)

Subject: Comments from the South Carolina State Historic Preservation Office on the  
Draft Program Comment on Accessible, Climate-Resilient, and Connected  
Communities

Dear Sara Bronin:

Our office is providing comments on the Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities dated 8-8-2024 proposed by the Advisory Council on Historic Preservation (ACHP) to cover multiple agencies and funding programs. Our office participated in the online public engagement meeting held September 11, 2024 and appreciate the overview and background provided.

As previously stated, our office supports efforts to streamline Section 106 review for undertakings where there is little likelihood to affect historic properties, and to standardize treatment measures when adverse effects are present for certain classes of undertakings. However, we find the process outlined in the draft to raise a number of questions that we have outlined below. General observations and questions on the overall concept of the Program Comment are followed by more technical comments.

#### General Observations

Are other federal project reviews for these type of projects, such as the National Environmental Policy Act, being similarly revised concurrent with this effort? Modifying Section 106 review, without similar streamlining of other reviews may not provide for faster project delivery times, and could have the effect of removing preservation's input to improve project outcomes. For example transit projects can have significant footprints and with Section 106 review these would be compatibly designed. Without it, these projects have the potential to disrupt historic neighborhoods and districts. We support the suggestion by others to remove transportation projects from the Program Comment and focus on housing projects.

If historic preservation advocates are relinquishing reviews with the goal of streamlining, what are we negotiating to gain? For example, our office too often sees federal funds (CDBG, other HUD funding, etc.) used to demolish older buildings, often in a scatter shot fashion. Over time these neighborhoods lose significant numbers of what could have been viable housing units. As you recently said in a recent Chicago Tribune opinion piece “from an environmental perspective, demolition of existing buildings is among the most carbon-intensive things we can do”. Tying use of the Program Comment to an agency’s commitment to not fund demolitions of older (50 years, 75 years) buildings could be a positive gain. Without this type of commitment, we are concerned that the pattern of demolition of older buildings will continue, along with an accelerating loss of historic building materials (see next paragraph).

The exemptions in the Appendices allow for the removal of a significant amount of historic interior and exterior building material. The more historic materials removed and the more new materials introduced, the less are the benefits of the “embodied carbon” in historic buildings. For example, the energy efficiency building envelope projects could allow replacement of millions of repairable historic windows with new units made of vinyl or other unsustainable materials of incompatible design and less durability, significantly altering the character of historic buildings.

If the Advisory Council hopes to prioritize faster review times for Section 106, we urge advocacy for better funding for federal agencies and SHPOs to have adequate staffing levels to handle consultation. (For example, a funding agreement with our state department of transportation allows us to hire dedicated staff for those reviews, resulting in much shorter review times for transportation projects.) Our average response time for all requests last year was 18.2 days, up from the previous year because of an increase of nearly 400 projects and no additional staffing resources.

Oversight and monitoring of the Program Comment will be critical to ensure that agencies and applicants are using as intended. We noted several mechanisms for raising concerns and offer the following comments.

- VI. Dispute Resolution states that any person may file a dispute by filing notice with relevant federal agency including the FPO, THPO, SHPO and that the federal agency is required to consult for not more than 60 days. Placing the burden of enforcement on members of the public can be problematic, as they often don’t know when a federal agency or funding is involved in a project. How would they or even SHPOs know about the federal involvement? We have limited staff capacity to research projects and to file disputes. And for the public, how would they know to follow this process? This dispute process also has the potential to be a burden for agency Federal Preservation Officers, will they get more staff?
- If disputes are not resolved then federal agency “may” forward to ACHP for advice, take comments into account. We believe “may” should be “shall”. Also, in our experience we don’t always get resolutions when we have raised concerns with federal agencies, again likely due to their significant workloads.
- X. Reports and Meetings requires federal agencies using the Program Comment to provide annual reports. In addition to examples of projects, we recommend that agencies track and provide numbers of projects that were exempted from review. Ideally each



project would have a name, address, type of project, source of federal funding (program and/or agency), and date of decision to apply the Program Comment. This would allow the ACHP to document the scope and effectiveness of the Program Comment rather than relying on anecdotal stories. And if agencies don't provide appropriately detailed annual reports by the due date, should that mean they can no longer use the Program Comment? The ACHP should make the annual reports available to the public, SHPOs, THPOs, and the public on the ACHP website.

To help with ACHP's oversight, we recommend that agencies proactively sign on to the Program Comment. This would serve at several purposes:

- Provide an opportunity for the ACHP to provide training to the agency FPO and other agency staff on how to apply use the Program Comment (see next paragraph).
- Let ACHP know who to expect annual reports from.
- Make a list of the federal agencies publicly available on ACHP website with contact information.

Finally, we urge the ACHP have a much more robust ability to provide training and support to federal agencies and their staff on how to apply and use the Program Comment if adopted. In our experience the existing ACHP training, while excellent, only reaches a small number of individuals who are involved in Section 106 review. Online, on-demand training that is widely accessible and required would be critical to the implementation and use of the Program Comment. Does the ACHP plan to hire staff to focus on helping federal agencies implement the Program Comment?

### Technical Comments

We concur with the observation provided by the National Conference of State Historic Preservation Officers that the title of the agreement should focus on types of projects rather than policy goals. Otherwise could someone building a new subdivision use the Program Comment claiming that that the development is providing an accessible, climate-resilient and connected community?

Please provide examples and data to support the statements on page 3 that other program comments "facilitated the preservation and reuse of existing buildings" and "facilitated such projects while upholding historic preservation values". If these are not available please revise the language to make it clear that these are assumptions.

How will agencies treat a project that has some aspects exempted, for example installation of solar panels, but other work that isn't? We assume Section II.E Standard Section 106 Review would be followed, but the language does not make this clear.

*Records check* – who will do the search and when? The term is used in Appendix A-1 and Appendix B-1, which do not reference a *qualified authority*, which implies anyone could do the records check. The definition does not state who will conduct. Is it the federal agency, applicant, hired contractor or other entity and their staff? Regardless, individuals without cultural resources experience will need training in how to do these searches (and each state has different sources



and levels of available online information), what to look for and how to understand the information. Ideally, a *qualified authority* or qualified professional would be handling these types of searches and determinations.

*Character-defining feature* - who will define these? The term is used in Appendices A-1 and B-1, which do not reference use of *qualified authority* or *qualified professional*. The use suggests that an agency has someone qualified to determine first, is there a historic property, and second is it character-defining? If it hasn't been previously evaluated, who is to seek a consensus determination with the SHPO?

*Qualified authority* – while we appreciate the emphasis on including individuals with appropriate expertise in the decision making processes, we have a number of questions about the roles of the qualified authority, how they will interact with the federal agencies, and who has oversight over decisions made by a qualified authority? Is it anticipated that the qualified authority is someone outside of the federal agency? Agency staff? CRM consultants? Others? Appendix B-2, section 2.c requires the assistance of a qualified professional as needed, who decides if needed?

*Determinations of eligibility (DOE)* - how would agencies deal with properties in SHPO inventories where DOEs have been made by SHPO and did not involve a federal agency, i.e. determinations made by SHPOs during grant funded surveys, due diligence reviews, federal and/or state tax reviews, or through responding to a constituent? Can the federal agency include these or not? (See Appendix A-1, Section 2.a for an example.) The language in the Program Comment suggests not, and that determinations must have been made by the federal agency or another federal agency. (Note: our online database/GIS system does not indicate whether a federal agency was involved in the DOE or not, so it would require research in SHPO files for this answer.)

We are concerned that not requiring determinations of eligibility and limiting the agencies to known historic properties has the potential to allow significant changes to buildings that may be eligible for the National Register, particularly modest vernacular buildings whose appearance belies the importance of the events or individual(s) associated with the building. Without research or connecting to the local community this significance will remain unknown.

What does the term “historic *housing*” mean? *Historic property* is defined, and *housing* is defined....but historic housing is not. Does this mean older? Does this mean NRHP eligible? We note this phrase used 11 times throughout document. Please add a definition.

Minimal adverse effects – This term is used in Appendices A-2 and B-2. This category is not defined in the Section 106 regulations or the draft Program Comment. We encounter projects where the effects are borderline, but have to make a decision about whether they fit into the no adverse effect category or adverse category. Often through consultation we arrive at a no adverse effect finding with a project modification. If a project causes a “minimal” adverse effect, what will the mitigation be? Some programmatic agreements we have with agencies such as FEMA set forth standard treatment measures for mitigation of adverse effects that do not require the separate MOAs, which help streamline reviews. Has the ACHP considered adding standard

treatment measures to the Program Comment to further help with streamlining when a project has adverse effects?

Appendix A-1 Section 5.d states transfer, lease or sale out of federal ownership with adequate and legally enforceable restrictions or conditions (such as a deed covenant) does not require Section 106 review. Our office has experienced discovering that a deed covenant includes our office, but we had not received prior notification. We strongly encourage federal agencies to identify a local entity to hold these covenants. Please require consultation and notification in these situations whether or not a SHPO will hold the covenant.

Appendix A-1, 2.c.ii – some of these activities have the potential to disturb ground to a greater depth than previous ground disturbance. For example drainage improvements could include excavating an underground stormwater storage system to hold thousands of gallons of stormwater to a depth far below previous disturbance. In urban areas in particular this could disturb important archaeological resources.

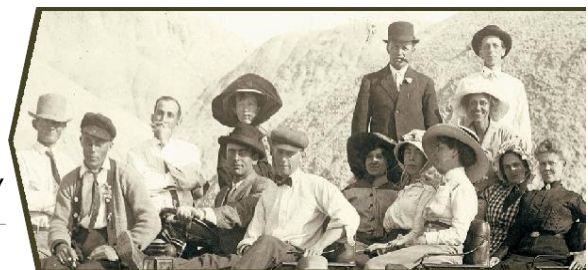
Thank you for the opportunity to provide these comments on the draft Program Comment. If you have any questions or would like more information please contact me at [ejohnson@scdah.sc.gov](mailto:ejohnson@scdah.sc.gov).

Cordially,

A handwritten signature in black ink that reads "Elizabeth M. Johnson". The signature is fluid and cursive, with the first name being the most prominent.

Elizabeth M. Johnson  
Director, Historical Services, D-SHPO  
State Historic Preservation Office

Cc: Reid Nelson [rnelson@achp.gov](mailto:rnelson@achp.gov)  
Jaime Loichinger [jloichinger@achp.gov](mailto:jloichinger@achp.gov)  
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October 9, 2024

Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

RE: Proposed Program Comment on Accessible, Climate-Resilient, and Connected Communities

Dear Advisory Council on Historic Preservation,

Staff of the South Dakota Office of the State Historic Preservation Officer have reviewed the draft Program Comment titled, *Program Comment on Accessible, Climate-Resilient, and Connected Communities* and have the following comments/questions regarding said draft:

- Throughout the draft Program Comment, it was mentioned that a *qualified authority* or *qualified professional* would be making the decision regarding a proposed undertaking's Determination of Effect. How are the federal agencies going to guarantee that a *qualified authority* or *qualified professional* would be the one to make such determinations, especially for the federal agencies that have delegated part or all of their responsibilities under Section 106 of the National Historic Preservation Act of 1966 (as amended)?
- Allowing for federal agencies to forgo determining if a property is a historic property is opening a door that allows for federal agencies to alter the integrity of what could potentially be a historic property with no oversight which leads to a possibility of diminishing the overall integrity of a historic property or rendering the property to be ineligible for the National Register of Historic Places at a later date based on the work that was performed.
- Under Section V.A., it states that if unidentified historic properties, along with unanticipated effects to historic properties, are discovered that the project activities should halt. In Section III.D., it notes that federal agencies can forgo identifying historic properties during the Section 106 process. Instead of allowing for the work to begin in the first place, it would be more beneficial that historic properties are identified during the Section 106 review process so appropriate work plans could be developed.

- Given the large scope of this proposed Program Comment, the duration period of this proposed comment is exceedingly long. Given the potential for misunderstanding and/or misuse of this Program Comment, a duration period of five (5) or ten (10) years appears to be more appropriate, with the option to extend the duration period of the proposed Program Comment provided there are no issues lingering at the end of the initial duration period.
- In the draft, it was noted that the Advisory Council on Historic Preservation would be the only party that receives an annual, or triannual, report of projects that utilized the proposed Program Comment. If this report only goes to the Advisory Council, how will State Historic Preservation Officers (SHPO) or Tribal Historic Preservation Officers (THPO) be able to identify if the proposed Program Comment is being used appropriately or inappropriately within the areas under their jurisdiction?

The following comments/questions are in regard to the Appendixes of the draft Program Comment. As portions of the three Appendixes are similar in their wording and/or intend, the following comments/questions may apply to more than one Appendix, unless specified otherwise.

- It is noted that there are some types of projects that don't require review under Section 106, such as replacement of windows or siding. Replacement of certain architectural items, like windows, have the potential to alter the potential eligibility of a historic property, regardless if the work occurs on the primary or non-primary facade.
- Regarding the installation of solar energy system on roofs, it is mentioned that the installation of the system could be visible from the primary right-of-way and would need to match the roof's profile. Has there been consideration on how this would impact the appearance and feeling of a historic district, such as a historic residential district where these characteristics play a part in the district's integrity?
- In South Dakota, we see plenty of abatement projects that are funded by various federal agencies that have an indirect effect resulting in the property being demolished after the abatement process has been completed. A number of these projects initial come into our office requesting a Determination of Effect of "No Historic Properties Affected" when the determination should be "Adverse Effect." Given this, how will these projects be handled under the proposed Program Comment? Will abatement projects that have adverse indirect effects be excluded from using the proposed Program Comment? How will federal agencies ensure that they are appropriately considering the indirect effects of a proposed project?
- Regarding Appendix A-2 and Appendix B-2, the way that these sections read is fairly confusing. It appears that the proposed Program Comment would allow for work to occur on housing whether it is younger or older than forty-five (45) years old without requiring the proposed project be reviewed under Section 106. Additionally, allowing for activities to occur on previous undisturbed grounds dismisses the fact that a proposed project may occur in an area with a high chance of archaeological resources to



be present. By not having proposed projects that occur on undisturbed ground reviewed under Section 106, it opens the possibility that archaeological resources may be disturbed and not be properly identified as an unanticipated discovery which would halt work on a proposed project.

- Within the Appendixes, it is noted in different sections that either the federal agency or *qualified professional* can determine that a property is not a historic property and that a proposed project may go forward. SHPOs and/or THPOs should retain the ability to comment on the eligibility of a potential historic property. There have been cases in South Dakota where a potential historic property has been submitted to our office for reviewing stating that the property is Not Eligible for the National Register. Though, during our office's review of eligibility, we have recommended an alternative determination based on our office's knowledge of the variation in historic properties in South Dakota and how they may differ from regional or national comparatives.
- The phrase "minimal adverse effect" has been used in the Appendixes in a way that allows for a project with "minimal adverse effect" to occur without review under Section 106. Regardless of how minimal an adverse effect may be, it is still an adverse effect and should be reviewed under Section 106.
- Under Appendix A-2.2.c and A-2.3.a, as well as Appendix B-2.2.c and B-2.3.a, there is the use of "no adverse effect on any historic property." Use of the word "any" is too broad and could lead to inadvertent adverse effects on historic properties that should not be grouped together, whether by resource type or project type. While the purpose of this proposed Program Comment is to provide broad exemptions, providing too many broad exemptions can and will have an adverse effect against the number of potentially eligible or eligible historic properties for the National Register.
- Regarding Appendix C, the projects that are listed in this section appear that they are aimed more so for historic districts, namely historic commercial districts. The introduction of some of the exempted items, without the guidance and review by SHPOs and/or THPOs, may create an adverse impact on the historic district's visual appearance and overall feeling along with the further reduction of space in areas that are already noted for having limited space available. Additionally, it is noted that a "recognized design manual" should be used for guidance. What if there is not a local manual available? Are there going to be recommendation made available and if so, how will they address regional/state/local differences?

The staff of the South Dakota office of the State Historic Preservation Officers is appreciative of the opportunity to provide comments on this proposed Program Comment. Should you require any clarification on the comments/questions provided in this letter, please contact Katie Wasley at [katie.wasley@state.sd.us](mailto:katie.wasley@state.sd.us) or 605-773-2906.

Sincerely,

A handwritten signature in blue ink, appearing to be 'Garry Guan', with a stylized, cursive script.

Garry Guan  
State Historic Preservation Officer

A handwritten signature in black ink, appearing to be 'Katie Wasley', with a cursive script.

Katie Wasley  
Historic Preservation Specialist





**TENNESSEE HISTORICAL COMMISSION**  
STATE HISTORIC PRESERVATION OFFICE  
2941 LEBANON PIKE  
NASHVILLE, TENNESSEE 37243-0442  
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October 8, 2024

Hon. Sara Bronin  
Chair  
Advisory Council on Historic Preservation  
[program\\_alternatives@achp.gov](mailto:program_alternatives@achp.gov)  
Washington, DC

Dear Chair Bronin:

SUBJECT: Tennessee SHPO Comments on Proposed Program Comment for Program Comment on Accessible, Climate-Resilient, and Connected Communities

The Tennessee State Historic Preservation Office (TN SHPO) has reviewed the Advisory Council on Historic Preservation's (ACHP) proposed draft Program Comment on Accessible, Climate-Resilient, and Connected Communities (PC). The TN SHPO finds this PC deeply concerning and strongly opposes its implementation for reasons stated within this letter. We urge the ACHP to reconsider this PC as it is against the spirit of Section 106 regulations and the National Historic Preservation Act.

The ACHP's mission is to "promote the preservation, enhancement, and sustainable use of our nation's diverse historic resources, and advise the President and Congress on national historic preservation policy." This PC

- does not promote preservation, treating it as a hinderance to be avoided, rather than a vital planning tool
- dismantles rather than enhances the spirit of 36CFR800 by eliminating consultation and
- promotes the opposite of sustainable use by treating character defining features as ready for the landfill.

The PC does not address the highly successful ways that streamlining efforts have worked in many states like ours. It would effectively undo years of work and consultation that SHPOs, tribes, and federal agencies have used to generate efficient and effective Programmatic Agreements within the framework of Section 106 to address housing and transportation needs. Our SHPO already has PAs with local governments and HUD to streamline reviews for housing that has eliminated the need for review of many projects. In Knoxville/Knox County alone over half of the total HUD projects since 2021 have been excluded from review. We also have effective PAs with FHWA/Tennessee DOT for transportation and the TVA for infrastructure that includes most excluded efforts in the proposed PC and more due to the detailed and specialized focus of each document. The overall efficiency of these documents has allowed the agencies to avoid nearly 3000 reviews in the last two years. Consultation and direct relationships between SHPOs and Federal Agencies foster a greater understanding of the types of local historic resources present in a community (and therefore the types of undertakings that may affect them), allows for consultation with local stakeholders so their input can be considered, and incorporates local voices with specific mitigation that benefits their community when it is determined that some adverse effects are unavoidable.

