



December 13, 2024

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

Dear Ms. Bronin

The Wyoming State Historic Preservation Office fundamentally disagrees with the Advisory Council on Historic Preservation's Draft Program Comment on Certain Housing, Building, and Transportation Activities on the grounds that the consultation processes in the document are not clear, it is not in the spirit of the NHPA, and ignores the valid concerns of consulting parties and specified roles of SHPOs.

The National Historic Preservation Act outlines the fundamental roles of SHPOs within historic preservation in this country. Recognizing the professional ability of SHPOs to provide localized expertise in archaeology and historic preservation, SHPOs hold a central role in the Section 106 process. The Wyoming SHPO is concerned that this program comment seeks to remove SHPOs from their legal role in this important process. Specifically, in section III.A.2., federal agencies are not required to notify individual SHPOs of the intent to use this program comment in their states. This makes it impossible for individual SHPOs to monitor the use this program comment. This problem is further exacerbated by the fact that federal agencies are not required to provide annual reports of their activities to SHPOs in section X. As it is currently written, this program comment allows federal agencies to move forward with projects without the knowledge of the SHPOs.

Section III.C. of this document allows for non-qualified personnel to make decisions about undertakings that have the potential to affect historic resources. This clause is not in keeping with the NHPA. The Wyoming SHPO feels strongly that this clause should be removed from the program comment.

Appendix B of this document describes several types of determinations that may be made in relation to certain types of activities. The language is confusing and the processes needed to follow this appendix are very unclear. The appendix states that certain activities "require a written determination before the federal agency may proceed with the undertaking." However, it is unclear as to who makes these determinations and if these determinations require SHPO

Mark Gordon | Governor
Dave Glenn | Director
Sara Sheen | SHPO Officer



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concurrence. If it is the responsibility of the federal agency to make these determinations, and if they do require concurrence from SHPO, then how is this any different from the current Section 106 process? Additionally, there needs to be more clarification on some of the individual determinations. For example, the Type C determination should clarify that any building over 45 years that has never been surveyed needs to be assessed by a qualified professional for its National Register eligibility.

The Wyoming SHPO respectfully submit these comments on the proposed Draft Program Comment on Certain Housing, Building, and Transportation Activities. It is our hope that these comments will be taken into account for any future drafts of this document.

Sincerely,



Brian Beadles
Deputy State Historic Preservation Officer

Mark Gordon | Governor
Dave Glenn | Director
Sara Sheen | SHPO Officer



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Outlook

[External] Revised Program Comment on Certain Housing, Building and Transportation Activities

From Sipes, Eric <Eric.Sipes@ahc.alabama.gov>

Date Fri 13-Dec-24 2:23 PM

To Program Alternatives <program_alternatives@achp.gov>

Cc Mercer, Chloe <Chloe.Mercer@ahc.alabama.gov>

Good afternoon,

Upon review of the revised draft Program Comment on Certain Housing, Building and Transportation Activities, our office continues to have concerns that unqualified federal agency officials and/or their legally designated representatives may be allowed to make decisions regarding the applicability of the draft document, which would exempt certain activities from Section 106 consultation (54 U.S.C. 306108, as codified in 36 CFR Part 800).

In terms of the document Appendices, which define the exemptions, we offer the following comments on Appendix A and Appendix B:

Appendix A

- 1.e. There remains concern over no oversight of elevation of ground surface up to 18 inches at transit facilities because there are transit facilities that are historic properties including depots and bus stations and historic structures such as passenger canopies.
- 2.b.xiv. Words "installation of" should be removed to match the others... maintenance and repair of... stanchions, fasteners, or tracks for flood shields.
- 2.c. Installation of solar panels has potential to cause adverse effects including concealing historic roof materials and impacting the historic character of the property.
- 3.f. Hazardous material abatement often consists of removing materials such as wood trim and doors (interior), and removing these types of historic features within houses could be an adverse effect.
- 4.b. and c. Both b and c indicate "maintenance, repair, or in-kind replacement" and should therefore be merged into the same category. However, if c is supposed to be "maintenance, repair, replacement, or installation" as indicated in previous sections, there are potential adverse effects for replacing and installing the elements listed.

Appendix B

This Appendix remains confusing.

1.a.-g. Type A-G Determinations (7): these entail very lengthy, wordy, cumbersome, complicated definitions that could be simplified. For example, Type C could be "Non-historic building" with a definition of such in the glossary. Type C Determination, by the way, is an unacceptable exclusion because it only accounts for already-identified and recorded historic buildings. There are untold numbers of buildings that are historic and have not yet been formally assessed, and this is the foundation of the Section 106 process that acknowledges *eligible* buildings. Simplify: rather than identify determinations as Type A-G, call them by regularly-used terms. Simplify: Type D Determination references Type C Determination and Type G Determination and requires looking back and forth to understand what the section is stating. Use already-used terms to say things simply and in a straightforward manner. Bottom line: unable to interpret Types A-G Determinations.

1.d.and g. Who is going to carry out the technical calculations of performance, energy use, embodied energy, carbon impact...and hold the agency to carry it out?

1.e. The same consideration for making sure action will not affect character-defining feature applies to buildings not deemed to be historic? Confusing and conflicting ideas.
2 through 5. Again, referencing specific activities or elements from Appendix A is cumbersome to use. Repeat the applicable items rather than require the user to flip back and forth between Appendices to understand what the section is stating.

We appreciate the ability to review and comment upon the revised draft. Should you have questions or concerns regarding our comments, please contact me.

Best Regards,

Eric D. Sipes
Assistant State Archaeologist
Alabama Historical Commission
468 S. Perry Street
Montgomery, AL 36130-0900
Ph 334-230-2667
Eric.Sipes@ahc.alabama.gov



Katie Hobbs
Governor

ARIZONA

STATE PARKS & TRAILS

Bob Broscheid
Executive Director



December 15, 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) revised *Draft Program Comment on Certain Housing, Building, and Transportation Activities (PC)*. The Arizona State Historic Preservation Office (SHPO) supports the annotated comments provided by our membership organization, the National Conference of State Historic Preservation Officers, in their November 22, 2024 review of the document.

We appreciate that this latest draft of the PC provides more clarity in its definitions and addresses several of our previously stated concerns, including the troublesome omission of mechanisms to provide for tribal government to government consultation. However, our contention that the use of a Program Comment to guide federal agency review of undertakings that have- in our experience- a high potential to adversely affect historic properties is still very much a concern.

In Arizona, over 80% of land is either publicly managed (state and federal) or tribal reserve. A very small percentage (roughly 3%) of this land has been inventoried for cultural resources. A high degree of Arizona's heritage- especially its tribal archaeological heritage- has little if any above-ground signature. Especially in the case of linear transportation projects, we rarely see consultations that clearly constitute a "no historic properties affected" or "no adverse effect" finding. More often than not, these projects require phased identification involving archaeological survey of areas judged by qualified professionals to have a high potential for buried resources. These projects often require consultation with multiple tribes to assess landscape-level cultural resources and traditional cultural properties. Quite often, federal agency commitments to engaged in phased identification and to evaluate and treat archeological discoveries- including human remains discoveries- are memorialized in agreement documents. These Programmatic Agreements are designed to avoid and minimize adverse effects to properties that may have not yet been identified and are developed through good faith consultation with the federal agency, tribes, and the State Historic Preservation Officer.

The Arizona State Historic Preservation Office enjoys collegial and effective partnerships with our federal partners, as well as the 22 tribal nations that consult on federal undertakings. In many respects, these good relationships are the product of the dialogue that is generated during consultation, where parties come together to chart the best course of action for projects that, if not executed sensitively, have very real potential to do significant harm to Arizona's heritage. Programmatic Agreements, such as that currently in place to address Arizona's federal-aid transportation program, reflect countless hours of discussion between tribes, the state's transportation department (acting under NEPA assignment,) the ACHP, and the AZ SHPO.

The process contemplated in this sweeping program comment presupposes that identification efforts for ground disturbing projects are complete and that decision-making for these Undertakings is simple and straightforward so as not to require input from qualified professionals at the SHPO. As we articulated in

our last letter, a program comment that establishes federal-agency unilateral decision making and removes the State's voice in considering effects to its heritage fundamentally undermines the principles of the National Historic Preservation Act.

As with many of my SHPO colleagues, I share the ACHP's concern that Section 106 review may not be occurring in an expeditious manner for all project types undertaken by all federal agencies in all states. In the spirit of regulatory reform, I encourage the ACHP to focus its efforts on gathering the data necessary to pinpoint precisely where the problems lie. While I can't speak for all SHPOs, I can pledge that the Arizona SHPO would be happy to assist in data collection and analysis efforts. Please feel free to reach out to me directly at 602.542.4009 or by email at KLeonard@azstateparks.gov if you would like to discuss my comments further.

Respectfully,



Kathryn Leonard
State Historic Preservation Officer
Arizona State Parks and Trails

CC:

Eric Hein, NCSHPO

Valerie Grussing, NATHPO

DRAFT PROGRAM COMMENT ON
CERTAIN HOUSING, BUILDING, AND TRANSPORTATION ACTIVITIES

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 CFR § 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 CFR part 800 (Section 106), regarding the *effects* of certain *housing*-related, *building*-related, and *alternative transportation infrastructure*-related activities.

I. INTRODUCTION

A. Background

The National Historic Preservation Act calls for “us[ing] measures ... to 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.” 54 U.S.C. § 300101. The development of this Program Comment responds to this call and is driven by the need to harmonize policies and procedures for the preservation of our nation’s historic places with other efforts designed to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce energy use and associated costs, improve resilience against natural hazards, and provide alternative transportation options — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

B. 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. The ACHP has performed these statutory duties in the areas covered by this Program Comment.

In its advising capacity, the ACHP 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 and Historic Preservation 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 energy use and cost, resilience, and historic preservation through its Climate Change and Historic Preservation 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 alternative transportation projects.

In its oversight of the Section 106 process, the ACHP has issued or participated in a variety of 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 CFR Parts 50 and 58.

With regard to building rehabilitation, 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 resilience-related undertakings.

With regard to transportation alternatives, 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, Indian Tribes, and state departments of transportation, covering a range of transportation-related activities.

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 approach for Section 106 review across the federal government for certain undertakings, equipping federal agencies to more effectively and efficiently preserve and protect our nation's historic resources while addressing other critical policy needs.

C. 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." Accordingly, it has been drafted to advance historic preservation goals including the reuse of historic materials and buildings and the upgrading of infrastructure in historic neighborhoods, and to harmonize them with the nation's pressing needs to expand access to housing, improve resilience, and offer transportation alternatives.

Every day, federal agencies meet these needs by proposing to carry out, permit, license, fund, assist, or approve undertakings that have the potential to affect historic properties, and when they do, they must comply with 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 offer efficiencies in 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. This Program Comment also aims to leverage existing investments in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for costly new construction materials.

Ultimately, this Program Comment aims to benefit the people who live in the housing, work in the buildings, and move using the transportation infrastructure projects being carried out, permitted,

licensed, funded, assisted, or approved by federal agencies by creating review efficiencies that deliver these projects more quickly and efficiently.

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 provides the ACHP a reasonable opportunity to comment regarding the covered *undertakings*.

B. Effect on Other Applicable Laws

This Program Comment does not modify, preempt, or replace any other federal laws or regulations (including the federal rehabilitation tax credit), or any applicable 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

1. ~~Overall Effect~~ A *federal agency* that already has an executed Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must follow the terms of those MOAs or PAs to the extent those MOAs or PAs address the *undertakings* covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of existing MOAs or PAs, or other program comments.

2. Amendment or Termination of MOAs and PAs

Federal agencies may pursue amendments to existing 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*.

If a *federal agency* elects to amend or terminate an MOA or PA, and if the applicable amendment or termination provision of such MOA or PA does not require consultation with relevant *Indian Tribes* or *Native Hawaiian Organizations*, the ACHP strongly recommends that the *federal agency* meaningfully consult with relevant *Indian Tribes* and *Native Hawaiian Organizations* in considering any such amendment or termination.

If a *federal agency* elects to terminate an MOA or PA, and if the applicable termination provision of such MOA or PA does not require notice to the ACHP of such termination, the *federal agency* must provide written notice to the ACHP of such termination and provide notice of its intent to follow this Program Comment per Section III.A.2. of this Program Comment.

3. Amendment of Existing Program Comments

Federal agencies may propose to the ACHP amendments to existing program comments following the amendment provisions in those program comments, and the ACHP may

consider any amendments to incorporate, in whole or in part, the terms of this Program Comment.

D. Application on Tribal Lands

This Program Comment does not apply to *undertakings* located on *Tribal lands*, or to *undertakings* that may affect *historic properties* located on *Tribal lands*, unless the *Tribal Historic Preservation Officer (THPO)* 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 C to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on the *Tribal lands* identified in such authorization on the date of receipt of the authorization by the Executive Director of the ACHP, who must ensure notice of such authorization is included on the website of the ACHP within 30 days of ACHP's receipt. The *THPO* 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. Activities Not Covered and Exceptions

A *federal agency* must follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7 or 36 CFR § 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*.
2. The *undertaking* is not listed in the Appendices to this Program Comment.
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 found within the boundaries of a *National Historic Landmark* district.
 - c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including but not limited to 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 and Federal Agency Use

1. Available Alternative Compliance Approaches

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

a. For *undertakings* set forth in Appendix A of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking*.

b. For *undertakings* set forth in Appendix B of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking* if the *federal agency* (i) satisfies the conditions, exclusions, or requirements prescribed in Appendix B, and (ii) documents, as part of its administrative record and for any reports required by Section X of this Program Comment, the manner in which it has satisfied such conditions, exclusions, or requirements.

2. Federal Agency Notice of Alternative Compliance Approaches

Prior to using this Program Comment, a *federal agency* must provide a written notification to the ACHP, the National Conference of State Historic Preservation Officers, and the National Association of Tribal Historic Preservation Officers of its decision to use this Program Comment, including an identification of the geographic scope (national, state, or otherwise) in which it will use the Program Comment. The ACHP must make available on its website any such notices submitted by *federal agencies* to the ACHP pursuant to this Section.

3. Request for ACHP Advisory Opinions

A *federal agency* may seek an advisory written opinion from the ACHP as to whether it may appropriately utilize this Program Comment for an *undertaking* by forwarding to the ACHP all documentation relevant to the *undertaking*, requesting the ACHP to provide within 30 *days* its written comments, and taking the ACHP's comments into account before making a decision as to whether to utilize this Program Comment for such an *undertaking*.

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.

1. Potential Effects on Properties of Traditional Religious and Cultural Significance to Indian Tribes and Native Hawaiian Organizations

It is important to recognize that while this Program Comment was drafted to limit *effects* on *historic properties*, including sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, covered *undertakings* could directly, indirectly, or cumulatively affect such properties.

2. Consultation-Related Obligations

Prior to engaging in any *undertaking* for which this Program Comment requires a Type B Determination in accordance with Appendix B of this Program Comment, or for any *undertaking* for which the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering *historic properties* in which an *Indian Tribe* or *Native Hawaiian Organization* may have an interest, a *federal agency* must make a reasonable and good faith effort to identify any *Indian Tribes* or *Native Hawaiian Organizations* that might attach religious and cultural significance to *historic properties* in the *area of potential effects* and invite them to be consulting parties. 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 *federal agency* staff; historic maps; information gathered from previous consultations pursuant to Section 106 or Section 110 (subject to Section III.B.4. of this Program Comment); 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. Such *Indian Tribe* or *Native Hawaiian Organization* that requests in writing to be a consulting party shall be one.

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 but not limited to recognizing the special expertise of holders of Indigenous Knowledge. The *federal agency* must defer to the determination by an *Indian Tribe* or *Native Hawaiian Organization* that a certain individual or individuals has or have expertise (including but not limited to Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects to historic properties* of religious and cultural significance to the *Indian Tribe* or to *Native Hawaiians*.

The *federal agency* must gather information to identify whether any *historic properties* of religious and cultural significance to such *Indian Tribes* or *Native Hawaiian Organizations* are included in such *area of potential effects* in accordance with the protocols in 36 CFR § 800.4(a)(4) and must use this information to assess whether the *undertaking* could result in an *effect* on any such *historic properties*.

3. ~~Effect of a~~ Finding of Potential Effect on Certain Properties

Should the *federal agency* determine through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including but not limited to a Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* will not use this Program Comment and must instead follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7, or 36 CFR § 800.8(c), or another applicable agreement or program alternative.

4. Confidentiality-Related Obligations

Consistent with 36 CFR § 800.4(a)(4) and 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, or by applicable State and local laws. *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, including when maintaining records of correspondence related to consultation under this Section. *Federal agencies* must also adhere to confidentiality requirements for other resources covered by Section 304 of the National Historic Preservation Act or other applicable State and local laws.

5. Responsibilities for Consultation and Opportunities for Outreach

The *federal agency* retains ultimate responsibility for complying with government-to-government consultation requirements. However, an *Indian Tribe* may consent in writing to allow an entity delegated legal responsibility for compliance with Section 106 in accordance with federal law to assist with or lead consultation. Such consent may be rescinded in writing by the *Indian Tribe* at any time.

Nothing in this Program Comment shall be construed to preclude or discourage early outreach by project proponents, applicants, state or local government entities, or other non-federal entities to *Indian Tribes* or *Native Hawaiian Organizations* prior to the initiation of an *undertaking*.

C. The Use of Qualified Professionals

Except where explicitly stated, *undertakings* covered by this Program Comment **do not require** the use of a *qualified professional*. When the *federal agency* consults with a *qualified professional*, the type of *qualified professional* must be appropriate to the **circumstances**. As an 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.

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 CFR 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~~. 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 ability to enter into such an arrangement and pursuant to its statutory authorities and regulations. 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 or analysis to perform preliminary assessments of eligibility to the National Register or to make recommendations about eligibility to the *federal agency* and thereby inform the *federal agency's* determination of eligibility.
- D. Conduct research or analysis to assess the potential *effects* of the *undertaking* on *historic properties* and thereby inform the *federal agency's* determination of *effects*.
- E. Carry additional research or monitor ground disturbing activities.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, or evaluation.
- 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, or minimize *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.

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 but not limited to visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of ~~the~~ *undertaking*, the *federal agency* must immediately halt all activity within 100 feet of the discovery or that could otherwise 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 CFR § 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. For sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow these procedures and be guided by the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects.

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 100 feet of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, any known and potentially affiliated *Indian Tribe* or *Native Hawaiian Organization*, 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* will comply with state burial laws and with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 CFR 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 any consulting parties involved in the *undertaking* and any relevant *State Historic Preservation Officer (SHPO)* or *THPO*. Objecting parties may include but are not limited to *Indian Tribes*, *THPO(s)*, *SHPO(s)*, *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 CFR § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 *days*, the *federal agency* must 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 written comments to resolve the dispute, and take the ACHP's comments into account before making a decision regarding its approach to complying with Section 106. The *federal agency* must notify the objecting party, any consulting parties previously notified of the dispute, and any relevant *THPO* or *SHPO* regarding its decision ~~regarding-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 in writing, 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 to identify patterns or common issues in the use of this Program Comment, 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, 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 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*, and after publication on the ACHP website of the Chair's written explanation (which shall take into account ACHP reports and *federal agency* reports required by this Program Comment and any comments received from *Indian Tribes*, *Native Hawaiian Organizations*, and others), may amend this Program Comment to extend its duration one time for 5 additional years. The ACHP must notify *federal agencies*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* 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*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* 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 CFR §§ 800.3 through 800.7, or 36 CFR § 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 Reports

1. Timing of Reports

The *federal agencies* that use this Program Comment must provide annual reports to the ACHP regarding the use of this Program Comment during the previous fiscal year reporting period, ending September 30 annually, to the ACHP, as provided in this Section. Annual reports are due on December 31 of each year, starting December 31, 2025.

2. Delivery of Reports

For any reporting required by this Section, *federal agencies* whose legal responsibility to comply with Section 106 has been delegated in accordance with federal law but who maintain a reporting mechanism for some or all such entities must provide reports to the ACHP on behalf of those entities for which such data is available. Other entities to whom legal responsibility for compliance with Section 106 has been delegated must directly submit reports to the ACHP in accordance with this Section, using their own reporting mechanisms. In any report required by this Section, the ACHP encourages *federal agencies* to also propose for ACHP's consideration amendments and refinements to this Program Comment based on their experience implementing it.

3. Content of Reports

In any report required by this Section, each *federal agency* must:

- a. Identify the number of times the *federal agency* has utilized this Program Comment for *undertakings* covered by Section III.A.1.a.;
- b. For any *undertakings* covered by Section III.A.1.b., include: the address or, if no address is available, the location of the *undertaking*; information about the manner or extent to which the agency satisfied the conditions, exclusions, and requirements to proceed with such *undertakings*; the names and any institutional affiliations of any *qualified professionals*, *SHPOs*, or *THPOs* who contributed to written determinations required by this Program Comment; and a list of relevant *Indian Tribes* and *Native Hawaiian Organizations* with which consultation on such *undertaking* occurred;
- c. Identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, and their resolution;
- d. Assess the overall effectiveness of the Program Comment;
- e. List any entities to which the *federal agency* has delegated legal responsibility for compliance with Section 106 in accordance with federal law and whose *undertakings* are included in the report.

4. Template for Reports

Within three months of the adoption of this Program Comment, the ACHP must develop a template for *federal agencies* to collect information about any *undertakings* covered by Section III.A.1.b. The ACHP must also endeavor to create an online reporting and tracking system for undertakings covered by this Program Comment.

5. Publication of Reports

The ACHP must make available on its website any annual reports submitted by *federal agencies* to the ACHP pursuant to this Section within 30 days of receipt.

B. Invitation to Provide Comment

At any time, any *Indian Tribe, Native Hawaiian Organization, SHPO, THPO*, consulting party, or member of the public may submit written comments to the ACHP regarding the overall effectiveness of the Program Comment in meeting its intent and regarding suggestions for amendments and refinements to this Program Comment. The ACHP must provide and maintain instructions for submission of written comments on its website. The ACHP must consider such written comments when drafting any reports required by Section X.D. of this Program Comment.

C. Annual Meetings

By March 31, 2026 and annually for the duration of this Program Comment, the ACHP must schedule an annual meeting and invite *federal agencies, Indian Tribes, SHPOs, THPOs, Native Hawaiian Organizations*, ACHP members, consulting parties, 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.

D. ACHP Reports and Recommendations for Amendments

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 at an ACHP business meeting a written and oral summary of information received from *federal agency* reports, annual meetings, comments provided pursuant to Section X.B. of this Program Comment, or other sources about the utility of this Program Comment and make any recommendations for amendments. The ACHP must make such written summary of information and such recommendations available to the public through posting on the ACHP website within 30 days of such meeting.

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, remove, or encapsulate.

Adverse effect, as provided in 36 CFR § 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.

Alternative transportation infrastructure means a *building* or structure used for pedestrian, bicycle, *micromobility vehicle*, and *transit* purposes.

Area of potential effects, as provided in 36 CFR § 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 is not physically separated from motor vehicle traffic and that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

Bicycle locker means a device or structure for storing personal or shared bicycles and *micromobility vehicles*, that may have a cover and enclosure to protect the bicycles and *micromobility vehicles* from weather or theft and is not intended for human occupancy.

Bicycle parking means a designated area to store a bicycle, whether personal or shared, including but not limited to *bicycle racks*, *bicycle lockers*, *bicycle shelters*, and dedicated docks and kiosks used in a shared system for bicycles or *micromobility vehicles*.

Bicycle rack means a rack for a personal or shared bicycle or *micromobility vehicle*.

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

Bicycle shelter means a canopy structure above a *bicycle rack* for a personal or shared bicycle or *micromobility vehicle* that provides partial weather protection of the rack and bicycles or *micromobility vehicles*.

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 but not limited to mobile and manufactured homes and *alternative 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.

Building safety system means fire alarm, fire suppression, and security systems and equipment.

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 *alternative transportation infrastructure*.

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.

Economic feasibility means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to estimated construction costs (including but not limited to the cost of *building* material and labor), estimated operational costs, material availability and life cycle, available budget, and the long-term sustainability of the *undertaking*.

Effect, as provided in 36 CFR §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative impact or 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 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 electric vehicle.

EVSE criteria means: (1) taking 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) using reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimizing *ground disturbance* to the maximum extent possible, and ensure that it does not exceed previous levels of documented *ground disturbance*; (4) using the lowest profile equipment reasonably available that provides the necessary charging capacity; (5) placing the EVSE in a minimally visibly intrusive area; and (6) using colors complementary to surrounding environment, where possible.

Federal agency means an agency as defined by 5 U.S.C. § 551(1), and for Section 106 purposes the term *federal agency* includes state, local, or Tribal governments that have been delegated legal responsibility for compliance with Section 106 pursuant to federal statutory authority such as that under the provisions of the Housing and Community Development Act of 1974 at 42 U.S.C. § 5304(g).

Flex post means flexible bollards or delineators used to separate motor vehicle traffic from a *bicycle lane* or *protected bicycle lane* 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.

Ground disturbance means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils.

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 but not limited to lead-based paint), asbestos, asbestos-containing material (including but not limited to 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 pavement using a polymer binder to restore or maintain pavement friction.

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, as provided in 36 CFR § 60.3(d), means a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of historic sites, *buildings*, structures, or objects united by past events or aesthetically by plan or physical development.

Historic property, as provided in 36 CFR § 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 significance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

Housing means any *building* containing or proposed to contain 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, barracks, and freestanding homes.

Independent utility means those aspects of a project, activity, or program without which the specifically approved project, activity, or program would not serve a rational need 

Indian Tribe, as provided in 36 CFR § 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 in composition, design, color, texture, size, dimension and other physical and visual properties.

In-kind replacement means *replacement* of *historic building materials* with *in-kind building materials* or *replacement* of other existing materials, elements, or equipment with new materials, elements, or equipment that are physically and visually similar in all possible respects.

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

Maintenance means activities required to maintain in an operational state, or to bring back to operating condition.

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, including but not limited to 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, waste heat recovery devices (including but not limited to desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment), adjustable speed drives, duct and pipe systems (including but not limited to return ducts, diffusers, registers, air filters, and thermostatic radiator controls), refrigeration lines, and building energy control systems.

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 approximately 15 to 30 miles per hour.

National Historic Landmark, as provided in 36 CFR § 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 CFR § 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 CFR § 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*.

Non-significant façade means any exterior façade of a *building* which does not contribute to the historic significance of the *building*.

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 materials* that are 45 years or older, including but not limited to those comprised of pavers, cobblestones, Belgian blocks, bricks, or wood and those involving earthworks or roofs of structures entirely underground.

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, including *previously disturbed right-of-way*, and does not mean areas that have been shallowly disturbed (such as via plowing) and does not mean areas in which the previous disturbance occurred sufficiently long ago to allow for subsequent deposit of cultural resources that are now over 45 years old (such as historic urban deposits).

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 a historically significant property to remain, including but not limited to: the entire curb-to-curb roadway, existing sidewalks, existing drains, and parking areas, including but not limited to 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 space means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other public space that contains a concentration of *character-defining features* of a *historic building* or *historic alternative transportation infrastructure*.

Protected bicycle lane means a bicycle or *micromobility vehicle* facility, whether one-way or two-way (such as a cycle track), that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

Qualified professional means a person who meets the relevant standards for the appropriate corresponding discipline 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 but not limited to 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 transportation manuals: 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 and available *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, local preservation or planning office, and *federal agency* files, records, inventories, and databases, or other sources recommended by such parties, for information about whether *historic properties*, including but not limited to 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*.

Repair means fix or mend obsolete, broken, damaged, or deteriorated features, elements, materials, and systems. **Replacement** means substitution of new material, element, or equipment for an existing material, element, or equipment, including *in-kind replacement* and including substitution requiring a change in composition, design, color, texture, size, dimension, location, or configuration in order to improve the function and condition of the material, element, or equipment or the broader system of which the material, element, or equipment is a part.

