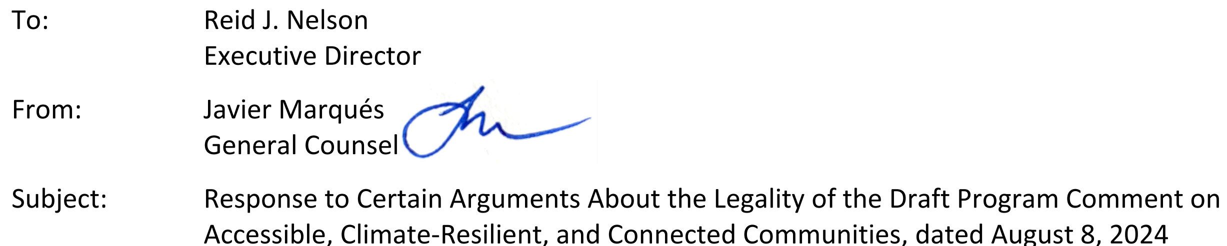
October 17, 2024

Memorandum



To: Reid J. Nelson
Executive Director

From: Javier Marqués
General Counsel

Subject: Response to Certain Arguments About the Legality of the Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities, dated August 8, 2024

You have asked me to address five key comments from commenting parties challenging the legality of the Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities dated August 8, 2024 (Draft PC). The sole purpose of this memorandum is to provide you and the membership with a general understanding of OGC's position on those arguments.

This memorandum may be circulated publicly (and may reach potential litigants), and as such, this memorandum is not a comprehensive discussion of all available counterarguments nor is it meant to limit those that the Department of Justice could raise on our behalf in any future litigation.

I. Program comments do not need to follow the rulemaking requirements of the Administrative Procedure Act

Commenters claim that the adoption of Program Comments must be preceded by the rulemaking procedures set forth in the Administrative Procedure Act at 5 U.S.C. § 553 (APA). That claim is incorrect. Program Comments are only required to follow the procedures in the regulations at 36 C.F.R. part 800 (2004). Those regulations were the ones that were subject to, and followed, the APA rulemaking requirements.

The National Historic Preservation Act, 54 U.S.C. § 300101 et. seq. (NHPA), granted the ACHP with the broad authority to "promulgate regulations as it considers necessary to govern the implementation of [Section 106] in its entirety." 54 U.S.C. § 304108(a).

Exactly as authorized, the ACHP issued such regulations, at 36 C.F.R. part 800, which prescribe three compliance approaches through which Section 106 may be implemented. That is, they set forth three compliance approaches available to federal agencies to meet their Section 106 responsibilities:

a. through the process found at sections 800.3 through 800.7 (default process);

b. through the use of National Environmental Policy Act documents in accordance section 800.8(c); or

c. through the use of alternate procedures, programmatic agreements, exemptions, or program comments issued by the ACHP per the procedures at section 800.14.

The compliance approaches were vetted and unquestionably went through the APA rulemaking requirements as part of the processes that resulted in the current rule at 36 C.F.R. part 800. The rulemaking process for 36 C.F.R. part 800, which included the establishment of program alternatives, spanned about 12 years, through various notices of proposed rulemaking in the Federal Register, extensive consultations, publications of final rules with exhaustive responses to public comments in the Federal Register, and litigation[1]. That history will not be repeated here, but suffice it to say that the regulations met all APA rulemaking requirements, namely:

1. Notices of proposed rulemaking in the Federal Register with the required contents;

2. Opportunity for interested persons to participate in the rule making through submission of written data, views, or arguments;

3. Final rule publication in the Federal Register, including a concise general statement of their basis and purpose; and

4. The required 30-day notice before going into effect.

For a summary of the history of that rulemaking process, please refer to the final rule notice at 65 FR 77698 (Dec. 12, 2000). The Section 106 regulations were last amended in 2004, again following all APA rulemaking requirements, to incorporate a few targeted changes (mostly as a result of the mentioned litigation). See 69 FR 40544 (July 6, 2004).

The present Section 106 regulations have remained in effect without any changes or further legal challenges for over 20 years.

Again, the regulations establishing program comments and how they may be issued, at 36 C.F.R. § 800.14(e), have already gone through the APA rulemaking requirements multiple times. The issuance of a new program comment is only required to follow the process at 800.14(e).