Rather than working with SHPOs, THPOs, and consulting parties, the proposed PC instead treats Section 106 as a hindrance and strips away the fundamentals of Section 106 consultation. It is harmful and false to paint Section



106 regulations in this light. Our office has made great strides in recent years to improve efficiency in the Section 106 process through the implementation of an e106 system with an internal office workflow and external agency tracking system. For regular Section 106 reviews our average response time is around 48 hours. Section 106 is not the problem that is prohibiting or holding up “our infrastructure and clean energy future.” SHPOs will be glad to work with the ACHP to find areas for improvement and ways to streamline to meet environmental goals, but this PC goes too far without providing clear preservation or environmental benefits.

As you should be aware, Section 106 is a consultative process between federal agencies, SHPOs/THPOs, tribes, local governments, the public, and potential other consulting parties to identify historic resources and assess effects of federal undertakings to historic resources. This PC strips away consultation with SHPOs and others to determine eligibility and assess effects by designating this responsibility to “qualified authorities” without consultation. Who is this “qualified authority”? Is it federal agency staff or a consultant? Pushing the SHPO/THPOs out of the process directly opposes Section 106 regulations. Additionally, this PC allows for “minimal” adverse effects to historic resources without proposing mitigation measures, which again is counter to the spirit of Section 106 regulations and eliminates Step 4 of the Section 106 process. Further “minimal” is a subjective term that could be defined a myriad of ways to fit undertakings under this PC. This is too vague and subjective to be included. Eligibility and effects assessments must be consulted on through the Section 106 process. We are opposed to allowing any activities that may adversely affect a historic resource to be exempted from consultation.


This proposed PC attempts to do too many things within a single document and is both vague and confusingly written. Combining transportation initiatives with the building related initiatives will make this PC more difficult to implement. Additionally, within the building initiatives, Appendix A focuses on a set of resources while Appendix B on a policy goal. The Appendices, the Part 2 Appendices in particular, have so many conditions for undertakings being excluded that is hard to figure out what falls under these exclusions. This confusion will lead to undertakings being excluded under this PC that do not actually fall under it. Additionally, the Appendices use vague phrasing such as “adjacent to” and “near” which are subjective and could be defined in different ways. In trying to fit too much into this document, it is difficult to interpret and would be ineffective and hard to use. We have found that PAs and PCs work best when they are focused and meet specific outcomes.

The TN SHPO strongly advises the ACHP to withdraw this Program Comment as it does not follow Section 106 regulations. Ultimately, the PC completely ignores the role of the SHPO to, “... reflect the interests of the State and its citizens in the preservation of their cultural heritage.” 800.2(c)(1)(i). We have other comments listed below that provide further justification that this PC should be withdrawn and started again with serious consideration of the ACHP’s mission. As the nation’s preservation advocate, the ACHP should only consider a revised PC with

- very clear and explicit exclusions that clearly have no potential to affect historic resources, and
- that the PC be divided to not include such drastically different types of resources and undertakings.

We would be glad to work with your office to develop an effective PC that uses the spirit and existing language of Section 106.

Sincerely,



E. Patrick McIntyre, Jr.  
Executive Director and  
State Historic Preservation Officer



## **Other General Comments on the Body of the PC:**

- The PC lacks almost all of the legal specifying language that is standard for agreement documents.
- This PC appears to allow for the segmentation of undertakings which is typically not permitted in Section 106 as effects must be considered holistically and cumulatively.
- The PC ignores the basic preservation language of the Secretary of the Interior's Standards.
- It is extremely short sighted to treat all federal buildings as if they exist within a downtown commercial block and are only being reviewed by a historic zoning commission. It is not sustainable historic preservation to allow federal agencies to not preserve any historic features of three-quarters of all federal buildings.
- The PC has multiple exemptions for undertakings that include ground-disturbance provided that they occur within previously disturbed areas, however the process laid out in the document allows for the assumption of an area to be previously disturbed without any mechanism or provision for identifying the depth or areal extent of ground disturbance. Arbitrary distances (10 feet or 40 feet) from existing features such as buildings and pathways are given as free zones for construction without considering that both historic and prehistoric archaeological features or deposits may be present in these areas. In particular, the document dismisses the possible presence of significant urban archaeological deposits or historic construction related features such as builder's trenches.
- The section on Tribal consultation is confusing in the middle of the document and seems unrelated to the PC as the goal appears to be to eliminate SHPO/THPO consultation as much as possible.
- The 20-year duration period too long for such a broad and unprecedented document.
- ACHP should not be able to amend the document without consulting with SHPOs and THPOs.
- Annual reports should include locational information.
- Annual reports should remain annual and not change to triennial after five years.

## **TN SHPO Comments on the Appendices:**

Overall Comments: Please note that these may not be comprehensive but are our initial comments after our first look at the draft document.

The part 2s of Appendices A-C are convoluted and confusing and allow eligibility and effects determinations to be made outside of consultation which directly opposes Section 106 regulations. None of the Appendices should include work that could potentially adversely affect a historic resource.

### **Appendix A-1:**

1. Site Work:
  - In-kind replacement of concrete or asphalt ground surfaces would be more appropriate. We have historic roads that are concrete and asphalt.
  - The installation of new elements throughout this section does not take into account potential effects to historic landscapes or districts or to the setting of other historic resources.
  - There is an issue here with using "adjacent to." This is too broad as someone could consider an entire parcel adjacent to a housing unit as adjacent which may be farmland, a large empty lot, a park, etc. This section allows for the installation of new elements so this could be a concern.
2. Work on the Building Exterior: The main issue with this section is it not considering individually eligible buildings as if focuses on non-primary facades and views from primary rights-of-way to exclude work. It completely ignores the Secretary of the Interior's Standards, again counter to 36CFR800. If something is individually eligible, the entire building will need to be looked at and removing 3/4s of the building's exterior character defining features (windows, doors, siding). Further, since this Appendix of the PC does not require someone with professional qualifications reviewing the work, how will someone not qualified identify if a historic building has more than one

primary façade or determine character defining features? This should be done in consultation with SHPO. Being able to install some of these elements as brand-new elements on the buildings is very concerning.

- Being able to replace or install new doors or windows is very concerning as there are not enough parameters considered here. It does not matter that the section specifies for non-primary facades on historic buildings. Some buildings may have multiple primary facades and who is to determine this? Some buildings that are individually eligible may have important features on non-primary facades. This should stick to buildings less than 50 years old or previously determined not eligible. Also, it should add that this pertains to buildings NOT in a historic district.
- Solar energy systems could be a problem in historic districts depending where they are placed on a house. This needs to be more specific.
- Elevator systems is too broad here. The way this is written, it appears that you can install an elevator on or within any building as long as it is not on the primary façade? If a building is individually eligible, installing a new elevator within the interior could drastically affect eligibility. Replacement of an existing elevator could be okay as long as the elevator is not historic and the new elevator fits in the existing space.
- Chimneys is too broad an activity. What size of a chimney? How is it being installed. This could really affect an individually eligible property. Especially if it required a new opening within a building or a new fireplace.
- Siding is too broad. This would allow the replacement of a historic siding material with a new material as long as it is not on the primary façade of a historic building. For individually eligible buildings, this is a major concern. This could also be a concern in historic district. For either type of listing this is not an environmentally friendly or preservation friendly outcome.
- Should not allow for replacement of historic light fixtures that are character defining.
- New mortar should match composition. Similar is not good enough here.
- For 2.e.iii of this section, views from the front of a building should be avoided. Typically, in historic districts or on individually eligible buildings, it is considered an adverse effect if the solar panels on a roof are on visible from the front. This could drastically change the character of historic buildings and districts and in many cases.
- Community solar system seems too broad with too many variables.
- 2.g is confusing. Does this mean that no windows 45 years or older can be replaced even if they are not on the primary façade of a historic house?

### 3. Work on the Building Interior

- We would be more comfortable with this applying to interior of historic housing as long as it is not in a primary space. Since this Appendix does not require someone with professional qualifications to see if the work qualifies under it, this will lead to work that does not align with the Secretary of the Interior's Standards. We are particularly concerned with new walls, new flooring, and new ceilings. The way 3a is written could potentially gut the interior of a historic building which would not be appropriate or sustainable when alternatives to wholesale demolition exists.
- Installation of a new skylight, atrium, courtyard, or lightwell could be a alter the historic character even within the set parameters.
- Should not allow for replacement of historic light fixtures that are character defining.

### 4. Emergency Work:

- If is truly emergency work is this not covered by 36 CFR 800.12? Is this needed?

### 5. Other Activities:

- The first two items do not appear to be undertakings.

## Appendix A-2:

### 1. Site Work:

- This provides authority to make effects determinations without consultation with SHPO or Consulting Parties on things that could potentially affect historic properties and landscapes, counter to the spirit of 36CFR800.
  - The way this is set up is very confusing with all the conditions.
  - 1.a.i allows for the replacement or removal of character defining features which is not sustainable or suitable.
2. Work on the Building Exterior: The main issue with this section is it allows effects determinations to be made outside of consultation with SHPOs and/or THPOs and tribes on known historic properties. In our experience, those that meet qualifications standards are not always qualified to make these determinations, particularly if their specific expertise is not historic preservation. This is completely outside the spirit of 106. Our office has run into many instances where we have received projects that the applicant or even qualified personnel thought were no adverse effect that we did not concur with and could have majorly impacted the historic integrity, and thus, eligibility of a historic resource. SHPOs/THPOs need to be consulted on such projects.
- It is against the spirit of Section 106 to allow effects determinations without consultation with SHPO/THPO on activities that could affect historic properties. This even allows for minimal adverse effects (2.a).
  - For 2.c, we would be okay with in-kind, but allowing the okay of substitute materials without consulting with SHPO is not okay. This could have major ramifications not only on the historic integrity of historic properties but could cause the project to not align with or receive the federal historic tax credit.
3. Work on Building Interiors: The main issue with this section is it allows effects determinations to be made outside of consultation with SHPOs and/or THPOs and tribes on known historic properties. In our experience, those that meet qualifications standards are not always qualified to make these determinations, particularly if their specific expertise is not historic preservation. This is outside the spirit of 106.

#### Appendix B-1:

1. Site Work:
  - How do some of these activities relate to climate-smart building related activities (such as fencing)? Many are similar to the activities in the same section in Appendix A (at least in subpart a), could they not be covered there?
2. Work Related to the Building Exterior:
  - Many of these are covered under Appendix A and are problems/comments apply to this section as well. The only difference is this section specifies the work is to reduce energy use or greenhouse gas emissions. Is that not what the entire Program Comment is supposed to be for? It is not clear how these activities help with energy efficiency. The ACHP
3. Work Related to the Building Interior:
  - No comments.

#### Appendix B-2:

1. Site Work:
  - Counter to 36CFR800, there is authority to make effects determinations without consultation with SHPO on things that could potentially affect historic properties and landscapes. We are not comfortable with this.
  - Same Comments as A-2, this is very confusing with all the different conditions for approval.

2. Work Related to the Building Exterior:

- Same comments as in Appendix A-2. It is not appropriate for effects determinations to be made on historic properties outside of consultation with SHPOs/THPOs.
- Federal agencies cannot do anything they want to the exterior of a building in the name of energy efficiency.
- Activities with the potential for adverse effects should not be included as exemptions. Consultation must be done.

3. Work Related to the Building Interior:

- Same comments as in Appendix A-2.

Appendix C-1: This section needs to consider historic roads, which are not necessarily limited to the definition of *potentially historic ground surface materials* as this appendix lays out. Many of the elements could adversely affect historic roads that have very intact settings (example: the Natchez Trace Parkway). I think this needs to be more specific about the types of roads you are talking about and not include historic roadways.

1. Work on Ground Surfaces:

- *Potentially historic ground surface materials* only considers materials such as pavers, cobblestones, Belgian blocks, bricks, or wood. In TN, we have listed and eligible roads that are concrete and asphalt.

2. Work Involving Fixtures and Equipment:

- Once again, the definition of *potentially historic ground surface materials* does not match all historic roads in our state. Additionally, how many posts, bollards, etc. are we talking about here? One might not be a concern, but if they go all along a section of a historic road, it could disturb the setting.
- Streetlights on certain historic roads could be an issue.

3. Work Relating to Vegetation and Landscapes:

- No Comments

4. Work on Bridges:

- The way the conditions is written is a little confusing.

5. Other Activities:

- No Comments

Appendix C-2:

1. Work on Ground Surfaces:

- This is giving a lot of authority to make effects determinations without consultation with SHPO on things that could potentially affect historic properties and landscapes. We are not comfortable with this. This is also potentially an adverse effect.

2. Work Involving Fixtures and Equipment:

- Same Comment as above and in other #2 appendices from this document. This is not in the spirit of 106. It also allows for potential adverse effects.

3. Work Relating to Vegetation and Landscapes:

- Same comments as above.
- Planting new trees along a street with no trees could be an adverse effect.
- Work here could be an adverse effect.

4. Work on Bridges:

- This is giving a lot of authority to make effects determinations without consultation with SHPO on things that could potentially affect historic properties and landscapes.
- We would want to review work on eligible and listed bridges.
- Installing a brand-new bridge? No. This would always need review.
- Does this allow for the replacement of any bridge just for transit use. Seems very problematic. This allows eligibility determinations to be made outside of consultation with SHPO.

October 9, 2024

The Honorable Sara C. Bronin  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

Re: *SHPO comments, Advisory Council on Historic Preservation's draft Program Comment on Accessible, Climate Resilient, and Connected Communities*

Chair Bronin:

Thank you for the opportunity to participate in the consultation towards the Council's draft Program Comment related to housing, climate change responses, and transportation projects. This letter serves as preliminary comment on the proposed Program Comment from the Texas Chief Deputy State Historic Preservation Officer, the Deputy Executive Director for Preservation Programs of the Texas Historical Commission (THC).

Our staff routinely receives more than 1,000 projects per month for Section 106 consultation, so we certainly appreciate the need to work efficiently and to prioritize those projects with greater potential to affect historic properties or with greater stakeholder interest. We can do that in large part thanks to our strong working relationships with Federal and state agencies, including several with foundational statewide Programmatic Agreements, and, crucially, our network of consulting parties, stakeholders, and preservation partners across the state.

Experience suggests that the development and implementation of program alternatives is far smoother and more successful when the alternative is focused on specific resource types, repetitive project or program types, and specific responsible agencies and professionals. Those situations lend themselves to identifiable commonalities among issues and treatments which allows stakeholders to create definable expectations, procedures, and outcomes that achieve the intended and stated results. This ultimately leads to an increased comfort level for all parties involved and fosters a willingness to support the alternative procedures while still meeting the mission of considering historic properties. Thus far, the proposed Program Comment lacks these characteristics.

Further, the draft frames historic preservation and consultation with states and stakeholders as an obstacle required to be overcome to meet federal goals related to housing and climate change. This framing may be unintentional; however, we consider framing historic preservation in conflict with these goals as detrimental and inaccurate.

We fully support the intention to facilitate federal agencies in achieving their specific missions and recognize that alternative procedures can be a valuable tool to achieve this streamlining while still fulfilling the intent of the National Historic Preservation Act of 1966. As drafted, the Program Comment largely removes the SHPOs from virtually all consultation on large categories of broad undertakings across indeterminate federal agencies and programs. We acknowledge there are projects envisioned as applicable that probably carry low

risk of adverse effects to historic resources and may benefit from limited or no external consultation. However, the almost outright exclusion of state participation flies in the face of NHPA. To be valuable, alternative procedures must improve upon an already flexible yet standardized and successful process, not simply create new complicated or confusing procedures to be balanced along with legacy procedures.

We believe that this Program Comment will benefit if the following considerations are addressed:

- The types of resources, projects, and agencies are clearly identified, and the focus of the comment is dramatically narrowed, even if this means the creation of multiple independent program comments that would be more effectively implemented. Appropriate guardrails can be designed and implemented when undertakings and resources are well-defined.
- Transportation-related undertakings should be omitted from this Program Comment. Many states already have deep and successful working partnerships with their Department of Transportation. In Texas we have an agreement in place that already expedites most reviews, creates a weekly or daily communications pattern and exempts certain undertaking types. The agreement has been renewed multiple times and notably includes funding from our DOT to facilitate the expedited work as well as related outreach and education efforts that enhance the shared results across the state. The impacts of transportation projects can be tremendous as well as generating some of the most controversies of project types. Transportation undertakings also tend to take place on public state or local land, triggering additional legal responsibilities and reviews that will remain regardless of any Program Comment. Our existing agreement dovetails with these state-level laws.
- Not only do SHPOs have defined roles, expectations, and deadlines, within the legacy Section 106 process, we believe SHPOs add value to good faith consultations but ultimately to the undertakings themselves and the overall protection of the nation's historic resources. SHPO consultation needs to remain one of the foundational elements of any alternative even if that involves streamlining and specific exclusions.
- The potential for impacts to archeological resources needs to be adequately considered in these alternative procedures. As written, archeology is omitted or appears to be a limited afterthought to the types of undertakings included, placing known and yet to be identified sites at risk.
- The assessments and decisions required within many of the undertakings require qualified professionals, especially if those decisions exclude consultation with SHPOs. Notably, one of the major project types intended to be covered is housing pairs most often with HUD, an agency empowered to delegate their Section 106 responsibilities and decision-making related to Section 106 down to thousands of individual project proponents who are generally ill-equipped for this compliance. This Program Comment will likely exacerbate an already challenging situation with one of the highest volumes of undertakings. More clearly defined and limited exclusions are needed to avoid unintended consequences.
- The framework for this Program Comment may encourage federal agencies to divide up and parse out portions of what traditionally would be viewed as a single undertaking to be reviewed and considered comprehensively. The federal agency and SHPOs will still need to review other portions of the same undertaking, assuming the agency staff who are not qualified professionals in the subject matter, do not unilaterally determine that their entire project is "housing" or "smart-building" or "accessible" or "climate resilient" and therefore excluded from consultation.

We look forward to working further with the ACHP and maintaining a partnership that will foster effective historic preservation. If you have any questions concerning our preliminary comments, or if we can be of further assistance, please contact me at 512-936-2315 or [brad.patterson@thc.texas.gov](mailto:brad.patterson@thc.texas.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Bradford Patterson", with a long, sweeping horizontal line extending to the right.