Resilience means the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

Right-of-way means land developed or designated for the public passage of people using any mode of transportation, including *transit*.

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 CFR § 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*.

Technical feasibility means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to health, safety, energy efficiency, *resilience*, durability of materials, and sound professional judgment (including but not limited to architectural, archaeological, or engineering judgment).

Transit means mass transportation by a conveyance (including but not limited to 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 shelter means a canopy structure or other structure open to the elements on at least one side, which provides partial weather protection for users of *transit*, such as those provided at city bus stops or along rail platforms.

Tribal Historic Preservation Officer, as provided in 36 CFR § 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 CFR § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

Undertaking, as provided in 36 CFR § 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. An *undertaking* must have *independent utility*.

APPENDIX A: ACTIVITIES NOT REQUIRING FURTHER REVIEW

1. Site Work

The following activities do not require further Section 106 review:

a. *Maintenance or repair* of any of the following elements, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

i. Concrete and asphalt ground surfaces such as streets, parking areas, driveways, alleys, ramps, sidewalks, and walkways, including repaving, restriping, replacing such surfaces with *permeable ground surface materials*, sealing (including *installation* of slurry seals, overlays, and seal coatings), filling, milling, grinding, grooving, 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, netting, basketball hoops, drinking fountains, and *ground surface materials*.

iii. *Fencing*.

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 landscape elements (such as planted beds), or in park and playground areas, and including but not limited to relamping and rewiring.

vi. *Water features*, such as decorative fountains, including but not limited to replumbing.

vii. *Curbs*, gutters, steps, ramps, and retaining walls.

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

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

x. *Bulb outs*, crosswalks (including but not limited to *raised* crosswalks across roadways and raised intersections), traffic calming devices (including but not limited to speed humps and speed tables), or islands (including but not limited to pedestrian islands and corner islands to separate or protect bicycles).

xi. *High friction surface treatments*, *cool pavements*, *permeable ground surface materials*, and rumble strips.

xii. *Green infrastructure*, sprinkler heads, irrigation lines, and gray water systems.

xiii. *Benches*, tables, and freestanding planters.

xiv. Vault toilets.

b. Any of the following landscaping, grounds, and water management activities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, sheering, feeding, seeding, reseeding, mulching, aerating, 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, or within 10 feet of, its existing location.
 - iv. Removal of grass, shrubs, brush, leaves, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.
 - v. Removal of rocks, litter, and debris, but not rocks arranged in a rock wall or other man-made feature.
 - vi. Removal of small conifers growing between mature trees.
 - vii. Removal of sediment, silt, and debris from man-made drainage facilities, including retention and detention basins, ponds, ditches, canals, and sumps.
- c. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter
- d. *Installation* or removal of temporary construction-related structures, including but not limited to scaffolding, barriers, screening, sediment-capture devices, fences, protective walkways, signage, office trailers, cofferdams, and restrooms, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance* and that such activity does not ~~damage~~ any existing *building* or *structure*.
- e. **Elevation** of the ground surface within *previously disturbed right-of-way* by up to 18 inches to maintain, create, or connect *alternative transportation infrastructure*, or to facilitate boarding and disembarking at *transit* facilities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*.
- f. Removal of a deteriorated or damaged mobile or manufactured home or other temporary *building* or *structure*, not including removal of foundations.

2. Work on a Building Exterior

The following activities do not require further Section 106 review when conducted on the exterior of a *building*:

- a. *Maintenance* or *repair* of any of the following elements 
 - i. Doors, including but not limited to insulated exterior doors and basement bulkhead doors.
 - ii. Windows, including but not limited to storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
 - iii. Siding.
- b. *Maintenance* or *repair* of any of the following elements, or *in-kind replacement* of any above-ground components of any of the following elements:
 - i. *Mechanical systems*.
 - ii. *Building safety systems*.

- iii. Canopies, awnings, and solar shades.
- iv. Roofing, including but not limited to cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; fasteners and ties to attach roofing to structural elements; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.
- v. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
- vi. *Clean energy technologies.*
- vii. Elevator systems.
- viii. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- ix. Foundations and foundation vents.
- x. Chimneys.
- xi. Vents, including but not limited to continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.
- xii. Energy and water metering devices.
- xiii. *Building-mounted utility infrastructure, including but not limited to wires and anchors.*
- xiv. Installation of stanchions, fasteners, or tracks for flood shields.

c. *Replacement or installation of building-mounted solar energy systems* if such system is installed with methods that do not irreversibly damage historic building materials, sits close to the roof, and has a profile that matches the roof profiles (such as pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.

d. Any of the following *maintenance or repair* activities:

- i. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.
- ii. Repointing of mortar joints with mortar matching in composition, joint profile, color, hardness, and texture of existing mortar.
- iii. 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 and not including sandblasting of masonry over 45 years old.

e. Paint or stain on previously painted or previously stained exterior surfaces, provided that no historic decorative paint schemes or colors (such as graining, stenciling, marbling) will be covered and provided that for masonry over 45 years old, there will be no use of nontraditional or historically inappropriate masonry coatings, including painting of previously unpainted historic masonry, masonry consolidants, and waterproof or water-repellant coatings.

f. *Abatement of hazardous materials* where *effects* of the *abatement* are not visible on the *building* exterior, and the *abatement* either is limited to *previously disturbed ground* or creates no new *ground disturbance*.

3. Work on a Building Interior

The following activities do not require further Section 106 review when conducted entirely in the interior of a *building* 

a. *Maintenance or repair* of any of the following elements:

- i. Walls, ceilings, and flooring.
- ii. Doors.
- iii. Light fixtures.
- iv. Elevator systems.
- v. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- vi. Chimneys.
- vii. Skylights, atria, courtyards, or lightwells.

b. *Maintenance, repair, or in-kind replacement* of any of the following elements:

- i. *Mechanical systems*.
- ii. *Building safety systems*.
- iii. Light bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
- iv. Battery energy storage systems.
- v. Thermal insulation, other than closed cell spray foam, in or around walls, floors, ceilings, attics, crawl spaces, *mechanical systems*, and foundations, where such insulation can be installed and removed without damaging ~~exterior~~ walls, and where such insulation will not cause condensation that could damage ~~exterior~~ walls – even if such insulation increases interior wall thickness.
- vi. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
- vii. Foundations and foundation vents.
- viii. Energy and water metering devices.

c. *Maintenance, repair, replacement, or installation* of household or kitchen appliances, where such appliances are Energy Star rated, or replace existing appliances with appliances with higher Energy Star ratings, or replace existing non-electric appliances with electric appliances.

- d. Caulking, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.
- e. Painting or staining previously painted or previously stained interior surfaces, provided that no decorative paint schemes or colors (such as graining, stenciling, or marbling) will be painted or stained.
- f. *Abatement of hazardous materials* where *effects* of the *abatement* are only visible from within an individual *housing unit* or where *effects* are not visible from the *building interior*.

4. Work Involving Transportation Fixtures and Equipment

The following activities do not require further Section 106 review, provided 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, replacement, or installation* of the following elements:
 - i. *Bicycle racks* or dedicated docks or kiosks used in a shared system for bicycles or *micromobility vehicles*.
 - ii. *Bicycle rails*.
 - iii. *Flex posts*.
 - iv. Concrete or stone blocks affixed to the ground by their weight.
 - v. Marks on the ground surface for visibility and delineation, including but not limited to striping for *bicycle lanes*, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, marks for *bicycle parking*, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.
 - vi. Detectable warnings on or before a curb, entry point, crosswalk, or accessible facility.
- b. *Maintenance or repair* of any of the following elements, or *in-kind replacement* of any above-ground components of any of the following elements:
 - i. Signs, signals, traffic control devices, or signalization, including but not limited to any such elements that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
 - ii. Cameras, masts, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.
 - iii. Tracks, including but not limited to ballasts and ties.
 - iv. *Clean energy technologies* supporting *alternative transportation infrastructure*.
 - v. Signal bridges.
 - vi. Transformers, breakers, switches, and other electrical components.
- c. *Maintenance or repair* of the following elements, or *in-kind replacement* of any above-ground components of the following elements:

- i. Bollards.
- ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures.
- iii. *Transit shelters, bicycle lockers, or bicycle shelters.*

5. Work on Bridges

The following activities related to bridges built as or incorporated into *alternative transportation infrastructure* do not require further Section 106 review:

- a. *Maintenance or repair* 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 but not limited to pin-and-hanger *replacement* and other retrofits.
- e. Implementing countermeasures against scour.

6. Other Activities

The following activities lack any potential to cause *adverse effects* and therefore do not require further Section 106 review:

- a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies.
- 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* or by another entity receiving federal financial assistance (such as a state, Tribal, or local government, or joint venture, railroad commission, compact authority, port authority, transit agency or authority, private company, or other project sponsor), of: *buildings*, energy efficiency or *electrification* materials or equipment, *clean energy technologies*, railway *rights-of-way* for the *maintenance, development, or expansion* of rail-to-trail pathways or passenger rail service, and fleets of bicycles, *micromobility vehicles*, hybrid or electric vehicles, or electric locomotives, provided that any changes in use or access, or any physical actions related to such activities 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. Direct home mortgages or mortgage guarantees for homeowners.
- e. Transfer, lease, or sale of a federal government-owned *building* or *alternative transportation infrastructure* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

f. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, *micromobility vehicle*, or *transit* uses, including but not limited to “play streets,” “school streets,” “safe route to school” streets, “open streets,” tolling, or congestion pricing, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

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

h. Treatment for pests, rodents, insects, and termites that does not visibly alter or obscure the structural, architectural, or decorative features of a *building*.

APPENDIX B: ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

1. Written Determinations

Certain *undertakings* listed in this Appendix B, due to their nature and potential *effects*, require a written determination before the *federal agency* may proceed with the *undertaking*. Applicable review processes and criteria for each type of determination are outlined below. After any such determination is made, the *federal agency* shall include the determination in its administrative record.

a. Type A Determination for Ground-Related Activities

A Type A Determination requires the *federal agency* to obtain a written determination that the *undertaking* is limited to *previously disturbed ground*, creates no new *ground disturbance*, or will have no *adverse effects* on any *historic property* from a *qualified professional* meeting the professional standards for archeology established by the Secretary of the Interior, the relevant *SHPO*, or the relevant *THPO*.

b. Type B Determination for Ground-Related Activities

A Type B Determination requires the *federal agency* to identify the *area of potential effects* in accordance with 36 CFR § 800.4 and either (a) (i) consult with *Indian Tribes* and *Native Hawaiian Organizations* in accordance with Section III.B. of this Program Comment and (ii) obtain a written determination that the activity will have no *adverse effects* on any *historic property* from either a *qualified professional* meeting the applicable professional standards established by the Secretary of the Interior or the relevant *SHPO*; or (b) conduct a field survey of the *area of potential effects* or obtain a field survey of such area completed within the past 10 years, where such survey is acceptable to current state or Tribal standards and, if applicable, has been subject to consultation with *Indian Tribes* and *Native Hawaiian Organizations*, without such survey or consultation identifying any *historic properties* in the *area of potential effects*.

In addition to explicit provisions in this Program Comment requiring a Type B Determination, if the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering subsurface *historic properties* or burial sites, human remains, funerary objects, sacred objects, or items of cultural patrimony, then a Type B Determination must be made before work can proceed pursuant this Program Comment.

c. Type C Determination of *Historic Building* Status

A Type C Determination applies to *buildings* placed in service 45 or more years ago and requires the *federal agency* to either (a) make a written finding that such *building* has not been identified as a *historic building* within the preceding 10 years after a *records check* and a review of its own records or (b) obtain a written determination from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or the relevant *SHPO* that such building is not a *historic building*. If a *building* was placed in service fewer than 45 years ago, then a Type C Determination is not required.

d. ~~Track~~ D Determination for Window, Door, and Siding Replacements

A Type D Determination applies to *undertakings* involving the *replacement* of a window, door, or siding of a *historic building* or of a *building* that has not received a Type C determination. A Type D Determination requires that (a) a *qualified professional* meeting the professional standards for

historic architecture or architectural history established by the Secretary of the Interior or the *SHPO* make a written determination that any *replacement* window, door, or siding is an *in-kind building material* or make a Type G Determination; and (b) the *federal agency* make a written determination that the *replacement* of a window or windows, door or doors, or siding as applicable, will reduce energy use of the *building*, after consideration of the lifespan and embodied energy of the existing element, the cost and carbon impact (including transportation-related impacts) of producing the *replacement* element, the *technical feasibility* of modifying the existing element to align it with current energy efficiency standards and codes, and the payback period of the *replacement* element.

e. Type E Determination for *Character-Defining Features* and *Non-Significant Facades*

A Type E Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type E Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *character-defining feature* of the *building façade* or that the *effects* of a proposed action will be limited to a *non-significant façade*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*. If a *building* was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type E Determination is not required.

f. Type F Determination for *Character-Defining Features* and *Primary Spaces*

A Type F Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type F Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *primary space* at all, or will not affect a *character-defining feature* in a *primary space*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*, and all lobbies, ceremonial rooms, and ground-floor hallways (unless primarily used for utility purposes) shall automatically be deemed *primary spaces*. If a *building* was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type F Determination is not required.

g. Type G Determination for Substitute Building Material *Replacements*

A Type G Determination applies to *undertakings* involving the *replacement* of *historic building materials* with substitute building materials. A Type G Determination requires that the *federal agency* obtain a written determination from either a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*, that the substitute building material is *appropriate based on the following factors*: (a) the character of existing *historic building materials* in terms of condition, design, material properties, performance (including but not limited to insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*; (b) the *technical feasibility* and *economic feasibility* of *repairing* or *replacing* the *historic building materials*; and (c) the suitability of available substitute building materials, with attention to composition, design, color, texture, size, dimension and other physical and visual properties.

h. *State Historic Preservation Officer Reviews*

The *State Historic Preservation Officer* shall have 30 days to review and respond to an adequately documented request by a federal agency for a determination pursuant to this Section. If the *State Historic Preservation Officer* requests additional, missing information in order to make its determination, the *State Historic Preservation Officer* shall have 30 days from receipt of the additional information to respond. If the *State Historic Preservation Officer* does not respond within 30 days of receipt of the request or the amended request, as applicable, then the determination shall be deemed to have been made.

2. Site Work

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

- a. *Replacement* of any element listed in Appendix A, Section 1.a., after a Type A Determination has been made.
- b. Removal of any element listed in Appendix A, Section 1.a., after a Type B Determination has been made.
- c. *Installation* of any element on the same lot as a *building* or within an existing *right-of-way* and listed in Appendix A, Section 1.a., after a Type B Determination has been made.
- d. Planting a tree (other than replacing a tree per Appendix A, Section 1.b.iii.), after a Type A Determination has been made.
- e. Test borings, soil sampling, well drilling, or perc tests more than eight inches in diameter, after a Type B Determination has been made.
- f. Any of the activities listed in Appendix A, Sections 1.d., 1.e. or 1.f. that have the potential for new *ground disturbance*, after a Type B Determination has been made.
- g. Removal of oil tanks, septic tanks, or hazardous materials, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*, after a Type B Determination has been made.

3. Work on a Building Exterior

The following activities do not require further Section 106 review, when conducted on the exterior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

- a. *Replacement* or *installation* of any of the elements listed in Appendix A, Section 2.a., after a Type C Determination has been made.
- b. *Replacement* or *installation* of any of the elements listed in Appendix A, Section 2.a., if a Type C Determination cannot be made or is inconclusive, after a Type D Determination has been made.
- c. *Replacement* or *installation* of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 2.b., if a Type E Determination has been made.
- d. *Abatement of hazardous materials* where *effects* of the *abatement* may be visible from the *building* exterior, if a Type E Determination has been made.

e. *Abatement of hazardous materials* where *effects* of the *abatement* have the potential for new *ground disturbance*, after a Type B Determination has been made.

4. Work on a Building Interior

The following activities do not require further Section 106 review, when conducted entirely in the interior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

a. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., after a Type C Determination has been made.

b. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., if a Type C determination cannot be made or is inconclusive, after a Type F Determination has been made.

c. *Abatement of hazardous materials* where *effects* of the *abatement* may be visible from the *building* interior (other than from the interior of an individual housing unit), after a Type F Determination has been made.

5. Work Involving Transportation Fixtures and Equipment

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

a. *Replacement* of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 4.b. after a Type B Determination has been made.

b. *Installation* of signs, signals, traffic control devices, or signalization supporting *alternative transportation infrastructure*, or *installation* of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 4.b.ii., after a Type B Determination has been made.

c. *Installation of clean energy technologies* supporting *alternative transportation infrastructure*, after a Type B Determination has been made.

d. *Installation* of any of the following elements after a Type A Determination has been made:

i. Bollards no taller than 48 inches and no larger in diameter than 12 inches.

ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures, 6 feet or less in height and 3 square feet or less in horizontal cross-section area, in addition to height or cross-section needed to incorporate solar power into such structures.

iii. *Transit shelters, bicycle lockers, or bicycle shelters* 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.

6. Work on Bridges

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

a. *Replacement or installation* of a bridge built to serve pedestrian, bicycle, *micromobility vehicle*, or *transit* use, after a Type B Determination has been made.

APPENDIX C: 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] Commentsfor Draft PC on Certain Housing, etc.....

From Johnmark Joseph <johnmark.joseph@dpr.guam.gov>

Date Fri 13-Dec-24 1:46 AM

To Blythe Semmer <bsemmer@achp.gov>; Lynne Richmond <lrichmond@achp.gov>; achp@achp.gov <achp@achp.gov>; Jaime Loichinger <jloichinger@achp.gov>

Hello,

Thank you for allowing me to comment on the revised Draft Program Comment. However, the email program_alternatives@achp.gov to send my comments to does not work, so I am sending it to you and others at the ACHP in hopes that it gets to the proper destination. Thank you all for helping me get my comments in. Below are my comments on the Draft Program Comment on Certain Housing, Building and Transportation Activities and on the Dec. 12 Webinar.

Page 3, II Scope, C. Effects on Existing Agreements, #2:

I believe that this should be struck from the document, as countless hours, weeks and months have gone into mitigating historic properties. Such a move may open up a new can of worms and could stop and delay projects, especially if the mitigation is changed where the federal agency can save money at the cost of the community.

Page 4 II, Scope, E. Activities Not Covered and Exceptions, #3:

Here "**Eligible**" historic properties should be included, it is stated later in the document, but not here and perhaps it should be in bold! The reasoning is that the federal agencies seem to always run as far as they can, and on the local end it is always a struggle to get them to do the right thing, and forget about pre- planning as mentioned in the Webinar, everything needs to be done immediately.

Page 5, III. Alternative Compliance Approaches:

Overall, I don't see where the individual state is notified, except through the National Confederation of State Historic Preservation Officers and posted on your website. Wow, I don't believe that they will ever be reviewed out here in the pacific unless there is an AI program that is going to log it into the database and print it out, it will never see the light of day. I hope I am wrong, but I believe you are expecting too much from some individuals. You should have a tracking system on this to see who actually reads these PCs.

Page 7, C. These individuals should be under the direction of a qualified profession, this has been a long standing problem, where individuals are directed to do a job, with little to no professional direction.

Page 8, V. Unanticipated Discoveries:

In a place unique as Guam and with as many different cultures working here, who on the staff of these contractors and subcontractors is trained to identify these discoveries. Many times employees have been punished if not fired for bringing to light such discoveries. Where I think they should be rewarded in order to change the mindset of schedule changes that will happen with such discoveries.

Page 10, IX Withdrawal:

The withdrawal would be based on the information provided in X. Reports and Meetings, however, D. ACHP Reports and Recommendations for Amendments, I would think that this should be examined every year during your meeting and reported on every year.

Page 12, XI. DEFINITIONS:

FENCING is not stated in your definitions, here the meaning of fencing can be skewed and have 4' x 4' x 4' post holes and walls have been considered fences.

Pig exclusion fences here can devastate an archaeological site as they go down some 16 plus inches into the ground.

Page 17, **Previously disturbed ground and Previously disturbed right-of-way**: This is very problematic as this can be skewed and the world always believes forgiveness is better than permission. The definition pertaining to shallowly disturbed I believe will be ignored, we have historic properties and burials within right of ways, burials that are less than 20 cm below surface and just below the pavement. This should never be included in this PC.

APPENDIX A: ACTIVITIES NOT REQUIRING FURTHER REVIEW:

Taking the SHPO out of the equation is absolutely the wrong move! Perhaps the PC should have stayed with things that the SHPOs have no issues with such as milling pavement, striping, changing out transformers, etc. I've never seen or rarely been able to dig to replace anything without disturbing new ground and here where we have burials left in place to save time and money, these efforts will now be mute and burials disturbed. We had known burials disturbed by the

same company with an archaeological monitor because they didn't do their background research. The Jasper quarry off of Rt. 522 Virginia would have never been discovered I believe if this PC was in place. I don't believe that some of these proposals are inline with the National Park Service Guidelines, especially on covering a site, because no one ever examined the area of potential effect to see if they were covering a historical property.

Page 27, APPENDIX B:

My comments above should address these without repeating them. The lack of SHPO review is very problematic and is ludicrous in my opinion.

12/12/2024 Webinar: The transportation aspect of the PC was underrepresented, and it was mainly a reflection of DC and metropolitan areas that were discussed. I would have loved to have heard from individuals from other areas of the country. I am not sure why comments are due on a Sunday nor why it started at 10 am rather than 9:30. There should have been a clearer definition of how this would be implemented, which I waited for but there was no clarification.

I agree with the comments of Dr. Allyson Brooks, Washington State Historic Preservation Officers comments and that this PC should be abandoned due to her reasons and the reasons I have stated.

Let's work toward something that we can all agree on that we don't need to review to speed up the process rather than bringing up issues that we have all had to deal with all too often that further delays the process and destroys historic properties.

Si Yu'os Ma'åse'

John Mark Joseph
State Archaeologist, Guam
490 Chalan Palasyo
Agana Heights, GU 96910
(671)-475-6339
JohnMark.Joseph@dpr.guam.gov

December 13, 2024

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

Dear Honorable Chair Bronin,

Thank you for the opportunity to provide comments on *Program Comment on Certain Housing, Building, and Transportation Activities*. 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 updated November 15, 2024, draft program comment circulated by the Advisory Council on Historic Preservation (ACHP). This letter summarizes our overarching comments regarding the program comment. Specific comments on the language are attached as a marked-up version of the program comment.

We appreciate the efforts made by the ACHP to address our office's concerns and comments on the previous draft in this updated version. However, many of our previous concerns continue to be reflected in the current draft. A few items we would like to bring your attention that have not changed in this draft are the utilization of qualified professionals, the use of "previously disturbed ground," the lack of public notifications to allow comments by the public, Certified Local Governments (CLGs), Tribes, and SHPOs, and the potential impacts of excluded activities, including those activities that regularly require consultation to reach a "no adverse effect". Please see our previous comment letter for a more detailed explanation regarding the concerns listed in this paragraph. The previous comment letter has been attached.

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 have explained this in our previous comment letter, please see attached. While the updated program comment draft provides assurances that existing agreements can be used the current program comment allows for an agency, at the national level, to disregard state-level agreements and adopt this proposed program alternative without regard to the opinions of the previous agreement signatories.

It remains our opinion that the program comment eliminates the opportunity for meaningful consultation on projects that could result in adverse effects to historic properties. Many of the activities identified as exclusions in previous drafts have been eliminated in the current draft, yet a few activities that could cause adverse effects remain due to inadequate property identification efforts, lack of or misuse of qualified professionals, and minimal consultation with tribes and local preservation partners (see marked-up version for specifics).

While the current program comment draft provides better, tighter definitions on what constitutes a "qualified professional," what remains a concern is when these professionals will be used. The updated program comment indicates a qualified professional is not required unless otherwise stated. From there on, it is not clear when a qualified professional is needed. Qualified professionals provide expertise needed to apply program alternative exclusions and should be involved throughout the process. This is particularly concerning in Appendix A with the ground disturbing activities described in it. In line with this,



the continued use of “previously disturbed ground” in the exclusions is cause for concern. As stated previously, this program comment creates the 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. For example, some archaeological sites have been avoided and left in place within rights-of-way that agencies later assume to be “previously disturbed.”

Please keep in mind that many agencies lack the necessary qualified 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 streamlined program alternatives reviews. Agencies with the most coverage of this program comment (i.e., HUD), use responsible entities or delegate responsibilities to fulfill Section 106 consultation, many of which do not have qualified professionals. Furthermore, training is certainly necessary for federal partners and their designated representatives to implement this program comment. 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 alternative.

This draft program comment provides a better attempt to include tribal partners in the consultation process. But such requirements by federal agencies are masked in the document text by references to 36 CFR 800.4(a)(4). We suggest explicitly stating that agencies are required to consult with tribal partners regardless of program comment exclusion usage. This draft continues to exclude consultation with Certified Local Governments (CLGs). There does not appear to be any requirement for federal agencies to let the public know of undertakings outside of informing the ACHP of their intent to use the program comment, a continuing issue from the previous draft. It is also not clear if the federal agency’s statement to use the program comment is a blanket statement for all projects (will only tell the ACHP once) or if they will notify the ACHP of their use on a case-by-case basis. In either instance, by not having some other way to notify the public we cannot see how the public, CLGs, Tribes/THPOs, or SHPOs will know of projects to provide comment on or dispute as they are given the ability to do in Section VI.

We reiterate that record checks are often insufficient for historic property identification efforts as many historic properties, both archaeological and architectural, have not been previously recorded. In our experience, agencies often complete record searches for undertakings and provide unsupported determinations of “no historic properties affected” because no known properties are present on unsurveyed ground. In this vein, property eligibility determinations often are made through consultation with SHPO(s), THPOs, and other preservation partners.

Additional concerns with the new draft can be found in the attached document, but one new and more intricate concern involves Appendix B. In its current form, Appendix B provides exclusions in confusing terms/conditions. For instance, it is difficult for the reader to identify when a Type C determination is required for undertakings verse Type D or E. Clarifying how or when certain determination types are applicable is necessary to ensure appropriate use of the program comment. If the appendix is intended to be used as a flow chart it could be useful to include a flow chart demonstrating the application of the exclusions and determination types.

We appreciate the changes that were made to the updated draft. Changes made to the reporting section and updated language for qualified professionals are appreciated. We believe these changes will result in a better understanding of who is qualified to review projects and help in the collection of data to analyze if the program comment is working in the way it was intended. The clarification on how this program comment will impact existing agreements was also appreciated. Finally, shortening the program comment duration to ten years will allow for more timely analysis of the program comment and allow for appropriate modifications which may result from changing technology and as more buildings of different eras reach their historic threshold.

We appreciate the opportunity to provide comments on the proposed program comment. The Iowa SHPO maintains that we can strike a balance between historic preservation and the goals of the proposed program comment, but we also maintain that without further revisions, the program comment will not result in streamlining while avoiding adverse effects. 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 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
CERTAIN HOUSING, BUILDING, AND TRANSPORTATION ACTIVITIES**

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 CFR § 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 CFR part 800 (Section 106), regarding the *effects* of certain *housing*-related, *building*-related, and *alternative transportation infrastructure*-related activities.

I. INTRODUCTION

A. Background

The National Historic Preservation Act calls for “us[ing] measures ... to 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.” 54 U.S.C. § 300101. The development of this Program Comment responds to this call and is driven by the need to harmonize policies and procedures for the preservation of our nation’s historic places with other efforts designed to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce energy use and associated costs, improve resilience against natural hazards, and provide alternative transportation options — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

B. 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. The ACHP has performed these statutory duties in the areas covered by this Program Comment.

In its advising capacity, the ACHP 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 and Historic Preservation 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 energy use and cost, resilience, and historic preservation through its Climate Change and Historic Preservation 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 alternative transportation projects.

In its oversight of the Section 106 process, the ACHP has issued or participated in a variety of 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 CFR Parts 50 and 58.

With regard to building rehabilitation, 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 resilience-related undertakings.

With regard to transportation alternatives, 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, Indian Tribes, and state departments of transportation, covering a range of transportation-related activities.