It also bears mentioning that the process required for issuing program comments by section 800.14(e), and the practices followed by the ACHP before issuing them, arguably surpass many of the APA rulemaking requirements. For instance, a draft is widely made available to the public through various means, including direct e-mailing to a large number of stakeholders (including State and Tribal Historic Preservation Officers, Indian Tribes, Native Hawaiian Organizations, and federal agency Historic Preservation Officers), and notification through wide social media; an opportunity is given to all parties, including the public, to provide written comments and have such comments considered; the ACHP conducts multiple, live consultation meetings with stakeholders, one open to everyone in the general

[1] National Mining Association v. Slater, 167 F. Supp. 2d 265 (D.D.C. 2001), rev'd in part sub nom, National Mining Association v. Fowler, 324 F.3d 752 (D.C. Cir. 2003) (the only part reversed had to do with the applicability of Section 106 to undertakings subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency). The National Mining Association initially challenged the APA rulemaking process for the regulations but ceased pursuing that argument after the first government brief was filed.

public; and a thorough statement of the basis and purpose of the program comment, with responses to salient issues raised in consultation, is published in the Federal Register.

II. The Program Comment will not supersede already executed Memoranda of Agreement or Programmatic Agreements

Commenters assert that the ACHP cannot supersede executed Memoranda of Agreement (MOAs) or Programmatic Agreements (PAs) through a Program Comment. That argument is now moot.

Section II.C. of the Draft PC will be amended so that it will not supersede executed MOA and PAs. I had lifted that language, with a few modifications, from a recent Army program comment when I was putting together an initial framework for the administrative provisions of the Draft PC. However, after discussions with staff and the Chair, it was agreed by all that while such a provision may fit other program comments including those issued to the Army, it is not advisable for a program comment like the Draft PC.

The program comments for the Army present a situation where only one federal agency was involved; the agency itself had sought such a stipulation; all properties within their scope were owned and managed by one federal agency; and all undertakings at issue were either directly carried out by that one agency or a partner for that agency. Lastly, the sole agency official in the potentially relevant MOAs and PAs would be from the same federal agency.

The Draft PC will be changed to state that agencies that want to follow it, rather than already existing MOAs or PAs that address covered undertakings, must follow the terms of those MOAs or PAs to either amend them or terminate them accordingly.

III. Program comments are not required to include processes for consultation with State Historic Preservation Officers

Some commenters argue, as we understand it, that State Historic Preservation Officers (SHPOs) have a statutory right to be consulted on every Section 106 review and that, therefore, program comments that do not include a process for consulting SHPOs on every undertaking are illegal. That argument is incorrect.

The NHPA includes a list of SHPO responsibilities in 54 U.S.C. § 302303. One of the listed responsibilities is to:

> consult with appropriate Federal agencies in accordance with [the NHPA] 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 U.S.C. § 302303. This language is not a grant of authority to SHPOs by Congress to conduct reviews of undertakings for the protection of affected historic properties. Rather, it refers to the federal agencies' statutory and regulatory obligations under Sections 106 and 110 of the NHPA and identifies one of the responsibilities that SHPOs must meet to fulfill the approval and grant funding requirements under the NHPA.

When read in conjunction with the other provisions of the NHPA and its legislative history, it is clear that the listed responsibility for SHPOs to consult with appropriate federal agencies on undertakings is not a grant of independent authority, but rather a requirement for approval of a State historic preservation program by the Secretary of the Interior (Secretary) and a condition for receiving federal grant assistance from the Historic Preservation Fund (HPF). The States maintain the option of declining to participate in the Section 106 process (i.e., declining to have a State historic preservation program). See 59 FR 50,396 (Oct. 3, 1994).

In consultation with the ACHP and in cooperation with the relevant SHPO, the Secretary is required to periodically (at least every four years after approval of the State program) evaluate a State's preservation program to determine whether it is consistent with the NHPA. If the Secretary determines that "a major aspect" of the State program is inconsistent with the NHPA, the Secretary is required to disapprove the program and suspend in whole or in part any existing contracts or cooperative agreements with the State and SHPO under the NHPA, until the State program is consistent with the NHPA. 54 U.S.C. § 302302. Routine failure or repeated refusal to consult with federal agencies in the Section 106 process would most likely meet the threshold determination that "a major aspect" of the State's program was inconsistent with the NHPA.

Additionally, in order to receive HPF matching grants-in-aid, SHPOs must administer their State programs in accordance with the responsibilities outlined in 54 U.S.C. § 302303. The NHPA establishes the HPF to be used to carry out the purposes of the NHPA. 54 U.S.C. §§ 303101–303103. Congress has directed the Secretary to administer a program of grants-in-aid to States for approved programs. 54 U.S.C. § 302902. Failure by a State program to meet the requirements of the NHPA, and related regulations and guidance, is cause for comment and appropriate action by the Secretary. 36 C.F.R. § 61.5(b).

Accordingly, the responsibility of SHPOs to consult with federal agencies on undertakings that may affect historic properties does not circumscribe the ACHP's broad regulatory authority over Section 106 to proscribe alternative compliance approaches or create either a right or requirement for SHPOs to review all undertakings independent of the processes set forth in the Section 106 regulations. Instead, it is one of the responsibilities that SHPOs must meet to fulfill their approval and grant funding requirements under the NHPA.