Bradford Patterson,  
Chief Deputy State Historic Preservation Officer

cc: Erik Hein, National Conference of State Historic Preservation Officers



## **DRAFT PROGRAM COMMENT ON ACCESSIBLE, CLIMATE-RESILIENT, AND CONNECTED COMMUNITIES**

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 C.F.R. § 800.14(e), and went into effect on that date. It provides all *federal agencies* with an alternative way to comply with their responsibilities under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations, 36 C.F.R. part 800 (Section 106), regarding the *effects* of certain *housing*-related, *climate-smart building*-related, and *climate-friendly transportation infrastructure*-related activities.

### **I. INTRODUCTION**

#### **A. Background**

The development of this Program Comment is driven by the nation's pressing needs to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce its energy use and greenhouse gas emissions, improve climate resilience, and cut energy costs; and to decarbonize its transportation sector — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

Recognizing these needs, in 2023, the ACHP adopted its Housing and Historic Preservation Policy Statement (Housing Policy Statement) and its Climate Change and Historic Preservation Policy Statement (Climate Change Policy Statement), which commit the ACHP to explore new opportunities to use program alternatives to enable federal agencies to advance historic preservation while meeting the nation's housing and climate goals. These policy statements reflect increasing public awareness that historic preservation strategies — and historic properties themselves — can play an important role in addressing the three interrelated sectors covered in this Program Comment.

Following these policy statements, the ACHP developed this government-wide Program Comment to help accelerate the review of projects carried out, permitted, licensed, funded, assisted, or approved by federal agencies to rehabilitate existing housing or create new housing in existing buildings, to maintain and update buildings and their immediate environs in response to climate concerns, and to rehabilitate or develop new climate-friendly transportation infrastructure.

#### **B. Current Federal Agency Action**

Every day, federal agencies propose to carry out, permit, license, fund, assist, or approve undertakings covered by this Program Comment, and when they do, they must comply with Section 106 of the National Historic Preservation Act. While the federal government's role in supporting housing rehabilitation and production, climate-smart buildings, and climate-friendly transportation is difficult to quantify, an overview of current federal agency actions and investments offers insight into the scope and scale of undertakings covered by this Program Comment.

In the area of housing, federal agencies support housing for millions of Americans and preserve the viability and affordability, upgrade the energy efficiency, and enhance the climate resiliency of the nation's housing stock. The Department of Housing and Urban Development (HUD), for example, supports 1 million housing units across 190,000 public housing buildings, with HUD spending nearly \$9 billion annually in capital and operating funds on these units, over half of which were

built before 1975. HUD also provides billions annually through the Community Development Block Grant and HOME Investments Partnership programs. In addition, the Department of Defense provides over one million units to Military Service members, including 846,000 units in military-owned barracks, while the Rural Housing Service of the Department of Agriculture provides loans to support affordable multifamily developments in rural areas and currently has over 400,000 units in its portfolio, including 17,000 units that support farm laborers. Thousands of projects are funded by other federal agencies working to ensure all Americans have safe, habitable, and affordable housing.

In the area of climate-smart buildings, federal agencies have long undertaken projects that seek to reduce energy cost burdens, cut climate pollution, and boost climate resilience of the nation's building stock. The Inflation Reduction Act — the largest climate bill in history — and the Bipartisan Infrastructure Law have accelerated these efforts. The Environmental Protection Agency \$27 billion Greenhouse Gas Reduction Fund, for example, finances zero emissions building projects and clean technology deployment nationally, including in low-income and disadvantaged communities. The Climate Smart Buildings Initiative is catalyzing more than \$8 billion of private sector investments by 2030 to perform energy efficiency upgrades in federal buildings. The \$1 billion HUD Green and Resilient Retrofit Program invests in energy efficiency, electrification, clean energy generation, climate resilience, and low-embodied-carbon materials in HUD-assisted multifamily housing. And the Department of Energy Efficiency and Conservation Block Grant Program is assisting states, local governments, and Tribes in implementing strategies to reduce energy use, to reduce fossil fuel emissions, and to improve energy efficiency, including for residential and commercial buildings.

In the area of climate-friendly transportation, the federal government's project portfolio — from sidewalks and bike lanes, to bus shelters and light rail — spans multiple Department of Transportation operating administrations as well as other federal agencies, including those that might fund such projects (such as HUD and the Environmental Protection Agency) or build such projects (such as the Department of Agriculture and the Department of Interior). Through the Bipartisan Infrastructure Law and other recent actions, the federal government is currently making significant investments to reduce greenhouse gas emissions and bolster the resilience of America's transportation infrastructure. This includes \$91 billion over five years for public transportation projects, including for transit accessibility, transit-oriented development, and expanded transit service. It also includes \$66 billion to improve the nation's rail systems, representing the largest investment in passenger rail since the creation of Amtrak, and additional funding for pedestrian and bike infrastructure, recreational trails, Safe Routes to School, and more. Other funding includes billions \$7.5 billion over five years for electric vehicle charging infrastructure, \$8.7 billion over five years for transportation infrastructure resilience, and \$2 billion to reduce the lifecycle emissions of transportation construction projects by investing in materials with lower levels of embodied carbon emissions compared to industry averages.

Many types of activities relating to these and other federal agency programs and investments require Section 106 review.

### **C. Prior ACHP Action**

The ACHP's statutory duties under the National Historic Preservation Act include advising the President, Congress, and state and local governments on historic preservation policy issues and overseeing the Section 106 process.

In its advising capacity, the ACHP has formally advised the President, Congress, and state and local governments on housing since at least 1995, when it issued its first policy statement on affordable housing. It updated this policy statement in 2006, and again in 2023. The Housing Policy Statement states that Section 106 reviews must “be grounded in a flexible yet consistent approach to ensure that housing can be developed expeditiously while still preserving the historic qualities of affected historic properties.” Also in 2023, the ACHP advised on climate change and historic preservation through its Climate Change Policy Statement. It urges action on building reuse and energy-and-emissions-saving retrofits of older and historic buildings (including enhanced electrification and increased energy efficiency standards). It also supports expediting Section 106 review of projects addressing climate change, including clean energy and climate-friendly transportation projects.

In its oversight of the Section 106 process, the ACHP has also issued or participated in other program alternatives to create tailored review processes for certain programs and undertakings relevant to this Program Comment. At the request of Department of Defense, for example, the ACHP has issued six program comments specifically related to housing, which cover housing developed under specific congressionally appropriated programs, housing constructed during specific eras, and housing designed and built with similar form, style, and materials. The ACHP has also recently been a signatory to several statewide programmatic agreements with HUD related to projects and programs subject to 24 C.F.R. Parts 50 and 58. Prior program comments addressing housing have reduced the operational and maintenance costs of historic housing, made homes more comfortable for occupants, and facilitated the preservation and reuse of existing buildings.

With regard to climate-smart buildings, ACHP has issued several program comments, along with an exemption for the General Services Administration’s routine operations and maintenance. The ACHP has also signed a Department of Energy Prototype Programmatic Agreement for weatherization activities and a Nationwide Programmatic Agreement Regarding Climate Resiliency and Sustainability Undertakings on Department of Homeland Security Owned Facilities, which cover a broad range of energy efficiency, water efficiency, and climate adaptation- related undertakings. Prior program alternatives incorporating climate-smart building strategies have reduced the operational and maintenance costs of historic buildings, made such buildings more comfortable for occupants, and facilitated the preservation and reuse of historic buildings.

With regard to climate-friendly transportation, the ACHP has issued two program comments specifically related to transportation projects, along with a government-wide exemption for certain electric vehicle supply equipment. In addition, the ACHP has been a signatory to statewide programmatic agreements with the Federal Highway Administration, state historic preservation offices, and state departments of transportation, covering a range of transportation-related activities. To the extent prior program alternatives have addressed climate-friendly transportation projects, they have facilitated such projects while upholding historic preservation values.

This Program Comment is guided in part by the mechanisms, provisions, and approaches in prior program alternatives that are most consistent with the ACHP’s recently adopted Housing Policy Statement and Climate Change Policy Statement. In expanding beyond the scope of these prior program alternatives, this Program Comment creates a consistent and holistic approach for Section 106 review across the federal government for certain undertakings, reducing complexity and equipping federal agencies to more effectively and efficiently address the nation’s needs.

## **D. Justification**

Many types of activities relating to the programs identified in Section I.B. of this Program Comment, and other similar programs, require review under Section 106 of the National Historic Preservation Act. Recognizing the extent, and in some cases the increasing extent, of federal action in the housing, building, and transportation sectors, and the volume and repetitive nature of such action, the ACHP has issued this Program Comment to clarify preferred approaches to reviewing these covered undertakings. In doing so, this Program Comment enables federal agencies to focus on other undertakings with greater potential for adverse effects on historic properties, reducing taxpayer costs and facilitating project delivery — while enabling the production and rehabilitation of housing, the preparation of buildings to be climate-resilient, and the reduction of energy use and greenhouse gas emissions in the building and transportation sectors.

## **E. Goals**

This Program Comment aims to promote actions that, consistent with the National Historic Preservation Act, 54 U.S.C. § 300101(1), “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”

More specifically, this Program Comment aims to achieve objectives laid out in ACHP policy statements, to advance historic preservation goals, and to help satisfy the nation’s pressing needs to expand access to housing, facilitate climate-resilient and zero emissions buildings, and promote climate-friendly transportation. It does so in recognition of three critical facts: that the United States has an aging housing stock, with half of existing housing units built before 1979; that more than a third of greenhouse emissions comes from the building sector, and buildings use 75% of the electricity generated annually; and that transportation sector is the largest source of greenhouse gas emissions in the United States, responsible for about one-third of all emissions.

This Program Comment also aims to leverage the embodied carbon in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for construction materials that currently account for more than 15 percent of annual global greenhouse gas emissions, and in turn slowing down climate change and its impacts on our most cherished places.

Ultimately, this Program Comment aims to benefit the people who live in the housing, work in the buildings, and move using the climate-friendly transportation infrastructure projects being carried out, permitted, licensed, funded, assisted, or approved by federal agencies.

# **II. SCOPE**

## **A. Overall Effect**

This Program Comment provides an alternative way for *federal agencies* to comply with their Section 106 responsibility to take into account the *effects on historic properties* of their covered *undertakings*. The Program Comment also provides the ACHP a reasonable opportunity to comment regarding covered *undertakings*.

## **B. Effect on Other Applicable Laws**

This Program Comment does not modify, preempt, or replace any other federal laws, or any applicable state, local, or Tribal laws or regulations.

## **C. Effect on Existing Agreements**

A *federal agency* that already has a Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must either:

1. Follow this Program Comment, rather than such MOA or PA for a class of covered *undertakings* for the life of this Program Comment. Before making a decision to do so, the *federal agency* must first consult with the signatories of such MOA or PA and then provide them written notice of the decision to apply this Program Comment to a class of covered *undertakings*; or
2. Continue to implement the existing MOA or PA regarding such covered *undertakings*, rather than this Program Comment.

*Federal agencies* may pursue amendments to such MOAs or PAs per their stipulations, to incorporate, in whole or in part, the terms of this Program Comment. *Federal agencies* may also consider terminating such MOA or PA and follow this Program Comment to satisfy their Section 106 responsibility for the covered *undertakings*.

A *federal agency* that already has a Section 106 program comment or program comments in effect for covered *undertakings* must follow the terms of those program comments to the extent those program comments address the *undertakings* covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of other program comments. *Federal agencies* may propose to the ACHP amendments to existing program comments following the amendment procedures in those program comments, to incorporate, in whole or in part, the terms of this Program Comment.

## **D. Effect on Tribal Lands**

This Program Comment does not apply on *Tribal lands*, or to activities that may affect *historic properties* located on *Tribal lands*, unless the *Indian Tribe*, *Tribal historic preservation officer*, or a designated representative of the *Indian Tribe* has provided prior written notification to the Executive Director of the ACHP that the Tribe allows the use of the Program Comment on the Tribe's lands. *Indian Tribes* can agree to such use of the Program Comment by issuing an authorization for such use in a format substantially similar to the format contained in Appendix D to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on those *Tribal lands* on the date of receipt by the Executive Director of the ACHP, who must ensure notice on such authorization is included on the website of the ACHP. The *Indian Tribe*, *Tribal historic preservation officer*, or designated representative of the *Indian Tribe* may terminate the *Indian Tribe's* authorization to use this Program Comment by notifying the Executive Director of the ACHP in writing. Such a termination will be limited to the Program Comment's applicability to *undertakings* that would occur on or affect *historic properties* on the *Tribal lands* under the jurisdiction of the *Indian Tribe*.

## E. Standard Section 106 Review

A *federal agency* must follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7 or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative, if:

1. The *federal agency* elects, for any reason, not to utilize this Program Comment for an *undertaking* for which alternative compliance approaches are prescribed in Section III of this Program Comment.
2. The *undertaking* that include activities not listed in the Appendices, meaning the undertaking would be subject to the Section 106 review process, but the *federal agency* could incorporate use of this Program Comment in its review of the entire *undertaking*.
3. The *undertaking* would occur on or have the potential to affect the following *historic properties*:
  - a. Any National Monument, National Historic Site, National Historic Trail, National Historical Park, National Military Park, National Battlefield, National Battlefield Park, or National Battlefield Site.
  - b. Any site, object, *building*, or structure, or district designated as a *National Historic Landmark* or designated as a *contributing property* to a *National Historic Landmark* district, or found within the boundaries of a *National Historic Landmark* archaeological district.
  - c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*.

## III. ALTERNATIVE COMPLIANCE APPROACHES

### A. Available Alternative Compliance Approaches

This Program Comment authorizes alternative compliance approaches for covered *undertakings*, as follows:

1. For *undertakings* with no or minimal potential to adversely affect *historic properties*, as set forth in Appendix A-1, B-1, or C-1 of this Program Comment, a *federal agency* may proceed with the *undertaking* without conducting further review under Section 106.
2. For *undertakings* for which the *federal agency* satisfies certain conditions, exclusions, or requirements, as set forth in Appendix A-2, B-2, or C-2 of this Program Comment, a *federal agency* may proceed with the *undertaking* if it satisfies the conditions, exclusions, or requirements prescribed in those Appendices, and it documents the manner in which it has satisfied such conditions, exclusions, or requirements.





## **B. Consultation with Indian Tribes and Native Hawaiian Organizations**

The United States government has a unique legal and political relationship with *Indian Tribes* as set forth in the Constitution of the United States, treaties, statutes, court decisions, and Executive Orders. The United States recognizes the right of *Indian Tribes* to self-government. Tribes exercise inherent sovereign powers over their members and territories. The ACHP drafted this Program Comment with a commitment to strengthening the government-to-government relationship between the United States and *Indian Tribes*.

### **1. Potential Effects on Properties of Significance to Indian Tribes and Native Hawaiian Organizations**

It is important to recognize that while this Program Comment was drafted to limit impacts on *historic properties*, such as sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, covered *undertakings* could directly or indirectly affect such properties.

### **2. Consultation-Related Obligations**

If the *federal agency*, based on the location of the *undertaking* and the *area of potential effects*, determines that an *effect* on the *historic properties* of religious and cultural significance to *Indian Tribes* or *Native Hawaiian Organizations*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, may occur, it must make a reasonable and good faith effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* and invite them to consult to assess whether use of the Program Comment for the subject undertaking is appropriate. The *federal agency's* consultation effort should be informed by and be conducted in accordance with the National Historic Preservation Act, the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects, including by recognizing the special expertise of holders of Indigenous Knowledge.

The *federal agency's* effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* should be informed by, but not limited to the following: the knowledge and expertise of agency Tribal liaison staff, historic maps, information gathered from previous consultations pursuant to Section 106, databases of *Indian Tribes* and *Native Hawaiian Organizations* where accessible and appropriate, the Bureau of Indian Affairs Tribal Leader List, U.S. Department of the Interior Native Hawaiian Organization List, the National Park Service Tribal Historic Preservation Program contact database, National Association of Tribal Historic Preservation Officers, the U.S. Housing and Urban Development Tribal Directory Assistance Tool, *state historic preservation officer* databases, and other resources.

### **3. Effect of Finding of Potential Effect on Certain Properties**

Should it be determined through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could potentially result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including a

Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* may not use this Program Comment and must instead follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative.

#### 4. Confidentiality-Related Obligations

Consistent with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, *federal agencies* should consider information regarding *historic properties* with traditional religious and cultural significance to *Indian Tribes* or *Native Hawaiian Organizations*, Tribal identified sacred sites, and Indigenous Knowledge shared with the *federal agency* by *Indian Tribes* or *Native Hawaiian Organizations* as sensitive, unless otherwise indicated by the *Indian Tribe* or *Native Hawaiian Organization*. *Federal agencies* should clearly inform *Indian Tribes* and *Native Hawaiian Organizations* of any limitations on the agency's ability to keep sensitive information confidential. *Federal agencies* must keep sensitive information provided by *Indian Tribes* or *Native Hawaiian Organizations* confidential to the extent authorized by applicable federal laws, such as Section 304 of the National Historic Preservation Act. *Federal agencies* are encouraged to use best practices on confidentiality delineated in the 2023 Interagency Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites when implementing this Program Comment.

### C. The Use of Qualified Authorities

*Undertakings* covered by this Program Comment do not require the use of a *qualified authority* except where explicitly stated, or except where, in the reasonable judgment of the *federal agency* in consideration of various factors, the use of a *qualified authority* is necessary to fulfill the intent of the National Historic Preservation Act or necessary or useful to inform the *federal agency's* decision-making.

When the *federal agency* chooses to use a *qualified authority*, the type of *qualified authority* must be appropriate to the circumstances. For example, a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects* to *historic properties* of religious and cultural significance to the Tribe or to *Native Hawaiians*, respectively, should be consulted to inform the identification, *effects* determination, and other matters involving *historic properties* significant to that *Indian Tribe* or *Native Hawaiian Organization*. As another example, determinations regarding architectural resources and structures must be made by a *qualified professional* meeting such professional standards for historic architecture or architectural history established by the Secretary of the Interior.

### D. Determinations of Eligibility

Undertakings covered by this Program Comment, due to their nature and potential *effects*, do not require a *federal agency* to determine whether an involved or affected property is a *historic property* except where explicitly stated.