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 approach for Section 106 review across the federal government for certain undertakings, equipping federal agencies to more effectively and efficiently preserve and protect our nation's historic resources while addressing other critical policy needs.

C. 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." Accordingly, it has been drafted to advance historic preservation goals including the reuse of historic materials and buildings and the upgrading of infrastructure in historic neighborhoods, and to harmonize them with the nation's pressing needs to expand access to housing, improve resilience, and offer transportation alternatives.

Every day, federal agencies meet these needs by proposing to carry out, permit, license, fund, assist, or approve undertakings that have the potential to affect historic properties, and when they do, they must comply with 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 offer efficiencies in 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. This Program Comment also aims to leverage existing investments in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for costly new construction materials.

Ultimately, this Program Comment aims to benefit the people who live in the housing, work in the buildings, and move using the transportation infrastructure projects being carried out, permitted,

licensed, funded, assisted, or approved by federal agencies by creating review efficiencies that deliver these projects more quickly and efficiently.

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 provides the ACHP a reasonable opportunity to comment regarding the covered *undertakings*.

B. Effect on Other Applicable Laws

This Program Comment does not modify, preempt, or replace any other federal laws or regulations (including the federal rehabilitation tax credit), or any applicable 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

1. Overall Effect A *federal agency* that already has an executed Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must follow the terms of those MOAs or PAs to the extent those MOAs or PAs address the *undertakings* covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of existing MOAs or PAs, or other program comments.

2. Amendment or Termination of MOAs and PAs

Federal agencies may pursue amendments to existing 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*.

If a *federal agency* elects to amend or terminate an MOA or PA, and if the applicable amendment or termination provision of such MOA or PA does not require consultation with relevant *Indian Tribes* or *Native Hawaiian Organizations*, the ACHP strongly recommends that the *federal agency* meaningfully consult with relevant *Indian Tribes* and *Native Hawaiian Organizations* in considering any such amendment or termination.

If a *federal agency* elects to terminate an MOA or PA, and if the applicable termination provision of such MOA or PA does not require notice to the ACHP of such termination, the *federal agency* must provide written notice to the ACHP of such termination and provide notice of its intent to follow this Program Comment per Section III.A.2. of this Program Comment.

3. Amendment of Existing Program Comments

Federal agencies may propose to the ACHP amendments to existing program comments following the amendment provisions in those program comments, and the ACHP may

consider any amendments to incorporate, in whole or in part, the terms of this Program Comment.

D. Application on Tribal Lands

This Program Comment does not apply to *undertakings* located on *Tribal lands*, or to *undertakings* that may affect *historic properties* located on *Tribal lands*, unless the *Tribal Historic Preservation Officer (THPO)* 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 C to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on the *Tribal lands* identified in such authorization on the date of receipt of the authorization by the Executive Director of the ACHP, who must ensure notice of such authorization is included on the website of the ACHP within 30 days of ACHP's receipt. The *THPO* 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. Activities Not Covered and Exceptions

A *federal agency* must follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7 or 36 CFR § 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*.
2. The *undertaking* is not listed in the Appendices to this Program Comment.
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 found within the boundaries of a *National Historic Landmark* district.
 - c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including but not limited to 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 and Federal Agency Use

1. Available Alternative Compliance Approaches

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

a. For *undertakings* set forth in Appendix A of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking*.

b. For *undertakings* set forth in Appendix B of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking* if the *federal agency* (i) satisfies the conditions, exclusions, or requirements prescribed in Appendix B, and (ii) documents, as part of its administrative record and for any reports required by Section X of this Program Comment, the manner in which it has satisfied such conditions, exclusions, or requirements.

2. Federal Agency Notice of Alternative Compliance Approaches

Prior to using this Program Comment, a *federal agency* must provide a written notification to the ACHP, the National Conference of State Historic Preservation Officers, and the National Association of Tribal Historic Preservation Officers of its decision to use this Program Comment, including an identification of the geographic scope (national, state, or otherwise) in which it will use the Program Comment. The ACHP must make available on its website any such notices submitted by *federal agencies* to the ACHP pursuant to this Section.

3. Request for ACHP Advisory Opinions

A *federal agency* may seek an advisory written opinion from the ACHP as to whether it may appropriately utilize this Program Comment for an *undertaking* by forwarding to the ACHP all documentation relevant to the *undertaking*, requesting the ACHP to provide within 30 *days* its written comments, and taking the ACHP's comments into account before making a decision as to whether to utilize this Program Comment for such an *undertaking*.

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.

1. Potential Effects on Properties of Traditional Religious and Cultural Significance to Indian Tribes and Native Hawaiian Organizations

It is important to recognize that while this Program Comment was drafted to limit *effects* on *historic properties*, including sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, covered *undertakings* could directly, indirectly, or cumulatively affect such properties.

2. Consultation-Related Obligations

Prior to engaging in any *undertaking* for which this Program Comment requires a Type B Determination in accordance with Appendix B of this Program Comment, or for any *undertaking* for which the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering *historic properties* in which an *Indian Tribe* or *Native Hawaiian Organization* may have an interest, a *federal agency* must make a reasonable and good faith effort to identify any *Indian Tribes* or *Native Hawaiian Organizations* that might attach religious and cultural significance to *historic properties* in the *area of potential effects* and invite them to be consulting parties. 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 *federal agency* staff; historic maps; information gathered from previous consultations pursuant to Section 106 or Section 110 (subject to Section III.B.4. of this Program Comment); 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. Such *Indian Tribe* or *Native Hawaiian Organization* that requests in writing to be a consulting party shall be one.

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 but not limited to recognizing the special expertise of holders of Indigenous Knowledge. The *federal agency* must defer to the determination by an *Indian Tribe* or *Native Hawaiian Organization* that a certain individual or individuals has or have expertise (including but not limited to Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects to historic properties* of religious and cultural significance to the *Indian Tribe* or to *Native Hawaiians*.

The *federal agency* must gather information to identify whether any *historic properties* of religious and cultural significance to such *Indian Tribes* or *Native Hawaiian Organizations* are included in such *area of potential effects* in accordance with the protocols in 36 CFR § 800.4(a)(4) and must use this information to assess whether the *undertaking* could result in an *effect* on any such *historic properties*.

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

Should the *federal agency* determine through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including but not limited to a Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* will not use this Program Comment and must instead follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7, or 36 CFR § 800.8(c), or another applicable agreement or program alternative.

4. Confidentiality-Related Obligations

Consistent with 36 CFR § 800.4(a)(4) and 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, or by applicable State and local laws. *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, including when maintaining records of correspondence related to consultation under this Section. *Federal agencies* must also adhere to confidentiality requirements for other resources covered by Section 304 of the National Historic Preservation Act or other applicable State and local laws.

5. Responsibilities for Consultation and Opportunities for Outreach

The *federal agency* retains ultimate responsibility for complying with government-to-government consultation requirements. However, an *Indian Tribe* may consent in writing to allow an entity delegated legal responsibility for compliance with Section 106 in accordance with federal law to assist with or lead consultation. Such consent may be rescinded in writing by the *Indian Tribe* at any time.

Nothing in this Program Comment shall be construed to preclude or discourage early outreach by project proponents, applicants, state or local government entities, or other non-federal entities to *Indian Tribes* or *Native Hawaiian Organizations* prior to the initiation of an *undertaking*.

C. The Use of Qualified Professionals

Except where explicitly stated, *undertakings* covered by this Program Comment do not require the use of a *qualified professional*. When the *federal agency* consults with a *qualified professional*, the type of *qualified professional* must be appropriate to the circumstances. As an 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.

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 CFR 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. 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 ability to enter into such an arrangement and pursuant to its statutory authorities and regulations. 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 or analysis to perform preliminary assessments of eligibility to the National Register or to make recommendations about eligibility to the *federal agency* and thereby inform the *federal agency's* determination of eligibility.
- D. Conduct research or analysis to assess the potential *effects* of the *undertaking* on *historic properties* and thereby inform the *federal agency's* determination of *effects*.
- E. Carry additional research or monitor ground disturbing activities.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, or evaluation.
- 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, or minimize *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.

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 but not limited to visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of the *undertaking*, the *federal agency* must immediately halt all activity within 100 feet of the discovery or that could otherwise 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 CFR § 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. For sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow these procedures and be guided by the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects.

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 100 feet of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, any known and potentially affiliated *Indian Tribe* or *Native Hawaiian Organization*, 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* will comply with state burial laws and with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 CFR 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 any consulting parties involved in the *undertaking* and any relevant *State Historic Preservation Officer (SHPO)* or *THPO*. *Objecting parties* may include but are not limited to *Indian Tribes*, *THPO(s)*, *SHPO(s)*, *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 CFR § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within *60 days*, the *federal agency* must 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 written comments to resolve the dispute, and take the ACHP's comments into account before making a decision regarding its approach to complying with Section 106. The *federal agency* must notify the *objecting party*, any consulting parties previously notified of the dispute, and any relevant *THPO* or *SHPO* regarding its decision regarding 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 in writing, 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 to identify patterns or common issues in the use of this Program Comment, 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, 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 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*, and after publication on the ACHP website of the Chair's written explanation (which shall take into account ACHP reports and *federal agency* reports required by this Program Comment and any comments received from *Indian Tribes*, *Native Hawaiian Organizations*, and others), may amend this Program Comment to extend its duration one time for 5 additional years. The ACHP must notify *federal agencies*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* 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*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* 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 CFR §§ 800.3 through 800.7, or 36 CFR § 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 Reports

1. Timing of Reports

The *federal agencies* that use this Program Comment must provide annual reports to the ACHP regarding the use of this Program Comment during the previous fiscal year reporting period, ending September 30 annually, to the ACHP, as provided in this Section. Annual reports are due on December 31 of each year, starting December 31, 2025.

2. Delivery of Reports

For any reporting required by this Section, *federal agencies* whose legal responsibility to comply with Section 106 has been delegated in accordance with federal law but who maintain a reporting mechanism for some or all such entities must provide reports to the ACHP on behalf of those entities for which such data is available. Other entities to whom legal responsibility for compliance with Section 106 has been delegated must directly submit reports to the ACHP in accordance with this Section, using their own reporting mechanisms. In any report required by this Section, the ACHP encourages *federal agencies* to also propose for ACHP's consideration amendments and refinements to this Program Comment based on their experience implementing it.

3. Content of Reports

In any report required by this Section, each *federal agency* must:

- a. Identify the number of times the *federal agency* has utilized this Program Comment for *undertakings* covered by Section III.A.1.a.;
- b. For any *undertakings* covered by Section III.A.1.b., include: the address or, if no address is available, the location of the *undertaking*; information about the manner or extent to which the agency satisfied the conditions, exclusions, and requirements to proceed with such *undertakings*; the names and any institutional affiliations of any *qualified professionals*, *SHPOs*, or *THPOs* who contributed to written determinations required by this Program Comment; and a list of relevant *Indian Tribes* and *Native Hawaiian Organizations* with which consultation on such *undertaking* occurred;
- c. Identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, and their resolution;
- d. Assess the overall effectiveness of the Program Comment;
- e. List any entities to which the *federal agency* has delegated legal responsibility for compliance with Section 106 in accordance with federal law and whose *undertakings* are included in the report.

4. Template for Reports

Within three months of the adoption of this Program Comment, the ACHP must develop a template for *federal agencies* to collect information about any *undertakings* covered by Section III.A.1.b. The ACHP must also endeavor to create an online reporting and tracking system for undertakings covered by this Program Comment.

5. Publication of Reports

The ACHP must make available on its website any annual reports submitted by *federal agencies* to the ACHP pursuant to this Section within 30 days of receipt.

B. Invitation to Provide Comment

At any time, any *Indian Tribe, Native Hawaiian Organization, SHPO, THPO*, consulting party, or member of the public may submit written comments to the ACHP regarding the overall effectiveness of the Program Comment in meeting its intent and regarding suggestions for amendments and refinements to this Program Comment. The ACHP must provide and maintain instructions for submission of written comments on its website. The ACHP must consider such written comments when drafting any reports required by Section X.D. of this Program Comment.

C. Annual Meetings

By March 31, 2026 and annually for the duration of this Program Comment, the ACHP must schedule an annual meeting and invite *federal agencies, Indian Tribes, SHPOs, THPOs, Native Hawaiian Organizations*, ACHP members, consulting parties, 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.

D. ACHP Reports and Recommendations for Amendments

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 at an ACHP business meeting a written and oral summary of information received from *federal agency* reports, annual meetings, comments provided pursuant to Section X.B. of this Program Comment, or other sources about the utility of this Program Comment and *make any recommendations for amendments*. The ACHP must make such written summary of information and such recommendations available to the public through posting on the ACHP website within 30 days of such meeting.

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, remove, or encapsulate.

Adverse effect, as provided in 36 CFR § 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.

Alternative transportation infrastructure means a *building* or structure used for pedestrian, bicycle, *micromobility vehicle*, and *transit* purposes.

Area of potential effects, as provided in 36 CFR § 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 is not physically separated from motor vehicle traffic and that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

Bicycle locker means a device or structure for storing personal or shared bicycles and *micromobility vehicles*, that may have a cover and enclosure to protect the bicycles and *micromobility vehicles* from weather or theft and is not intended for human occupancy.

Bicycle parking means a designated area to store a bicycle, whether personal or shared, including but not limited to *bicycle racks*, *bicycle lockers*, *bicycle shelters*, and dedicated docks and kiosks used in a shared system for bicycles or *micromobility vehicles*.

Bicycle rack means a rack for a personal or shared bicycle or *micromobility vehicle*.

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

Bicycle shelter means a canopy structure above a *bicycle rack* for a personal or shared bicycle or *micromobility vehicle* that provides partial weather protection of the rack and bicycles or *micromobility vehicles*.

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 but not limited to mobile and manufactured homes and *alternative 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.

Building safety system means fire alarm, fire suppression, and security systems and equipment.

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 *alternative transportation infrastructure*.

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.

Economic feasibility means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to estimated construction costs (including but not limited to the cost of *building* material and labor), estimated operational costs, material availability and life cycle, available budget, and the long-term sustainability of the *undertaking*.

Effect, as provided in 36 CFR §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative impact or 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 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 electric vehicle.

EVSE criteria means: (1) taking 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) using reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimizing *ground disturbance* to the maximum extent possible, and ensure that it does not exceed previous levels of documented *ground disturbance*; (4) using the lowest profile equipment reasonably available that provides the necessary charging capacity; (5) placing the EVSE in a minimally visibly intrusive area; and (6) using colors complementary to surrounding environment, where possible.

Federal agency means an agency as defined by 5 U.S.C. § 551(1), and for Section 106 purposes the term *federal agency* includes state, local, or Tribal governments that have been delegated legal responsibility for compliance with Section 106 pursuant to federal statutory authority such as that under the provisions of the Housing and Community Development Act of 1974 at 42 U.S.C. § 5304(g).

Flex post means flexible bollards or delineators used to separate motor vehicle traffic from a *bicycle lane* or *protected bicycle lane* 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.

Ground disturbance means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils.

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 but not limited to lead-based paint), asbestos, asbestos-containing material (including but not limited to 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 pavement using a polymer binder to restore or maintain pavement friction.

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, as provided in 36 CFR § 60.3(d), means a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of historic sites, *buildings*, structures, or objects united by past events or aesthetically by plan or physical development.

Historic property, as provided in 36 CFR § 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 significance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

Housing means any *building* containing or proposed to contain 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, barracks, and freestanding homes.

Independent utility means those aspects of a project, activity, or program without which the specifically approved project, activity, or program would not serve a rational need.

Indian Tribe, as provided in 36 CFR § 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 in composition, design, color, texture, size, dimension and other physical and visual properties.

In-kind replacement means *replacement* of *historic building materials* with *in-kind building materials* or *replacement* of other existing materials, elements, or equipment with new materials, elements, or equipment that are physically and visually similar in all possible respects.

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

Maintenance means activities required to maintain in an operational state, or to bring back to operating condition.

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, including but not limited to 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, waste heat recovery devices (including but not limited to desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment), adjustable speed drives, duct and pipe systems (including but not limited to return ducts, diffusers, registers, air filters, and thermostatic radiator controls), refrigeration lines, and building energy control systems.

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 approximately 15 to 30 miles per hour.

National Historic Landmark, as provided in 36 CFR § 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 CFR § 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 CFR § 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*.

Non-significant façade means any exterior façade of a *building* which does not contribute to the historic significance of the *building*.

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 materials* that are 45 years or older, including but not limited to those comprised of pavers, cobblestones, Belgian blocks, bricks, or wood and those involving earthworks or roofs of structures entirely underground.

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, including *previously disturbed right-of-way*, and does not mean areas that have been shallowly disturbed (such as via plowing) and does not mean areas in which the previous disturbance occurred sufficiently long ago to allow for subsequent deposit of cultural resources that are now over 45 years old (such as historic urban deposits).

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 a historically significant property to remain, including but not limited to: the entire curb-to-curb roadway, *existing sidewalks*, existing drains, and parking areas, including but not limited to 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 space means lobby, ceremonial room, *ground-floor hallway* (unless primarily used for utility purposes), and any other public space that contains a concentration of *character-defining features* of a *historic building* or *historic alternative transportation infrastructure*.

Protected bicycle lane means a bicycle or *micromobility vehicle* facility, whether one-way or two-way (such as a cycle track), that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

Qualified professional means a person who meets the relevant standards for the appropriate corresponding discipline 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 but not limited to 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 transportation manuals: 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 and available *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, local preservation or planning office, and *federal agency* files, records, inventories, and databases, or other sources recommended by such parties, for information about whether *historic properties*, including but not limited to 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*.

Repair means fix or mend obsolete, broken, damaged, or deteriorated features, elements, materials, and systems. *Replacement* means substitution of new material, element, or equipment for an existing material, element, or equipment, including *in-kind replacement* and including substitution requiring a change in composition, design, color, texture, size, dimension, location, or configuration in order to improve the function and condition of the material, element, or equipment or the broader system of which the material, element, or equipment is a part.

Resilience means the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

Right-of-way means land developed or designated for the public passage of people using any mode of transportation, including *transit*.

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 CFR § 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*.

Technical feasibility means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to health, safety, energy efficiency, *resilience*, durability of materials, and sound professional judgment (including but not limited to architectural, archaeological, or engineering judgment).

Transit means mass transportation by a conveyance (including but not limited to 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 shelter means a canopy structure or other structure open to the elements on at least one side, which provides partial weather protection for users of *transit*, such as those provided at city bus stops or along rail platforms.

Tribal Historic Preservation Officer, as provided in 36 CFR § 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 CFR § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

Undertaking, as provided in 36 CFR § 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. An *undertaking* must have *independent utility*.

APPENDIX A: ACTIVITIES NOT REQUIRING FURTHER REVIEW

1. Site Work

The following activities do not require further Section 106 review:

a. *Maintenance or repair* of any of the following elements, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

i. Concrete and asphalt ground surfaces such as streets, parking areas, driveways, alleys, ramps, sidewalks, and walkways, including repaving, restriping, replacing such surfaces with *permeable ground surface materials*, sealing (including *installation* of slurry seals, overlays, and seal coatings), filling, milling, grinding, grooving, 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, netting, basketball hoops, drinking fountains, and *ground surface materials*.

iii. Fencing.

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 landscape elements (such as planted beds), or in park and playground areas, and including but not limited to relamping and rewiring.

vi. Water features, such as decorative fountains, including but not limited to replumbing.

vii. Curbs, gutters, steps, ramps, and retaining walls.

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

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

x. *Bulb outs*, crosswalks (including but not limited to raised crosswalks across roadways and raised intersections), traffic calming devices (including but not limited to speed humps and speed tables), or islands (including but not limited to pedestrian islands and corner islands to separate or protect bicycles).

xi. *High friction surface treatments*, *cool pavements*, *permeable ground surface materials*, and rumble strips.

xii. *Green infrastructure*, sprinkler heads, irrigation lines, and gray water systems.

xiii. Benches, tables, and freestanding planters.

xiv. Vault toilets.

b. Any of the following landscaping, grounds, and water management activities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, sheering, feeding, seeding, reseeding, mulching, aerating, 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, or within 10 feet of, its existing location.
- iv. Removal of grass, shrubs, brush, leaves, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.
- v. Removal of rocks, litter, and debris, but not rocks arranged in a rock wall or other man-made feature.
- vi. Removal of small conifers growing between mature trees.
- vii. Removal of sediment, silt, and debris from man-made drainage facilities, including retention and detention basins, ponds, ditches, canals, and sumps.

c. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter

d. *Installation* or removal of temporary construction-related structures, including but not limited to scaffolding, barriers, screening, sediment-capture devices, fences, protective walkways, signage, office trailers, cofferdams, and restrooms, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance* and that such activity does not damage any existing *building* or *structure*.

e. Elevation of the ground surface within *previously disturbed right-of-way* by up to 18 inches to maintain, create, or connect *alternative transportation infrastructure*, or to facilitate boarding and disembarking at *transit* facilities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*.

f. Removal of a deteriorated or damaged mobile or manufactured home or other temporary *building* or *structure*, not including removal of foundations.

2. Work on a Building Exterior

The following activities do not require further Section 106 review when conducted on the exterior of a *building*:

a. *Maintenance* or *repair* of any of the following elements:

- i. Doors, including but not limited to insulated exterior doors and basement bulkhead doors.
- ii. Windows, including but not limited to storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
- iii. Siding.

b. *Maintenance* or *repair* of any of the following elements, or *in-kind replacement* of any above-ground components of any of the following elements:

- i. *Mechanical systems*.
- ii. *Building safety systems*.

- iii. Canopies, awnings, and solar shades.
 - iv. Roofing, including but not limited to cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; fasteners and ties to attach roofing to structural elements; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.
 - v. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
 - vi. *Clean energy technologies*.
 - vii. Elevator systems.
 - viii. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
 - ix. Foundations and foundation vents.
 - x. Chimneys.
 - xi. Vents, including but not limited to continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.
 - xii. Energy and water metering devices.
 - xiii. *Building-mounted utility infrastructure*, including but not limited to wires and anchors.
 - xiv. Installation of stanchions, fasteners, or tracks for flood shields.
- c. *Replacement or installation of building-mounted solar energy systems* if such system is installed with methods that do not irreversibly damage *historic building materials*, sits close to the roof, and has a profile that matches the roof profiles (such as pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.
- d. Any of the following *maintenance or repair* activities:
- i. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.
 - ii. Repointing of mortar joints with mortar matching in composition, joint profile, color, hardness, and texture of existing mortar.
 - iii. 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 and not including sandblasting of masonry over 45 years old.
- e. Paint or stain on previously painted or previously stained exterior surfaces, provided that no historic decorative paint schemes or colors (such as graining, stenciling, marbling) will be covered and provided that for masonry over 45 years old, there will be no use of nontraditional or historically inappropriate masonry coatings, including painting of previously unpainted historic masonry, masonry consolidants, and waterproof or water-repellant coatings.

f. *Abatement of hazardous materials* where *effects* of the *abatement* are not visible on the *building exterior*, and the *abatement* either is limited to *previously disturbed ground* or creates no new *ground disturbance*.

3. Work on a Building Interior

The following activities do not require further Section 106 review when conducted entirely in the interior of a *building*:

a. *Maintenance or repair* of any of the following elements:

- i. Walls, ceilings, and flooring.
- ii. Doors.
- iii. Light fixtures.
- iv. Elevator systems.
- v. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- vi. Chimneys.
- vii. Skylights, atria, courtyards, or lightwells.

b. *Maintenance, repair, or in-kind replacement* of any of the following elements:

- i. *Mechanical systems*.
- ii. *Building safety systems*.
- iii. Light bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
- iv. Battery energy storage systems.
- v. Thermal insulation, other than closed cell spray foam, in or around walls, floors, ceilings, attics, crawl spaces, *mechanical systems*, and foundations, where such insulation can be installed and removed without damaging exterior walls, and where such insulation will not cause condensation that could damage exterior walls – even if such insulation increases interior wall thickness.
- vi. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
- vii. Foundations and foundation vents.
- viii. Energy and water metering devices.

c. *Maintenance, repair, replacement, or installation* of household or kitchen appliances, where such appliances are Energy Star rated, or replace existing appliances with appliances with higher Energy Star ratings, or replace existing non-electric appliances with electric appliances.

- d. Caulking, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.
- e. Painting or staining previously painted or previously stained interior surfaces, provided that no decorative paint schemes or colors (such as graining, stenciling, or marbling) will be painted or stained.
- f. *Abatement of hazardous materials* where *effects* of the *abatement* are only visible from within an individual *housing* unit or where *effects* are not visible from the *building* interior.

4. Work Involving Transportation Fixtures and Equipment

The following activities do not require further Section 106 review, provided 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, replacement, or installation* of the following elements:
 - i. *Bicycle racks* or dedicated docks or kiosks used in a shared system for bicycles or *micromobility vehicles*.
 - ii. *Bicycle rails*.
 - iii. *Flex posts*.
 - iv. Concrete or stone blocks affixed to the ground by their weight.
 - v. Marks on the ground surface for visibility and delineation, including but not limited to striping for *bicycle lanes*, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, marks for *bicycle parking*, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.
 - vi. Detectable warnings on or before a curb, entry point, crosswalk, or accessible facility.
- b. *Maintenance or repair* of any of the following elements, or *in-kind replacement* of any above-ground components of any of the following elements:
 - i. Signs, signals, traffic control devices, or signalization, including but not limited to any such elements that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
 - ii. Cameras, masts, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.
 - iii. Tracks, including but not limited to ballasts and ties.
 - iv. *Clean energy technologies* supporting *alternative transportation infrastructure*.
 - v. Signal bridges.
 - vi. Transformers, breakers, switches, and other electrical components.
- c. *Maintenance or repair* of the following elements, or *in-kind replacement* of any above-ground components of the following elements:

- i. Bollards.
- ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures.
- iii. *Transit shelters, bicycle lockers, or bicycle shelters.*

5. Work on Bridges

The following activities related to bridges built as or incorporated into *alternative transportation infrastructure* do not require further Section 106 review:

- a. *Maintenance or repair* 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 but not limited to pin-and-hanger *replacement* and other retrofits.
- e. Implementing countermeasures against scour.

6. Other Activities

The following activities lack any potential to cause *adverse effects* and therefore do not require further Section 106 review:

- a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies.
- 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* or by another entity receiving federal financial assistance (such as a state, Tribal, or local government, or joint venture, railroad commission, compact authority, port authority, transit agency or authority, private company, or other project sponsor), of: *buildings*, energy efficiency or *electrification* materials or equipment, *clean energy technologies*, railway *rights-of-way* for the *maintenance*, development, or expansion of rail-to-trail pathways or passenger rail service, and fleets of bicycles, *micromobility vehicles*, hybrid or electric vehicles, or electric locomotives, provided that any changes in use or access, or any physical actions related to such activities 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. Direct home mortgages or mortgage guarantees for homeowners.
- e. Transfer, lease, or sale of a federal government-owned *building* or *alternative transportation infrastructure* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

f. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, *micromobility vehicle*, or *transit* uses, including but not limited to “play streets,” “school streets,” “safe route to school” streets, “open streets,” tolling, or congestion pricing, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

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

h. Treatment for pests, rodents, insects, and termites that does not visibly alter or obscure the structural, architectural, or decorative features of a *building*.