IV. Program comments can provide for undertakings for which no further Section 106 review is required

Commenters assert that program comments are not exemptions and, therefore, cannot provide for undertakings for which no further Section 106 review is required. That argument is incorrect.

A program comment and an exemption are two different types of program alternatives that the ACHP is authorized to approve, following the process set forth in the NHPA and the Section 106 implementing regulations, 36 C.F.R. part 800. While they serve different purposes, a program comment can identify certain undertakings for which no further Section 106 review is required, following a specific process informed by the consultation that led to the issuance of the program comment. Including undertakings that require no further review in a program comment is a different approach than what is required to exempt undertakings from Section 106 entirely. An exemption requires no review at all under Section 106 for the covered undertakings, whereas a program comment provides a modified process to

evidence the ACHP's comment on how the agency will satisfy its Section 106 responsibilities for the covered undertakings. In sum, the issuance of an exemption releases the federal agency from Section 106, while the issuance of a program comment provides the agency's path for Section 106 compliance.

The ACHP first addressed the concept of a program comment as a program alternative in the 1996 proposed rule.[2] It is important to note that the 1992 amendments to the NHPA added the phrase, "in its entirety" to 54 U.S.C. 304108(a), which authorizes the ACHP to promulgate regulations to govern the implementation of Section 106 (in its entirety). Based on this clear statutory direction, the ACHP proposed program alternatives to tailor the Section 106 review for designated agency programs or categories of undertakings; an agency's compliance with such an approved program alternative would satisfy its Section 106 responsibilities for the covered undertakings. The notice for the 1999 final rule explained further that:

> … [p]rogram comments are intended to give the Council the flexibility to issue comments on a [f]ederal program or class of undertakings rather than comment on such undertakings on a case-by-case basis. This section sets forth the process for issuing such comments and withdrawing them. The [f]ederal agency is obligated to consider, but not necessarily follow, the Council's comments. If it does not, the Council may withdraw the comment, in which case the agency continues to comply with section 106 on a case-by-case basis.

64 FR 27044, 27069 (May 18, 1999); see also 65 FR 77698 (Dec. 12, 2000) (providing the same explanation for the purpose and use of a program comment).

In more recent years, the ACHP developed guidance to help implement the process set forth in 36 CFR part 800 to propose, develop, issue, and utilize a program comment. The guidance, and the subsequent development and use of program comments,[3] shows the intent for this program alternative to address the potential for covered undertakings to affect or adversely affect historic properties and provide the ACHP's comment on how the agency would "take into account" those effects on historic properties, including resolution of adverse effects where appropriate.

In issuing a program comment, the ACHP can determine that no further consultation or review is necessary to fulfill the agency's Section 106 responsibilities for certain undertakings based on existing information, previous work, previous consultation, analysis or assessment done in preparing the request for the project comment, or other such measures. Often this type of action in a program comment (requiring no further review) is also based on an informed understanding of the minimal or likely not adverse effects the covered undertakings may pose to historic properties.

Unlike an exemption, where once it is issued, the agency has no Section 106 responsibility for the covered undertaking, a program comment contains recognition of steps already taken or steps to be taken to consider the effects of the covered undertaking on historic properties. In the case an undertaking does not meet the criteria threshold for an exemption, a program comment can set forth a

---

[2] See 61 FR 48580 (Sept. 13, 1996), explaining that, "Section 800.15(e) provides an efficient mechanism for fulfilling the requirement of seeking Council comment. This section allows agencies to request Council comment on a category of routine or repetitive undertakings instead of conducting individual reviews."

[3] See Program Comments, listing the program comments issued by the ACHP, available at https://www.achp.gov/program_alternatives/program_comments (last visited Oct. 4, 2024).

modified, tailored, or abbreviated process to take into account the potential effects of the covered undertakings and satisfy an agency's Section 106 responsibilities.

V. Questions raised by Indian Tribes

Some Indian Tribes have raised questions about the legality of the Draft PC. I will not address those here since we are still going through the written comments provided by several Tribes and are continuing to engage in government-to-government consultations. As a general comment, the ACHP fully recognizes its Trust responsibility and its government-to-government relationship with Tribes. While the intent of the Draft PC is to limit the potential of covered undertakings to impact historic properties of traditional religious and cultural significance to an Indian Tribe or Native Hawaiian Organization, we recognize the challenge presented in assessing whether any proposed undertaking presents such potential on a nationwide basis. The Draft PC proposes a process for consultation with Indian Tribes and Native Hawaiian Organizations in case covered undertakings may affect such properties. See Section III.B. of the Draft PC. Although it is written so it will not apply on Tribal Lands, the ACHP recognizes that many sites of religious and cultural significance to Tribes and NHOs are not on Tribal lands as defined in the NHPA. See Section II.D. of the Draft PC.

Let me know if you have any questions.