#### IV. ASSISTANCE TO CONSULTING PARTIES

This Program Comment does not require a *federal agency* to pay any consulting party for providing its views or comments in response to 36 C.F.R. part 800 responsibilities, including invitations to consult in a Section 106 review; to respond to the proposed *area of potential effects*, scope of identification efforts, eligibility findings, assessment of *effect*; or to consult to seek ways to resolve any *adverse effects* or to develop a memorandum of agreement or programmatic agreement to conclude the Section 106 review finding or determination. If, however, a *federal agency* asks an *Indian Tribe*, *Native Hawaiian Organization*, or any consulting party to do more than the activities listed in the preceding sentence in connection with this Program Comment, the *federal agency* or its applicant, grantee, or permittee, if applicable, must enter into an appropriate arrangement to provide the *Indian Tribe*, *Native Hawaiian Organization*, or consulting party reasonable payment for such services, if and to the fullest extent the *federal agency* has the authority to enter into such an arrangement and pursuant to its policies and procedures. Examples of services include requests to:

- A. Conduct an archaeological, ethnographic, or other inventory or field survey to identify *historic properties* that may be affected by the *undertaking*.
- B. Perform a *records check* on behalf of the *federal agency*.
- C. Conduct research and make preliminary assessments of National Register eligibility on behalf of a *federal agency*, as opposed to responding to determination of eligibility.
- D. Provide an assessment of the potential *effects* of the *undertaking* on *historic properties*, as opposed to responding to such an assessment.
- E. Carry out *mitigation measures*, including conducting additional research or monitoring ground disturbing activities as part of a mitigation plan.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, evaluation, or mitigation efforts.
- G. Design or develop a specific plan or specifications for an *undertaking* that would meet the Secretary of the Interior's Standards for Rehabilitation or otherwise avoid, minimize, or mitigate *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.
- I. Contribute substantially to any of the above activities carried out by a third party.

A request during consultation by an *Indian Tribe* or *Native Hawaiian Organization* to conduct such services itself does not preclude reasonable payment for services simply because the request was made during consultation. A *federal agency* or its applicant, grantee, or permittee, if applicable, must consider entering into an arrangement, in accordance with this Section, with any *Indian Tribe* or *Native Hawaiian Organization* making such a request.

## V. UNANTICIPATED DISCOVERIES

### A. Immediate Response Requirements

If previously unidentified *historic properties* or unanticipated *effects*, including visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of the *undertaking*, the *federal agency* must immediately halt all activity that could affect the discovery and institute interim measures to protect the discovery from looting, vandalism, weather, and other threats. The *federal agency* must then follow the procedures set forth in 36 C.F.R. § 800.13(b); for sites with potential religious and cultural significance to *Indian Tribes* or *Native Hawaiian* organizations, the *federal agency* must request, and incorporate, if provided, the special expertise of *Tribes* or *Native Hawaiian Organizations* and the information provided by designated holders of Indigenous Knowledge and must follow those procedures accordance with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and for sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow these procedures in accordance with the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. A *federal agency* that has *historic property* discovery procedures in existing management plans pertaining to *historic properties* should follow such existing procedures.

### B. Response to the Discovery of Human Remains, Funerary Objects, Sacred Objects, or Items of Cultural Patrimony

The *federal agency* must ensure that in the event human remains, funerary objects, sacred objects, or items of cultural patrimony are discovered during implementation of an *undertaking*, all work within 50 feet of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, local law enforcement, and coroner/medical examiner in accordance with any applicable state statute(s) must be immediately contacted. The *federal agency* must be guided by the principles within the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. The *federal agency* must comply with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 C.F.R. part 10, in regard to any human remains, funerary objects, sacred objects, or items of cultural patrimony found on federal or Tribal land.

## VI. DISPUTE RESOLUTION

Any person may file a dispute over the implementation of this Program Comment or its use for any particular *undertaking*, by filing a notice with the relevant *federal agency*, including the *federal agency's* federal preservation officer, with a copy to the consulting parties involved in the *undertaking* and any relevant *Tribal historic preservation officer* or *state historic preservation officer*. Objecting parties may include but are not limited to *Indian Tribes*, *Tribal historic preservation officers*, *state historic preservation officers*, *Native Hawaiian Organizations*, local governments, preservation organizations, owners of historic properties, and members of the public. The *federal agency* must consult with the objecting party to resolve the dispute for not more than 60 *days*. Any disputes over the evaluation of unanticipated discoveries must be resolved in accordance with the requirements of 36 C.F.R. § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 *days*, the *federal agency* may forward to the ACHP all documentation relevant to the objection, including the *federal agency's* proposed resolution if any, request

the ACHP to provide within 30 *days* its advisory comments to resolve the dispute, and take the ACHP's comments into account before finalizing its approach to complying with Section 106. The *federal agency* must notify the objecting party and any relevant *Tribal historic preservation officer* or *state historic preservation officer* regarding its approach to complying with Section 106 for an *undertaking* that is the subject of a dispute. The *federal agency's* decision regarding the resolution will be final. Following the issuance of its final decision, the *federal agency* may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

The ACHP must monitor such disputes, and from time to time, the Executive Director of the ACHP may issue advisory opinions about the use of this Program Comment to guide *federal agencies*.

## VII. DURATION

This Program Comment will remain in effect from the date of adoption by the ACHP through December 31, 2044, unless prior to that time the ACHP withdraws the Program Comment in accordance with Section IX of this Program Comment. On any date during the six-month period preceding the expiration date, the ACHP Chair may amend the Program Comment to extend its duration in accordance with Section VIII.A. of this Program Comment. If an *Indian Tribe* authorizes the use of this Program Comment on its *Tribal lands* in accordance with Section II.D. of this Program Comment, such authorization will be in effect from the date of the issuance of the authorization until the termination of such authorization by the *Indian Tribe* or the expiration or withdrawal of this Program Comment, whichever is earlier.

## VIII. AMENDMENT

The ACHP may amend this Program Comment after consulting with *federal agencies* and other parties as it deems appropriate and as set forth below.

### A. Amendment by the Chair, ACHP

The Chair of the ACHP, after notice to the rest of the ACHP membership and *federal agencies* may amend this Program Comment to extend its duration. The ACHP must notify *federal agencies* and publish notice in the Federal Register regarding such amendment within 30 *days* after its issuance.

### B. Amendment by the Executive Director, ACHP

The Executive Director of the ACHP, after notice to the ACHP membership and other *federal agencies* may amend this Program Comment to adjust due dates and make corrections of grammatical and typographical errors. The ACHP must notify *federal agencies* and publish notice in the Federal Register regarding such amendments within 30 *days* after their issuance.

### C. All Other Amendments

Amendments to this Program Comment not covered by Sections VIII.A. or VIII.B. of this Program Comment will be subject to ACHP membership approval.

## IX. WITHDRAWAL

If the ACHP determines that the consideration of *historic properties* is not being carried out in a manner consistent with this Program Comment, the ACHP may withdraw this Program Comment. The Chair of the ACHP must then notify *federal agencies* and publish notice in the Federal Register regarding withdrawal of the Program Comment within 30 days of the decision to withdraw. If this Program Comment is withdrawn, *federal agencies* must comply with the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative for individual *undertakings* covered by this Program Comment.

## X. REPORTS AND MEETINGS

### A. Federal Agency Annual Reports

The *federal agencies* that use this Program Comment must provide annual reports regarding the use of this Program Comment during the previous reporting period, ending June 30 annually, to the ACHP, as provided in this Section. Each agency's annual report must: provide examples of *undertakings* covered by Section III.A.1. of this Program Comment; provide information about the manner or extent to which the agency satisfied the conditions, exclusions, and requirements to proceed with the *undertakings* covered by Section III.A.2.; identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; include an assessment of the overall effectiveness of the Program Comment in meeting its intent; and summarize professional assistance and compliance monitoring activities. Annual reports are due on September 30 of each year, starting September 30, 2025 and ending September 30, 2029.

For the remaining duration of this Program Comment, the *federal agencies* that use this Program Comment must provide reports regarding the use of this Program Comment during the previous reporting period, ending June 30 triennially, to the ACHP, as provided in this Section. Each agency's triennial report must be submitted either as part of *federal agencies'* report to the ACHP pursuant to Executive Order (EO) 13287, "Preserve America," or, for *federal agencies* not otherwise required to submit such report to the ACHP, as a stand-alone triennial report. Each agency's triennial report must: identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; and include an assessment of the overall effectiveness of the Program Comment in meeting its intent. Triennial reports are due on September 30 of every third year, starting September 30, 2032.

In any report required by this Section, the ACHP encourages *federal agencies* to also propose for ACHP consideration amendments and refinements to this Program Comment based on their experience implementing it.

In any report required by this Section, a *federal agency* must include in its report the activities, if any, of entities to which it has delegated legal responsibility for compliance with Section 106 in accordance with federal law.

## **B. Annual Meetings**

By January 31, 2026 and for four years thereafter, the ACHP must schedule an annual meeting and invite *federal agencies, Indian Tribes, state historic preservation officers, Tribal historic preservation officers, Native Hawaiian Organizations* and others it deems appropriate, to discuss implementation of the Program Comment. At the meeting, attendees will have an opportunity to provide their views on the overall effectiveness of the Program Comment in meeting its intent and purpose. Such views may inform decisions such as those regarding amendments to the Program Comment. Annual meetings may take place in-person, by phone, virtually using electronic meeting platforms, or any combination of such means.

## **C. ACHP Reports**

At any time, but at least once during the initial three-year period during which this Program Comment is being used, and every three years thereafter, ACHP staff must provide a written or oral summary of information received from *federal agency* reports, annual meetings, or other sources about the utility of this Program Comment and make any recommendations for amendments to the ACHP membership.

# **XI. DEFINITIONS**

For purposes of this Program Comment, the following definitions apply, and beginning in Section II of this Program Comment, such words are *italicized* for convenience:

*Abatement* means acting or actions to eliminate, lessen, reduce, or remove.

*Adverse effect*, as provided in 36 C.F.R. § 800.5(a)(1), means an action that may alter, directly or indirectly, any of the characteristics of a *historic property* that qualify the property for inclusion in the National Register of Historic Places in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association; and it includes reasonably foreseeable *effects* caused by the *undertaking* that may occur later in time, be farther removed in distance or be cumulative.

*Area of potential effects*, as provided in 36 C.F.R. § 800.16(d), means the geographic area or areas within which an *undertaking* may directly or indirectly cause alterations in the character or use of *historic properties*, if any such properties exist, and is influenced by the scale and nature of an *undertaking* and may be different for different kinds of *effects* caused by the *undertaking*.

*Bicycle lane* means a portion of a roadway that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists.

*Bicycle parking* means a designated area to store a bicycle, whether personal or shared, including *bicycle racks* and dedicated bicycle docks used in a shared system.

*Bicycle rack* means a rack for a personal or shared bicycle, e-bicycle, or scooter that is typically u-shaped.

*Bicycle rail* means a traffic control device that provides a protective barrier between motor vehicle travel lanes and *protected bicycle lanes* or *cycle tracks*.

*Bulb out* means feature that extends the line of the curb into the traveled way, reducing the width of the street, also known as curb extensions or bump-outs.

*Building* means a constructed work created principally to shelter any form of human activity, including mobile and manufactured homes and *climate-friendly transportation facilities* that are *buildings*.

*Building energy control system* means a *mechanical system* enabling a *building* occupant to manage or monitor energy use and all components of such system, including but not limited to programmable thermostats, digital outdoor reset controls, occupancy sensors, Underwriters Laboratories listed energy management systems or *building* automation systems, demand response and virtual power plant technologies, smoke and carbon monoxide detectors, and related technologies.

*Character-defining feature* means an element of a *historic property* that demonstrates or includes the characteristics of a *historic property* that qualify the *historic property* for inclusion in the National Register of Historic Places, including elements that contribute to the *historic property*'s overall shape, style, design, and decorative details.

*Clean energy technologies* means *solar energy systems*, wind energy systems, battery energy storage systems, geothermal systems, and microgrids serving a *building* or *buildings*, or serving a *climate-friendly transportation facility*.

*Climate-friendly transportation infrastructure* means pedestrian, bicycle, *micromobility vehicle*, bus (including bus rapid transit), and rail infrastructure.

*Climate-friendly transportation facility* means a *building* or structure used for *bicycle parking*, *micromobility parking*, a bus station, a bus rapid transit station, or a rail station.

*Climate-smart building* means a *building* that is *energy* efficient, electric, uses clean energy, and is resilient.

*Climate resilience* is defined as the ability to prepare for environmental threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

*Community solar system* means a solar photovoltaic *installation* with up to 5 megawatts nameplate capacity and delivering at least 50% of the power generated from the system to *buildings* within the same utility territory as the facility.

*Cool pavement* means paving materials that reflect more solar energy, enhance water evaporation, or have been otherwise modified to remain cooler than conventional pavements.

*Contributing property*, as provided in National Register Bulletin 16A, "How to Complete the National Register Registration Form," means a *building*, structure, object, or site, as applicable, within the boundaries of a *historic district* that adds to the historic associations, historic architectural qualities, or archaeological values for which a property is significant because it was present during the period of significance, relates to the documented significance of the property, and possesses historic integrity or is capable of yielding important information about the period; or it independently meets the criteria for the National Register of Historic Places.

*Cycle track* means a bicycle facility that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use of bicyclists.



*Day* means calendar *day*, taking place from one midnight to the following midnight.

*Economic feasibility* means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including estimated construction costs (including the cost of *building* material and labor), estimated operational costs, available budget, and timelines for compliance review processes to the extent they impact financial conditions for the *undertaking*.

*Effect*, as provided in 36 C.F.R. §§ 800.5(a)(1) and 800.16(i), means a direct, *indirect*, reasonably foreseeable, or cumulative alteration to the characteristics of a *historic property* qualifying it for inclusion in or eligibility for the National Register of Historic Places.

*Electrification* means the *replacement* or conversion of an energy-consuming device or system from non-electric sources of energy to electricity; or the *replacement* or conversion of an inefficient electric appliance to an efficient electric appliance.

*Electric vehicle supply equipment or EVSE* means conductors, including the ungrounded, grounded, and equipment grounding conductors and the electric vehicle (EV) connectors, attachment plugs, and all other fittings, devices, power outlets, or apparatus installed specifically for the purpose of delivering energy from the premises wiring to the EV. There are three levels of EVSE: i. Level 1: Refers to a freestanding or wall mounted charging structure that delivers a 110/120V charge, replenishing an EV battery at a rate of 4 to 6 miles of range per hour of charging time. Charging an EV at level 1 typically takes between 7 and 20 hours depending on the size of the vehicle's battery. ii. Level 2: Refers to a freestanding or wall mounted charging structure that delivers a 208/240V charge, replenishing an EV battery at a rate of 10 to 20 miles of range per hour of charging time. Charging an EV at level 2 typically takes between 2 and 5 hours depending on the size of the vehicle's battery. iii. Level 3 (also known as Direct Current (DC) Fast Charging): Refers to a freestanding or wall mounted structure capable of being networked that is designed to charge vehicles more quickly than level I or level II with an electrical output ranging between 40 kW-500 kW delivering 50-1000 volts of direct current to the EV battery. Converts AC power to DC within the charging station and delivers DC power directly to the battery. DC fast charging can typically replenish an EV battery at a rate of 50 to 200 miles of range per 30 minutes of charging time.

*Emergency situation* means any of the following: occurrence of a natural catastrophe, such as a hurricane, wildfire, flood, or excessive heat; declaration of emergency by the President, an *Indian Tribe*, governor, or a chief elected official of a territory or city; or recognition or report of a sudden, serious, and imminent threat to life, health, safety, or property.

*EVSE criteria* means (1) take place in existing *parking facilities* with no major electrical infrastructure modifications and are located as close to an existing electrical service panel as practicable; (2) use reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimize *ground disturbance* to the maximum extent possible, and ensure that it does not exceed previous levels of documented *ground disturbance*; (4) use the *lowest profile equipment* reasonably available that provides the necessary charging capacity; (5) place the *EVSE* in a minimally visibly intrusive area; and (6) use colors complementary to surrounding environment, where possible.

*Federal agency* means an agency as defined by 5 U.S.C. § 551(1), and includes state, local, or Tribal government officials who have been delegated legal responsibility for compliance with Section 106 in accordance with federal law.

*Flex post* means flexible bollards or delineators used to separate motor vehicle traffic from a *bicycle lane*, *protected bicycle lane*, or *cycle track*, and designed to withstand being hit or run over by motor vehicles.

*Green infrastructure* means the range of measures that use plant or soil systems, *permeable ground surface materials*, stormwater harvest and reuse, or landscaping to store, infiltrate, and evapotranspire stormwater and reduce flows to sewer systems or to surface waters, including but not limited to rain gardens, bioswales, bioretention facilities, and other ecosystem services and nature-based solutions used to treat stormwater as close to the source as possible and improve resiliency.

*Greenhouse gas* means gas that traps heat in the atmosphere, including but not limited to carbon dioxide, methane, nitrous oxide, and fluorinated gases (such as hydrofluorocarbons).

*Ground disturbance* means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils that are not *previously disturbed ground*.

*Ground surface material* means any hard material typically used to cover soils for transportation purposes, including but not limited to asphalt, concrete, pavers, cobblestones, Belgian blocks, bricks, gravel surface or base, or wood.

*Hazardous material* means lead, lead-containing material (including lead-based paint), asbestos, asbestos-containing material (including floor tile, plaster, insulation, glazing putty, roofing material, and flashing material), radon, and other similar materials detrimental to human health and safety.

*High friction surface treatment* means application of very high-quality aggregate to the pavement using a polymer binder to restore or maintain pavement friction at existing or potentially high crash areas.

*Historic building* means a *building* included in, or eligible for inclusion in, the National Register of Historic Places, as an individually listed property or as a *contributing property* to a *historic district*.

*Historic building material* means *building material* used in the construction of a *historic building* and installed during the period of significance, and any pre-existing *in-kind replacement* of same.

*Historic district* means a geographically definable area that possesses a significant concentration of *historic buildings*, associated *buildings* and structures, and objects united historically by plan or physical development that are *historic properties*.

*Historic property*, as provided in 36 C.F.R. § 800.16(l), means any prehistoric or *historic district*, site, *building*, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural importance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

*Housing* means any *building* containing one or more dwelling units, including but not limited to multi-unit apartment *buildings*, single-family homes, administrative and employee dwelling units, and recreation residences, in a variety of *building types* and configurations, including but not



limited to *buildings* served by an elevator or elevators, “walk-up” *buildings*, rowhouses, semi-detached homes, mobile and manufactured homes, and freestanding homes.

*Indian Tribe*, as provided in 36 C.F.R. § 800.16(m), means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*In-kind building materials* means new *building materials* that are identical to *historic building materials* in all possible respects, including their composition, design, color, texture, and other physical and visual properties.