APPENDIX B: ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

1. Written Determinations

Certain *undertakings* listed in this Appendix B, due to their nature and potential *effects*, require a written determination before the *federal agency* may proceed with the *undertaking*. Applicable review processes and criteria for each type of determination are outlined below. After any such determination is made, the *federal agency* shall include the determination in its administrative record.

a. Type A Determination for Ground-Related Activities

A Type A Determination requires the *federal agency* to obtain a written determination that the *undertaking* is limited to *previously disturbed ground*, creates no new *ground disturbance*, or will have no *adverse effects* on any *historic property* from a *qualified professional* meeting the professional standards for archeology established by the Secretary of the Interior, the relevant *SHPO*, or the relevant *THPO*.

b. Type B Determination for Ground-Related Activities

A Type B Determination requires the *federal agency* to identify the *area of potential effects* in accordance with 36 CFR § 800.4 and either (a) (i) consult with *Indian Tribes* and *Native Hawaiian Organizations* in accordance with Section III.B. of this Program Comment and (ii) obtain a written determination that the activity will have no *adverse effects* on any *historic property* from either a *qualified professional* meeting the applicable professional standards established by the Secretary of the Interior or the relevant *SHPO*; or (b) conduct a field survey of the *area of potential effects* or obtain a field survey of such area completed within the past 10 years, where such survey is acceptable to current state or Tribal standards and, if applicable, has been subject to consultation with *Indian Tribes* and *Native Hawaiian Organizations*, without such survey or consultation identifying any *historic properties* in the *area of potential effects*.

In addition to explicit provisions in this Program Comment requiring a Type B Determination, if the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering subsurface *historic properties* or burial sites, human remains, funerary objects, sacred objects, or items of cultural patrimony, then a Type B Determination must be made before work can proceed pursuant this Program Comment.

c. Type C Determination of *Historic Building* Status

A Type C Determination applies to *buildings* placed in service 45 or more years ago and requires the *federal agency* to either (a) make a written finding that such *building* has not been identified as a *historic building* within the preceding 10 years after a *records check* and a review of its own records or (b) obtain a written determination from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or the relevant *SHPO* that such building is not a *historic building*. If a *building* was placed in service fewer than 45 years ago, then a Type C Determination is not required.

d. Track D Determination for Window, Door, and Siding *Replacements*

A Type D Determination applies to *undertakings* involving the *replacement* of a window, door, or siding of a *historic building* or of a *building* that has not received a Type C determination. A Type D Determination requires that (a) a *qualified professional* meeting the professional standards for

historic architecture or architectural history established by the Secretary of the Interior or the *SHPO* make a written determination that any *replacement* window, door, or siding is an *in-kind building material* or make a Type G Determination; and (b) the *federal agency* make a written determination that the *replacement* of a window or windows, door or doors, or siding as applicable, will reduce energy use of the *building*, after consideration of the lifespan and embodied energy of the existing element, the cost and carbon impact (including transportation-related impacts) of producing the *replacement* element, the *technical feasibility* of modifying the existing element to align it with current energy efficiency standards and codes, and the payback period of the *replacement* element.

e. Type E Determination for *Character-Defining Features* and *Non-Significant Facades*

A Type E Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type E Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *character-defining feature* of the *building* façade or that the *effects* of a proposed action will be limited to a *non-significant façade*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*. If a *building* was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type E Determination is not required.

f. Type F Determination for *Character-Defining Features* and *Primary Spaces*

A Type F Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type F Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *primary space* at all, or will not affect a *character-defining feature* in a *primary space*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*, and all lobbies, ceremonial rooms, and ground-floor hallways (unless primarily used for utility purposes) shall automatically be deemed *primary spaces*. If a building was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type F Determination is not required.

g. Type G Determination for Substitute Building Material *Replacements*

A Type G Determination applies to *undertakings* involving the *replacement* of *historic building materials* with substitute building materials. A Type G Determination requires that the *federal agency* obtain a written determination from either a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*, that the substitute building material is appropriate based on the following factors: (a) the character of existing *historic building materials* in terms of condition, design, material properties, performance (including but not limited to insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*; (b) the *technical feasibility* and *economic feasibility* of *repairing* or *replacing* the *historic building materials*; and (c) the suitability of available substitute building materials, with attention to composition, design, color, texture, size, dimension and other physical and visual properties.

h. *State Historic Preservation Officer Reviews*

The *State Historic Preservation Officer* shall have 30 days to review and respond to an adequately documented request by a *federal agency* for a determination pursuant to this Section. If the *State Historic Preservation Officer* requests additional, missing information in order to make its determination, the *State Historic Preservation Officer* shall have 30 days from receipt of the additional information to respond. If the *State Historic Preservation Officer* does not respond within 30 days of receipt of the request or the amended request, as applicable, then the determination shall be deemed to have been made.

2. Site Work

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

- a. *Replacement* of any element listed in Appendix A, Section 1.a., after a Type A Determination has been made.
- b. Removal of any element listed in Appendix A, Section 1.a., after a Type B Determination has been made.
- c. *Installation* of any element on the same lot as a *building* or within an existing *right-of-way* and listed in Appendix A, Section 1.a., after a Type B Determination has been made.
- d. Planting a tree (other than replacing a tree per Appendix A, Section 1.b.iii.), after a Type A Determination has been made.
- e. Test borings, soil sampling, well drilling, or perc tests more than eight inches in diameter, after a Type B Determination has been made.
- f. Any of the activities listed in Appendix A, Sections 1.d., 1.e. or 1.f. that have the potential for new *ground disturbance*, after a Type B Determination has been made.
- g. Removal of oil tanks, septic tanks, or hazardous materials, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*, after a Type B Determination has been made.

3. Work on a Building Exterior

The following activities do not require further Section 106 review, when conducted on the exterior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

- a. *Replacement* or *installation* of any of the elements listed in Appendix A, Section 2.a., after a Type C Determination has been made.
- b. *Replacement* or *installation* of any of the elements listed in Appendix A, Section 2.a., if a Type C Determination cannot be made or is inconclusive, after a Type D Determination has been made.
- c. *Replacement* or *installation* of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 2.b., if a Type E Determination has been made.
- d. *Abatement of hazardous materials* where *effects* of the *abatement* may be visible from the *building* exterior, if a Type E Determination has been made.

e. *Abatement of hazardous materials* where *effects* of the *abatement* have the potential for new *ground disturbance*, after a Type B Determination has been made.

4. Work on a Building Interior

The following activities do not require further Section 106 review, when conducted entirely in the interior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

a. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., after a Type C Determination has been made.

b. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., if a Type C determination cannot be made or is inconclusive, after a Type F Determination has been made.

c. *Abatement of hazardous materials* where *effects* of the *abatement* may be visible from the *building* interior (other than from the interior of an individual housing unit), after a Type F Determination has been made.

5. Work Involving Transportation Fixtures and Equipment

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

a. *Replacement* of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 4.b. after a Type B Determination has been made.

b. *Installation* of signs, signals, traffic control devices, or signalization supporting *alternative transportation infrastructure*, or *installation* of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 4.b.ii., after a Type B Determination has been made.

c. *Installation of clean energy technologies* supporting *alternative transportation infrastructure*, after a Type B Determination has been made.

d. *Installation* of any of the following elements after a Type A Determination has been made:

i. Bollards no taller than 48 inches and no larger in diameter than 12 inches.

ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures, 6 feet or less in height and 3 square feet or less in horizontal cross-section area, in addition to height or cross-section needed to incorporate solar power into such structures.

iii. *Transit shelters, bicycle lockers, or bicycle shelters* 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.

6. Work on Bridges

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

a. *Replacement or installation* of a bridge built to serve pedestrian, bicycle, *micromobility vehicle*, or *transit* use, after a Type B Determination has been made.

APPENDIX C: 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:

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

Maryland

DEPARTMENT OF PLANNING

MARYLAND HISTORICAL TRUST

December 12, 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

Re: ACHP's 2nd Draft of Program Comment on Certain Housing, Building, and Transportation Activities (originally entitled 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 Certain Housing, Building, and Transportation Activities*, a revision of the *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 revised draft has been developed without sufficient consultation with the full range of Section 106 participants and stakeholders (including, particularly, tribes and other underrepresented communities) that would have facilitated the development of an achievable, effective, defensible, and transparent 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, *building*-related, and *transportation*-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 revised draft remains too expansive and cumbersome. More important, the proposed second draft of the PC is inconsistent with key premises of the Section 106 process itself, and key relationships amongst preservation agencies and programs, specifically:

Maryland Historical Trust • 100 Community Place • Crownsville • Maryland • 21032

Tel: 410.697.9591 • toll free 877.767.6272 • TTY users: Maryland Relay • MHT.Maryland.gov

- It creates exemptions for a range of activities, but without following the ACHP's regulations governing the process for exemptions.
- 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.
- 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, building, and transportation undertakings, in favor of a one-sided decision process which rests fully with the federal agency.
- It circumvents the Section 106 process by not requiring adequate efforts to identify and evaluate historic properties, including and especially landscapes and archaeological resources. Many project areas that may appear to have been "previously disturbed" may actually contain deep deposits and have a moderate to high potential for significant archeological resources or human remains. For these reasons, further disturbance in such areas needs to be evaluated and managed appropriately.
- It eliminates the use of Determinations of Eligibility (DOEs), which are the vehicle for establishing the characteristics of properties qualifying them for inclusion in or eligibility for the National Register of Historic Places. Without DOEs, decisions regarding effects and adverse effects are piecemeal and unsubstantiated. The "determinations" outlined in Appendix B, specifically the "Type C - Determination of Historic Building Status" which is based solely on a "records check", are not an adequate substitute for DOEs. For those activities where a qualified professional is determining adherence to the Secretary of the Interior's *Standards*, they would need to know if the involved resource was National Register eligible or not. Such evaluations of National Register eligibility should involve SHPOs for consistency and adherence with 36 CFR 800.4(c).
- 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 (and therefore, elimination of the possibility of mitigation).
- It fails to consider the Secretary of the Interior's *Standards*, which are integral to the Section 106 regulations for determination of 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 PC lacks meaningful notification and dispute resolution provisions.
- Conditions for withdrawal of the PC are too narrow.
- The PC lacks specific goals and measurable outcomes to gauge the impact of its implementation.
- It allows the ACHP Chair, rather than the Council, to extend the PC; instead, the Council should make this determination as a body.

MHT offers the following comments on the revised 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 revised PC as drafted remains 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 revised 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 building-related undertakings and the other devoted to transportation 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 III.A.2). 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? Such a separation of project components will be confusing to consulting parties involved in the standard Section 106 consultation.
- The use of Qualified Professionals (QPs) does not have clearly defined parameters. Who is determining that an individual is a QP? Is the federal agency confirming those qualifications? Is a federal agency providing preservation staff to meet those qualifications? The decisions of the 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 QP makes a determination accordingly. 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. Instead, QPs will review and make findings under the PC, and unless an individual chooses to file a dispute, SHPOs will never be informed about these projects. In addition, the PC lacks any specification regarding the duration of time for which a QP's determinations are considered valid and/or the conditions under which the determinations would need to be reevaluated.
- 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 inquires appropriately when they had never been notified of the project?
- 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* and, by extension, "The Secretary of the Interior's *Standards for the Treatment of Historic Properties* with Guidelines for Preserving, Rehabilitating, Restoring & Reconstructing Historic Buildings (2017)".
- The PC should clearly indicate that, for those activities where the QP has not made a finding of 'no adverse effect,' the projects will need to follow the standard Section 106 consultation path.
- The PC demonstrates a lack of consideration of effects on properties other than those that will be *directly* impacted by a proposed project. The PC should ensure the consideration of *all* historic properties that could be directly, indirectly, or cumulatively impacted by an undertaking.

- 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.
- On page 23, Appendix A, 3.b.v: If insulation increases interior wall thickness, it is not an in-kind replacement.
- In Appendix B as written, most of the determination processes are grammatically unclear. For example, Type A should say "obtain a written determination...from a qualified professional meeting the professional standards for archeology established by the Secretary of the Interior, **from** the relevant SHPO, or **from** the relevant THPO."

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 additional reworking of the revised 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)

**DRAFT PROGRAM COMMENT ON
CERTAIN HOUSING, BUILDING, AND TRANSPORTATION ACTIVITIES**

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 CFR § 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 CFR part 800 (Section 106), regarding the *effects* of certain *housing*-related, *building*-related, and *alternative transportation infrastructure*-related activities.

I. INTRODUCTION

A. Background

The National Historic Preservation Act calls for “us[ing] measures ... to 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.” 54 U.S.C. § 300101. The development of this Program Comment responds to this call and is driven by the need to harmonize policies and procedures for the preservation of our nation’s historic places with other efforts designed to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce energy use and associated costs, improve resilience against natural hazards, and provide alternative transportation options — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

B. 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. The ACHP has performed these statutory duties in the areas covered by this Program Comment.

In its advising capacity, the ACHP 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 and Historic Preservation 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 energy use and cost, resilience, and historic preservation through its Climate Change and Historic Preservation 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 alternative transportation projects.

In its oversight of the Section 106 process, the ACHP has issued or participated in a variety of 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 CFR Parts 50 and 58.

With regard to building rehabilitation, 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 resilience-related undertakings.

With regard to transportation alternatives, 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, Indian Tribes, and state departments of transportation, covering a range of transportation-related activities.

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 approach for Section 106 review across the federal government for certain undertakings, equipping federal agencies to more effectively and efficiently preserve and protect our nation's historic resources while addressing other critical policy needs.

C. 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." Accordingly, it has been drafted to advance historic preservation goals including the reuse of historic materials and buildings and the upgrading of infrastructure in historic neighborhoods, and to harmonize them with the nation's pressing needs to expand access to housing, improve resilience, and offer transportation alternatives.

Every day, federal agencies meet these needs by proposing to carry out, permit, license, fund, assist, or approve undertakings that have the potential to affect historic properties, and when they do, they must comply with 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 offer efficiencies in 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. This Program Comment also aims to leverage existing investments in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for costly new construction materials.

Ultimately, this Program Comment aims to benefit the people who live in the housing, work in the buildings, and move using the transportation infrastructure projects being carried out, permitted,

licensed, funded, assisted, or approved by federal agencies by creating review efficiencies that deliver these projects more quickly and efficiently.

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 provides the ACHP a reasonable opportunity to comment regarding the covered *undertakings*.

B. Effect on Other Applicable Laws

This Program Comment does not modify, preempt, or replace any other federal laws or regulations (including the federal rehabilitation tax credit), or any applicable 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

1. Overall Effect A *federal agency* that already has an executed Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must follow the terms of those MOAs or PAs to the extent those MOAs or PAs address the *undertakings* covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of existing MOAs or PAs, or other program comments.

2. Amendment or Termination of MOAs and PAs

Federal agencies may pursue amendments to existing 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*.

If a *federal agency* elects to amend or terminate an MOA or PA, and if the applicable amendment or termination provision of such MOA or PA does not require consultation with relevant *Indian Tribes* or *Native Hawaiian Organizations*, the ACHP strongly recommends that the *federal agency* meaningfully consult with relevant *Indian Tribes* and *Native Hawaiian Organizations* in considering any such amendment or termination.

If a *federal agency* elects to terminate an MOA or PA, and if the applicable termination provision of such MOA or PA does not require notice to the ACHP of such termination, the *federal agency* must provide written notice to the ACHP of such termination and provide notice of its intent to follow this Program Comment per Section III.A.2. of this Program Comment.

3. Amendment of Existing Program Comments

Federal agencies may propose to the ACHP amendments to existing program comments following the amendment provisions in those program comments, and the ACHP may

consider any amendments to incorporate, in whole or in part, the terms of this Program Comment.

D. Application on Tribal Lands

This Program Comment does not apply to *undertakings* located on *Tribal lands*, or to *undertakings* that may affect *historic properties* located on *Tribal lands*, unless the *Tribal Historic Preservation Officer (THPO)* 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 C to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on the *Tribal lands* identified in such authorization on the date of receipt of the authorization by the Executive Director of the ACHP, who must ensure notice of such authorization is included on the website of the ACHP within 30 days of ACHP's receipt. The *THPO* 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. Activities Not Covered and Exceptions

A *federal agency* must follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7 or 36 CFR § 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*.
2. The *undertaking* is not listed in the Appendices to this Program Comment.
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 found within the boundaries of a *National Historic Landmark* district.
 - c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including but not limited to 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 and Federal Agency Use

1. Available Alternative Compliance Approaches

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

a. For *undertakings* set forth in Appendix A of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking*.

b. For *undertakings* set forth in Appendix B of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking* if the *federal agency* (i) satisfies the conditions, exclusions, or requirements prescribed in Appendix B, and (ii) documents, as part of its administrative record and for any reports required by Section X of this Program Comment, the manner in which it has satisfied such conditions, exclusions, or requirements.

2. Federal Agency Notice of Alternative Compliance Approaches

Prior to using this Program Comment, a *federal agency* must provide a written notification to the ACHP, the National Conference of State Historic Preservation Officers, and the National Association of Tribal Historic Preservation Officers of its decision to use this Program Comment, including an identification of the geographic scope (national, state, or otherwise) in which it will use the Program Comment. The ACHP must make available on its website any such notices submitted by *federal agencies* to the ACHP pursuant to this Section.

3. Request for ACHP Advisory Opinions

A *federal agency* may seek an advisory written opinion from the ACHP as to whether it may appropriately utilize this Program Comment for an *undertaking* by forwarding to the ACHP all documentation relevant to the *undertaking*, requesting the ACHP to provide within 30 *days* its written comments, and taking the ACHP's comments into account before making a decision as to whether to utilize this Program Comment for such an *undertaking*.

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.

1. Potential Effects on Properties of Traditional Religious and Cultural Significance to Indian Tribes and Native Hawaiian Organizations

It is important to recognize that while this Program Comment was drafted to limit *effects* on *historic properties*, including sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, covered *undertakings* could directly, indirectly, or cumulatively affect such properties.

2. Consultation-Related Obligations

Prior to engaging in any *undertaking* for which this Program Comment requires a Type B Determination in accordance with Appendix B of this Program Comment, or for any *undertaking* for which the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering *historic properties* in which an *Indian Tribe* or *Native Hawaiian Organization* may have an interest, a *federal agency* must make a reasonable and good faith effort to identify any *Indian Tribes* or *Native Hawaiian Organizations* that might attach religious and cultural significance to *historic properties* in the *area of potential effects* and invite them to be consulting parties. 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 *federal agency* staff; historic maps; information gathered from previous consultations pursuant to Section 106 or Section 110 (subject to Section III.B.4. of this Program Comment); 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. Such *Indian Tribe* or *Native Hawaiian Organization* that requests in writing to be a consulting party shall be one.

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 but not limited to recognizing the special expertise of holders of Indigenous Knowledge. The *federal agency* must defer to the determination by an *Indian Tribe* or *Native Hawaiian Organization* that a certain individual or individuals has or have expertise (including but not limited to Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects to historic properties* of religious and cultural significance to the *Indian Tribe* or to *Native Hawaiians*.

The *federal agency* must gather information to identify whether any *historic properties* of religious and cultural significance to such *Indian Tribes* or *Native Hawaiian Organizations* are included in such *area of potential effects* in accordance with the protocols in 36 CFR § 800.4(a)(4) and must use this information to assess whether the *undertaking* could result in an *effect* on any such *historic properties*.

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

Should the *federal agency* determine through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including but not limited to a Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* will not use this Program Comment and must instead follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7, or 36 CFR § 800.8(c), or another applicable agreement or program alternative.

4. Confidentiality-Related Obligations

Consistent with 36 CFR § 800.4(a)(4) and 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, or by applicable State and local laws. *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, including when maintaining records of correspondence related to consultation under this Section. *Federal agencies* must also adhere to confidentiality requirements for other resources covered by Section 304 of the National Historic Preservation Act or other applicable State and local laws.

5. Responsibilities for Consultation and Opportunities for Outreach

The *federal agency* retains ultimate responsibility for complying with government-to-government consultation requirements. However, an *Indian Tribe* may consent in writing to allow an entity delegated legal responsibility for compliance with Section 106 in accordance with federal law to assist with or lead consultation. Such consent may be rescinded in writing by the *Indian Tribe* at any time.

Nothing in this Program Comment shall be construed to preclude or discourage early outreach by project proponents, applicants, state or local government entities, or other non-federal entities to *Indian Tribes* or *Native Hawaiian Organizations* prior to the initiation of an *undertaking*.

C. The Use of Qualified Professionals

Except where explicitly stated, *undertakings* covered by this Program Comment do not require the use of a *qualified professional*. When the *federal agency* consults with a *qualified professional*, the type of *qualified professional* must be appropriate to the circumstances. As an 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.

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 CFR 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. 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 ability to enter into such an arrangement and pursuant to its statutory authorities and regulations. 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 or analysis to perform preliminary assessments of eligibility to the National Register or to make recommendations about eligibility to the *federal agency* and thereby inform the *federal agency's* determination of eligibility.
- D. Conduct research or analysis to assess the potential *effects* of the *undertaking* on *historic properties* and thereby inform the *federal agency's* determination of *effects*.
- E. Carry additional research or monitor ground disturbing activities.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, or evaluation.
- 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, or minimize *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.

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 but not limited to visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of the *undertaking*, the *federal agency* must immediately halt all activity within 100 feet of the discovery or that could otherwise 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 CFR § 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. For sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow these procedures and be guided by the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects.

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 100 feet of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, any known and potentially affiliated *Indian Tribe* or *Native Hawaiian Organization*, 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* will comply with state burial laws and with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 CFR 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 any consulting parties involved in the *undertaking* and any relevant *State Historic Preservation Officer (SHPO)* or *THPO*. Objecting parties may include but are not limited to *Indian Tribes*, *THPO(s)*, *SHPO(s)*, *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 CFR § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 *days*, the *federal agency* must 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 written comments to resolve the dispute, and take the ACHP's comments into account before making a decision regarding its approach to complying with Section 106. The *federal agency* must notify the objecting party, any consulting parties previously notified of the dispute, and any relevant *THPO* or *SHPO* regarding its decision regarding 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 in writing, 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 to identify patterns or common issues in the use of this Program Comment, 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, 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 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*, and after publication on the ACHP website of the Chair's written explanation (which shall take into account ACHP reports and *federal agency* reports required by this Program Comment and any comments received from *Indian Tribes*, *Native Hawaiian Organizations*, and others), may amend this Program Comment to extend its duration one time for 5 additional years. The ACHP must notify *federal agencies*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* 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*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* 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 CFR §§ 800.3 through 800.7, or 36 CFR § 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 Reports

1. Timing of Reports

The *federal agencies* that use this Program Comment must provide annual reports to the ACHP regarding the use of this Program Comment during the previous fiscal year reporting period, ending September 30 annually, to the ACHP, as provided in this Section. Annual reports are due on December 31 of each year, starting December 31, 2025.

2. Delivery of Reports

For any reporting required by this Section, *federal agencies* whose legal responsibility to comply with Section 106 has been delegated in accordance with federal law but who maintain a reporting mechanism for some or all such entities must provide reports to the ACHP on behalf of those entities for which such data is available. Other entities to whom legal responsibility for compliance with Section 106 has been delegated must directly submit reports to the ACHP in accordance with this Section, using their own reporting mechanisms. In any report required by this Section, the ACHP encourages *federal agencies* to also propose for ACHP's consideration amendments and refinements to this Program Comment based on their experience implementing it.

3. Content of Reports

In any report required by this Section, each *federal agency* must:

- a. Identify the number of times the *federal agency* has utilized this Program Comment for *undertakings* covered by Section III.A.1.a.;
- b. For any *undertakings* covered by Section III.A.1.b., include: the address or, if no address is available, the location of the *undertaking*; information about the manner or extent to which the agency satisfied the conditions, exclusions, and requirements to proceed with such *undertakings*; the names and any institutional affiliations of any *qualified professionals*, *SHPOs*, or *THPOs* who contributed to written determinations required by this Program Comment; and a list of relevant *Indian Tribes* and *Native Hawaiian Organizations* with which consultation on such *undertaking* occurred;
- c. Identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, and their resolution;
- d. Assess the overall effectiveness of the Program Comment;
- e. List any entities to which the *federal agency* has delegated legal responsibility for compliance with Section 106 in accordance with federal law and whose *undertakings* are included in the report.

4. Template for Reports

Within three months of the adoption of this Program Comment, the ACHP must develop a template for *federal agencies* to collect information about any *undertakings* covered by Section III.A.1.b. The ACHP must also endeavor to create an online reporting and tracking system for undertakings covered by this Program Comment.

5. Publication of Reports

The ACHP must make available on its website any annual reports submitted by *federal agencies* to the ACHP pursuant to this Section within 30 days of receipt.

B. Invitation to Provide Comment

At any time, any *Indian Tribe, Native Hawaiian Organization, SHPO, THPO*, consulting party, or member of the public may submit written comments to the ACHP regarding the overall effectiveness of the Program Comment in meeting its intent and regarding suggestions for amendments and refinements to this Program Comment. The ACHP must provide and maintain instructions for submission of written comments on its website. The ACHP must consider such written comments when drafting any reports required by Section X.D. of this Program Comment.

C. Annual Meetings

By March 31, 2026 and annually for the duration of this Program Comment, the ACHP must schedule an annual meeting and invite *federal agencies, Indian Tribes, SHPOs, THPOs, Native Hawaiian Organizations*, ACHP members, consulting parties, 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.

D. ACHP Reports and Recommendations for Amendments

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 at an ACHP business meeting a written and oral summary of information received from *federal agency* reports, annual meetings, comments provided pursuant to Section X.B. of this Program Comment, or other sources about the utility of this Program Comment and make any recommendations for amendments. The ACHP must make such written summary of information and such recommendations available to the public through posting on the ACHP website within 30 days of such meeting.

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, remove, or encapsulate.

Adverse effect, as provided in 36 CFR § 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.

Alternative transportation infrastructure means a *building* or structure used for pedestrian, bicycle, *micromobility vehicle*, and *transit* purposes.

Area of potential effects, as provided in 36 CFR § 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 is not physically separated from motor vehicle traffic and that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

Bicycle locker means a device or structure for storing personal or shared bicycles and *micromobility vehicles*, that may have a cover and enclosure to protect the bicycles and *micromobility vehicles* from weather or theft and is not intended for human occupancy.

Bicycle parking means a designated area to store a bicycle, whether personal or shared, including but not limited to *bicycle racks*, *bicycle lockers*, *bicycle shelters*, and dedicated docks and kiosks used in a shared system for bicycles or *micromobility vehicles*.

Bicycle rack means a rack for a personal or shared bicycle or *micromobility vehicle*.

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

Bicycle shelter means a canopy structure above a *bicycle rack* for a personal or shared bicycle or *micromobility vehicle* that provides partial weather protection of the rack and bicycles or *micromobility vehicles*.

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 but not limited to mobile and manufactured homes and *alternative 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.

Building safety system means fire alarm, fire suppression, and security systems and equipment.

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 *alternative transportation infrastructure*.

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.

Economic feasibility means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to estimated construction costs (including but not limited to the cost of *building* material and labor), estimated operational costs, material availability and life cycle, available budget, and the long-term sustainability of the *undertaking*.

Effect, as provided in 36 CFR §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative impact or 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 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 electric vehicle.

EVSE criteria means: (1) taking 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) using reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimizing *ground disturbance* to the maximum extent possible, and ensure that it does not exceed previous levels of documented *ground disturbance*; (4) using the lowest profile equipment reasonably available that provides the necessary charging capacity; (5) placing the EVSE in a minimally visibly intrusive area; and (6) using colors complementary to surrounding environment, where possible.

Federal agency means an agency as defined by 5 U.S.C. § 551(1), and for Section 106 purposes the term *federal agency* includes state, local, or Tribal governments that have been delegated legal responsibility for compliance with Section 106 pursuant to federal statutory authority such as that under the provisions of the Housing and Community Development Act of 1974 at 42 U.S.C. § 5304(g).

Flex post means flexible bollards or delineators used to separate motor vehicle traffic from a *bicycle lane* or *protected bicycle lane* 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.

Ground disturbance means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils.

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 but not limited to lead-based paint), asbestos, asbestos-containing material (including but not limited to 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 pavement using a polymer binder to restore or maintain pavement friction.

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, as provided in 36 CFR § 60.3(d), means a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of historic sites, *buildings*, structures, or objects united by past events or aesthetically by plan or physical development.

Historic property, as provided in 36 CFR § 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 significance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

Housing means any *building* containing or proposed to contain 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, barracks, and freestanding homes.

Independent utility means those aspects of a project, activity, or program without which the specifically approved project, activity, or program would not serve a rational need.

Indian Tribe, as provided in 36 CFR § 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 in composition, design, color, texture, size, dimension and other physical and visual properties.

In-kind replacement means *replacement* of *historic building materials* with *in-kind building materials* or *replacement* of other existing materials, elements, or equipment with new materials, elements, or equipment that are physically and visually similar in all possible respects.

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

Maintenance means activities required to maintain in an operational state, or to bring back to operating condition.

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, including but not limited to 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, waste heat recovery devices (including but not limited to desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment), adjustable speed drives, duct and pipe systems (including but not limited to return ducts, diffusers, registers, air filters, and thermostatic radiator controls), refrigeration lines, and building energy control systems.

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 approximately 15 to 30 miles per hour.

National Historic Landmark, as provided in 36 CFR § 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 CFR § 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 CFR § 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*.

Non-significant façade means any exterior façade of a *building* which does not contribute to the historic significance of the *building*.

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 materials* that are 45 years or older, including but not limited to those comprised of pavers, cobblestones, Belgian blocks, bricks, or wood and those involving earthworks or roofs of structures entirely underground.

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, including *previously disturbed right-of-way*, and does not mean areas that have been shallowly disturbed (such as via plowing) and does not mean areas in which the previous disturbance occurred sufficiently long ago to allow for subsequent deposit of cultural resources that are now over 45 years old (such as historic urban deposits).

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 a historically significant property to remain, including but not limited to: the entire curb-to-curb roadway, existing sidewalks, existing drains, and parking areas, including but not limited to 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 space means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other public space that contains a concentration of *character-defining features* of a *historic building* or *historic alternative transportation infrastructure*.

Protected bicycle lane means a bicycle or *micromobility vehicle* facility, whether one-way or two-way (such as a cycle track), that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

Qualified professional means a person who meets the relevant standards for the appropriate corresponding discipline 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 but not limited to 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 transportation manuals: 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 and available *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, local preservation or planning office, and *federal agency* files, records, inventories, and databases, or other sources recommended by such parties, for information about whether *historic properties*, including but not limited to 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*.

Repair means fix or mend obsolete, broken, damaged, or deteriorated features, elements, materials, and systems. *Replacement* means substitution of new material, element, or equipment for an existing material, element, or equipment, including *in-kind replacement* and including substitution requiring a change in composition, design, color, texture, size, dimension, location, or configuration in order to improve the function and condition of the material, element, or equipment or the broader system of which the material, element, or equipment is a part.

Resilience means the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

Right-of-way means land developed or designated for the public passage of people using any mode of transportation, including *transit*.

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 CFR § 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*.

Technical feasibility means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to health, safety, energy efficiency, *resilience*, durability of materials, and sound professional judgment (including but not limited to architectural, archaeological, or engineering judgment).

Transit means mass transportation by a conveyance (including but not limited to 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 shelter means a canopy structure or other structure open to the elements on at least one side, which provides partial weather protection for users of *transit*, such as those provided at city bus stops or along rail platforms.

Tribal Historic Preservation Officer, as provided in 36 CFR § 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 CFR § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

Undertaking, as provided in 36 CFR § 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. An *undertaking* must have *independent utility*.

APPENDIX A: ACTIVITIES NOT REQUIRING FURTHER REVIEW

1. Site Work

The following activities do not require further Section 106 review:

a. *Maintenance or repair* of any of the following elements, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

i. Concrete and asphalt ground surfaces such as streets, parking areas, driveways, alleys, ramps, sidewalks, and walkways, including repaving, restriping, replacing such surfaces with *permeable ground surface materials*, sealing (including *installation* of slurry seals, overlays, and seal coatings), filling, milling, grinding, grooving, 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, netting, basketball hoops, drinking fountains, and *ground surface materials*.

iii. Fencing.

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 landscape elements (such as planted beds), or in park and playground areas, and including but not limited to relamping and rewiring.

vi. Water features, such as decorative fountains, including but not limited to replumbing.

vii. Curbs, gutters, steps, ramps, and retaining walls.

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

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

x. *Bulb outs*, crosswalks (including but not limited to raised crosswalks across roadways and raised intersections), traffic calming devices (including but not limited to speed humps and speed tables), or islands (including but not limited to pedestrian islands and corner islands to separate or protect bicycles).

xi. *High friction surface treatments, cool pavements, permeable ground surface materials*, and rumble strips.

xii. *Green infrastructure*, sprinkler heads, irrigation lines, and gray water systems.

xiii. Benches, tables, and freestanding planters.

xiv. Vault toilets.

b. Any of the following landscaping, grounds, and water management activities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, sheering, feeding, seeding, reseeding, mulching, aerating, 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, or within 10 feet of, its existing location.
 - iv. Removal of grass, shrubs, brush, leaves, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.
 - v. Removal of rocks, litter, and debris, but not rocks arranged in a rock wall or other man-made feature.
 - vi. Removal of small conifers growing between mature trees.
 - vii. Removal of sediment, silt, and debris from man-made drainage facilities, including retention and detention basins, ponds, ditches, canals, and sumps.
- c. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter
- d. *Installation* or removal of temporary construction-related structures, including but not limited to scaffolding, barriers, screening, sediment-capture devices, fences, protective walkways, signage, office trailers, cofferdams, and restrooms, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance* and that such activity does not damage any existing *building* or *structure*.
- e. Elevation of the ground surface within *previously disturbed right-of-way* by up to 18 inches to maintain, create, or connect *alternative transportation infrastructure*, or to facilitate boarding and disembarking at *transit* facilities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*.
- f. Removal of a deteriorated or damaged mobile or manufactured home or other temporary *building* or *structure*, not including removal of foundations.

2. Work on a Building Exterior

The following activities do not require further Section 106 review when conducted on the exterior of a *building*:

- a. *Maintenance* or *repair* of any of the following elements:
 - i. Doors, including but not limited to insulated exterior doors and basement bulkhead doors.
 - ii. Windows, including but not limited to storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
 - iii. Siding.
- b. *Maintenance* or *repair* of any of the following elements, or *in-kind replacement* of any above-ground components of any of the following elements:
 - i. *Mechanical systems*.
 - ii. *Building safety systems*.

- iii. Canopies, awnings, and solar shades.
- iv. Roofing, including but not limited to cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; fasteners and ties to attach roofing to structural elements; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.
- v. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
- vi. *Clean energy technologies.*
- vii. Elevator systems.
- viii. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- ix. Foundations and foundation vents.
- x. Chimneys.
- xi. Vents, including but not limited to continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.
- xii. Energy and water metering devices.
- xiii. *Building-mounted utility infrastructure, including but not limited to wires and anchors.*
- xiv. Installation of stanchions, fasteners, or tracks for flood shields.

c. *Replacement or installation of building-mounted solar energy systems* if such system is installed with methods that do not irreversibly damage *historic building materials*, sits close to the roof, and has a profile that matches the roof profiles (such as pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.

d. Any of the following *maintenance or repair* activities:

- i. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.
- ii. Repointing of mortar joints with mortar matching in composition, joint profile, color, hardness, and texture of existing mortar.
- iii. 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 and not including sandblasting of masonry over 45 years old.

e. Paint or stain on previously painted or previously stained exterior surfaces, provided that no historic decorative paint schemes or colors (such as graining, stenciling, marbling) will be covered and provided that for masonry over 45 years old, there will be no use of nontraditional or historically inappropriate masonry coatings, including painting of previously unpainted historic masonry, masonry consolidants, and waterproof or water-repellant coatings.

f. *Abatement of hazardous materials* where *effects* of the *abatement* are not visible on the *building* exterior, and the *abatement* either is limited to *previously disturbed ground* or creates no new *ground disturbance*.

3. Work on a Building Interior

The following activities do not require further Section 106 review when conducted entirely in the interior of a *building*:

a. *Maintenance or repair* of any of the following elements:

- i. Walls, ceilings, and flooring.
- ii. Doors.
- iii. Light fixtures.
- iv. Elevator systems.
- v. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- vi. Chimneys.
- vii. Skylights, atria, courtyards, or lightwells.

b. *Maintenance, repair, or in-kind replacement* of any of the following elements:

- i. *Mechanical systems*.
- ii. *Building safety systems*.
- iii. Light bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
- iv. Battery energy storage systems.
- v. Thermal insulation, other than closed cell spray foam, in or around walls, floors, ceilings, attics, crawl spaces, *mechanical systems*, and foundations, where such insulation can be installed and removed without damaging exterior walls, and where such insulation will not cause condensation that could damage exterior walls – even if such insulation increases interior wall thickness.
- vi. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
- vii. Foundations and foundation vents.
- viii. Energy and water metering devices.

c. *Maintenance, repair, replacement, or installation* of household or kitchen appliances, where such appliances are Energy Star rated, or replace existing appliances with appliances with higher Energy Star ratings, or replace existing non-electric appliances with electric appliances.

- d. Caulking, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.
- e. Painting or staining previously painted or previously stained interior surfaces, provided that no decorative paint schemes or colors (such as graining, stenciling, or marbling) will be painted or stained.
- f. *Abatement of hazardous materials* where *effects* of the *abatement* are only visible from within an individual *housing* unit or where *effects* are not visible from the *building* interior.

4. Work Involving Transportation Fixtures and Equipment

The following activities do not require further Section 106 review, provided 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, replacement, or installation* of the following elements:
 - i. *Bicycle racks* or dedicated docks or kiosks used in a shared system for bicycles or *micromobility vehicles*.
 - ii. *Bicycle rails*.
 - iii. *Flex posts*.
 - iv. Concrete or stone blocks affixed to the ground by their weight.
 - v. Marks on the ground surface for visibility and delineation, including but not limited to striping for *bicycle lanes*, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, marks for *bicycle parking*, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.
 - vi. Detectable warnings on or before a curb, entry point, crosswalk, or accessible facility.
- b. *Maintenance or repair* of any of the following elements, or *in-kind replacement* of any above-ground components of any of the following elements:
 - i. Signs, signals, traffic control devices, or signalization, including but not limited to any such elements that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
 - ii. Cameras, masts, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.
 - iii. Tracks, including but not limited to ballasts and ties.
 - iv. *Clean energy technologies* supporting *alternative transportation infrastructure*.
 - v. Signal bridges.
 - vi. Transformers, breakers, switches, and other electrical components.
- c. *Maintenance or repair* of the following elements, or *in-kind replacement* of any above-ground components of the following elements:

- i. Bollards.
- ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures.
- iii. *Transit shelters, bicycle lockers, or bicycle shelters.*

5. Work on Bridges

The following activities related to bridges built as or incorporated into *alternative transportation infrastructure* do not require further Section 106 review:

- a. *Maintenance or repair* 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 but not limited to pin-and-hanger *replacement* and other retrofits.
- e. Implementing countermeasures against scour.

6. Other Activities

The following activities lack any potential to cause *adverse effects* and therefore do not require further Section 106 review:

- a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies.
- 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* or by another entity receiving federal financial assistance (such as a state, Tribal, or local government, or joint venture, railroad commission, compact authority, port authority, transit agency or authority, private company, or other project sponsor), of: *buildings*, energy efficiency or *electrification* materials or equipment, *clean energy technologies*, railway *rights-of-way* for the *maintenance*, development, or expansion of rail-to-trail pathways or passenger rail service, and fleets of bicycles, *micromobility vehicles*, hybrid or electric vehicles, or electric locomotives, provided that any changes in use or access, or any physical actions related to such activities 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. Direct home mortgages or mortgage guarantees for homeowners.
- e. Transfer, lease, or sale of a federal government-owned *building* or *alternative transportation infrastructure* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

f. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, *micromobility vehicle*, or *transit* uses, including but not limited to “play streets,” “school streets,” “safe route to school” streets, “open streets,” tolling, or congestion pricing, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

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

h. Treatment for pests, rodents, insects, and termites that does not visibly alter or obscure the structural, architectural, or decorative features of a *building*.

APPENDIX B: ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

1. Written Determinations

Certain *undertakings* listed in this Appendix B, due to their nature and potential *effects*, require a written determination before the *federal agency* may proceed with the *undertaking*. Applicable review processes and criteria for each type of determination are outlined below. After any such determination is made, the *federal agency* shall include the determination in its administrative record.

a. Type A Determination for Ground-Related Activities

A Type A Determination requires the *federal agency* to obtain a written determination that the *undertaking* is limited to *previously disturbed ground*, creates no new *ground disturbance*, or will have no *adverse effects* on any *historic property* from a *qualified professional* meeting the professional standards for archeology established by the Secretary of the Interior, the relevant *SHPO*, or the relevant *THPO*.

b. Type B Determination for Ground-Related Activities

A Type B Determination requires the *federal agency* to identify the *area of potential effects* in accordance with 36 CFR § 800.4 and either (a) (i) consult with *Indian Tribes* and *Native Hawaiian Organizations* in accordance with Section III.B. of this Program Comment and (ii) obtain a written determination that the activity will have no *adverse effects* on any *historic property* from either a *qualified professional* meeting the applicable professional standards established by the Secretary of the Interior or the relevant *SHPO*; or (b) conduct a field survey of the *area of potential effects* or obtain a field survey of such area completed within the past 10 years, where such survey is acceptable to current state or Tribal standards and, if applicable, has been subject to consultation with *Indian Tribes* and *Native Hawaiian Organizations*, without such survey or consultation identifying any *historic properties* in the *area of potential effects*.

In addition to explicit provisions in this Program Comment requiring a Type B Determination, if the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering subsurface *historic properties* or burial sites, human remains, funerary objects, sacred objects, or items of cultural patrimony, then a Type B Determination must be made before work can proceed pursuant this Program Comment.

c. Type C Determination of *Historic Building* Status

A Type C Determination applies to *buildings* placed in service 45 or more years ago and requires the *federal agency* to either (a) make a written finding that such *building* has not been identified as a *historic building* within the preceding 10 years after a *records check* and a review of its own records or (b) obtain a written determination from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or the relevant *SHPO* that such building is not a *historic building*. If a *building* was placed in service fewer than 45 years ago, then a Type C Determination is not required.

d. Track D Determination for Window, Door, and Siding *Replacements*

A Type D Determination applies to *undertakings* involving the *replacement* of a window, door, or siding of a *historic building* or of a *building* that has not received a Type C determination. A Type D Determination requires that (a) a *qualified professional* meeting the professional standards for

historic architecture or architectural history established by the Secretary of the Interior or the *SHPO* make a written determination that any *replacement* window, door, or siding is an *in-kind building material* or make a Type G Determination; and (b) the *federal agency* make a written determination that the *replacement* of a window or windows, door or doors, or siding as applicable, will reduce energy use of the *building*, after consideration of the lifespan and embodied energy of the existing element, the cost and carbon impact (including transportation-related impacts) of producing the *replacement* element, the *technical feasibility* of modifying the existing element to align it with current energy efficiency standards and codes, and the payback period of the *replacement* element.

e. Type E Determination for *Character-Defining Features* and *Non-Significant Facades*

A Type E Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type E Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *character-defining feature* of the *building* façade or that the *effects* of a proposed action will be limited to a *non-significant façade*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*. If a *building* was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type E Determination is not required.

f. Type F Determination for *Character-Defining Features* and *Primary Spaces*

A Type F Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type F Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *primary space* at all, or will not affect a *character-defining feature* in a *primary space*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*, and all lobbies, ceremonial rooms, and ground-floor hallways (unless primarily used for utility purposes) shall automatically be deemed *primary spaces*. If a building was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type F Determination is not required.

g. Type G Determination for Substitute Building Material *Replacements*

A Type G Determination applies to *undertakings* involving the *replacement* of *historic building materials* with substitute building materials. A Type G Determination requires that the *federal agency* obtain a written determination from either a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*, that the substitute building material is appropriate based on the following factors: (a) the character of existing *historic building materials* in terms of condition, design, material properties, performance (including but not limited to insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*; (b) the *technical feasibility* and *economic feasibility* of *repairing* or *replacing* the *historic building materials*; and (c) the suitability of available substitute building materials, with attention to composition, design, color, texture, size, dimension and other physical and visual properties.

h. *State Historic Preservation Officer Reviews*

The *State Historic Preservation Officer* shall have 30 days to review and respond to an adequately documented request by a *federal agency* for a determination pursuant to this Section. If the *State Historic Preservation Officer* requests additional, missing information in order to make its determination, the *State Historic Preservation Officer* shall have 30 days from receipt of the additional information to respond. If the *State Historic Preservation Officer* does not respond within 30 days of receipt of the request or the amended request, as applicable, then the determination shall be deemed to have been made.

2. Site Work

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

- a. *Replacement* of any element listed in Appendix A, Section 1.a., after a Type A Determination has been made.
- b. Removal of any element listed in Appendix A, Section 1.a., after a Type B Determination has been made.
- c. *Installation* of any element on the same lot as a *building* or within an existing *right-of-way* and listed in Appendix A, Section 1.a., after a Type B Determination has been made.
- d. Planting a tree (other than replacing a tree per Appendix A, Section 1.b.iii.), after a Type A Determination has been made.
- e. Test borings, soil sampling, well drilling, or perc tests more than eight inches in diameter, after a Type B Determination has been made.
- f. Any of the activities listed in Appendix A, Sections 1.d., 1.e. or 1.f. that have the potential for new *ground disturbance*, after a Type B Determination has been made.
- g. Removal of oil tanks, septic tanks, or hazardous materials, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*, after a Type B Determination has been made.

3. Work on a Building Exterior

The following activities do not require further Section 106 review, when conducted on the exterior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

- a. *Replacement* or *installation* of any of the elements listed in Appendix A, Section 2.a., after a Type C Determination has been made.
- b. *Replacement* or *installation* of any of the elements listed in Appendix A, Section 2.a., if a Type C Determination cannot be made or is inconclusive, after a Type D Determination has been made.
- c. *Replacement* or *installation* of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 2.b., if a Type E Determination has been made.
- d. *Abatement of hazardous materials* where *effects* of the *abatement* may be visible from the *building* exterior, if a Type E Determination has been made.

e. *Abatement of hazardous materials* where *effects* of the *abatement* have the potential for new *ground disturbance*, after a Type B Determination has been made.

4. Work on a Building Interior

The following activities do not require further Section 106 review, when conducted entirely in the interior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

a. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., after a Type C Determination has been made.

b. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., if a Type C determination cannot be made or is inconclusive, after a Type F Determination has been made.

c. *Abatement of hazardous materials* where *effects* of the *abatement* may be visible from the *building* interior (other than from the interior of an individual housing unit), after a Type F Determination has been made.

5. Work Involving Transportation Fixtures and Equipment

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

a. *Replacement* of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 4.b. after a Type B Determination has been made.

b. *Installation* of signs, signals, traffic control devices, or signalization supporting *alternative transportation infrastructure*, or *installation* of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 4.b.ii., after a Type B Determination has been made.

c. *Installation of clean energy technologies* supporting *alternative transportation infrastructure*, after a Type B Determination has been made.

d. *Installation* of any of the following elements after a Type A Determination has been made:

i. Bollards no taller than 48 inches and no larger in diameter than 12 inches.

ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures, 6 feet or less in height and 3 square feet or less in horizontal cross-section area, in addition to height or cross-section needed to incorporate solar power into such structures.

iii. *Transit shelters, bicycle lockers, or bicycle shelters* 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.

6. Work on Bridges

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

a. *Replacement or installation* of a bridge built to serve pedestrian, bicycle, *micromobility vehicle*, or *transit* use, after a Type B Determination has been made.

APPENDIX C: 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:



State of New Jersey

DEPARTMENT OF ENVIRONMENTAL PROTECTION
COMMUNITY INVESTMENT AND ECONOMIC REVITALIZATION
HISTORIC PRESERVATION OFFICE

501 East State Street

P.O. Box 420, Mail Code 501-04B

Trenton, New Jersey 08625-0420

Tel. (609) 940-4312 • Fax (609) 984-0578

www.nj.gov/dep

PHILIP D. MURPHY

Governor

TAHESHA L. WAY

Lt. Governor

SHAWN M. LATOURETTE

Commissioner

December 13, 2024

HPO- L2024-118

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

Re: ACHP's Proposed Program Comment for Certain Housing, Building, and Transportation Activities

Dear Chair Bronin,

Thank you for providing the opportunity to comment on the Advisory Council on Historic Preservation's (ACHP) revised Draft Program Comment for Certain Housing, Building, and Transportation Activities. The New Jersey Historic Preservation Office (NJHPO) has reviewed the revised draft program comment. The NJHPO appreciates the ACHP's efforts to continue to consult on the draft 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 and appreciate that substantial revisions have been made, we continue to have several concerns about the draft Program Comment. These concerns are outlined in more detail below:

General Concerns

- The draft Program Comment remains overly broad, covering disparate, incongruous undertakings. As such, it does not address a particular program and conflicts with the intent of the use of Program Comments outlined in 36 CFR Part 800. As currently written, it just creates a *carte blanche* exemption system for federal agencies.
- 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.

- The draft Program Comment is not clear and could cause confusion and lead to project delays. It does not clearly define a process, but rather, lays out a series of conditions. However, it is unclear how and when these conditions should be applied. This is further complicated if there are multiple exemptions to be met by the undertaking.
- The draft Program Comment would continue to 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. 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.
- 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. In addition, the Program Comment has its own vocabulary which is not commonly used in the field of historic preservation. This could lead to confusion, more complex project reviews, and potentially, project delays.
- Despite the changes in the draft, the Program Comment may undercut property owner's ability to take advantage of Federal and State Historic Rehabilitation Tax Credits.
- 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 definitions of *previously disturbed ground* and *previously disturbed right-of-way* are too broad and should be amended. As currently defined, *previously disturbed ground* and *previously disturbed right-of-way* include subjective assessments that are not grounded in any sort of quantifiable data. There is a well-documented history of assessments, such as these, being used as an instrument for willfully ignoring the potential for archaeological resources to be present within an area of potential effects. The level of disturbance to negate the potential presence of archaeological resources can only be demonstrated through documentation and archaeological/geotechnical investigations. The two definitions, while similar, also establish two different criteria for evaluation, despite dealing with the same issue. It is unclear why a different standard is established for rights-of-way, or why rights-of-way require their own definition for prior disturbance. The concept of ground disturbance is universal, whether it be within the right-of-way or outside the right-of-way. Furthermore, these definitions fail to indicate how these assessments should be made and by whom.



Comments on Specific Sections

- II.C
 - We appreciate that the ACHP has modified the language to recognize the relationship of the draft Program Comment to existing agreements. However, we still have questions about potential objection to the termination of existing agreements. Can federal agencies just unilaterally cancel existing agreements provided they go through the *pro forma* provisions outlined in the original agreement? What if SHPO's [and other signatories] do not agree with terminating existing agreements? Would that potentially constitute Section 106 termination?
- III.A
 - NCSHPO should not be the clearinghouse for federal agency notifications of their intent to use the Program Comment. If a federal agency is going to use this Program Comment, it should notify the affected SHPOs and THPOs. As currently structured, the individual SHPOs are not notified of a federal agency's decision to use this Program Comment. According to this provision, the ACHP will make available on its website any such notices submitted by *federal agencies* to the ACHP. As a result, this provision puts the onus on SHPOs to keep track of where and when federal agencies intend to utilize this Program Comment, which places an undue burden on our offices.
- III.C
 - "...qualified professional must be appropriate to the circumstances..." This still seems less specific than it should be. We recommend referencing qualified professional in the "relevant discipline"
- V.B
 - Why is the SHPO not consulted as part of a human remains discovery?
 - What if the remains are not Native American in origin?
- VI
 - The dispute resolution clause appears to be meaningless given that the intent of the document is the exemption of activities from further Section 106 consultation at the agency's own discretion. Since the SHPOs have been removed from the consultation process, it is unclear how and where SHPOs would be made aware of enough information to be able to evaluate whether a situation exists where a dispute is even warranted. As a result, it would fall on SHPOs to specifically seek out information and documentation on disputed undertakings on which they were not consulted. How will this be possible given the removal of the SHPO from a majority of the consultation process documented within the Program Comment and the nature of reporting outlined?
- VIII
 - Federal agencies, SHPOs and THPOs should be specified with other parties as appropriate.
- IX
 - The reasons for withdrawal of this Program Comment should be expanded. Given the nature and breadth of the Program Comment, the ACHP should be able to withdraw this Program Comment for a variety of reasons including widespread adverse effects, unintended consequences, etc.
- X.



- A.3.b
 - Thank you for updating this reporting provision. It provides greater detail than what was originally proposed in the last draft
- A.4
 - The ACHP should develop a template for federal agencies to collect information about any undertakings covered by the Program Comment and create an online reporting and tracking system for undertakings covered by this Program Comment before its adoption.
- XI
 - We continue to be concerned about the use of “previously disturbed ground” and “previously disturbed right-of-way” in the draft Program Comment. 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.
- Appendix A
 - Shouldn't in-kind repair be specified in 2.a? What if these are character defining features of a historic property?
 - 2.c The blanket installation of solar systems on front-facing gabled roofs without any review in concerning.
 - We suggest removing transportation-related provisions throughout the document as they do not relate to the other project types.
- Appendix B
 - Does not address delegated authorities
 - Why does it become the SHPO's responsibility to provide these determinations to the federal agency if they decide to forgo the use of a qualified professional?
 - When would a federal agency ever determine that conducting survey would be the appropriate methodology to make a determination over either 1) making the decision in-house, or 2) requesting the SHPO make the decision?
 - As a basic premise, this is not likely from a cost standpoint, as cost of field survey would cost far beyond a desktop assessment
 - 1.b Paragraph 2 sounds redundant procedurally
 - 1.d – Should be “Type” not “Track”
 - We suggest removing transportation-related provisions throughout the document as they do not relate to the other project types.

In light of the many issues with the proposed Program Comment, we urge the Advisory Council on Historic Preservation to continue consultation with SHPOs, THPOs, archaeologists, local governments, and other stakeholders on the development of a program alternative that balances historic preservation goals with the goals of addressing housing and building activities.



Thank you for the opportunity to review and comment on the draft Program Comment on Certain Housing, Building, and Transportation Activities. 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

Katherine J. Marcopul, Ph.D., CPM
Deputy State Historic Preservation
Officer

Cc: Erik Hein, NCSHPO





THE STATE
of **ALASKA**
GOVERNOR MIKE DUNLEAVY

Department of Natural Resources

DIVISION OF PARKS AND OUTDOOR RECREATION
Office of History & Archaeology

550 West 7th Avenue, Suite 1310
Anchorage, AK 99501-3561
907.269-8700
<http://dnr.alaska.gov/parks/oha>

December 13, 2024

Sara C. Bronin, Chair
Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington DC 20001
Program_alternatives@achp.gov

Subject: ACHP 11/15/2024 Draft Program Comment on Certain Housing, Building, and Transportation Activities

Dear Chair Bronin:

Alaska State Historic Preservation Office has reviewed the 11/15/2024 proposed *Draft Program Comment on Certain Housing, Building, and Transportation Activities* (Program Comment) and appreciated the opportunity to provide comment on the changes made. While we are grateful for the opportunity, we are discouraged at the condensed review period and urgency to respond to political pressures.

Our office appreciated your response to our comments concerning existing agreement documents and applauds the steps laid out for amending or terminating existing agreements. The inclusion of following the existing stipulations allows consulting parties the option to still participate in integral consultation processes as set forth in the NHPA. However, this consideration of key participant consultation on projects that may affect communities is not carried on to Section III.A.2 where the only notification from the federal agency of their intent to use the Program Comment is sent to the ACHP, NCSHPO, and NATHPO. Notifications should also be sent to affected SHPOs and THPOs within the identified geographic scope in which the agency will use the Program Comment. Without such notifications, the opportunity to dispute, as described in Section VI, is not possible until an undertaking is underway or the appropriate SHPO/THPO personnel is otherwise notified. We appreciate the ACHP's intent to distribute agency notifications on their website, but this distribution method adds another layer of bureaucracy to the process while also disrupting consultation between agencies and the respective SHPO/THPO.