*In-kind replacement* means *replacement* of historic or existing *building materials* with *in-kind building materials*.

*Installation* means the action or process of placing or fixing something, including but not limited to materials, *mechanical systems* and components, appliances, and equipment, or of being installed, in a particular location.

*Lowest profile equipment* means EVSE that is the smallest height and width possible that meets the EV charging needs.

*Maintenance and repair* means activities required to maintain in an operational state, or to bring back to operating condition by *repair* or *replacement* of obsolete, broken, damaged, or deteriorated features, elements, materials, and systems.

*Mechanical system* means any heating, cooling, indoor air quality, ventilation, dehumidification, air conditioning, plumbing, or electrical system, and the individual elements and components of each system.

*Micromobility vehicle* means small, lightweight vehicles such as e-bicycles and scooters, which can be human-powered or electronic, privately owned or shared, and operate at low to moderate speeds of 15 to 30 miles per hour.

*Micromobility parking* means an area to store for *micromobility vehicles*, whether private vehicles or shared vehicles, including dedicated bicycle docks used in a shared system.

*Minimally visibly intrusive* means that the EVSE is partially visible but does not detract from the views from or to historic properties.

*Mitigation measures* means any existing, new, or updated materials or actions that serve to address, compensate for, or otherwise resolve *adverse effects* on *historic properties*, and may include research reports, historical documentation, recordation, and other materials and activities.

*National Historic Landmark*, as provided in 36 C.F.R. § 800.16(p), means a *historic property* that the Secretary of the Interior has designated a *National Historic Landmark*.

*Native Hawaiian*, as provided in 36 C.F.R. § 800.16(s)(2), means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

*Native Hawaiian Organization*, as provided in 36 C.F.R. § 800.16(s)(1), means any organization which serves and represents the interests of *Native Hawaiians*; has as a primary and stated purpose the provision of services to *Native Hawaiians*; and has demonstrated expertise in aspects of historic preservation that are significant to *Native Hawaiians*.

*Parking facilities* mean buildings, structures, land, rights-of-way, facilities, or areas used for parking of motor vehicles.

*Permeable ground surface materials* means permeable pavement, permeable pavers, porous flexible pavement, or other material or system that provides a hard surface, while allowing water to flow through to the underlying soils instead of into the storm sewer.

*Potentially historic ground surface materials* means any *ground surface material* comprised of pavers, cobblestones, Belgian blocks, bricks, or wood that are 45 years or older.

*Previously disturbed ground* means soils not likely to possess intact and distinct soil horizons and have a reduced likelihood of possessing *historic properties* within their original depositional contexts in the area and to the depth to be excavated, and does not mean plowed soils or *historic urban deposits*, including *previously disturbed right-of-way*.

*Previously disturbed right-of-way* means areas where previous construction or other activities have physically altered soils within the three-dimensional *area of potential effects* to the point where there is likely no potential for an archaeologically significant property to remain, including but not limited to: the entire curb-to-curb roadway, existing sidewalks, existing drains, and parking areas, including the prepared substrate constructed to support the infrastructure down to undisturbed or intact soil or subsoil. As-built drawings and plans can be used to determine the vertical and horizontal dimensions of the previously disturbed areas.

*Primary façade* means the exterior façade of a *building* which serves as the front or the major entry point of the *building*, provided that a determination of the *primary façade* depends on a variety of factors, and one *building* may have more than one *primary façade*.

*Primary right-of-way* means the corridor, open to the public for transportation purposes, from which a person may best view the *primary façade* of a *building* or, if the *primary façade* is not visible from the public *right-of-way*, the corridor nearest the façade through which people enter the *building*.

*Primary space* means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other space that contains a *character-defining feature* of a *historic building* or *historic climate-friendly transportation facility*.

*Protected bicycle lane* means a bicycle facility that is physically separated from motor vehicle traffic and is distinct from the sidewalk for the exclusive use by and increased safety of bicyclists.

*Qualified authority* means a *qualified professional* or a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects to historic properties* of religious and cultural significance to their *Indian Tribe* or to *Native Hawaiians*, respectively.

*Qualified professional* means a person who meets the relevant standards outlined in the Secretary of the Interior's Professional Qualifications Standards, as amended and annotated.

*Rail infrastructure* means structures, *building*, land, and equipment that supports land lines, including both the infrastructure that is in the rail *right-of-way* (such as ballast, ties, tracks, bridges, and tunnels) and the infrastructure that is adjacent to the *right-of-way* such as signs, signals, mileposts or switches.

*Recognized design manual* means one of the following: Federal Highway Administration Manual on Uniform Traffic Control Devices, American Association of State Highway and Transportation Officials A Policy on Geometric Design of Highways and Streets, National Association of City Transportation Officials (NACTO) Urban Street Design Guide, NACTO Urban Bikeway Design Guide, NACTO *transit* Street Design Guide, NACTO Bike Share Station Siting Guide, or NACTO Urban Street Stormwater.

*Records check* means a search of relevant *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, and *federal agency* files, records, inventories, and databases, or other sources recommended by such parties, for information about whether *historic properties*, including properties with traditional religious and cultural significance to one or more *Indian Tribes* or *Native Hawaiian Organizations*, are known to exist within an *area of potential effects*.

*Reduce energy use or greenhouse gas emissions* means to take an action that: lessens either the amount of energy used or *greenhouse gas* emitted to perform the same task or produce the same result; replaces an energy production source reliant on fossil fuels with a clean energy technology or upgrades a clean energy technology; or achieves *electrification*.

*Rehabilitation* means the act or process of making possible an efficient compatible use for a property through *repair*, alterations and additions while preserving those portions or features that convey its historical, cultural or architectural values.

*Replacement* means substitution of new element for an existing element, which may require a change in size, dimension, location, and configuration, in order to improve the function and condition of the element or the broader system of which the element is a part.

*Solar energy system* means any addition, alteration, or improvement which is designed to utilize solar energy either of the active type based on mechanically forced energy transfer or of the passive type based on convective, conductive, or radiant energy transfer, or some combination of these types to reduce the energy requirements of that structure from other energy sources, including but not limited solar hot water equipment, *community solar systems*, and solar photovoltaic equipment and all components.

*State historic preservation officer*, as provided in 36 C.F.R. § 800.16(v), means the official appointed or designated pursuant to Section 101(b)(1) of the National Historic Preservation Act to administer the state historic preservation program or a representative designated to act for the *state historic preservation officer*.

*Substitute building materials* means modern, industry standard, natural, composite, and synthetic materials that simulate the appearance, physical properties, and related attributes of historic materials well enough to make them alternatives for use when *historic building materials* require *replacement*.

*Technical feasibility* means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including health, safety, energy efficiency, climate resiliency,

durability of materials, and sound professional judgment (including architectural, archaeological, or engineering judgment).

*Transit* means mass transportation by a conveyance (including a bus, railcar, locomotive, trolley car, or light rail vehicle) that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation.

*Transit-oriented development building* means a *building* within one half mile of an existing or planned *transit* stop to be developed or redeveloped as part of a federal program or project to promote *transit*-oriented development.

*Tribal historic preservation officer*, as provided in 36 C.F.R. § 800.16(w), means the Tribal official appointed by the *Indian Tribe's* chief governing authority or designated by a Tribal ordinance or preservation program who has assumed the responsibilities of the *state historic preservation officer* for purposes of Section 106 compliance on *Tribal lands* in accordance with Section 101(d)(2) of the National Historic Preservation Act.

*Tribal lands*, as provided in 36 C.F.R. § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

*Undertaking*, as provided in 36 C.F.R. § 800.16(y), means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a *federal agency*, including those carried out by or on behalf of a *federal agency*; those carried out with federal financial assistance; and those requiring a federal permit, license or approval.

*Zero emissions building* means a *building* that is highly energy efficient, does not emit *greenhouse gases* directly from energy use, and is powered solely by clean energy, as further defined in the National Definition of a Zero Emissions Building.

## APPENDIX A-1: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to or on the same lot as *housing*:

a. *Rehabilitation, replacement, installation*, and removal of any of the following elements less than 45 years old, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*:

i. Concrete and asphalt ground surfaces such as streets, parking areas, driveways, and walkways, including repaving, restriping, replacing such surfaces with *permeable ground surface materials*, and reducing surface size, but not changing vertical alignment or expanding surface size.

ii. Park, playground, and sports equipment such as platforms, guardrails, handrails, climbers, ramps, stairways, ladders, balance beams, fitness equipment, rings, rolls, un-mechanized merry-go-rounds, seesaws, slides, swings, benches, netting, basketball hoops, drinking fountains, and *ground surface materials*, but not *buildings*.

iii. Fencing, but not *replacement* or removal of fencing that is a *character-defining feature* of a *historic property*.

iv. Wayfinding, address, and identification signage.

v. Lighting, such as building-mounted lighting and freestanding lighting in parking areas, along driveways or walkways, or in park and playground areas, and including relamping and rewiring, but not including *replacement* or removal of lighting that is a *character-defining feature* of a *historic property*.

vi. Water feature, such as decorative fountains, including replumbing, but not *replacement* or removal of a water feature that is a *character-defining feature* of a *historic property*.

vii. Curb, gutter, steps, ramp, and retaining wall, but not a retaining wall that is a *character-defining feature* of a *historic property*.

b. Maintenance, repair, and *in-kind replacement* of any element listed in Section 1.a. of this Appendix.

c. Any of the following landscaping, grounds, and water management activities:

i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.

ii. Planting of grass, shrubs, and other plants, and xeriscaping.

iii. Replacement of a tree in its existing location and planting of a new tree within 40 feet of the building.

iv. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.

v. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.

vi. *Maintenance, repair, rehabilitation, replacement, and installation of green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*.

d. *Maintenance, repair, rehabilitation, replacement, and removal of the following elements serving housing*, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in auger holes, or other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, natural gas, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Vault toilets.

e. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter that do not impact *ground surface materials* 45 years or older or known *historic properties*.

f. *Installation and removal of temporary construction-related structures*, including scaffolding, barriers, screening, fences, protective walkways, signage, office trailers, and restrooms.

## 2. Work on the Building Exterior

The following activities do not require further Section 106 review when conducted on or near the exterior of *housing*:

a. *Rehabilitation, replacement, and installation of the following elements: on a building less than 45 years old and not known after a records check to be a historic property; on a building the federal agency or another federal agency has determined to not be a historic property within the preceding ten years; or on the non-primary façade of a historic building or on the non-primary façade of a building whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the primary right-of-way:*

i. Doors, including insulated exterior doors and basement bulkhead doors.

ii. Windows, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings or window louvers.

iii. Canopies, awnings, and solar shades.

iv. Roofing, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.

v. Improvements that address the requirements of the Americans with Disabilities Act, such as ramps and railings.

vi. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.

vii. *Solar energy systems.*

viii. Elevator systems.

ix. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.

x. Foundations and seismic and structural *repairs*, with *ground disturbance* limited to areas within 10 feet of the *building*.

xi. Chimneys.

xii. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.

xiii. Siding.

xiv. Energy and water metering devices.

b. *Maintenance, repair, and in-kind replacement* activities on any *building*, including:

i. *Maintenance, repair, and in-kind replacement* of any element listed in Section 2.a. of this Appendix.

ii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.

iii. Repointing of mortar joints with mortar similar in composition, joint profile, color, hardness, and texture of existing mortar.

iv. Removal of exterior paint or graffiti using non-destructive means, limited to hand scraping, low-pressure water wash of less than 500 psi, heat plates, hot air guns, and chemical paint removal.

c. *Maintenance, repair, rehabilitation, replacement, installation* and removal of any of the following elements on or near a *building*, provided that such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.

ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

iii. Foundation vents, if painted or finished to match the existing foundation material.

iv. *Green infrastructure*.

v. Gray water systems.

d. Paint on previously painted exterior surfaces.

e. *Rehabilitation, replacement, and installation of clean energy technologies*, provided that:

i. Such technology is located either outside the boundaries of a *historic district*, or on the non-primary façade side of historic *housing*, or in a location not otherwise visible from the *primary right-of-way*; and is located on the same lot as or on an adjacent lot to that *housing*, or in the case of a *community solar system*, in a lot within two blocks or two thousand feet (whichever is longer) of the *housing* served;

ii. Such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*;

iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted *solar energy system* may be visible from the *primary right-of-way* if it is installed with methods that do not irreversibly damage historic materials, sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.

f. *Maintenance, repair, or in-kind replacement of clean energy technologies*.

g. *Abatement of hazardous materials* where effects of the *abatement* are reversible or temporary or not visible from the *primary right-of-way*, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal, *replacement*, or *concealment* of: windows on the primary façade of historic *housing* or *housing* whose eligibility for inclusion in the National Register is not known; or windows 45 years or older.

### 3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of *housing*, and do not result in physical changes visible from the *primary right-of-way*:

a. *Maintenance, repair, rehabilitation, replacement, and installation, and abatement of hazardous materials*, that take place entirely within the interior of the *housing* and: in an individual *housing* unit; in any interior location of *housing* less than 45 years old and not known after a *records check* to be a *historic property*; on *housing* the *federal agency* or another *federal agency* has determined to be not a *historic property* within the preceding ten years; or in any interior space within historic *housing* that is not a *primary space*. Example activities covered by this Section 3.a. include: removal, alteration (including of width, height, and location), and construction of interior walls; alteration of floors and flooring (including of material, pattern, and texture); alteration of ceilings (including of material, lighting, and height); *installation of mechanical systems* and fire alarm, fire suppression, and security systems and equipment; insulation and air sealing; removal and *installation* of equipment and fixtures (including bathroom, kitchen, and lighting equipment and fixtures); *replacement* and refurbishment of elevator cabs, system-wide upgrades to elevator *mechanical systems*, *installation of building energy control systems*; and *installation* of code-required signage; removal, alteration, and construction of stairs; cosmetic improvements; and improvements to address the requirements of the Americans with Disabilities Act.

b. *Rehabilitation, replacement and installation* of any of the following elements, in any location other than the locations identified in Section 3.a. of this Appendix, if such activity does not result



in physical changes visible from the *primary right-of-way* and has no visual *effect* on the *primary spaces* of historic *housing*:

- i. **Mechanical** systems, including but not limited to heating, ventilating, and cooling components such as heat pumps, electric furnaces and boilers, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, ventilation systems, and refrigeration lines; and fire alarm, fire suppression, and security systems and equipment.
  - ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.
  - iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.
  - iv. Electronic ignition devices.
  - v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.
  - vi. Water conservation measures, such as low flow faucets, toilets, shower heads, urinals, and distribution device controls.
  - vii. Light fixtures, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
  - viii. *Building energy control systems*.
  - ix. EnergyStar (or similarly rated) appliances.
  - x. Battery energy storage systems.
  - xi. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, **where** such insulation can be installed and removed without damaging exterior walls.
  - xii. **Spray** foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch *historic building materials* and can be installed and removed without damaging exterior walls.
  - xiii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.
- c. *Maintenance, repair, and in-kind replacement* of any of the elements listed in Section 3.b., any *building* element, any improvement that addresses the requirements of the Americans with Disabilities Act, and any cosmetic or decorative features of the *housing*.
- d. *Maintenance, repair, in-kind replacement, and rehabilitation* of a skylight, atrium, courtyard, or lightwell; and *installation* of a new skylight, atrium, courtyard, or lightwell that will not be visible

from the *primary right-of-way* and will not result in interior reconfigurations to *primary spaces* or removal of *historic building materials* in *primary spaces*.

e. *Abatement of hazardous materials* where *effects* of the *abatement* are reversible or temporary or **not** within *primary spaces*, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal or *replacement* of: windows on the primary façade of historic *housing* or *housing* whose eligibility for inclusion in the National Register is not known; or windows 45 years or older.

#### 4. Emergency Work

The following activities related to the exterior or interior of any historic *housing* do not require further Section 106 review when such work relates to an *emergency situation* and takes place within 30 *days* of the occurrence of the *emergency situation* and otherwise complies with 36 C.F.R. § 800.12:

- a. Temporary stabilization that causes no permanent damage to historic *housing* or any other *historic property*, including *installation* of temporary bracing, shoring and tarps.
- b. Emergency *repair* of masonry, concrete, or *building* façade cracks or falling elements.
- c. Emergency *repair* of falling plaster or other elements that pose an immediate and imminent health and safety hazard.
- d. *Abatement of hazardous materials* required to address an *emergency situation*.
- e. *Replacement* and demolition of a deteriorated or damaged mobile or manufactured home.

#### 5. Other Activities

The following activities do not require Section 106 review:

- a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of *housing*.
- b. Feasibility studies related to energy efficiency improvements, *electrification*, improvements incorporating *clean energy technologies*, and other topics relating to *building* energy use.
- c. Leasing, refinancing, acquisition, or purchase by the *federal agency* of *housing*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- d. Transfer, lease, or sale of a federal government-owned *housing* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- e. *Maintenance, repair, rehabilitation, replacement, and installation* of electric vehicle supply equipment satisfying the **EVSE** criteria.

## APPENDIX A-2: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

### 1. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to *housing* or on the same lot as *housing*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Replacement, installation, or removal of any of the following elements which are either less than 45 years old and create new ground disturbance in previously undisturbed soils, or 45 years or older; if a qualified authority makes a written determination that such activity will have no adverse effects on any historic property; or if the area of potential effects has been previously field surveyed (acceptable to current state or Tribal standards or within the past ten years) and, if applicable, has been subject to consultation with Indian Tribes and Native Hawaiian Organizations without such survey or consultation identifying any historic properties:*

i. Any of the elements listed in Sections 1.a. and 1.d. of Appendix A-1, including *character-defining features* of such elements.

ii. Test borings, soil sampling, well drilling, or perc tests more than eight inches in diameter, or that impact *ground surface materials* 45 years or older or known *historic properties*.

b. Planting of a new tree 40 feet or more from a *building* or *replacement or installation of green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*, if a *qualified authority* has made a written determination that such planting will have no *adverse effects* on any *historic property*.