We continue to have concerns about the approach to exempt undertakings from consideration under Section 106 and the lack of consultation outlined in the alternative process. Specifically, there are activities included in Appendix A that can lead to adverse effects to historic properties but provide for no means to mitigate adverse effects. Appendix B remains too complicated for practical applications and would benefit from having the ambitious suite of undertaking types split into separate comments that can address the concerns and considerations needed for each type of project. We also recommend creating a flowchart for Appendix B to help clarify the process.

Our office is also concerned that the Program Comment seeks to empower federal agencies to determine that properties are not eligible for listing, which conflicts with 36 CFR 63, *Determinations of Eligibility for Inclusion in the National Register of Historic Places*. These regulations repeatedly state that the federal agency shall consult with the SHPO regarding whether the criteria have been met. We note that the regulations only allow for the federal agency to assume that a property is eligible for listing in order to obtain comment from the ACHP (36 CFR 63.3).

The Program Comment fails to address the potential data discrepancies that can arise if, and when, agency officials with assistance from a qualified professional make determinations regarding significance under the National Register Criteria, without consensus from the State Historic Preservation Office. SHPO's are often directly related to their State or Territory's historic property database of which the qualified professionals, project applicants, and federal agencies rely on to make informed decisions. Determinations of eligibility should be consulted with the appropriate SHPO/THPO or the Keeper consistent with 36 CFR 63 and at minimum such information should be provided to them in order to fulfill their role in the National Historic Preservation Act.

The inclusion of transportation projects continues to overcomplicate the Program Comment by introducing unrelated activities. Including the installation of new transportation related elements with exempted activities does not provide any consideration to their surrounding environments and has the potential to adversely affect historic properties with no minimization, avoidance or mitigation. The conversation regarding flex-polls at the December 12, 2024 consultation with SHPO partners was demoralizing and illustrated that the Program Comment does not adequately consider the visual effects these types of undertakings can have on historic properties. While AK SHPO recognizes that adding new transportation elements can be seen as having minimal impact, we have found that there can be substantive effects to the historic integrity of an area by the intrusion of modern elements that cannot be accurately accounted for in a nationwide comment.

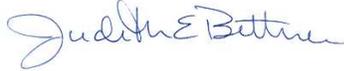
The messaging of the Program Comment and the rushed approach towards the document's preparation is not beneficial to the goal of the National Historic Preservation Act to balance historic preservation and needed projects. The Program Comment feeds the misconception that Section 106 reviews are an unnecessary impediment to beneficial federal projects. Section 106 has never had the power to stop projects from happening; it merely allows for interested parties to express their concerns, advocate for avoidance and minimization, and if needed, influence how to mitigate lost heritage resources in their communities. Our office does not support reducing the ability of consulting parties to engage in the process or minimize our ability to advocate for Alaskans.

We believe that there are aspects to the Program Comment that could aid in program efficiencies without damaging the ethos of historic preservation. We strive to balance historic preservation law with the needs of development, and we believe there could be a long-term benefit to all parties if more time was given to the development of this Program Comment, including

responding and incorporating comments from Indian Tribes, SHPOs/THPOs, and other consulting parties. We strongly encourage the continued improvement of the document and advocate for the ACHP to follow the guidance recommended for others. According the ACHP's website (found at https://www.achp.gov/program_comment_questions_and_answers) "The ACHP's experience is that a thorough program comment development process typically takes from one to two years to complete."

Our office has added comments to the *Nov 2024 Draft Program Comment – NCSHPO Comments.pdf* and have attached a copy. We hope that the Advisory Council on Historic Preservation will further consider these comments before submitting a final draft to the ACHP members to vote on.

Sincerely,

A handwritten signature in blue ink that reads "Judith E Bittner". The signature is written in a cursive, flowing style.

Judith E Bittner
State Historic Preservation Officer

**DRAFT PROGRAM COMMENT ON
CERTAIN HOUSING, BUILDING, AND TRANSPORTATION ACTIVITIES**

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 CFR § 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 CFR part 800 (Section 106), regarding the *effects* of certain *housing*-related, *building*-related, and *alternative transportation infrastructure*-related activities.

I. INTRODUCTION

A. Background

The National Historic Preservation Act calls for “us[ing] measures ... to 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.” 54 U.S.C. § 300101. The development of this Program Comment responds to this call and is driven by the need to harmonize policies and procedures for the preservation of our nation’s historic places with other efforts designed to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce energy use and associated costs, improve resilience against natural hazards, and provide alternative transportation options — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

B. 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. The ACHP has performed these statutory duties in the areas covered by this Program Comment.

In its advising capacity, the ACHP 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 and Historic Preservation 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 energy use and cost, resilience, and historic preservation through its Climate Change and Historic Preservation 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 alternative transportation projects.

In its oversight of the Section 106 process, the ACHP has issued or participated in a variety of 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 CFR Parts 50 and 58.

With regard to building rehabilitation, 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 resilience-related undertakings.

With regard to transportation alternatives, 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, Indian Tribes, and state departments of transportation, covering a range of transportation-related activities.

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 approach for Section 106 review across the federal government for certain undertakings, equipping federal agencies to more effectively and efficiently preserve and protect our nation's historic resources while addressing other critical policy needs.

C. 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." Accordingly, it has been drafted to advance historic preservation goals including the reuse of historic materials and buildings and the upgrading of infrastructure in historic neighborhoods, and to harmonize them with the nation's pressing needs to expand access to housing, improve resilience, and offer transportation alternatives.

Every day, federal agencies meet these needs by proposing to carry out, permit, license, fund, assist, or approve undertakings that have the potential to affect historic properties, and when they do, they must comply with 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 offer efficiencies in 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. This Program Comment also aims to leverage existing investments in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for costly new construction materials.

Ultimately, this Program Comment aims to benefit the people who live in the housing, work in the buildings, and move using the transportation infrastructure projects being carried out, permitted,

licensed, funded, assisted, or approved by federal agencies by creating review efficiencies that deliver these projects more quickly and efficiently.

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 provides the ACHP a reasonable opportunity to comment regarding the covered *undertakings*.

B. Effect on Other Applicable Laws

This Program Comment does not modify, preempt, or replace any other federal laws or regulations (including the federal rehabilitation tax credit), or any applicable 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

1. Overall Effect A *federal agency* that already has an executed Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must follow the terms of those MOAs or PAs to the extent those MOAs or PAs address the *undertakings* covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of existing MOAs or PAs, or other program comments.

2. Amendment or Termination of MOAs and PAs

Federal agencies may pursue amendments to existing 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*.

If a *federal agency* elects to amend or terminate an MOA or PA, and if the applicable amendment or termination provision of such MOA or PA does not require consultation with relevant *Indian Tribes* or *Native Hawaiian Organizations*, the ACHP strongly recommends that the *federal agency* meaningfully consult with relevant *Indian Tribes* and *Native Hawaiian Organizations* in considering any such amendment or termination.

If a *federal agency* elects to terminate an MOA or PA, and if the applicable termination provision of such MOA or PA does not require notice to the ACHP of such termination, the *federal agency* must provide written notice to the ACHP of such termination and provide notice of its intent to follow this Program Comment per Section III.A.2. of this Program Comment.

3. Amendment of Existing Program Comments

Federal agencies may propose to the ACHP amendments to existing program comments following the amendment provisions in those program comments, and the ACHP may

consider any amendments to incorporate, in whole or in part, the terms of this Program Comment.

D. Application on Tribal Lands

This Program Comment does not apply to *undertakings* located on *Tribal lands*, or to *undertakings* that may affect *historic properties* located on *Tribal lands*, unless the *Tribal Historic Preservation Officer (THPO)* 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 C to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on the *Tribal lands* identified in such authorization on the date of receipt of the authorization by the Executive Director of the ACHP, who must ensure notice of such authorization is included on the website of the ACHP within 30 days of ACHP's receipt. The *THPO* 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. Activities Not Covered and Exceptions

A *federal agency* must follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7 or 36 CFR § 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*.
2. The *undertaking* is not listed in the Appendices to this Program Comment.
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 found within the boundaries of a *National Historic Landmark* district.
 - c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including but not limited to 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 and Federal Agency Use

1. Available Alternative Compliance Approaches

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

a. For *undertakings* set forth in Appendix A of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking*.

b. For *undertakings* set forth in Appendix B of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking* if the *federal agency* (i) satisfies the conditions, exclusions, or requirements prescribed in Appendix B, and (ii) documents, as part of its administrative record and for any reports required by Section X of this Program Comment, the manner in which it has satisfied such conditions, exclusions, or requirements.

2. Federal Agency Notice of Alternative Compliance Approaches



Prior to using this Program Comment, a *federal agency* must provide a written notification to the ACHP, the National Conference of State Historic Preservation Officers, and the National Association of Tribal Historic Preservation Officers of its decision to use this Program Comment, including an identification of the geographic scope (national, state, or otherwise) in which it will use the Program Comment. The ACHP must make available on its website any such notices submitted by *federal agencies* to the ACHP pursuant to this Section.

3. Request for ACHP Advisory Opinions

A *federal agency* may seek an advisory written opinion from the ACHP as to whether it may appropriately utilize this Program Comment for an *undertaking* by forwarding to the ACHP all documentation relevant to the *undertaking*, requesting the ACHP to provide within 30 *days* its written comments, and taking the ACHP's comments into account before making a decision as to whether to utilize this Program Comment for such an *undertaking*.

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*.

1. Potential Effects on Properties of Traditional Religious and Cultural Significance to Indian Tribes and Native Hawaiian Organizations

It is important to recognize that while this Program Comment was drafted to limit *effects* on *historic properties*, including sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, covered *undertakings* could directly, indirectly, or cumulatively affect such properties.

2. Consultation-Related Obligations

Prior to engaging in any *undertaking* for which this Program Comment requires a Type B Determination in accordance with Appendix B of this Program Comment, or for any *undertaking* for which the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering *historic properties* in which an *Indian Tribe* or *Native Hawaiian Organization* may have an interest, a *federal agency* must make a reasonable and good faith effort to identify any *Indian Tribes* or *Native Hawaiian Organizations* that might attach religious and cultural significance to *historic properties* in the *area of potential effects* and invite them to be consulting parties. 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 *federal agency* staff; historic maps; information gathered from previous consultations pursuant to Section 106 or Section 110 (subject to Section III.B.4. of this Program Comment); 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. Such *Indian Tribe* or *Native Hawaiian Organization* that requests in writing to be a consulting party shall be one.

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 but not limited to recognizing the special expertise of holders of Indigenous Knowledge. The *federal agency* must defer to the determination by an *Indian Tribe* or *Native Hawaiian Organization* that a certain individual or individuals has or have expertise (including but not limited to Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects to historic properties* of religious and cultural significance to the *Indian Tribe* or to *Native Hawaiians*.

The *federal agency* must gather information to identify whether any *historic properties* of religious and cultural significance to such *Indian Tribes* or *Native Hawaiian Organizations* are included in such *area of potential effects* in accordance with the protocols in 36 CFR § 800.4(a)(4) and must use this information to assess whether the *undertaking* could result in an *effect* on any such *historic properties*.

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

Should the *federal agency* determine through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including but not limited to a Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* will not use this Program Comment and must instead follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7, or 36 CFR § 800.8(c), or another applicable agreement or program alternative.

4. Confidentiality-Related Obligations

Consistent with 36 CFR § 800.4(a)(4) and 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, or by applicable State and local laws. *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, including when maintaining records of correspondence related to consultation under this Section. *Federal agencies* must also adhere to confidentiality requirements for other resources covered by Section 304 of the National Historic Preservation Act or other applicable State and local laws.

5. Responsibilities for Consultation and Opportunities for Outreach

The *federal agency* retains ultimate responsibility for complying with government-to-government consultation requirements. However, an *Indian Tribe* may consent in writing to allow an entity delegated legal responsibility for compliance with Section 106 in accordance with federal law to assist with or lead consultation. Such consent may be rescinded in writing by the *Indian Tribe* at any time.

Nothing in this Program Comment shall be construed to preclude or discourage early outreach by project proponents, applicants, state or local government entities, or other non-federal entities to *Indian Tribes* or *Native Hawaiian Organizations* prior to the initiation of an *undertaking*.

C. The Use of Qualified Professionals

Except where explicitly stated, *undertakings* covered by this Program Comment do not require the use of a *qualified professional*. When the *federal agency* consults with a *qualified professional*, the type of *qualified professional* must be appropriate to the circumstances. As an 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.

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 CFR 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. 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 ability to enter into such an arrangement and pursuant to its statutory authorities and regulations. 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 or analysis to perform preliminary assessments of eligibility to the National Register or to make recommendations about eligibility to the *federal agency* and thereby inform the *federal agency's* determination of eligibility.
- D. Conduct research or analysis to assess the potential *effects* of the *undertaking* on *historic properties* and thereby inform the *federal agency's* determination of *effects*.
- E. Carry additional research or monitor ground disturbing activities.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, or evaluation.
- 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, or minimize *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.

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 but not limited to visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of the *undertaking*, the *federal agency* must immediately halt all activity within 100 feet of the discovery or that could otherwise 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 CFR § 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. For sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow these procedures and be guided by the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects.

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 100 feet of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, any known and potentially affiliated *Indian Tribe* or *Native Hawaiian Organization*, 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* will comply with state burial laws and with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 CFR 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 any consulting parties involved in the *undertaking* and any relevant *State Historic Preservation Officer (SHPO) or THPO*. Objecting parties may include but are not limited to *Indian Tribes, THPO(s), SHPO(s), 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 CFR § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 days, the *federal agency* must 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 written comments to resolve the dispute, and take the ACHP's comments into account before making a decision regarding its approach to complying with Section 106. The *federal agency* must notify the objecting party, any consulting parties previously notified of the dispute, and any relevant *THPO or SHPO* regarding its decision regarding 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 in writing, 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 to identify patterns or common issues in the use of this Program Comment, 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, 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 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*, and after publication on the ACHP website of the Chair's written explanation (which shall take into account ACHP reports and *federal agency* reports required by this Program Comment and any comments received from *Indian Tribes*, *Native Hawaiian Organizations*, and others), may amend this Program Comment to extend its duration one time for 5 additional years. The ACHP must notify *federal agencies*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* 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*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* 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 CFR §§ 800.3 through 800.7, or 36 CFR § 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 Reports

1. Timing of Reports

The *federal agencies* that use this Program Comment must provide annual reports to the ACHP regarding the use of this Program Comment during the previous fiscal year reporting period, ending September 30 annually, to the ACHP, as provided in this Section. Annual reports are due on December 31 of each year, starting December 31, 2025.

2. Delivery of Reports

For any reporting required by this Section, *federal agencies* whose legal responsibility to comply with Section 106 has been delegated in accordance with federal law but who maintain a reporting mechanism for some or all such entities must provide reports to the ACHP on behalf of those entities for which such data is available. Other entities to whom legal responsibility for compliance with Section 106 has been delegated must directly submit reports to the ACHP in accordance with this Section, using their own reporting mechanisms. In any report required by this Section, the ACHP encourages *federal agencies* to also propose for ACHP's consideration amendments and refinements to this Program Comment based on their experience implementing it.

3. Content of Reports

In any report required by this Section, each *federal agency* must:

- a. Identify the number of times the *federal agency* has utilized this Program Comment for *undertakings* covered by Section III.A.1.a.;
- b. For any *undertakings* covered by Section III.A.1.b., include: the address or, if no address is available, the location of the *undertaking*; information about the manner or extent to which the agency satisfied the conditions, exclusions, and requirements to proceed with such *undertakings*; the names and any institutional affiliations of any *qualified professionals*, *SHPOs*, or *THPOs* who contributed to written determinations required by this Program Comment; and a list of relevant *Indian Tribes* and *Native Hawaiian Organizations* with which consultation on such *undertaking* occurred;
- c. Identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, and their resolution;
- d. Assess the overall effectiveness of the Program Comment;
- e. List any entities to which the *federal agency* has delegated legal responsibility for compliance with Section 106 in accordance with federal law and whose *undertakings* are included in the report.

4. Template for Reports

Within three months of the adoption of this Program Comment, the ACHP must develop a template for *federal agencies* to collect information about any *undertakings* covered by Section III.A.1.b. The ACHP must also endeavor to create an online reporting and tracking system for undertakings covered by this Program Comment.

5. Publication of Reports

The ACHP must make available on its website any annual reports submitted by *federal agencies* to the ACHP pursuant to this Section within 30 days of receipt.

B. Invitation to Provide Comment

At any time, any *Indian Tribe, Native Hawaiian Organization, SHPO, THPO*, consulting party, or member of the public may submit written comments to the ACHP regarding the overall effectiveness of the Program Comment in meeting its intent and regarding suggestions for amendments and refinements to this Program Comment. The ACHP must provide and maintain instructions for submission of written comments on its website. The ACHP must consider such written comments when drafting any reports required by Section X.D. of this Program Comment.

C. Annual Meetings

By March 31, 2026 and annually for the duration of this Program Comment, the ACHP must schedule an annual meeting and invite *federal agencies, Indian Tribes, SHPOs, THPOs, Native Hawaiian Organizations*, ACHP members, consulting parties, 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.

D. ACHP Reports and Recommendations for Amendments

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 at an ACHP business meeting a written and oral summary of information received from *federal agency* reports, annual meetings, comments provided pursuant to Section X.B. of this Program Comment, or other sources about the utility of this Program Comment and make any recommendations for amendments. The ACHP must make such written summary of information and such recommendations available to the public through posting on the ACHP website within 30 days of such meeting.

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, remove, or encapsulate.

Adverse effect, as provided in 36 CFR § 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.

Alternative transportation infrastructure means a *building* or structure used for pedestrian, bicycle, *micromobility vehicle*, and *transit* purposes.

Area of potential effects, as provided in 36 CFR § 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 is not physically separated from motor vehicle traffic and that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

Bicycle locker means a device or structure for storing personal or shared bicycles and *micromobility vehicles*, that may have a cover and enclosure to protect the bicycles and *micromobility vehicles* from weather or theft and is not intended for human occupancy.

Bicycle parking means a designated area to store a bicycle, whether personal or shared, including but not limited to *bicycle racks*, *bicycle lockers*, *bicycle shelters*, and dedicated docks and kiosks used in a shared system for bicycles or *micromobility vehicles*.

Bicycle rack means a rack for a personal or shared bicycle or *micromobility vehicle*.

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

Bicycle shelter means a canopy structure above a *bicycle rack* for a personal or shared bicycle or *micromobility vehicle* that provides partial weather protection of the rack and bicycles or *micromobility vehicles*.

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 but not limited to mobile and manufactured homes and *alternative 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.

Building safety system means fire alarm, fire suppression, and security systems and equipment.

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 *alternative transportation infrastructure*.

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.

Economic feasibility means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to estimated construction costs (including but not limited to the cost of *building* material and labor), estimated operational costs, material availability and life cycle, available budget, and the long-term sustainability of the *undertaking*.

Effect, as provided in 36 CFR §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative impact or 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 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 electric vehicle.

EVSE criteria means: (1) taking 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) using reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimizing *ground disturbance* to the maximum extent possible, and ensure that it does not exceed previous levels of documented *ground disturbance*; (4) using the lowest profile equipment reasonably available that provides the necessary charging capacity; (5) placing the EVSE in a minimally visibly intrusive area; and (6) using colors complementary to surrounding environment, where possible.

Federal agency means an agency as defined by 5 U.S.C. § 551(1), and for Section 106 purposes the term *federal agency* includes state, local, or Tribal governments that have been delegated legal responsibility for compliance with Section 106 pursuant to federal statutory authority such as that under the provisions of the Housing and Community Development Act of 1974 at 42 U.S.C. § 5304(g).

Flex post means flexible bollards or delineators used to separate motor vehicle traffic from a *bicycle lane* or *protected bicycle lane* 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.

Ground disturbance means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils.

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 but not limited to lead-based paint), asbestos, asbestos-containing material (including but not limited to 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 pavement using a polymer binder to restore or maintain pavement friction.

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, as provided in 36 CFR § 60.3(d), means a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of historic sites, *buildings*, structures, or objects united by past events or aesthetically by plan or physical development.

Historic property, as provided in 36 CFR § 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 significance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

Housing means any *building* containing or proposed to contain 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, barracks, and freestanding homes.

Independent utility means those aspects of a project, activity, or program without which the specifically approved project, activity, or program would not serve a rational need.

Indian Tribe, as provided in 36 CFR § 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 in composition, design, color, texture, size, dimension and other physical and visual properties.

In-kind replacement means *replacement* of *historic building materials* with *in-kind building materials* or *replacement* of other existing materials, elements, or equipment with new materials, elements, or equipment that are physically and visually similar in all possible respects.

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

Maintenance means activities required to maintain in an operational state, or to bring back to operating condition.

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, including but not limited to 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, waste heat recovery devices (including but not limited to desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment), adjustable speed drives, duct and pipe systems (including but not limited to return ducts, diffusers, registers, air filters, and thermostatic radiator controls), refrigeration lines, and building energy control systems.

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 approximately 15 to 30 miles per hour.

National Historic Landmark, as provided in 36 CFR § 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 CFR § 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 CFR § 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*.

Non-significant façade means any exterior façade of a *building* which does not contribute to the historic significance of the *building*.

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 materials* that are 45 years or older, including but not limited to those comprised of pavers, cobblestones, Belgian blocks, bricks, or wood and those involving earthworks or roofs of structures entirely underground.

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, including *previously disturbed right-of-way*, and does not mean areas that have been shallowly disturbed (such as via plowing) and does not mean areas in which the previous disturbance occurred sufficiently long ago to allow for subsequent deposit of cultural resources that are now over 45 years old (such as historic urban deposits).

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 a historically significant property to remain, including but not limited to: the entire curb-to-curb roadway, existing sidewalks, existing drains, and parking areas, including but not limited to 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 space means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other public space that contains a concentration of *character-defining features* of a *historic building* or *historic alternative transportation infrastructure*.

Protected bicycle lane means a bicycle or *micromobility vehicle* facility, whether one-way or two-way (such as a cycle track), that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

Qualified professional means a person who meets the relevant standards for the appropriate corresponding discipline 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 but not limited to 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 transportation manuals: 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 and available *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, local preservation or planning office, and *federal agency* files, records, inventories, and databases, or other sources recommended by such parties, for information about whether *historic properties*, including but not limited to 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*.

Repair means fix or mend obsolete, broken, damaged, or deteriorated features, elements, materials, and systems. *Replacement* means substitution of new material, element, or equipment for an existing material, element, or equipment, including *in-kind replacement* and including substitution requiring a change in composition, design, color, texture, size, dimension, location, or configuration in order to improve the function and condition of the material, element, or equipment or the broader system of which the material, element, or equipment is a part.

Resilience means the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

Right-of-way means land developed or designated for the public passage of people using any mode of transportation, including *transit*.

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 CFR § 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*.

Technical feasibility means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to health, safety, energy efficiency, *resilience*, durability of materials, and sound professional judgment (including but not limited to architectural, archaeological, or engineering judgment).

Transit means mass transportation by a conveyance (including but not limited to 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 shelter means a canopy structure or other structure open to the elements on at least one side, which provides partial weather protection for users of *transit*, such as those provided at city bus stops or along rail platforms.

Tribal Historic Preservation Officer, as provided in 36 CFR § 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 CFR § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

Undertaking, as provided in 36 CFR § 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. An *undertaking* must have *independent utility*.

APPENDIX A: ACTIVITIES NOT REQUIRING FURTHER REVIEW

1. Site Work

The following activities do not require further Section 106 review:

a. *Maintenance or repair* of any of the following elements, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

i. Concrete and asphalt ground surfaces such as streets, parking areas, driveways, alleys, ramps, sidewalks, and walkways, including repaving, restriping, replacing such surfaces with permeable ground surface materials, sealing (including installation of slurry seals, overlays, and seal coatings), filling, milling, grinding, grooving, 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, netting, basketball hoops, drinking fountains, and ground surface materials.

iii. Fencing.

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 landscape elements (such as planted beds), or in park and playground areas, and including but not limited to relamping and rewiring.

vi. Water features, such as decorative fountains, including but not limited to replumbing.

vii. Curbs, gutters, steps, ramps, and retaining walls.

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

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

x. Bulb outs, crosswalks (including but not limited to raised crosswalks across roadways and raised intersections), traffic calming devices (including but not limited to speed humps and speed tables), or islands (including but not limited to pedestrian islands and corner islands to separate or protect bicycles).

xi. High friction surface treatments, cool pavements, permeable ground surface materials, and rumble strips.

xii. Green infrastructure, sprinkler heads, irrigation lines, and gray water systems.

xiii. Benches, tables, and freestanding planters.

xiv. Vault toilets.

b. Any of the following landscaping, grounds, and water management activities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, sheering, feeding, seeding, reseeding, mulching, aerating, 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, or within 10 feet of, its existing location.
 - iv. Removal of grass, shrubs, brush, leaves, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.
 - v. Removal of rocks, litter, and debris, but not rocks arranged in a rock wall or other man-made feature.
 - vi. Removal of small conifers growing between mature trees.
 - vii. Removal of sediment, silt, and debris from man-made drainage facilities, including retention and detention basins, ponds, ditches, canals, and sumps.
- c. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter
 - d. Installation or removal of temporary construction-related structures, including but not limited to scaffolding, barriers, screening, sediment-capture devices, fences, protective walkways, signage, office trailers, cofferdams, and restrooms, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance* and that such activity does not damage any existing *building* or *structure*.
 - e. Elevation of the ground surface within *previously disturbed right-of-way* by up to 18 inches to maintain, create, or connect *alternative transportation infrastructure*, or to facilitate boarding and disembarking at *transit* facilities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*.
 - f. Removal of a deteriorated or damaged mobile or manufactured home or other temporary building or structure, not including removal of foundations.

2. Work on a Building Exterior

The following activities do not require further Section 106 review when conducted on the exterior of a *building*:

- a. Maintenance or repair of any of the following elements:
 - i. Doors, including but not limited to insulated exterior doors and basement bulkhead doors.
 - ii. Windows, including but not limited to storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
 - iii. Siding.
- b. Maintenance or repair of any of the following elements, or in-kind replacement of any above-ground components of any of the following elements:
 - i. Mechanical systems.
 - ii. Building safety systems.

- iii. Canopies, awnings, and solar shades.
- iv. Roofing, including but not limited to cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; fasteners and ties to attach roofing to structural elements; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.
- v. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
- vi. *Clean energy technologies*.
- vii. Elevator systems.
- viii. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- ix. Foundations and foundation vents.
- x. Chimneys.
- xi. Vents, including but not limited to continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.
- xii. Energy and water metering devices.
- xiii. *Building-mounted utility infrastructure*, including but not limited to wires and anchors.
- xiv. ~~Installation of~~ stanchions, fasteners, or tracks for flood shields.

 c. *Replacement or installation of building-mounted solar energy systems* if such system is installed with methods that do not irreversibly damage *historic building materials*, sits close to the roof, and has a profile that matches the roof profiles (such as pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.

d. *Any of the following maintenance or repair activities:*

- i. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.
- ii. Repointing of mortar joints with mortar matching in composition, joint profile, color, hardness, and texture of existing mortar.
- iii. 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 and not including sandblasting of masonry over 45 years old.

e. Paint or stain on previously painted or previously stained exterior surfaces, provided that no historic decorative paint schemes or colors (such as graining, stenciling, marbling) will be covered and provided that for masonry over 45 years old, there will be no use of nontraditional or historically inappropriate masonry coatings, including painting of previously unpainted historic masonry, masonry consolidants, and waterproof or water-repellant coatings.

f. *Abatement of hazardous materials* where *effects* of the *abatement* are not visible on the *building* exterior, and the *abatement* either is limited to *previously disturbed ground* or creates no new *ground disturbance*.