### 2. Work on the Building Exterior

The following activities do not require further Section 106 review when conducted on, or in the case of *clean energy technologies* near (as further provided below), the exterior of *housing*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Rehabilitation, replacement, and installation of the following elements on the exterior of: buildings 45 years or older if a qualified authority determines that the building is not a historic property; or buildings 45 years or older determined by a qualified authority to be a historic property, if a qualified professional makes a written determination that such installation or replacement will have no adverse effects on any character-defining feature of a historic building:*

i. Any of the elements listed in Section 2.a. of Appendix A-1, including elements in locations other than those identified in that Section.

b. *Rehabilitation, replacement, or installation of any of the following elements on, or in the case of clean energy technologies near (as further provided below), a building, which create new ground disturbance on previously undisturbed ground, if a qualified authority makes a written determination that such activities will have no adverse effects on any historic property:*

i. Any of the elements listed in Section 2.c. of Appendix A-1, including elements in locations other than those identified in that Section.

ii. *Clean energy technologies*, when located or configured in a manner other than that identified in Section 2.e. of Appendix A-1.

c. *Replacement of exterior historic building materials* of historic *housing* with in-kind or *substitute building materials* after the *federal agency*, with the assistance of a *qualified authority*, conducts the following selection procedure:

- i. Characterize existing *historic building materials* in terms of condition, design, material properties, performance (including insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*;
- ii. Next, determine, based on an evaluation of *technical feasibility* and *economic feasibility*, if *historic building materials* can be *repaired* or if they must be replaced;
- iii. Next, if *replacement* is required, identify potential in-kind and *substitute building materials* and evaluate their *technical feasibility* and *economic feasibility*;
- iv. Finally, based on such evaluation, select the most appropriate in-kind or substitute *building material*;

provided, however, that a *federal agency* may only utilize this selection procedure if such *replacement* or demolition does not create *ground disturbance*, creates *ground disturbance* exclusively on *previously disturbed ground*, or, in the opinion of a *qualified authority*, has no *adverse effects* on any *historic property*.

d. The *abatement of hazardous materials*, where such activity is irreversible or permanent or will be visible from the *primary right-of-way*, create new *ground disturbance*, or result in the permanent removal or *replacement* of: windows on the primary façade of a historic *building* or a *building* whose eligibility for inclusion in the National Register is not known; or windows 45 years or older, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*.

### 3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of *housing*, after the satisfaction of the identified conditions, exclusions, and requirements:

a. In addition to those activities listed in Section 3 of Appendix A-1, *maintenance, repair, rehabilitation, replacement, and installation*, and the *abatement of hazardous materials*, where such activity results in physical changes to a historic *building* visible from the *primary right-of-way* or has a visual effect on the *primary spaces* of a historic *building*, if a *qualified authority* makes a written determination that such activity has no *adverse effects* on any *historic property*.

## APPENDIX B-1: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Site Work

The following activities do not require further Section 106 review when they are conducted in areas adjacent to a *building* or on the same lot as a *building*, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*:

a. *Rehabilitation, replacement, installation, and removal* of any of the following elements less than 45 years old, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and not including *replacement* or removal of any element that is a *character-defining feature* of a *historic property*:

i. Fencing.

ii. Lighting, such as *building-mounted* lighting and freestanding lighting in parking areas, along driveways and walkways, in park and playground areas, and in other areas, and including relamping and rewiring.

iii. Water feature, such as decorative fountains, including replumbing.

iv. Curb, gutter, steps, ramp, and retaining wall.

b. *Maintenance, repair, and in-kind replacement* of any element listed in Section 1.a. of this Appendix.

c. Any of the following landscaping, grounds, and water management activities:

i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.

ii. Planting of any of the following that are native, naturalized, drought-adapted, drought-resistant, drought-tolerant, water-wise, or xeric: grass, shrubs, and other plants; and xeriscaping.

iv. *Replacement* of a tree in its existing location and planting of a new tree within 40 feet of the *building*.

v. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.

vi. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.

vii. *Maintenance, repair, rehabilitation, replacement, and installation* of *green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*.

viii. Removal of concrete or asphalt ground surfaces or *replacement* of such surfaces with *permeable ground surface materials*.

ix. The following activities conducted to address fire threats within 200 feet of a *building* or auxiliary structure:

- a. Disposal of heavy accumulations of ground litter and debris.
- b. Removal of small conifers growing between mature trees, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*.
- d. *Maintenance, repair, rehabilitation, replacement* and removal of the following elements, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:
  - i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.
  - ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.
  - iii. Vault toilets.
- e. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter that do not impact *ground surface materials* 45 years or older or known historic properties.
- f. *Installation* and removal of temporary construction-related structures, including scaffolding, barriers, screening, fences, protective walkways, signage, office trailers, and restrooms.

## 2. Work Related to the Building Exterior

The following activities do not require further Section 106 review when they are conducted on or near the exterior of a *building* and when they are conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building*, or to enhance the *climate resilience* of the *building*:

- a. *Rehabilitation, replacement, and installation* of any of the following elements: on a *building* less than 45 years old and not known after a *records check* to be a *historic property*; on a *building* the *federal agency* or another *federal agency* has determined to not be a *historic property* within the preceding ten years; or on the non-*primary façade* of a historic *building* or on the non-*primary façade* of a *building* whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the *primary right-of-way*:
  - i. Doors, including insulated exterior doors.
  - ii. Windows, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
  - iii. Canopies, awnings, and solar shades.
  - iv. Roofing, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; white roofs or cool roofs; and green, sod, or grass roofs.
  - v. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.
  - vi. *Solar energy systems*.

- vii. Elevator systems.
  - viii. Chimneys.
  - ix. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, and frieze board vents.
  - x. Siding.
  - xi. Energy and water metering devices.
- b. *Maintenance, repair, and in-kind replacement* of the following elements on, or in the case of *clean energy technologies* near (as further provided below), any *building*:
- i. Any element listed in Section 2.a. of this Appendix.
  - ii. *Clean energy technologies*.
  - iii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.
  - iv. Repointing of mortar joints with mortar similar in composition, joint profile, color, hardness, and texture of existing mortar.
- c. *Maintenance, repair, rehabilitation, replacement, installation*, and removal of any of the following elements on or near a *building*, provided that such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:
- i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.
  - ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.
  - iii. Foundation vents, if painted or finished to match the existing foundation material.
  - iv. *Green infrastructure*.
  - v. Gray water systems.
- d. Paint on previously painted exterior surfaces.
- e. *Rehabilitation, replacement, and installation of clean energy technologies*, provided that:
- i. Such technology is located either outside the boundaries of a *historic district*, or on the non-primary façade side of a historic *building*, or in a location not otherwise visible from the *primary right-of-way*; and is located on the same lot as or on an adjacent lot to that *building* or *buildings*, or in the case of a *community solar system*, in a lot within two blocks or two thousand feet (whichever is longer) of the *building* or *buildings* served;
  - ii. Such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*;

iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted *solar energy system* may be visible from the *primary right-of-way* if it is installed with methods that do not irreversibly damage historic materials, sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.

### 3. Work Related to the Building Interior

The following activities do not require further Section 106 review when they are conducted in the interior of a *building* and when they are conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building*, or to enhance the *climate resilience* of the *building*:

a. *Maintenance, repair, rehabilitation, replacement, and installation* of any of the following elements:

i. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, where such insulation can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.

ii. Spray foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch *historic building materials*, and can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.

iii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.

b. *Maintenance, repair, rehabilitation, replacement and installation* of any of the following elements, if such activity does not result in physical changes visible from the *primary right-of-way*, and has no visual *effect* on the *primary spaces* of a historic *building*:

i. *Mechanical systems*, including but not limited to heating, ventilating, and cooling components such as furnaces, heat pumps, electric furnaces, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, heat pumps, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, and refrigeration lines.

ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.

iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.

iv. Electronic ignition devices.

v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.

vi. Water conservation measures, such as low flow faucets, toilets, shower heads, urinals, and distribution device controls.



vii. Light fixtures, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.

viii. *Building energy control systems.*

ix. EnergyStar (or similarly rated) appliances.

x. Battery energy storage systems.

#### 4. Other Activities

The following activities do not require Section 106 review:

a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of *buildings*.

b. Feasibility studies related to energy efficiency improvements, *electrification*, improvements incorporating *clean energy technologies*, and other topics relating to *building* energy use.

c. Leasing, refinancing, acquisition, or purchase by the *federal agency* of energy efficiency, *electrification*, and *clean energy technologies*, provided that any changes in use or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such technologies must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

d. *Maintenance, repair, rehabilitation, replacement, and installation* of *electric vehicle supply equipment* satisfying the *EVSE* criteria.

## **APPENDIX B-2: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS**

### **1. Site Work**

The following activities do not require further Section 106 review when conducted in areas adjacent to a *building* or on the same lot as a *building*, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Rehabilitation, replacement, installation*, and removal of any of the following elements which are either less than 45 years old and create new *ground disturbance* in previously undisturbed soils, or 45 years or older, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*; or if the *area of potential effects* has been previously field surveyed (acceptable to current state or Tribal standards or within the past ten years) and, if applicable, has been subject to consultation with *Indian Tribes* and *Native Hawaiian* organizations without such survey or consultation identifying any *historic properties*

i. Any element listed in Section 1.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section.

ii. Any element listed in Section 1.d. of Appendix B-1, unrestricted by any limiting conditions found in such Section.

b. Planting of a new tree 40 feet or more from a *building*, or *replacement* or *installation* of *green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*, if a *qualified authority* makes a written determination that such planting will have no *adverse effects* on any *historic property*.

### **2. Work Related to the Building Exterior**

The following activities do not require further Section 106 review when conducted on, or in the case of *clean energy technologies* near (as further provided below), the exterior of a *building*, and when conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. *Rehabilitation, replacement, and installation* of the following elements visible from the *primary right-of-way* and on the exterior of: *buildings* 45 years or older if a *qualified professional* determines that the *building* is not a *historic property*; or *buildings* 45 years or older determined by a *qualified professional* to be a *historic property*, if a *qualified professional* makes a written determination that such *installation* or *replacement* will have no *adverse effects* on any *character-defining feature* of a *historic building*; provided, however, that an analysis of *adverse effects* must consider *technical feasibility* and *economic feasibility*, including long-term operational costs and *climate resilience* of the *building* upon which elements are installed or replaced:

i. Any element listed in Section 2.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section.

b. *Rehabilitation, replacement, or installation* of any of the following elements on or near a *building*, which create new *ground disturbance* on previously undisturbed ground, if a *qualified*

*authority* makes a written determination that such activities will have no *adverse effects* on any *historic property*:

i. Any of the elements listed in Section 2.c. of Appendix B-1.

ii. *Clean energy technologies*, when located or configured in a manner other than that identified in Section 2.e. of Appendix B-1.

c. *Replacement of historic building materials* of historic housing with in-kind or *substitute building materials* to improve energy efficiency after the *federal agency*, with the assistance of a qualified professional as needed, conducts the following selection procedure:



i. Characterize existing *historic building materials* in terms of condition, design, material properties, performance, safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*;

ii. Next, determine, based on an evaluation of *technical feasibility* and *economic feasibility*, if *historic building materials* can be repaired or if they must be replaced;

iii. Next, if *replacement* is required, identify potential in-kind and *substitute building materials* and evaluate their *technical feasibility* and *economic feasibility*;

iv. Finally, based on such evaluation, select the most appropriate in-kind or substitute *building material*;

provided, however, that a *federal agency* may only utilize this selection procedure if such *replacement* or demolition does not create *ground disturbance*, exclusively affects *previously disturbed ground*, or, in the opinion of a *qualified authority*, has no *adverse effects* on any *historic property*.

### 3. Work Related to the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of a *building*, and when conducted primarily to *reduce energy use* or *greenhouse gas emissions* of the *building* or to enhance *climate resilience* of the *building*, after the satisfaction of the identified conditions, exclusions, or requirements:

a. In addition to those activities listed in Section 3 of Appendix B-1, *maintenance*, *repair*, *rehabilitation*, *replacement*, and *installation*, and the *abatement* of *hazardous materials*, where such activity results in physical changes to a historic *building* visible from the *primary right-of-way* or has a visual *effect* on the *primary spaces* of a historic *building*, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*.



## APPENDIX C-1: CLIMATE-FRIENDLY TRANSPORTATION-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Work on Ground Surfaces

The following activities do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials*, and they are located entirely within the *previously disturbed right-of-way*:

a. *Maintenance, repair, rehabilitation, replacement, and installation* of the following elements when used for or incorporated into pedestrian, bicycle, *micromobility vehicle*, or *transit* infrastructure:

i. *Ground surface material*, including *installation* of slurry seals, overlays, and seal coatings; sealing and *repairing* cracks; milling and re-paving; *repair* of potholes; and restoration after utility *installation*.

ii. Curb.

iii. Sidewalk.

iv. *Bulb out*.

v. Ramp.

vi. Crosswalk, including a raised crosswalk across a roadway and a raised intersection.

vii. Mark on the ground surface for visibility and delineation, including striping for *bicycle lanes*, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, *bicycle parking*, *micromobility parking*, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.

viii. Detectable warning on or before a curb, entry point, crosswalk, or accessible facility.

ix. Island, including a pedestrian island to reduce crossing distance or improve visibility, and a corner island to separate bicycles from motor vehicles or enable a protected bicycle queuing area or motor vehicle waiting zone.

b. *Maintenance, repair, rehabilitation, replacement, and installation* of the following *ground surface materials* and elements:

i. *High friction surface treatment*.

ii. *Cool pavement*.

iii. *Permeable ground surface materials*.

iv. Rumble strip.

vii. Traffic calming device, such as speed hump, speed table, raised crosswalk, and raised intersections.

c. Elevation of no more than 10 inches of the existing ground surface to maintain, create, or connect pathways for pedestrians, bicyclists, or *micromobility vehicle* users, or to facilitate boarding and disembarking at *transit* facilities.

## 2. Work Involving Fixtures and Equipment

The following activities do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials*, they are located entirely within the *previously disturbed right-of-way*, and they follow the specifications of a *recognized design manual* (if and to the extent covered in any such manual):

a. *Maintenance, repair, rehabilitation, replacement, and installation* of the following elements when used for or incorporated into pedestrian, bicycle, *micromobility vehicle*, or *transit* infrastructure:

- i. *Bicycle rack*.
- ii. *Micromobility parking* corral.
- iii. *Bicycle rail* or wheel stop no taller than 6 inches.
- iv. *Flex post* no taller than 36 inches and no larger in circumference than 22 inches.
- v. Bollard no taller than 48 inches and no larger in diameter than 12 inches.
- vi. Concrete or stone block no taller than 24 inches and no wider than 6 inches, to protect *bicycle parking* or *micromobility parking* or to delineate a pedestrian pathway.
- vii. Sign, signal, traffic control device, and signalization, including any such elements that address the requirements of the Americans with Disabilities Act.
- viii. Ticket dispensing structure, fee collection structure, interpretive wayside exhibit structure, and single-post metal or wooden sign 5 feet or less in height and 2 square feet or less in cross-section area, not including provisions for solar power.
- ix. Camera, intelligent transportation systems, and other technological equipment limiting, removing, or identifying unauthorized traffic from pathways dedicated to walking, biking, *micromobility vehicle* use, or *transit* use.
- x. Temporary construction fencing, but not grading, creating a soil borrow pit, or other significant excavation.

b. *Maintenance, repair, rehabilitation, replacement, and installation* of street furniture, including the following elements, provided that such activity does not result in the removal of historic street furniture:

- i. Bench.
- ii. Table.
- iii. Freestanding planter.
- iv. Street light.
- v. Shelter for *transit* users with a combined dimension (length plus width plus height) less than 30 linear feet and with advertising space no greater than 24 square feet visible at any one time; and *maintenance, repair, and in-kind replacement* of any other such shelter.

c. *Maintenance, repair, rehabilitation, and in-kind replacement* of the following elements:

- i. Catenary system.
- ii. Tracks, including ballasts and ties.
- iii. Camera, mast, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.

### 3. Work Relating to Vegetation and Landscapes

The following activities occurring within the same *right-of-way* or on the same lot as *climate-friendly transportation infrastructure* do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials*, and further provided that they exclusively affect *previously disturbed ground* or create no new *ground disturbance*:

a. Any of the following landscaping, grounds, and water management activities:

- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.
- ii. Planting of any of the following that are native, naturalized, drought-adapted, drought-resistant, drought-tolerant, water-wise, or xeric: grass, shrubs, and other plants; and xeriscaping.
- iii. *Replacement* of a tree in its existing location and planting of a new tree on, along, or within a street that already has street trees.
- iv. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.
- v. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.

b. *Maintenance, repair, rehabilitation, replacement, or installation* of *green infrastructure* or landscaping to delineate pedestrian pathways or *bicycle lanes*, provided such *green infrastructure* or landscaping follows the specifications of a *recognized design manual* (if and to the extent covered in any such manual).

### 4. Work on Bridges

The following activities related to a bridge built to serve pedestrian, bicycle, *micromobility vehicle*, or *transit* use do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials*; further provided that they exclusively affect *previously disturbed ground* or create no new *ground disturbance*; and further provided that the bridge is: either less than 45 years old and not known after a *records check* to be a *historic property*, or has been determined by the *federal agency* or another *federal agency* to not be a *historic property* within the preceding ten years:

- a. *Maintenance, repair, rehabilitation, and in-kind replacement* of drains, joints, joint seals, concrete decks, parapet, rail, concrete, steel elements, bearings, retaining walls, and bridge machinery.
- b. Cleaning and washing.

- c. Conducting electrochemical extraction and cathodic protection.
- d. Mitigating cracks, including pin-and-hanger *replacement* and other retrofits.
- e. Implementing countermeasures against scour.

## 5. Other Activities

The following activities do not require Section 106 review:

- a. Leasing, refinancing, acquisition, or purchase by the *federal agency* of:
  - i. A railway *right-of-way* for the *maintenance*, development, or expansion of either rail-to-trail pathways or passenger rail service;
  - ii. A *transit-oriented development building*; or
  - iii. Fleets of bicycles, hybrid or electric vehicles, or electric locomotives,provided that any physical activities related to such properties must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- b. Transfer, lease, or sale of a federal government-owned *climate-friendly transportation facility* or *transit-oriented development building* from one *federal agency* to another *federal agency*, provided that any changes in use or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such facility must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- c. Transfer, lease, or sale out of federal ownership or out of federal control of a historic *climate-friendly transportation facility* or *transit-oriented development building*, provided there are adequate and legally enforceable restrictions or conditions (such as in a deed covenant) to ensure long-term preservation of the property's historic significance in accordance with 36 C.F.R. § 800.5(a)(2)(vii).
- d. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, *micromobility vehicle*, or *transit* uses, including “play streets,” “school streets,” “safe route to school” streets, or “open streets,” provided that any physical activities related to such decisions, including but not limited to the *maintenance, repair, rehabilitation, replacement, or installation* of streets for the purpose of limiting motor vehicle access, must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- e. *Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment* satisfying the *EVSE criteria*.

## **APPENDIX C-2: CLIMATE-FRIENDLY TRANSPORTATION-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS**

The following activities do not require further Section 106 review after the satisfaction of the identified conditions, exclusions, or requirements:

### **1. Work on Ground Surfaces**

The following activities do not require further Section 106 review, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. Elevation of the existing ground surface by more than 10 inches, or that will result in the demolition or removal of *potentially historic ground surface materials*: to maintain, create, or connect pathways for pedestrians, bicyclists, or *micromobility vehicle* users, or to facilitate boarding and disembarking at *transit* facilities.

### **2. Work Involving Fixtures and Equipment**

The following activities do not require further Section 106 review, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. Any activities listed in Section 2.a. of Appendix C-1 that will result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials*, or create new *ground disturbance* in previously undisturbed soils, or result in the removal of historic street furniture.
- b. *Rehabilitation, replacement, and installation* of a shelter for *transit* users with a combined dimension (length plus width plus height) 30 linear feet or more, or with advertising space more than 24 square feet visible at any one time.
- c. *Installation* of the following new elements that will result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials* or that create new *ground disturbance* in previously undisturbed soils:
  - i. Catenary system.
  - ii. Tracks, including ballasts and ties.
  - iii. Camera, mast, wiring, and other equipment and fixtures used for automatic traffic enforcement, to monitor motor vehicle traffic, or for security purposes.

### **3. Work Relating to Vegetation and Landscapes**

The following activities do not require further Section 106 review, even if they create new *ground disturbance* in previously undisturbed soils, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. Planting of a new tree on, along, or within a street that has not previously had street trees, or in other locations where such planting is intended to improve the experience for pedestrians, bicyclists, *micromobility vehicle* users, or *transit* users.
- b. *Maintenance, repair, rehabilitation, replacement, or installation* of *green infrastructure* and landscaping related to pedestrian pathway or *bicycle lane* delineation that will result in the



demolition or removal of *potentially historic ground surface materials* or will create new *ground disturbance*.

#### 4. Work on Bridges

The following activities do not require further Section 106 review, even if they create new *ground disturbance* in previously undisturbed soils, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:

- a. Activities listed in Section 4 of Appendix C-1 and conducted on historic bridges.
- b. *Rehabilitation, replacement, or installation* of a bridge built to serve pedestrian, bicycle, *micromobility vehicle*, or *transit* use.

**APPENDIX D: FORMAT FOR AUTHORIZATION BY AN INDIAN TRIBE FOR USE OF THIS PROGRAM COMMENT ON ITS TRIBAL LANDS**

On behalf of [NAME OF INDIAN TRIBE] and as a duly authorized representative of such Tribe, I authorize federal agencies to utilize the Program Comment on Housing on the Tribal Lands of the [NAME OF INDIAN TRIBE]. This authorization is in effect until the withdrawal or termination of the Program Comment or on the date of receipt by the Executive Director of the Advisory Council on Historic Preservation that [NAME OF INDIAN TRIBE] has rescinded its authorization, which it may do at any time.

For further information, please contact: [Tribal Contact; Name and Contact Information].

Signed by:

[Signature]

Name:

Title:

Date:

Acknowledged and accepted by the ACHP:

[Signature – leave blank]

Name:

Title:

Date:



Spencer J. Cox  
Governor

Deidre M. Henderson  
Lieutenant Governor

Donna Law  
Interim Executive Director



Christopher Merritt  
State Historic Preservation Officer  
Utah State Historic Preservation Office

October 8, 2024

To the Advisory Council on Historic Preservation,

On behalf of the Utah State Historic Preservation Office, we are providing comments on the *Proposed Program Comment on Accessible, Climate-Resilient, and Connected Communities*.

While we are supportive of many of the objectives of the Program Comment, such as streamlining certain types of housing and transportation projects for the betterment of our communities, over the years our office has already strived, successfully, to accomplish this goal by developing relationships with agencies and creating efficiencies with programmatic agreements (such as the 2019 HUD PA between the Utah Housing & Community Development Division), digital processes, and a working relationship with all agencies to facilitate timely reviews without sacrificing historic preservation. In addition, our office already reviews and comments on undertakings in less than one week, thus delays are not an issue in Utah.

The wide-reaching Program Comment, which applies to all federal agencies (see preamble paragraph; typically Program Comments apply to a specific agency or program), reduces the opportunity for the Utah public and the State Historic Preservation Office (SHPO) to provide input and be involved in federal actions, thus disproportionately impacting our historic communities; and we feel strongly that meaningful consultation is at the heart of the preservation practice as envisioned by the National Historic Preservation Act. Further, we have one of the most streamlined systems for identification and consultation in the entire country, thus this is a 'one size fits all' solution that is not appropriate in Utah.

Before specific comments, we want to underscore that this proposed Program Comment undermines decades of practice and diminishes the statutory role of the SHPO. Congress, in the original 1966 National Historic Preservation Act, established the importance of the States and the SHPO role in federal programs by providing local expertise, historic property information, and review and comment on federal undertakings (54 USC 302303(b)), as germane to this discussion, specifically for SHPO to review "the content and sufficiency of any plans developed [by a federal agency] to protect, manage, or reduce or mitigate harm to that property" (54USC302303(9)(B)).

It is clear that this proposed Program Comment removes the significant role that SHPO's play in these processes outlined in the NHPA and the implementing regulations (36CFR800), let alone removing nearly all public commenting and local government consultation for those identified activities occurring within those same communities, and allowing federal agencies to make sweeping decisions in near isolation. The Utah SHPO feels that this proposed Program Comment goes against the intent of the National Historic Preservation Act and will do more to harm historic properties than the standard process by itself. Of course, there are always opportunities to find efficiencies within the federal



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permitting systems but this particular example is too narrow (housing and infrastructure) and also too sweeping (giving too little oversight to federal decisions affecting local communities).

Key issues from the perspective of the Utah SHPO:

1. Existing state-level streamlining agreements are far better for Utah's communities, versus a federal one-size fits all approach.
2. Program Comment places a significant amount of power to federal agencies by removing any State Historic Preservation Office or Utah public input, review, or comment on a wide swath of undertakings.
3. Significance of historic buildings or archaeological sites being affected by proposed undertakings is insufficiently addressed through this Program Comment.
4. Under Section III.D "Determinations of Eligibility" a more robust effort should be made identifying historic properties that may be affected by undertakings, as this is a key component of the compliance process. Of which, we administer the database for those properties for the State of Utah.
5. Proposed streamlined/exempt actions directly impact character-defining features of historic buildings and neighborhoods without allowing adequate input from local or state level (see all of the Appendices)
6. While we appreciate that there is a Post-Review discovery section, with the sweeping exemptions here, the SHPOs will be hearing about undertakings ONLY when something bad has happened. That could delay projects significantly as we try to sort out next steps with a project that had no identification or paper trail. (Section V)
7. Dispute resolution has questionable language. For instance, it states appropriately that any entity can dispute the application of the Program Comment and if not resolved by the agency in 60 days they "may" forward that dispute to ACHP. That should be "will" forward to the ACHP, as that places too much power on the federal agency to ignore appropriate comments. In the same section, the ACHP notes that the Federal agency's decision is final, regardless of validity of a dispute by a consulting party. (Section VI)
8. The agreement is set to be 20 years long, which is significantly longer than most normal agreements, and offers little flexibility as projects/funding/historic research change. This also is sufficient time depth that the bad precedents set in this Program Comment become a baseline for future preservation efforts. (Section VII)
9. Amendment to this agreement is written currently to be driven by the Advisory Council and Federal Agencies, with little provision to include others (SHPOs, etc.) with the phrase 'as it [ACHP] deems appropriate'. We do not feel this is appropriate to limit inclusion in the amendment to the discretion of the ACHP or federal agencies alone. (Section VIII)
10. The annual reporting requirement for federal agencies should be more detailed on all the undertakings covered and exempted by the Program Comment, as we have agreed to in our existing programmatic agreements with agencies. (Section X)
11. Global comment on appendices is that much of the proposed work occurs within local communities, and the local government entity (let alone the SHPO) will not have any role in providing guidance on significant alterations to historic homes or neighborhoods by federal agencies. This again removes the local voice in defining local needs.

12. Some of the exemptions, especially those that allow for the replacement of character-defining features such windows and doors (under Appendix A-1.2), are concerning and if allowed may preclude a property owner from receiving historic tax credits that the Utah SHPO administered (Utah has a state tax credit for historic residential properties, in addition to the federal tax credit for commercial properties).
13. Byproduct impact would include that the SHPO's cultural resource databases, which by the National Historic Preservation Act the SHPO is meant to be the central repository for this information, would not be updated with new information on historic or archaeological resources given that the ACHP is allowing agencies to bypass SHPO consultation. This would create a generational impact to our databases, and the functioning of consultation processes.

Thank you for the opportunity to comment on the Program Comment, but as it is currently written we do not support its implementation with significant revisions to address the litany of concerns. We also are understanding that our Governor's Office and Public Lands Policy Coordinating Office will also be providing letters on this Program Comment. We look forward to more meaningful consultation on efforts to streamline Section 106, but in a responsible, public-engaging, and non top-down manner.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Merritt", with a long horizontal flourish extending to the right.

Christopher W. Merritt, Ph.D.  
Utah State Historic Preservation Officer



Allyson Brooks Ph.D., Director  
State Historic Preservation Officer

September 24, 2024

The Honorable Sarah C. Bronin  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

Dear Chair Bronin:

Thank you for the opportunity to provide comments on the proposed ACHP Program Comment on Accessible, Climate Resilient, and Connected Communities pertaining to certain housing-related, climate-smart building-related and climate-friendly transportation infrastructure-related activities.

As the State Historic Preservation Officer of Washington, I *agree* with some of the basic principles involved in developing this comment, namely, the concept of streamlining for housing projects, climate projects and climate related transportation. We *agree* that our focus should be balancing project delivery with impacts to historic properties. However, our state has met most of these goals with our existing state programmatic agreements. These agreements have gone through our own state-focused consultation process with federal agencies, local governments and tribes. It is also important to note that our agency responds to 106 submittals within *one business week*. There is no reason for these program comments to negate our existing streamlined agreements by instituting a national initiative that may not meet our local concerns, goals and objectives and that have been previously and successfully negotiated.

Based on the concern above, I respectively *object* to this agency wide Program Comment as currently proposed and many of the proposed exemptions. The pre-emptive elimination of the State Historic Preservation Officer's role in the Section 106 process detailed in this Program Comment is problematic. The legislative requirement in 54 USC 302301 that each Chief state elected official must appoint a state historic preservation officer demonstrates the paramount importance of including the state official's role in the historic preservation process.

Title 54 USC 304108 allows the Advisory Council on Historic Preservation to exempt undertakings through *regulations*. Unless each federal agency adopting these proposed Program Comments goes through the Administrative Procedures Act, and publishes the exemptions in the federal register, they should only be considered guidelines.

Another reason for our objection is the Advisory Council on Historic Preservation has *not* provided us with data demonstrating that climate related projects are being delayed due to the Section 106 regulatory process. Instead, we can demonstrate that our 106 agreements have *effectively streamlined* the process to ensure timely project delivery. Aside from the regulatory havoc these program comments will create, and the lack of data to demonstrate any climate related project delays, this initiative seems to be an *intellectual exercise* rather than an initiative based on science and facts.

While we *agree* that streamlining is a laudable goal, this endeavor would be better served under programmatic agreements. The agreement process provides for tribal and public input, and state consent on streamlining initiatives specific to each state's regional ecological environments and public



interest. At minimum, the program comments should *not* override existing agreements that are functioning well and serving their purpose *nor should the decision of using program comments vs existing agreements be left to the federal government alone*. The state and tribes **must** have a voice in whether existing agreements should remain, or the program comments should be implemented.

The challenge with making blanket exemptions at a national level is that they remove the specific analysis for the environmental and cultural conditions of each state. For example, in Appendix A-1 ciii there is an exemption for the removal of trees for housing. However, in the Pacific Northwest, we have over 1300 culturally Modified Trees, some of which in urban areas are registered as archaeological sites. An exemption for work on trees will inadvertently demolish culturally important trees to Washington State tribes. We recently found our agency in this exact situation where a significant culturally modified tree, important to an area tribe, was slated for removal for a housing project in Seattle. Appendix A-1 ciii needs to be adjusted to allow for the identification of culturally significant trees through consultation with the state and tribes.

While we appreciate efforts under Appendix C-1 for streamlining transportation projects to expedite project delivery, Washington State has already streamlined transportation undertakings through a successful statewide programmatic agreement. Our existing agreement, which was carefully negotiated with all of Washington's 29+ tribes, delineates exemptions, and ***maintains an average response time of three days***. Appendix C-1 should be modified to allow existing programmatic agreements with FHWA and WSDOT to continue. There is no reason to negate a ***successful*** agreement that is working for our state and tribes. **The proposed program comments should NOT override any existing national or state programmatic agreements.**

It is also critical to acknowledge that programmatic agreements are contracts. If the Advisory Council terminates that contract for the program comment, then the entire list of transportation undertakings will need to be renegotiated under a new programmatic agreement and the process could take months to a year or more. Why create *regulatory chaos* when an existing agreement process is fully functioning? In this case, if ACHP is adamant about the proposed program comments in the transportation arena then there must be an independent, objective legal analysis focused on the impact of the program comments on existing programmatic agreements. An objective legal analysis should include reviewing the authority of federal agencies to unilaterally void existing contractual agreements.

In general:

1. State Historic Preservation Officers (SHPO) have their own authority under 54 U.S. Code §302303 to review federal undertakings. Section III, Alternative Compliance Approaches is unclear and should be removed. Who is determining minimal potential to adversely affect historic properties? Programmatic Agreements are the current method for making these decisions with qualified professionals. **Programmatic agreements and memorandum of agreements require the signature by either a SHPO or the National Conference of State Historic Preservation Officers as the negotiated consent to the streamlining initiatives. Existing agreements should remain in place.**

2. Consultation with Indian Tribes and Native Hawaiian Organizations: This section is confusing as it does not tie into the remainder of the program comments. Who is considered qualified to be conducting tribal consultation? Any project manager? Only a qualified cultural resource professional? Who are the tribal liaison staff being referred to? It is not clear whether this staff person is responsible for consulting with Tribal Historic Preservation Officers or whether they are just using internal agency information.



3. The Use of Qualified Authorities: The concept of a qualified authority vs. a qualified professional is very confusing. What does appropriate to the circumstances mean? How is that defined? What is the difference between the two?

4. Determinations of Eligibility: This seems to be a direct violation of the National Historic Preservation Act. Section 106/Title 54 is clear that the effects of an undertaking on historic properties must be considered by the federal agency, SHPO and THPO. That legal requirement cannot be waived in regulation. While there may be a legal opinion that ACHP does have this authority it seems open to a Loper Bright challenge.

5. The exemption for review of buildings 45 years and less for climate related activities means that buildings or structures that may become eligible for the National Register of Historic Places in the additional 5 years will be modified before a property owner can consider the use of tax credits as a cost savings for climate efficiency. The proposed program comment prevents a property owner from learning whether they can take advantage of the federal or state tax credit programs once the property reaches 50 years. If modifications to potentially eligible buildings result in loss of National Register status this could cost a property owner, the loss of thousands of dollars that could have been used for climate related rehabilitation. **States were given rights regarding the identification of historic properties and the right to have property owners learn of tax incentives. The right of the public to learn about potential tax incentives before funding climate related changes deserves to be honored and continued.**

6. The exemptions for ground disturbance must be determined by a *professional archaeologist* who understands the potential for buried soil surfaces and whether ground disturbance may have the potential for artifacts or human remains. If this is not properly analyzed, the exemption will cause a project to stop due to inadvertent discoveries. Stopping projects is exorbitantly expensive and time consuming. Time is better spent on properly analyzing the potential for archaeological material ahead of project initiation.

In the early 2000s, our state transportation agency moved forward on a large transportation project, known as the Graving Dock, claiming the area and archaeological materials were disturbed. This erroneous decision led to impacting over 300 intact tribal burials, and a 2000- year-old village site. This egregious impact caused the project to be terminated and cost the federal government and Washington State over \$100 million. There is a misunderstanding from the Federal Advisory Council on Historic Preservation that many critical archeological discoveries have been located either within or just below ground disturbance. Due to beneficial environmental conditions most, urban areas have simply been built over indigenous villages and cultural places. The failure to use science and culture for archaeological identification methods will have detrimental results.

The idea that previous ground disturbance will not impact archaeological or cultural material, or that either is unimportant, is a misunderstanding of the science of archaeology from a soil development perspective. This generalization diminishes the value of cultural material that may be retrievable to groups that were marginalized and moved during the development of urban area. The best method of streamlining the Section 106 process is to fund technological initiatives such as expanded Geographic Information Systems projects. Sharing data through





technology streamlines Section 106 reviews, expedites responses and prevents harm to historic properties.

7. While the policy focus on zoning is laudable there are an estimated 365,000 Community/Homeowner Associations in the United States. HOAs are essentially private residential government, and all too often function as de facto covenants for land use. We strongly urge examining the impact of HOAs on land use restrictions. HOA covenants are often more damaging than traditional zoning as the latter allows legal variances which the former does not.

**There is no data to support that there is a problem that requires solving through this proposal.** In state Fiscal year 2024 our agency received 4,994 Section 106 submittals and the average response time was 3 days. Out of all the projects submitted 948 were considered No Historic Properties Affected, 317 were No Adverse Effect and only 32 we identified as having an Adverse Effect. Our agency also has 111 active programmatic agreements which assists with reducing the number of Adverse Effects. The data clearly demonstrates that the current streamlining processes are functioning as intended. The proposed program comments will actually harm our regulatory timelines as the ACHP override of programmatic agreements, that were carefully negotiated with all stakeholders and our tribal partners, will require either new agreements or amendments. The proposed changes will be particularly devastating to existing agreements with HUD and federal and state transportation agencies.

As a reminder, the National Historic Preservation Act of 1966 (NHPA) (a law proudly spearheaded by Washington State Senator Scoop Jackson) was designed to be a collaborative process between states, tribes, local governments and the federal government to preserve America's heritage. The NHPA gave each party a unique role that ensured a well-rounded perspective on our heritage. The voice of the state was paramount in identifying historic buildings, structures, sites, districts, and objects within their boundaries. In 1992, the responsibility of identifying places of religious and cultural significance was expanded to tribal governments., The Congressionally established process ensured that one governmental entity was not solely responsible for identifying, preserving and protecting places of importance to the tribes, the state, local communities and the nation. The importance of multiple voices cannot be understated; neither is the concept of a collaborative process that was a right given by Congress to the states and the tribes to voice historical significance from their localized perspective and to have a role in avoiding, minimizing, or mitigating effects to historic properties.