3. Work on a Building Interior

The following activities do not require further Section 106 review when conducted entirely in the interior of a *building*:

a. *Maintenance or repair* of any of the following elements:

- i. Walls, ceilings, and flooring.
- ii. Doors.
- iii. Light fixtures.
- iv. Elevator systems.
- v. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- vi. Chimneys.
- vii. Skylights, atria, courtyards, or lightwells.

b. *Maintenance, repair, or in-kind replacement* of any of the following elements:

- i. *Mechanical systems*.
- ii. *Building safety systems*.
- iii. Light bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
- iv. Battery energy storage systems.
- v. Thermal insulation, other than closed cell spray foam, in or around walls, floors, ceilings, attics, crawl spaces, *mechanical systems*, and foundations, where such insulation can be installed and removed without damaging exterior walls, and where such insulation will not cause condensation that could damage exterior walls – even if such insulation increases interior wall thickness.
- vi. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
- vii. Foundations and foundation vents.
- viii. Energy and water metering devices.

c. *Maintenance, repair, replacement, or installation* of household or kitchen appliances, where such appliances are Energy Star rated, or replace existing appliances with appliances with higher Energy Star ratings, or replace existing non-electric appliances with electric appliances.

- d. Caulking, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.
- e. Painting or staining previously painted or previously stained interior surfaces, provided that no decorative paint schemes or colors (such as graining, stenciling, or marbling) will be painted or stained.
- f. *Abatement of hazardous materials* where *effects* of the *abatement* are only visible from within an individual *housing unit* or where *effects* are not visible from the *building interior*.



4. Work Involving Transportation Fixtures and Equipment

~~The following activities do not require further Section 106 review, provided 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, replacement, or installation of the following elements:~~

- ~~i. Bicycle racks or dedicated docks or kiosks used in a shared system for bicycles or micromobility vehicles.~~
- ~~ii. Bicycle rails.~~
- ~~iii. Flex posts.~~
- ~~iv. Concrete or stone blocks affixed to the ground by their weight.~~
- ~~v. Marks on the ground surface for visibility and delineation, including but not limited to striping for bicycle lanes, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, marks for bicycle parking, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.~~
- ~~vi. Detectable warnings on or before a curb, entry point, crosswalk, or accessible facility.~~

~~b. Maintenance or repair of any of the following elements, or in-kind replacement of any above-ground components of any of the following elements:~~

- ~~i. Signs, signals, traffic control devices, or signalization, including but not limited to any such elements that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.~~
- ~~ii. Cameras, masts, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.~~
- ~~iii. Tracks, including but not limited to ballasts and ties.~~
- ~~iv. Clean energy technologies supporting alternative transportation infrastructure.~~
- ~~v. Signal bridges.~~
- ~~vi. Transformers, breakers, switches, and other electrical components.~~

~~c. Maintenance or repair of the following elements, or in-kind replacement of any above-ground components of the following elements:~~

~~i. Bollards.~~

~~ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures.~~

~~iii. Transit shelters, bicycle lockers, or bicycle shelters.~~

~~5. Work on Bridges~~

~~The following activities related to bridges built as or incorporated into *alternative transportation infrastructure* do not require further Section 106 review:~~

~~a. Maintenance or repair 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 but not limited to pin-and-hanger replacement and other retrofits.~~

~~e. Implementing countermeasures against scour.~~

6. Other Activities

The following activities lack any potential to cause *adverse effects* and therefore do not require further Section 106 review:

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

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* or by another entity receiving federal financial assistance (such as a state, Tribal, or local government, or joint venture, railroad commission, compact authority, port authority, transit agency or authority, private company, or other project sponsor), of: *buildings*, energy efficiency or *electrification* materials or equipment, *clean energy technologies*, railway *rights-of-way* for the *maintenance*, development, or expansion of rail-to-trail pathways or passenger rail service, and fleets of bicycles, *micromobility vehicles*, hybrid or electric vehicles, or electric locomotives, provided that any changes in use or access, or any physical actions related to such activities 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. Direct home mortgages or mortgage guarantees for homeowners.

e. Transfer, lease, or sale of a federal government-owned *building* or *alternative transportation infrastructure* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

~~f. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, micromobility vehicle, or transit uses, including but not limited to “play streets,” “school streets,” “safe route to school” streets, “open streets,” tolling, or congestion pricing, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.~~

~~g. Maintenance, repair, replacement, and installation of electric vehicle supply equipment satisfying the EVSE criteria.~~

h. Treatment for pests, rodents, insects, and termites that does not visibly alter or obscure the structural, architectural, or decorative features of a *building*.

APPENDIX B: ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

1. Written Determinations

Certain *undertakings* listed in this Appendix B, due to their nature and potential *effects*, require a written determination before the *federal agency* may proceed with the *undertaking*. Applicable review processes and criteria for each type of determination are outlined below. After any such determination is made, the *federal agency* shall include the determination in its administrative record.

a. Type A Determination for Ground-Related Activities

A Type A Determination requires the *federal agency* to obtain a written determination that the *undertaking* is limited to *previously disturbed ground*, creates no new *ground disturbance*, or will have no *adverse effects* on any *historic property* from a *qualified professional* meeting the professional standards for archeology established by the Secretary of the Interior, the relevant *SHPO*, or the relevant *THPO*.

b. Type B Determination for Ground-Related Activities

A Type B Determination requires the *federal agency* to identify the *area of potential effects* in accordance with 36 CFR § 800.4 and either (a) (i) consult with *Indian Tribes* and *Native Hawaiian Organizations* in accordance with Section III.B. of this Program Comment and (ii) obtain a written determination that the activity will have no *adverse effects* on any *historic property* from either a *qualified professional* meeting the applicable professional standards established by the Secretary of the Interior or the relevant *SHPO*; or (b) conduct a field survey of the *area of potential effects* or obtain a field survey of such area completed within the past 10 years, where such survey is acceptable to current state or Tribal standards and, if applicable, has been subject to consultation with *Indian Tribes* and *Native Hawaiian Organizations*, without such survey or consultation identifying any *historic properties* in the *area of potential effects*.

In addition to explicit provisions in this Program Comment requiring a Type B Determination, if the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering subsurface *historic properties* or burial sites, human remains, funerary objects, sacred objects, or items of cultural patrimony, then a Type B Determination must be made before work can proceed pursuant this Program Comment.

c. Type C Determination of *Historic Building* Status

A Type C Determination applies to *buildings* placed in service 45 or more years ago and requires the *federal agency* to either (a) make a written finding that such *building* has not been identified as a *historic building* within the preceding 10 years after a *records check* and a review of its own records or (b) obtain a written determination from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or the relevant *SHPO* that such building is not a *historic building*. If a *building* was placed in service fewer than 45 years ago, then a Type C Determination is not required.

d. Type D Determination for Window, Door, and Siding Replacements

A Type D Determination applies to *undertakings* involving the *replacement* of a window, door, or siding of a *historic building* or of a *building* that has not received a Type C determination. A Type D Determination requires that (a) a *qualified professional* meeting the professional standards for

historic architecture or architectural history established by the Secretary of the Interior or the *SHPO* make a written determination that any *replacement* window, door, or siding is an *in-kind building material* or make a Type G Determination; and (b) the *federal agency* make a written determination that the *replacement* of a window or windows, door or doors, or siding as applicable, will reduce energy use of the *building*, after consideration of the lifespan and embodied energy of the existing element, the cost and carbon impact (including transportation-related impacts) of producing the *replacement* element, the *technical feasibility* of modifying the existing element to align it with current energy efficiency standards and codes, and the payback period of the *replacement* element.

e. Type E Determination for *Character-Defining Features* and *Non-Significant Facades*

A Type E Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type E Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *character-defining feature* of the *building* façade or that the *effects* of a proposed action will be limited to a *non-significant façade*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*. If a *building* was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type E Determination is not required.

f. Type F Determination for *Character-Defining Features* and *Primary Spaces*

A Type F Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type F Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *primary space* at all, or will not affect a *character-defining feature* in a *primary space*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*, and all lobbies, ceremonial rooms, and ground-floor hallways (unless primarily used for utility purposes) shall automatically be deemed *primary spaces*. If a *building* was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type F Determination is not required.

g. Type G Determination for Substitute Building Material *Replacements*

A Type G Determination applies to *undertakings* involving the *replacement* of *historic building materials* with substitute building materials. A Type G Determination requires that the *federal agency* obtain a written determination from either a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*, that the substitute building material is appropriate based on the following factors: (a) the character of existing *historic building materials* in terms of condition, design, material properties, performance (including but not limited to insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*; (b) the *technical feasibility* and *economic feasibility* of *repairing* or *replacing* the *historic building materials*; and (c) the suitability of available substitute building materials, with attention to composition, design, color, texture, size, dimension and other physical and visual properties.

h. *State Historic Preservation Officer Reviews*

The *State Historic Preservation Officer* shall have 30 days to review and respond to an adequately documented request by a *federal agency* for a determination pursuant to this Section. If the *State Historic Preservation Officer* requests additional, missing information in order to make its determination, the *State Historic Preservation Officer* shall have 30 days from receipt of the additional information to respond. If the *State Historic Preservation Officer* does not respond within 30 days of receipt of the request or the amended request, as applicable, then the determination shall be deemed to have been made.

2. Site Work

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



a. *Replacement* of any element listed in Appendix A, Section 1.a., after a Type A Determination has been made.

b. Removal of any element listed in Appendix A, Section 1.a., after a Type B Determination has been made.

c. *Installation* of any element on the same lot as a *building* or within an existing *right-of-way* and listed in Appendix A, Section 1.a., after a Type B Determination has been made.

d. Planting a tree (other than replacing a tree per Appendix A, Section 1.b.iii.), after a Type A Determination has been made.

e. Test borings, soil sampling, well drilling, or perc tests more than eight inches in diameter, after a Type B Determination has been made.

f. Any of the activities listed in Appendix A, Sections 1.d., 1.e. or 1.f. that have the potential for new *ground disturbance*, after a Type B Determination has been made.

g. Removal of oil tanks, septic tanks, or hazardous materials, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*, after a Type B Determination has been made.

3. Work on a Building Exterior

The following activities do not require further Section 106 review, when conducted on the exterior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

a. *Replacement* or *installation* of any of the elements listed in Appendix A, Section 2.a., after a Type C Determination has been made.

b. *Replacement* or *installation* of any of the elements listed in Appendix A, Section 2.a., if a Type C Determination cannot be made or is inconclusive, after a Type D Determination has been made.

c. *Replacement* or *installation* of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 2.b., if a Type E Determination has been made.

d. *Abatement of hazardous materials* where *effects* of the *abatement* may be visible from the *building* exterior, if a Type E Determination has been made.

e. *Abatement of hazardous materials* where *effects* of the *abatement* have the potential for new *ground disturbance*, after a Type B Determination has been made.

4. Work on a Building Interior

The following activities do not require further Section 106 review, when conducted entirely in the interior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

a. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., after a Type C Determination has been made.

b. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., if a Type C determination cannot be made or is inconclusive, after a Type F Determination has been made.

c. *Abatement of hazardous materials* where *effects* of the *abatement* may be visible from the *building* interior (other than from the interior of an individual housing unit), after a Type F Determination has been made.

~~5. Work Involving Transportation Fixtures and Equipment~~

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

~~a. *Replacement* of any of the elements (whether above ground or below ground) listed in Appendix A, Section 4.b. after a Type B Determination has been made.~~

~~b. *Installation* of signs, signals, traffic control devices, or signalization supporting *alternative transportation infrastructure*, or *installation* of any of the elements (whether above ground or below ground) listed in Appendix A, Section 4.b.ii., after a Type B Determination has been made.~~

~~c. *Installation* of *clean energy technologies* supporting *alternative transportation infrastructure*, after a Type B Determination has been made.~~

~~d. *Installation* of any of the following elements after a Type A Determination has been made:~~

~~i. Bollards no taller than 48 inches and no larger in diameter than 12 inches.~~

~~ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures, 6 feet or less in height and 3 square feet or less in horizontal cross-section area, in addition to height or cross-section needed to incorporate solar power into such structures.~~

~~iii. *Transit shelters*, *bicycle lockers*, or *bicycle shelters* 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.~~

~~6. Work on Bridges~~

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

~~a. Replacement or installation of a bridge built to serve pedestrian, bicycle, micromobility vehicle, or transit use, after a Type B Determination has been made.~~

APPENDIX C: 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:



December 13, 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 updated draft of the proposed Program Comment on Certain Housing, Buildings, and Transportation Activities (PC). We appreciate many of the changes that were made between the first and this most recent draft but ultimately maintain that the PC needs further edits and additional consultation before being considered for a vote.

The PC's purview is too broad by combining transportation and energy efficiency in buildings, which are two vastly disparate undertaking types, and removes checks and balances to federal agency decision-making authority. Additionally, the PC fails to include the specific and explicit language that makes agreements of this type useful in Section 106 consultation by not specifying whom within each agency has the authority to determine use of the PC. Lastly, it fails to provide SHPOs and stakeholders with processes for registering concerns with work that is publicly funded.

The PC does not differentiate between the ACHP's existing Policy Statements and federal and state regulations. As written now, the PC rhetorically implies that ACHP Policy Statements hold as much legal clout as federal and state regulations. This is a misrepresentation of the relationship between ACHP Policy Statements and the aforementioned regulations.

Our biggest concern with the current draft lies in *Appendix B: Activities Not Requiring Further Review After the Satisfaction of Conditions, Exclusions, or Requirements*. We hold that Appendix B either needs to be completely rewritten or removed from the PC altogether. Our specific concerns include the following:

- 1) The appendix is poorly organized, in that the reader must reference two different areas of the PC in order to understand each exempted activity. This format leaves room for misunderstanding and misinterpretation.
- 2) Undertakings determined under traditional Section 106 consultation to have No Adverse Effect to Historic Properties can be extremely nuanced in scope and context and therefore should not be left to be unilaterally evaluated by a federal agency and/or the qualified professional they've hired. We would minimally ask that only projects determined by the agency to have No Effect on Historic Properties be considered for Appendix B.
- 3) A final concern with this appendix pertains to the lack of mandated survey and recordation. Under both Type C and D determinations, survey is an option but not required, and recordation of buildings not previously determined to be historic is also not required under any determination type. Without full documentation of cultural resources how can an informed effect determination be made?

We would be remiss if we did not acknowledge the work that has been done in between drafts of the PC. We appreciate that the PC's duration has been shortened, and clarifications added regarding existing agreements.

Below are additional Montana State Historic Preservation Office comments on the PC's draft language. We look forward to continuing these discussions with the ACHP and fellow consulting parties to achieve an agreement document that helps to streamline Section 106 review and protects cultural resources.

Respectfully,

A handwritten signature in black ink that reads "Jessica Bush". The signature is written in a cursive, flowing style.

Jessica Bush, M.A.
State Archaeologist, Deputy SHPO
Montana State Historic Preservation Office
406-444-0388
jbush2@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 Certain Housing, Buildings, and Transportation Activities

II.B – The federal rehabilitation tax credit is not a federal law nor is it a federal regulation. We recommend pulling that out separately with a statement that explains that this PC and review for the HTC are completely separate and approval or compliance with one does not mean approval or compliance with the other. Completing work under the PC prior to having the project reviewed under the HTC puts the applicant at risk for not being approved by the NPS.

III.A.2 – SHPOs should also be notified directly.

III.A.3 – SHPOs and THPOs should also be able to seek an advisory opinion from the ACHP / Can these opinions and frequently asked questions be compiled into a resource that everyone would have access to? With the understanding that identifying information will be redacted.

VIII.B – Everyone that gets notified under VIII.A should also be notified if this section is utilized.

VIII.C – Can this be further clarified? Does it have to be unanimous, or majority? Would proposed amendments go under any other consultation?

IX – If federal agencies are allowed to terminate their other agreements and follow this PC, and this stipulation were to ever be utilized, then agencies will need to reconsult on any agreements they previously terminated following the withdrawal of this PC. Further, between the PC being withdrawn and the completion of the new agreement, agencies would need to fully consult under Section 106. This is not made clear.

X – Will the ACHP be keeping track of which agencies have not submitted reports and what happens if an agency does not submit their report? Will they still be allowed to use the PC?

X.A.2 – This needs to be flushed out further and made clearer as to who is ultimately responsible for completing and filing the annual report.

X.A.3.a – These projects should be subject to the same reporting requirements as projects in X.3.b, if only for the first 5 years of the PC. A reporting requirement will help SHPOs and THPOs to understand how agencies will likely be using this PC into the future

X.A.4 – Consulting parties should be involved in the creation of the annual report template. / Remove “endeavor to”.

X.A.5 – Notification of posted annual reports should be broader. This could be as simple as creating an opportunity to “subscribe” to the webpage where someone could receive and automatic notification when an annual report was added.

X.C – Notification of the date of annual meeting should be made at least 2 months in advance to give attendees time to read through annual reports, ACHP reports, and any other relevant information.

X.D – Consider changing every 3 years to annually.

The definition of “ground surface material” might lend itself better to be describing “hardscape”.

Can the definition of “maintenance” be clarified? As written, it feels too broad and too dependent on different interpretations of “required”, “operational state”, and “operating condition”.

“Non-significant façade” is not a term generally used in the preservation community – consider changing to “secondary elevation”.

Can further clarification be given on the definition of “shallowly disturbed”? Or rather include in the examples that this could be roads and sidewalks as well.

“Substitute building materials” should be defined.

“Relamping” should be defined.

Appendix A.1.b.iii – This exemption does not consider trees that have been culturally modified and that have been previously listed as Eligible, or that have not been recorded but could be listed as Eligible. There should be additional language that requires a federal agency to investigate eligibility status before such activity can be exempted (i.e. records check, consultation with tribes, etc.).

Appendix A.2 – The activities within this section that consist of installation should be removed from exemption.

Appendix A.2.c should be removed from exemption.

Appendix A.3.b.v should be removed from exemption.

Appendix A.2.b.v and *Appendix A.3.b.vi* should be removed from exemption if the intent is to include the installation of said improvements.



December 15, 2024

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

RE: Proposed Program Comment on Certain Housing, Building and Transportation Activities

Dear Chair Bronin:

We are writing to express our continued opposition to the proposed Program Comment on Certain Housing, Building and Transportation Activities as currently drafted. While our reasons are numerous, they fall generally into three categories: legal concerns, technical problems, and precedent. Despite these concerns, however, we still offer a potential path forward that does not present legal questions and the potential for litigation, and therefore one we believe should enjoy broad support.

Overall, we agree that there are some efficiencies that can be made in the Section 106 process relative to the provision of federally supported housing. But we believe that there is a better way to do it than via this Program Comment as written. We observe that the rapid race to conclude this agreement before the change in Presidential Administration coming on January 20, 2025, has created an arbitrary sense of urgency that will prevent the adoption of a workable, useful and responsible document. We therefore urge the Council to do the right thing as it would under regular order to allow for ample time for the adjudication of the comments submitted, and for the creation of a focused working group tasked with rewriting this draft into a more cohesive, defensible and usable document for Council consideration.

Attached are two documents that support our position. The first is a letter from our organization's legal counsel outlining very alarming legal issues with the program comment as currently drafted. The second is a markup of the existing document to better illustrate where technical and other problems exist.

Concerning Legal Questions

The ACHP's regulations at 36 CFR 800 articulate what program alternatives that it has made available to the standard Section 106 process. Program Comments, according to the ACHP's own regulations, are designed to allow the Council to "...comment on a category of undertakings in lieu of conducting individual reviews." While the Council also has given itself the authority to issue program comments at its own initiative, it has never done so. But the intent is clear in that program comments are meant to apply to a specific, nuanced niche category of undertakings – not a sweeping menu of various and disparate undertakings across the entire federal government. The proposed Program Comment does not, therefore, meet the definition or intent as provided for in the regulations.

Additionally, the Council's regulations stipulate that an agency official must identify the category of undertakings as well as specify the likely effects on historic properties and the steps the agency will take to ensure that the effects are taken into account. The Chair has not done so, placing the Council in an untenable position as to the viability of this Program Comment. Instead, the Chair's draft has simply prepared pathways whereby no Section 106 review will be required –creating a de facto exemption, which is another 106 alternative.

While the Council's regulations do allow for exemptions, they must meet certain criteria beyond those of a program comment. In addition to qualifying as undertakings, the potential effects of the undertakings must be foreseeable and likely minimal or not adverse. They also must be consistent with the purposes of the National Historic Preservation Act. Given the proposal outright exempts numerous projects from Section 106, it is clear, in our view, and in our legal counsel's opinion, that the purported draft program comment is in fact an exemption. **Therefore, this proposal, as offered, should move through the exemption process, not that for a Program Comment.** Importantly, exemptions require public participation far beyond what has been offered by the Chair, and perhaps even more strikingly, require publication in the Federal Register, which has not been done in this instance. To put it simply, the Chair's draft is on questionable legal ground, and subject to legal challenge and litigation.

Further discussion on this topic is attached via a letter from our legal counsel Andrea Ferster.

Technical Questions and Concerns

As can be seen in the accompanying markup, numerous technical questions and concerns still exist in this proposed document. Some key issues include:

1. **Elimination of consultation with the public and States.** The primary efficiency sought in this agreement is still the elimination of consultation with SHPOs. While there is agreement that there are actions where this may be appropriate, this document also exempts undertakings that will cause adverse effects, per the ACHP's own regulations, and bestows enormous latitude and responsibility in the hands of all federal agencies. This approach is not only contrary to the intent and requirements of the National Historic Preservation Act, we think that the best decision making is informed – not made unilaterally by decisionmakers far removed from the locale and not made with an instrument designed limit knowledge, identification, assessment and treatments for historic properties.
2. **Pass-through entities.** The Program Comment is unclear how it would apply to pass-through entities or, in the case of HUD, "responsible entities." While they are responsible for some of the reporting requirements, it is unclear how the functional aspects of the undertaking/activity process would be completed.
3. **Template reports.** The Template Reports, which is the primary proposed mechanism for assuring the appropriate functioning of the Program Comment should be developed prior to adoption – not within three months. Stakeholders should have an opportunity to review and comment on the reporting template.

4. **Problematic definitions.** Some definitions are problematic and vague – such as “independent utility,” which seems to contradict itself and call into question how many undertakings actually would be covered. It is a term also added to the definition of “undertaking,” conflicting with the statutory definition – something that the ACHP has always been clear rejecting in agreement documents.
5. **Determination process.** The “Determination” process outlined in Appendix B is confusing and cumbersome and includes a measure requiring consultation to develop an Area of Potential Effects but then potentially no consultation on the identification of historic properties or on the assessment of effects.
6. **Does not meet spirit of program comment as alternative to 106.** The proposed document does not focus on streamlining for projects with no or minimal potential to adversely affect historic properties and instead includes undertakings with clear potential for adverse effects without any consultation or mitigation required. This approach does not meet the spirit of the National Historic Preservation Act or the ACHP’s own regulations.
7. **No public notification.** The Dispute Resolution section is not meaningful. Since no notification of SHPOs is required, and there will be no public notification, how would an interested party know whether an undertaking is covered by the Program Comment and whether or not to file a dispute?
8. **Not in alignment with Secretary’s Standards.** The provisions covering the exteriors of buildings still conflict with generally accepted protocols for reviewing projects relative to the Secretary’s Standards – the most common approach taken by local governments. Indeed, alterations not in keeping with the Secretary’s Standards are an example of an adverse effect per 36 CFR 800.5(2)(ii). This means there would be potentially two different and conflicting spheres of historic preservation review.
9. **Archaeological concerns.** “Previously-disturbed” ground exemptions are problematic without proper due diligence and consultation. Simply requiring a written determination by a person meeting the Professional Qualifications Standards does not guarantee any particular outcome if they are not required to consult.
10. **Inadequate identification efforts.** Historic Property Identification Efforts are inexplicably abbreviated. Since no consultation is required in some cases beyond a “records check,” by a person meeting Professional Qualification Standards, there is still no guarantee that even a phone call would take place with the SHPO – who are the official repositories of historic property data in their states.

Precedent

While working to achieve overarching political policy goals is to be expected, the ACHP was established to *advise* the President and Congress on historic preservation matters in an informed and impartial manner. We are very concerned that the Council seems to instead be doing the opposite – increasingly taking advice and instruction from the President and Congress to help them achieve their own political policy goals. The precedent potentially set by this Program Comment, as written, is clear – that the Council can be pressured to use its tools to achieve political goals, even when they are in direct contravention of the intent of the National Historic Preservation Act, its own regulations and published

guidance, concerns from State and Tribal Historic Preservation Officers, and objections from professionals in the preservation field, and most importantly, the larger public. While it may seem acceptable, even laudable, if the policy goals are desired – we ask the Council to consider very carefully the implications should future policy goals be infinitely more fraught with political divergence and societal complexity.

Possible Path Forward

Despite our concerns, as noted at the beginning of this letter, we believe there is a possible path forward. Simply put, instead of the overly broad and legally concerning program comment draft, a program alternative focused on the maintenance, repair and rehabilitation of housing interiors could enjoy strong support from agencies, State Historic Preservation Officers and preservationists alike. There would be numerous benefits to this approach:

1. It would tailor the scope of the PC to a more definable category of undertakings, more consistent with the regulatory intent of this program alternative. It would make it more manageable and easier to monitor.
2. Ground disturbance would be either eliminated or substantially reduced, alleviating numerous concerns about archaeology and reduce a number of tribal concerns.
3. Inconsistencies and policy conflicts relative to local building reviews would be reduced or eliminated.
4. Problems with determinations of eligibility and Areas of Potential Effect could be substantially reduced.
5. Objectives identified in the Housing Policy Statement would be furthered.
6. More latitude for expeditious interior rehabilitation would occur.

Conclusion

While many concerning and disquieting issues still exist with the Chair's proposed Program Comment draft, we remain optimistic that a productive path forward, as outlined above, is still possible. We urge the Council to reconsider the approach it is taking to this effort, to consider the consequences, and to instead move towards a collaborative and welcome solution that could be useful and beneficial to everyone.

Respectfully,



Erik M. Hein
Executive Director

ANDREA C. FERSTER*

LAW OFFICES
68 BEEBE POND ROAD
CANAAN, NY 12029

* ADMITTED IN NEW YORK AND DC

TEL. (202) 669-6311
ANDREAFERSTER@GMAIL.COM

WWW.ANDREAFERSTERLAW.COM

December 14, 2024

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

Dear Ms. Bronin:

This letter is written on behalf of the National Conference of State Historic Preservation Officers (“NCSHPO”) to express concerns about the lawfulness the proposed revised “Program Comment” dated November 15, 2024 (hereinafter referred to as “Revised Draft Program Comment”), which was recently circulated to the members of the Advisory Council on Historic Preservation (“ACHP”) and members of the public for comment. The Revised Draft Program Comment would effectively exempt numerous undertakings from any obligation to comply with the procedures set forth in Section 106 of the National Historic Preservation Act (“NHPA”), 54 U.S.C. § 306108 and 36 C.F.R. Part 800.

NCSHPO is providing a detailed substantive critique of the Revised Draft Program Comment simultaneously with this letter. The focus of this letter, however, is on overarching legal issues regarding whether the Revised Draft Program Comment can lawfully be used for the purpose of enacting exemptions and new rules of broad applicability without following the procedures for notice and comment rulemaking, as required by the Administrative Procedure Act (“APA”), the NHPA, and the ACHP’s own regulations.

- I. The Program Comment Violates the NHPA and Its Implementing Regulations by Proposing Numerous Exemptions from Section 106 Without following the Statutory and Regulatory Requirements for Developing Exemptions.
 - A. The Undertakings in Appendix A Are Exemptions from Section 106.

Section 214 of the NHPA confers on the ACHP specific authority to exempt categories of actions or undertakings from Section 106. 54 U.S.C. § 304108(c). Under this authority, the ACHP has developed various “Program alternatives” to “implement section 106 and substitute them for all or part of” the Section 106 regulations. 36 C.F.R. § 800.14(a). These alternative procedures include “program comments” and “exemptions for a program or category of undertakings.” *Id.* §§ 800.14(c), 800.14(e).