Program Comments are *not* in law but are a construction devised in federal rules. Regulations must exist within the framework of the law they seek to administer as established by Congress. The authority to write general regulations does not allow an agency to usurp power and authority given to the states and tribes by laws enacted by Congress. While the Chair of the ACHP has the right to develop *general rules* for Section 106, the concept of using a program comment is creating vast changes in how Section 106 functions in Title 54. If the ACHP wants to use the idea of a program comment for such a vast change to the Section 106 process, the Chair of the ACHP should write an amendment to the National Historic Preservation Act. The current program comment proposal seems open to a Loper Bright challenge. Even though the Advisory Council on Historic Preservation has general rule making authority regarding NHPA that does not make it legal or appropriate that they should abrogate the State's authority under Section 106 of the Act without state consent. This also holds true for the rights of the tribes under the Act.

In general, the Washington State Department of Archaeology and Historic Preservation does not waive its right to participate in the Section 106 process as written and passed by Congress without our consent. We are, however, more than willing to continue entertaining national programmatic agreements or state agreements that result in state **approval** of a **streamlined process** by all parties. These are very effective streamlining methods that are tailored to state conditions. This agreement process assures regional



accountability by all parties and is a process tailored to variations in the archaeological and built environment across the United States.

We look forward to working with the Chair of the Advisory Council on Historic Preservation to transform these comments into national or state programmatic agreements that allows the consent of the states, tribes and local communities that will result in an expedited Section 106 process.

Sincerely,



Dr. Allyson Brooks, Ph.D.  
Executive Director/State Historic Preservation Officer

cc: Jordan E. Tannenbaum, Vice Chair, Advisory Council on Historic Preservation  
Erica C. Avrami, Advisory Council on Historic Preservation  
Carmen A Jordan-Cox, PhD, Advisory Council on Historic Preservation  
Frank G. Matero, Advisory Council on Historic Preservation  
Monica Rhodes, Advisory Council on Historic Preservation  
Charles "Sonny" L. Ward III, Advisory Council on Historic Preservation  
Jane D. Woodfin, Advisory Council on Historic Preservation  
Amelia AM Marchand, Advisory Council on Historic Preservation





WISCONSIN  
HISTORICAL  
SOCIETY

October 7, 2024

The Honorable Sarah Bronin  
Advisory Council on Historic Preservation  
401 F St. NW, Suite 308  
Washington DC 20001

Dear Chair Bronin and members of the Council:

Thank you for the opportunity to comment on the *Program Comment on Accessible, Climate-Resilient, Connected Communities*. As stated in the Goals of the *Program Comment*, it is our collective interest to advance historic preservation goals. These goals are not separate from addressing housing needs and working toward greater sustainability. We can advance historic preservation **and** address societal needs, as was the intent of the National Historic Preservation Act in 1966.

However, while many aspects of the proposed *Program Comment* are sensible provisions that eliminate the need for unnecessary reviews, there are several points that we would like the ACHP to consider moving forward. The provisions as proposed stand in direct opposition to Congressional intent by diminishing the role of SHPOs as set forth in the National Historic Preservation Act to protect resources within their states. Furthermore, the use of the *Program Comment* may undermine beneficial State/Agency and Tribal partnerships created through years of collaboration and relationship building, may increase conflict between the actions of Federal agencies and state statutes, and may lead to avoidable disturbance of archaeological/burial sites.

For over two decades, the Wisconsin SHPO has made significant investments to build a comprehensive cultural resources database and project tracking system so that we can provide the critical data needed for Section 106 reviews and to expedite consultation. Our state receives approximately 1600 federal projects for review annually and our average response time is 11 calendar days. Last year, we were able to resolve all projects with our federal partners, and through consultation reduced projects with adverse effects to only 41 projects out of 1600. These projects were mitigated through consultation with impacted communities and project partners.

**General Observations:**

The scope of the document is overly large and complex. The need for a lengthy flow chart exemplifies the complexity of the proposed rule changes and underscores the possibilities of misinterpretation. In addition, while most of the *Comment* addresses buildings, the transportation portion is not a good fit. Specifically, many states have worked with FHWA and our state Departments of Transportation to develop robust programmatic agreements that address the concerns and historic resources that are unique to each state. A one-size-fits-all approach is not

advisable where cultural resources are concerned. Our Wisconsin transportation Programmatic Agreement signed in 2023 with FHWA, WisDOT, FRA, USACE, and THPOs encompasses the particular interests of Tribes with a historical and cultural interest in Wisconsin, as communicated to us and our partners, and includes other federal agencies with roles in the transportation permitting process.

A concern throughout is that the effect of this *Program Comment* may be to hold private individuals and state and local governments to a higher preservation standard than the federal government in the treatment of potentially eligible buildings, and on impacts to archaeological and burial sites. In Wisconsin, like many other states, approximately 77% of the 157,000+ standing resources in our state inventory have not been evaluated for National Register eligibility. The *Program Comment* has the potential to have negative impacts on these unevaluated buildings because allowable projects could diminish a property's integrity and possibly render it not eligible for listing due to *Comment*-permitted alterations. If federal projects allow for non-reviewable replacement of historic features and materials, it makes the job of local historic preservation commissions and SHPOs more difficult and undermines the uniform application of the Secretary of the Interior's Standards. The *Program Comment* allows federal agencies to skirt the Standards as well as SHPO review and consultation, while requiring private property owners to comply under the federal tax credit program, local preservation ordinances, or state cultural resources laws. Section I.5.e. addresses the transfer, lease or sale out of federal ownership and the requirement for enforceable conditions to ensure the long-term preservation of the property. These conditions include provisions for review and for adherence to the Standards. This again may require the purchaser (often a unit of government or a private individual) to adhere to stricter historic preservation standards than the previous federal owner.

The removal or replacement of extant historic materials or features and the allowance of substitute materials should be subject to SHPO review. Some materials are better suited as alternative materials than others, while other substitutes offered as replacements by the building trades are inappropriate because they are not suitable for local conditions or cannot replicate the appearance, physical properties, or performance of original materials as documented by NPS in their Preservation Brief 16, *The Use of Substitute Materials on Historic Building Exteriors*.

Overall, there is insufficient consideration given to the potential impact of the *Program Comment* to archaeological sites, which may include sites of significance to Tribes, but also sites with Euro-American significance, as well as impacts to pre- and post-contact burial sites. While the *Program Comment* addresses impacts to previously disturbed areas, it may lead to work that has the potential to impact known and unknown archeological and burial sites. Just as many buildings are unevaluated, 96% of Wisconsin's 36,000+ identified archaeological sites are unevaluated—and large portions of Wisconsin have not been surveyed for the presence or absence of archaeological resources. Furthermore, Wisconsin's strict burial laws require reviews or permits within identified burial sites. Based on documented finds, these burial sites may be under existing roadways, under or adjacent to standing buildings, or within the right of way. In Wisconsin, buildings have been built within the boundaries of older Euro-American cemeteries as well as burial mounds. SHPO experience in helping partners identify and avoid known sites

and prevent potential disturbance to unreported sites in areas with high archaeological potential will be circumvented by the proposed changes, despite our proven track record of expediting projects while simultaneously protecting resources.

Appropriately, “Sites of religious or cultural significance to Indian Tribes and Native Hawaiian Organizations” are subject to standard 106 review. However, language in this section is unacceptably vague, and underrepresents the vital role played by THPOs outside of tribal lands. At least 19 Native American tribes, including several now living in other states, have a demonstrated historical and cultural interest in the land now known as Wisconsin. As defined in the document, “tribal lands” is all lands within the exterior boundaries of any Indian reservation. As an example, Wisconsin’s Ho-Chunk Nation has no reservation and only holds land in trust and fee simple. Historically, their territory covered 8.5 million acres by the Treaty of 1825, and they maintain an interest in this larger area.

By excluding SHPO from consultation, projects will inadvertently affect sites of religious or cultural significance. Together, SHPOs and THPOs assist in the identification of potential sites and SHPOs can help federal agencies identify the Tribes to consult. Overall, the *Program Comment*’s steps for the identification of relevant parties in consultation with Indian Tribes and Native Hawaiian Organizations discounts the state and regional Tribal relationships of THPOs and SHPOs. Our Wisconsin Archaeological Site Inventory stores important information related to sites, but only 0.04% of our sites currently have an identified Tribal affiliation. Tribal affiliation, when included, is only for post-contact sites. SHPOs and THPOs play a critical role in this important part of the consultation process, helping to ensure that the relevant Tribal interests are considered so that we can facilitate and coordinate reviews with our Tribal partners.

The statement on B. Effect on Other Applicable Laws should be strengthened, as this can easily be overlooked. Failure to obtain required state reviews or legal authorization may result in avoidable delays and significant costs. In Wisconsin, failure to obtain the necessary permits under our state’s burial law may lead to prosecution. SHPO staff ensure that these reviews and authorizations are obtained through the Section 106 project review.

Further clarification should be provided on when which type of Qualified Authority should be consulted. Some instances require a Qualified Professional or a Tribal authority, other situations may require both a Qualified Professional and an authority with Tribal expertise. Throughout the appendices, the *Comment* calls out a determination of a *qualified authority* without specifying which type of authority should participate.

The *Program Comment* notes that it “provides all Federal agencies with an alternative way to comply with their responsibilities,” and later stipulates (I.C.) that federal agencies may follow the *Program Comment* or continue to implement existing MOA or PAs. This provision allows solely the agency to choose which approach to use. It is also unclear at which federal level MOAs or PAs may be terminated. For example, could USDA terminate all agreements that exist within a Forest Service region in favor of the national scope *Program Comment*? SHPOs have worked in good faith for decades with federal agencies to develop these documents and successful partnerships. Again, these active MOAs and PAs address the particular needs of our

state, our Tribal partners, and our agencies, and their circumvention can only come at the expense of our cultural resources and established partnerships. The localized agreement documents that we have developed with federal agencies reflect how we work in the state and acknowledge the unique conditions within our state. They identify the factors that affect eligibility, as well as the character defining features that merit special consideration within our borders.

A 20-year duration for the agreement is much too long. This far exceeds other agreement documents and discourages adjustments or updates that reflect prevailing conditions or issues that arise. As we know well, a 20-year period will encompass new scholarship that will affect how we evaluate historic properties and new materials. New approaches to preservation will also need to be considered.

Per Stipulation X(A), federal agencies are required to provide an annual report regarding the use of the *Program Comment* only to the ACHP. Why would this report not be provided to SHPOs and THPOs as well? Per Stipulation X(B), ACHP will only meet with the SHPOs for the first four years to discuss the “implementation of the *Program Comment*.” Is there an assumption that any issues will be resolved within that time? SHPOs and THPOs regularly provide agencies with valuable feedback on concerns that arise and suggest improvements in the process, including ideas for additional streamlining. The current processes we have with our federal agency partners are a direct outcome of years of communication regarding what works best, and it is our intention to continue to improve those processes in years to come.

## **Comments on Appendix A-1, A-2, B-1**

### **Site work:**

- Concrete and Asphalt Ground Surfaces: Exclusion of these projects from review denies protection to archaeological and burial sites immediately beneath the surface. We have seen multiple instances where significant sites, including ancestral burials, have survived immediately beneath asphalt and surface levels. SHPO review allows us to warn agencies of past finds in sensitive areas and to employ methods of rapid identification of near-surface resources in consultation with Tribal partners.
- Installation of other features, such as new lighting and retaining walls, has the potential to cause irreparable ground disturbance to archaeological and burial sites. Similarly, test borings could damage archaeological or burial sites. We ask that SHPOs be allowed to identify those instances through consultation and review and to assist agencies to avoid the delays, costs, and cultural trauma that result from inadvertent disturbance and destruction.
- Landscaping features may be part of a significant designed landscape.
- Areas within 10 feet of existing paved area or within 10 feet of a building may have known archaeological or burial sites.
- Many of these concerns may be alleviated through a consultation with SHPO, with the result that damage is avoided, partnerships and trust remain intact, and legal prosecution is forestalled.

### **Work on Building Exterior:**

- The exclusion of buildings that were determined to not be historic in the past ten years may remove from consideration those that were found to not meet eligibility criteria due solely to age. Allowing changes to buildings that have not been assessed has the potential to cause significant impacts to the integrity of unevaluated eligible buildings. Elements such as roofing, gutters, chimneys, windows, and siding may be character defining features. Consider a Tudor Revival building that has leaded glass, a slate roof, and decorative chimneys. The inappropriate replacement of these features may so diminish the integrity of the building as to render it no longer eligible.
- Maintenance or removal of below ground utilities within the boundaries of a recorded burial site would need to comply with Wisconsin state statutes related to burial site protection.
- Windows under 45 years of age may be character defining features of buildings that may meet criteria consideration G or be in buildings that are in potential historic districts that have periods of significance that end less than 50 years ago.
- Per the document, the replacement of materials may be allowed through an assessment of economic feasibility. As the definition is currently drafted, the “estimated operation costs and available budget” are included in project outcome determinations of “viability, suitability, and practicality of a proposed undertaking.” We already face numerous issues with applicants who use these reasons to not maintain historic facilities. The *Program Comment*, and this definition, will drastically reduce the ability to successfully offset adverse effects to historic properties and may encourage agencies to use the cost argument to avoid the upkeep of historic properties.

### **Work on Building Interior:**

- While the language clearly excludes work on primary spaces, the alteration of flooring, ceilings, or stairs may affect important character defining features. The term “cosmetic improvements” is not defined and is open to broad interpretation. These items, as well as the others listed in Section 3 are subject to review and approval for compliance with the Standards for individuals applying for federal rehabilitation tax credits. Furthermore, many of the allowable actions may be considered adverse effects in 36 CFR 800.5(a)(2).
- The same concerns noted above apply related to determinations that are 10 years old.
- It should be noted that some detailed actions, such as removal and installation of equipment and fixtures or the installation of building energy control systems are already addressed in many existing agency agreement documents and allow these improvements to proceed without SHPO review.

## APPENDIX C-1: Transportation related activities

- The placement of **shelters** should be reviewed to ensure minimized impacts to viewsheds and setting. A shelter could have a significant visual impact on a historic property. SHPOs are happy to work with transportation agencies to find more appropriate locations in the immediate area. Depending on the location, the preference is for a see-through shelter (no advertising) to allow for visibility of adjacent historic properties.
- Wisconsin Tribes have identified the installation of **rumble strips** (1.b.iv) as having a potential of adverse effect on adjacent ceremonial areas. **Bollards** have also met with community opposition.
- As noted above, we recommend the removal of this section.

### Recent Examples of Successful Consultation:

Below are some examples of Wisconsin projects where consultation with SHPO avoided project delays and adverse effects to resources. In these examples, we identified solutions and assisted the agency in avoiding adverse effects.

#### Silver Maple Solar Project

The project involved the installation of a solar field surrounding a church and community center in Oshkosh Township, Winnebago County. The qualified professional determined the historic property to be eligible under criterion A for its associations with the Welsh community and possibly under criterion C. The integrity of the feeling and setting of the rural church would have been affected by the installation of solar panels on three sides of the property. The project as proposed faced opposition. The SHPO consulted with the developer, state agencies, and the local community and developed a mitigation plan that included screening to lessen the visual impact while allowing the solar field to move forward within 30 days from initiation of consultation.

#### Vista Sands Solar Electric Generation Facility

A cluster of archaeological sites with exceptional integrity were encountered intact during the Phase I archaeological survey for this project in Portage County and research indicated that additional sites were located nearby. The SHPO concurred with the archaeological consultants that the density of sites in the area likely indicated the presence of a larger and significant Native American village complex. The qualified professional determined, and the SHPO concurred, that the area was eligible for the National Register under Criterion D. The SHPO developed a working plan of an area to be excluded from development with the understanding that the boundaries could be altered based on additional archaeological survey. A stipulation was added that interested parties should meet to discuss options and potential mitigation should any work proceed in the marked area.

#### Bus Rapid Transit in Milwaukee

Bus Rapid Transit is a federally funded initiative through the Federal Transit Administration which provides enhanced transit services to major metropolitan areas with stations strategically



placed to reduce trip time and improve traffic safety. The first BRT program in Wisconsin came in for SHPO review in 2017. Through consultation, we were able to assist project leads with relocating proposed stations to avoid Native and early Euro-American unmarked cemeteries and from obstructing the view of National Register listed resources such as Marquette University's iconic Johnston Hall.

### **Burials in Disturbed Areas**

Wisconsin SHPO staff have reviewed numerous projects in La Crosse, Onalaska, Trempealeau, Neenah, Prairie du Chien, Oshkosh, Calumetville, Milwaukee, Sauk City, and other municipalities where burial and other features have been found just below the road surface, along sidewalks, directly underneath buildings, and adjacent to hand-dug basements. These archaeological features, which reflect cultural sites as wide-ranging as Oneota cemeteries, post-contact Indigenous villages, and historic forts, are often located in heavily developed and so-called "disturbed" urban settings. Some sites were known prior to investigation, and consultation with SHPO resulted in their rapid identification and mitigation. Others were unknown, and SHPO responded rapidly as a consulting party to ensure respectful treatment and project success. Besides intact deposits and burials found just beneath the asphalt or concrete at many sites, human remains are found scattered back into utility trenches along with the backfill. Moreover, we have entire communities such as La Crosse, Onalaska, Trempealeau, and Sauk City, where large swaths of land are known to contain burials sites due to the long history of occupation at these locations. There are many other locations throughout Wisconsin where the exemptions proposed by ACHP are not allowable under Wisconsin statutes. We would not consider categorically exempting such undertakings in a statewide PA.

In conclusion, we at the Wisconsin SHPO look forward to working with the Advisory Council and our federal agency partners to incorporate the goals of the *Program Comment* into new or amended programmatic agreements. As SHPO staff and preservation professionals, we take the responsibilities in 36 CFR 800.2 seriously. It is our goal in all consultation to reflect the interests of the State and its citizens in the preservation of Wisconsin's cultural heritage. We advise and assist Federal agencies in carrying out their section 106 responsibilities and cooperating with such agencies, local governments, organizations, and individuals to ensure that historic properties are taken into consideration at all levels of planning and development. We request to continue to be active participants in the consultation process as partners in our shared goal of protection of our cultural heritage.

Sincerely,



Daina Penkiunas, Ph.D.  
State Historic Preservation Officer - Wisconsin

cc: Erik Hein, NCSHPO