The Section 106 regulations make clear that program comments differ from exemptions in that program comments establish alternative procedures for agency Section 106 compliance, not exemptions from any further Section 106 review. Unlike exemptions, a program comment must “specify the steps the agency official will take to ensure that the effects are taken into account.” *Id.* § 800.14(e)(1). By contrast, where a category of undertakings is exempted from Section 106 review, no further consultation or “review under the provisions of subpart B” (i.e. the normal Section 106 process) is required. *Id.* § 800.14(c)(1).

The vast majority of the categories of undertakings identified in Appendix A of the Revised Draft Program Comment meet this regulatory definition of exemption. They do not constitute a program alternative because they do not “specify the steps the agency official will take to ensure that the effects are taken into account.” *Id.* § 800.14(e)(1). Rather, the Revised Draft Program Comment clearly states that undertakings identified in Appendix A “do not require further Section 106 review.” Revised Draft Program Comment, at 20. Accordingly, they are exemptions and not alternative procedures, and the ACHP must comply with the procedures and criteria set forth in its regulations and in the statute for developing exemptions, which differ from the procedures for developing program comments.

B. The ACHP Has Not Followed the Statutory and Regulatory Procedures for Developing Exemptions from Section 106.

While the vast majority of the undertakings listed in Appendix A of the Revised Draft Program Comment are clearly exemptions, the process and criteria set forth in the NHPA and the regulations governing the adoption of exemptions was not followed.

1. The Process For Adoption of Exemptions Has Not Been Followed.

The process for adopting exemptions is distinctly different than the process for adopting program comments. Most notably, “[t]he proponent of the exemption shall publish notice of any approved exemption in the Federal Register.” 36 C.F.R. § 800.14(c)(8). Here, however, the ACHP followed the process for program comments initiated by the ACHP itself, which merely requires that the ACHP “notify and consider the views of SHPOs/THPOs on the proposed program comment,” as well as “Indian tribes and Native Hawaiian organizations.” *Id.* § 800.14(e)(3) and (4). With respect to the exemptions contained in the Revised Program Comment, the ACHP must comply with the procedures for exemptions set out in 36 C.F.R. § 800.14(c), including publication of the approved exemption in the Federal Register.¹ The prior notice and comment opportunity from many years ago when 36 C.F.R. § 800.14(c) was adopted is insufficient to satisfy this requirement that notice of the approved exemption be published in

¹ For example, when the ACHP proposed and adopted an exemption in 2022 for the installation of electric vehicle supply equipment, the draft of the proposed exemption was published in the Federal Register, 87 Fed. Reg. 26,771-73 (May 5, 2022), and the final exemption was published as well. *Id.* at 66,201-04 (Nov. 2, 2022).

the Federal Register, since, as discussed below, the exemptions in the Revised Draft Program Comment do not satisfy the criteria for exemptions set forth in the regulations.

Moreover, the NHPA establishes statutory procedures governing the adoption of exemptions. Section 214 of the NHPA also requires “the concurrence of the Secretary [of the Interior]” in order for ACHP to adopt an exemption. 54 U.S.C. § 304108(c). While the Secretary of the Interior concurred when the ACHP adopted 36 C.F.R. § 800.14(c)(1), the proposed program comment is effectively a new exemption with different criteria and breadth. Therefore, the Secretary of the Interior must concur in the exemptions prior to their adoption by the ACHP. The Secretary of the Interior has not concurred in the exemptions; to the contrary, the Secretary has made comments on draft program comment that were highly critical, and most recently, has requested specific revisions

2. The Exemptions in the Revised Program Comment Do Not Comply with the Statutory and Regulatory Criteria Governing the Adoption of Exemptions.

Section 214 of the NHPA also requires that the ACHP must determine the exemption “to be consistent with the purposes of this division, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic property.” 54 U.S.C. § 304108(c). The Section 106 regulations likewise provide that all exemptions from Section 106 must satisfy specified criteria, which includes that “(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and (iii) Exemption of the program or category is consistent with the purposes of the [NHPA].” 36 C.F.R. § 800.14(c)(1).

However, there are no specific findings in the Revised Draft Program Comment that all of the undertakings identified in Appendix A satisfy the statutory and regulatory criteria or procedures for exemptions. With respect to the vast majority of the listed categories of undertakings, the Revised Draft Proposed Program Comment does not include a determination that the effects are likely to be “minimal or not adverse,” as required by the regulations. *Id.* Only one group of “other activities” listed in Appendix A is found to “lack any potential to cause *adverse effects*.” Revised Draft Program Comment, at 25-26 (Appendix A, ¶ 6) (emphasis in original).

To the contrary, the Revised Draft Program Comment makes clear that the objective of the program comment is to provide “efficiencies” in reviewing voluminous and “repetitive” undertakings in the housing, building, and transportation sectors, and to create “review efficiencies that deliver these projects more quickly and efficiently.” *Id.* at 2. In lieu of any specific finding that the exempted undertakings would have minimal or no adverse effect, the Revised Draft Program Comment finds only that the exemptions would allow federal agencies to “focus on preservation and consultation for other undertakings with greater potential for adverse effects on historic properties.” While the benefit of “efficiencies” in carrying out certain

Section 106 reviews could potentially justify the adoption of *alternative procedures* for these undertakings, these objectives are insufficient to satisfy the statutory and regulatory criteria governing the adoption of exemptions.

Section 214 of the NHPA also requires that the ACHP determine the exemption “to be consistent with the purposes” of the NHPA. 54 U.S.C. § 304108(c). The Revised Draft Program Comment includes a single reference to one of the purposes of the NHPA -- “us[ing] measures ... to 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.’ 54 U.S.C. § 300101.” Revised Draft Program Comment, at 1. The lack of any finding relating to the actual preservation purposes of the NHPA reflects the fact that the proposed program comment is not predicated on any finding that the listed categories of undertakings are likely to have minimal or no adverse effects.

The fact that the proposed exemptions may include undertakings that have the potential to adversely affect historic properties has been pointed out by a number of commenters. For example, HUD commented on the prior draft that the exemption for actions that create no new ground disturbance in *Appendix A-2* (now A-1) has the potential to adversely affect historic properties “without a professional’s guidance and judgement to assist.” Yet this exemption continues to apply without any requirement that the determination be made by a qualified professional. Revised Draft Program Comment, at 20 (*Appendix A-1*).

Likewise, the Revised Draft Program Comment empowers agencies to make unilateral determinations that replacement of exterior features identified in *Appendix A* are “in-kind” and therefore require no further Section 106 review. The lack of any consultation in applying these exemptions may lead to inappropriate replacements and alterations that adversely affect historic properties, which consultation with the SHPO could have avoided. The potential for excluding undertakings with adverse effects is all the greater in this context since the Revised Draft Program Comment does not require the use of qualified professionals when applying the exclusions identified in *Appendix A*, nor does it require the application of the exemption to be documented in the administrative record. Accordingly, the *de facto* exemptions identified in *Appendix A* do not satisfy the statutory criteria or regulatory procedures required for the adoption of exemptions.

II. The Administrative Procedure Act Requires Formal Notice and Comment Rulemaking for the Exemptions Proposed in Appendix A.

As the Department of the Interior recognized in its comments, the use of a “program comment” to exempt “vast numbers of resources and programs” across multiple agencies appears to be a “contrived workaround” to avoid the three-step notice-and-comment process when formulating, amending, or repealing an administrative rule required by the Administrative Procedure Act, 5 U.S.C. §§ 553, 551(5). The need for public notice and comment

was dismissed by ACHP staff on the grounds that the Section 106 regulations authorizing the use of program alternatives already went through the standard notice and comment rulemaking process twenty-five years ago. The ACHP should revisit this conclusion. As noted above, while nominally called a “program comment,” the proposal is in effect a set of exemptions, and represents a substantial departure from the existing regulatory regime for the adoption of exemptions. Therefore, the prior notice and comment opportunity from many years ago is insufficient to satisfy the notice and comment requirements of the APA.

The APA does include several exceptions from the requirements of formal notice-and-comment rulemaking for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” *Id.* § 553(b)(A). However, those exceptions “must be narrowly construed.” *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015), *as revised* (Nov. 25, 2015) (citations omitted). None of these exceptions are applicable here.

To the contrary, the exemptions proposed by the Revised Draft Program Comment contain all the hallmarks of a substantive rather than an interpretative rule or policy statement. Simply put, “[s]ubstantive rules are ones treated as binding by the agency, while true policy statements are not.” *Pub. Citizen, Inc. v. U.S. Nuclear Regul. Comm’n*, 940 F.2d 679, 682 (D.C. Cir. 1991). Here, the ACHP is bound by the exemptions that it has created; it has left itself no discretion to individually comment on an undertaking where the agency chooses to apply the exemption in the program comment. The dispute resolution mechanism in the draft does not render the exemptions any less binding than a Memorandum of Agreement or Program Agreement, which are likewise binding on the agency notwithstanding the existence of similar dispute resolution clauses.

Further, “[l]egislative rules ... grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed.” *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983). Here, the exemptions developed in Appendix A will have broad applicability to all federal agencies and will affect all future undertakings that come within their purview. They will therefore have a significant effect on private interests – namely, the private individuals and entities who own and/or seek to protect historic properties from adverse effects. *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union v. Fed. Highway Admin.*, 151 F. Supp. 3d 76, 91 (D.D.C. 2015) (holding that an FHWA memorandum creating a new regulatory exemption from the “Buy America” requirements for steel products was a substantive, not interpretative, rule because it “adopt[s] a new position inconsistent with ... existing regulations.”)

Nor can the Revised Draft Program Comment be considered an “interpretive rule.” The new exemptions proposed by Appendix A do not derive or flow fairly from the substance of the Section 106 regulation authorizing the ACHP to develop exemptions, 36 C.F.R. § 800.14(c)(1). As noted above, the Revised Draft Program Comment does not comport with the procedures

Sarah Bronin
December 14, 2024
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established by the Section 106 regulations for exemptions, nor does it provide any assurances that the exemptions would involve minimal or no adverse effects. The exemptions are inconsistent with Section 106 regulations governing exemptions. To comport with the requirements of the APA and the ACHP's own regulations, the public must be provided with notice and an opportunity to comment on exemptions proposed by the Revised Draft Program Comment through publication in the Federal Register.

Accordingly, we urge the ACHP to provide for publication of the Revised Draft Program Comment in the Federal Register. NCSHPO would appreciate your formal response to the legal issues and concerns raised here.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Ferster', with a large, stylized flourish at the end.

Andrea C. Ferster
Counsel for NCSHPO

CC

Javier Marques, General Counsel, ACHP

Reid Nelson, Executive Director, ACHP

Caroline Henry, Federal Preservation Officer, Department of the Interior

**DRAFT PROGRAM COMMENT ON
CERTAIN HOUSING, BUILDING, AND TRANSPORTATION ACTIVITIES**

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 CFR § 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 CFR part 800 (Section 106), regarding the *effects* of certain *housing*-related, *building*-related, and *alternative transportation infrastructure*-related activities.

I. INTRODUCTION

A. Background

The National Historic Preservation Act calls for “us[ing] measures ... to 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.” 54 U.S.C. § 300101. The development of this Program Comment responds to this call and is driven by the need to harmonize policies and procedures for the preservation of our nation’s historic places with other efforts designed to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce energy use and associated costs, improve resilience against natural hazards, and provide alternative transportation options — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

B. 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. The ACHP has performed these statutory duties in the areas covered by this Program Comment.

In its advising capacity, the ACHP 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 and Historic Preservation 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 energy use and cost, resilience, and historic preservation through its Climate Change and Historic Preservation 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 alternative transportation projects.

In its oversight of the Section 106 process, the ACHP has issued or participated in a variety of 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

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The Program Comment is still too sweeping - covering disparate, non-related and non-intuitive categories of undertakings. The intent of Program Comments was to cover specific categories of undertakings, not a broad government-wide set activities. In short, there is no Program being commented upon. Also required, under the regs, is a specification of the likely effects on historic properties and steps the agency will take to ensure these effects are taken into account. This is not clearly present in this document. Moreover, the primary focus of this Program Comment is the identification of undertakings that are not subject to further review, or "exemptions" with no discussion at all about mitigation for adverse effects. It is an "exemption." Just because it is called Program Comment does not negate this fact. The ACHP has regulations in place governing the process for exemptions which it has failed to follow. Therefore, while improved, it is the improper vehicle.

has also recently been a signatory to several statewide programmatic agreements with HUD related to projects and programs subject to 24 CFR Parts 50 and 58.

With regard to building rehabilitation, 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 resilience-related undertakings.

With regard to transportation alternatives, 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, Indian Tribes, and state departments of transportation, covering a range of transportation-related activities.

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 approach for Section 106 review across the federal government for certain undertakings, equipping federal agencies to more effectively and efficiently preserve and protect our nation's historic resources while addressing other critical policy needs.

C. 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." Accordingly, it has been drafted to advance historic preservation goals including the reuse of historic materials and buildings and the upgrading of infrastructure in historic neighborhoods, and to harmonize them with the nation's pressing needs to expand access to housing, improve resilience, and offer transportation alternatives.

Every day, federal agencies meet these needs by proposing to carry out, permit, license, fund, assist, or approve undertakings that have the potential to affect historic properties, and when they do, they must comply with 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 offer efficiencies in 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. This Program Comment also aims to leverage existing investments in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for costly new construction materials.

Ultimately, this Program Comment aims to benefit the people who live in the housing, work in the buildings, and move using the transportation infrastructure projects being carried out, permitted,

licensed, funded, assisted, or approved by federal agencies by creating review efficiencies that deliver these projects more quickly and efficiently.

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 ¹ at the ACHP's own initiative provides the ACHP a reasonable opportunity to comment regarding the covered *undertakings*.

B. Effect on Other Applicable Laws

This Program Comment does not modify, preempt, or replace any other federal laws or regulations (including the federal rehabilitation tax credit), or any applicable state, local, or Tribal laws or regulations (including local historic preservation review or zoning ordinances, building codes, or permitting requirements).

C. ²Effect on Existing Agreements

1. Overall Effect A *federal agency* that already has an executed Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must follow the terms of those MOAs or PAs to the extent those MOAs or PAs address the *undertakings* covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of existing MOAs or PAs, or other program comments.

2. Amendment or Termination of MOAs and PAs

Federal agencies may pursue amendments to existing 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*.

If a *federal agency* elects to amend or terminate an MOA or PA, and if the applicable amendment or termination provision of such MOA or PA does not require consultation with relevant *Indian Tribes* or *Native Hawaiian Organizations*, the ACHP strongly recommends that the *federal agency* meaningfully consult with relevant *Indian Tribes* and *Native Hawaiian Organizations* in considering any such amendment or termination.

If a *federal agency* elects to terminate an MOA or PA, and if the applicable termination provision of such MOA or PA does not require notice to the ACHP of such termination, the *federal agency* must provide written notice to the ACHP of such termination and provide notice of its intent to follow this Program Comment per Section III.A.2. of this Program Comment.

3. Amendment of Existing Program Comments

Federal agencies may propose to the ACHP amendments to existing program comments following the amendment provisions in those program comments, and the ACHP may

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As a technical matter, it should be pointed out that the ACHP did not follow the procedures it recommends every other federal agency to follow in the development of a Program Comment, despite the overwhelming number of comments submitted asking it to do so. The Chair instead has stated that as those recommendations are not regulatory, so the ACHP is not required to do so - which in our view is poor form. We maintain that the ACHP stands to lose credibility and undermine its value when it refuses to follow its own advice for no reason other than the desire of the Chair.

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NCSHPO applauds this change that does not override existing agreements.

consider any amendments to incorporate, in whole or in part, the terms of this Program Comment.

D. Application on Tribal Lands

This Program Comment does not apply to *undertakings* located on *Tribal lands*, or to *undertakings* that may affect *historic properties* located on *Tribal lands*, unless the *Tribal Historic Preservation Officer (THPO)* 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 C to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on the *Tribal lands* identified in such authorization on the date of receipt of the authorization by the Executive Director of the ACHP, who must ensure notice of such authorization is included on the website of the ACHP within 30 days of ACHP's receipt. The *THPO* 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. Activities Not Covered and Exceptions

A *federal agency* must follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7 or 36 CFR § 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*.
2. The *undertaking* is not listed in the Appendices to this Program Comment.
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 found within the boundaries of a *National Historic Landmark* district.
 - c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including but not limited to 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 and Federal Agency Use

1. Available Alternative Compliance Approaches

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

¹ For *undertakings* set forth in Appendix A of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking*.

² For *undertakings* set forth in Appendix B of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking* if the *federal agency* (i) satisfies the conditions, exclusions, or requirements prescribed in Appendix B, and (ii) documents, as part of its administrative record and for any reports required by Section X of this Program Comment, the manner in which it has satisfied such conditions, exclusions, or requirements.

2. Federal Agency Notice of Alternative Compliance Approaches

³ Prior to using this Program Comment, a *federal agency* must provide a written notification to the ACHP, the National Conference of State Historic Preservation Officers, and the National Association of Tribal Historic Preservation Officers of its decision to use this Program Comment, including an identification of the geographic scope (national, state, or otherwise) in which it will use the Program Comment. The ACHP must make available on its website any such notices submitted by *federal agencies* to the ACHP pursuant to this Section.

3. Request for ACHP Advisory Opinions

A *federal agency* may seek an advisory written opinion from the ACHP as to whether it may appropriately utilize this Program Comment for an *undertaking* by forwarding to the ACHP all documentation relevant to the *undertaking*, requesting the ACHP to provide within 30 *days* its written comments, and taking the ACHP's comments into account before making a decision as to whether to utilize this Program Comment for such an *undertaking*.

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.

1. Potential Effects on Properties of Traditional Religious and Cultural Significance to Indian Tribes and Native Hawaiian Organizations

It is important to recognize that while this Program Comment was drafted to limit *effects* on *historic properties*, including sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, covered *undertakings* could directly, indirectly, or cumulatively affect such properties.

2. Consultation-Related Obligations

Number: 1 Author: hein Subject: Comment on Text Date: 12/11/2024 2:35:34 PM
Everything in Appendix A is exempted from 106. Again, this is an exemption.

Number: 2 Author: hein Subject: Comment on Text Date: 12/11/2024 2:39:10 PM
Everything in Appendix B is exempted if it satisfies certain conditions. Again, this is an exemption.

Number: 3 Author: hein Subject: Comment on Text Date: 12/11/2024 2:40:02 PM
If the Federal Agency opts to use this Program comment it should notify the affected SHPOs and THPOs - not just NCSHPO and NATHPO. There should also be some parameters - particularly if an agency wants to use this nationally. How exactly would this notification work for grant recipients, such as HUD responsible entities?

Prior to engaging in any *undertaking* for which this Program Comment requires a Type B Determination in accordance with Appendix B of this Program Comment, or for any *undertaking* for which the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering *historic properties* in which an *Indian Tribe* or *Native Hawaiian Organization* may have an interest, a *federal agency* must make a reasonable and good faith effort to identify any *Indian Tribes* or *Native Hawaiian Organizations* that might attach religious and cultural significance to *historic properties* in the *area of potential effects* and invite them to be consulting parties. 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 *federal agency* staff; historic maps; information gathered from previous consultations pursuant to Section 106 or Section 110 (subject to Section III.B.4. of this Program Comment); 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. Such *Indian Tribe* or *Native Hawaiian Organization* that requests in writing to be a consulting party shall be one.

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 but not limited to recognizing the special expertise of holders of Indigenous Knowledge. The *federal agency* must defer to the determination by an *Indian Tribe* or *Native Hawaiian Organization* that a certain individual or individuals has or have expertise (including but not limited to Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects to historic properties* of religious and cultural significance to the *Indian Tribe* or to *Native Hawaiians*.

The *federal agency* must gather information to identify whether any *historic properties* of religious and cultural significance to such *Indian Tribes* or *Native Hawaiian Organizations* are included in such *area of potential effects* in accordance with the protocols in 36 CFR § 800.4(a)(4) and must use this information to assess whether the *undertaking* could result in an *effect* on any such *historic properties*.

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

Should the *federal agency* determine through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including but not limited to a Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* will not use this Program Comment and must instead follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7, or 36 CFR § 800.8(c), or another applicable agreement or program alternative.

4. Confidentiality-Related Obligations

Consistent with 36 CFR § 800.4(a)(4) and 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, or by applicable State and local laws. *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, including when maintaining records of correspondence related to consultation under this Section. *Federal agencies* must also adhere to confidentiality requirements for other resources covered by Section 304 of the National Historic Preservation Act or other applicable State and local laws.

5. Responsibilities for Consultation and Opportunities for Outreach

The *federal agency* retains ultimate responsibility for complying with government-to-government consultation requirements. However, an *Indian Tribe* may consent in writing to allow an entity delegated legal responsibility for compliance with Section 106 in accordance with federal law to assist with or lead consultation. Such consent may be rescinded in writing by the *Indian Tribe* at any time.

Nothing in this Program Comment shall be construed to preclude or discourage early outreach by project proponents, applicants, state or local government entities, or other non-federal entities to *Indian Tribes* or *Native Hawaiian Organizations* prior to the initiation of an *undertaking*.

C. The Use of Qualified Professionals

Except where explicitly stated, *undertakings* covered by this Program Comment do not require the use of a *qualified professional*.¹ When the *federal agency* consults with a *qualified professional*, the type of *qualified professional* must be appropriate to the circumstances. As an 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.

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 CFR 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

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This clarification is appreciated.

develop a memorandum of agreement or programmatic agreement to conclude the Section 106 review. 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 ability to enter into such an arrangement and pursuant to its statutory authorities and regulations. 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 or analysis to perform preliminary assessments of eligibility to the National Register or to make recommendations about eligibility to the *federal agency* and thereby inform the *federal agency's* determination of eligibility.
- D. Conduct research or analysis to assess the potential *effects* of the *undertaking* on *historic properties* and thereby inform the *federal agency's* determination of *effects*.
- E. Carry additional research or monitor ground disturbing activities.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, or evaluation.
- 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, or minimize *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.

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 but not limited to visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of the *undertaking*, the *federal agency* must immediately halt all activity within 100 feet of the discovery or that could otherwise 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 CFR § 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. For sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow these procedures and be guided by the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects.

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 100 feet of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, any known and potentially affiliated *Indian Tribe* or *Native Hawaiian Organization*, 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* will comply with state burial laws and with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 CFR 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

¹ 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 any consulting parties involved in the *undertaking* and any relevant *State Historic Preservation Officer (SHPO) or THPO*. Objecting parties may include but are not limited to *Indian Tribes, THPO(s), SHPO(s), 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 CFR § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 *days*, the *federal agency* must 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 written comments to resolve the dispute, and take the ACHP's comments into account before making a decision regarding its approach to complying with Section 106. The *federal agency* must notify the objecting party, any consulting parties previously notified of the dispute, and any relevant *THPO or SHPO* regarding its decision regarding 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 in writing, 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 to identify patterns or common issues in the use of this Program Comment, 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*.

Number: 1 Author: hein Subject: Comment on Text Date: 12/11/2024 2:41:58 PM

As previously noted.... since the primary purpose of this PC is the exemption of activities from further 106 at an agency's own direction, this dispute resolution provision is fairly meaningless as potentially interested parties would have no idea about the undertaking unless they had been previously notified. The notification provision prescribed is too broad - allowing an agency to provide a singular notification to a national entity for a national set of undertakings. How would anyone know a specific project is taking place that is covered by this PC and, therefore, not subject to the usual Section 106 process?

VII. DURATION

This Program Comment will remain in effect from the date of adoption by the ACHP through December 31, 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 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 ¹ *federal agencies* and other parties as it deems appropriate and as set forth below.

A. Amendment by the Chair, ACHP

² The Chair of the ACHP, after notice to the rest of the ACHP membership and *federal agencies*, and after publication on the ACHP website of the Chair's written explanation (which shall take into account ACHP reports and *federal agency* reports required by this Program Comment and any comments received from *Indian Tribes*, *Native Hawaiian Organizations*, and others), may amend this Program Comment to extend its duration one time for 5 additional years. The ACHP must notify *federal agencies*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* 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* ³ 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*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* 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 CFR §§ 800.3 through 800.7, or 36 CFR § 800.8(c), or another applicable agreement or program alternative for individual *undertakings* covered by this Program Comment.

Number: 1 Author: hein Subject: Comment on Text Date: 11/22/2024 10:27:45 AM
federal agencies, SHPOs and THPOs should be specified with other parties as appropriate.

Number: 2 Author: hein Subject: Comment on Text Date: 12/11/2024 2:43:25 PM
If the Chair is being bestowed the authority to extend, they should also have the authority to terminate.

Number: 3 Author: hein Subject: Comment on Text Date: 12/11/2024 2:44:37 PM
This is too limiting as it only allows the withdraw if the Program Comment isn't being carried consistent with its own terms. As a sweeping new concept, there must be more latitude for its withdraw. In short, the ACHP should be able withdraw this Program Comment for a variety of reasons - including widespread adverse effects, unintended consequences, etc.. - not just because it isn't being carried out as written.

X. REPORTS AND MEETINGS

A. Federal Agency Reports

1. Timing of Reports

The *federal agencies* that use this Program Comment must provide annual reports to the ACHP regarding the use of this Program Comment during the previous fiscal year reporting period, ending September 30 annually, to the ACHP, as provided in this Section. Annual reports are due on December 31 of each year, starting December 31, 2025.

2. Delivery of Reports

For any reporting required by this Section, *federal agencies* whose legal responsibility to comply with Section 106 has been delegated in accordance with federal law but who maintain a reporting mechanism for some or all such entities must provide reports to the ACHP on behalf of those entities for which such data is available. ¹ Other entities to whom legal responsibility for compliance with Section 106 has been delegated must directly submit reports to the ACHP in accordance with this Section, using their own reporting mechanisms. In any report required by this Section, the ACHP encourages *federal agencies* to also propose for ACHP's consideration amendments and refinements to this Program Comment based on their experience implementing it.

3. Content of Reports

In any report required by this Section, each *federal agency* must:

- a. Identify the number of times the *federal agency* has utilized this Program Comment for *undertakings* covered by Section III.A.1.a.;
- b. For any *undertakings* covered by Section III.A.1.b., include: the address or, if no address is available, the location of the *undertaking*; information about the manner or extent to which the agency satisfied the conditions, exclusions, and requirements to proceed with such *undertakings*; the names and any institutional affiliations of any *qualified professionals*, *SHPOs*, or *THPOs* who contributed to written determinations required by this Program Comment; and a list of relevant *Indian Tribes* and *Native Hawaiian Organizations* with which consultation on such *undertaking* occurred;
- c. Identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, and their resolution;
- d. Assess the overall effectiveness of the Program Comment;
- e. List any entities to which the *federal agency* has delegated legal responsibility for compliance with Section 106 in accordance with federal law and whose *undertakings* are included in the report.

4. Template for Reports

Number: 1 Author: hein Subject: Comment on Text Date: 12/6/2024 10:05:21 AM

The agreement as a whole is very unclear as to how it would work where delegated to a grantee? With so many HUD projects operating this way, the agreement should not be silent on this. This section is really the only place where delegation is discussed.

¹ Within three months of the adoption of this Program Comment, the ACHP must develop a template for *federal agencies* to collect information about any *undertakings* covered by Section III.A.1.b. The ACHP must also endeavor to create an online reporting and tracking system for undertakings covered by this Program Comment.

5. Publication of Reports

The ACHP must make available on its website any annual reports submitted by *federal agencies* to the ACHP pursuant to this Section within 30 days of receipt.

B. Invitation to Provide Comment

At any time, any *Indian Tribe, Native Hawaiian Organization, SHPO, THPO*, consulting party, or member of the public may submit written comments to the ACHP regarding the overall effectiveness of the Program Comment in meeting its intent and regarding suggestions for amendments and refinements to this Program Comment. The ACHP must provide and maintain instructions for submission of written comments on its website. The ACHP must consider such written comments when drafting any reports required by Section X.D. of this Program Comment.

C. Annual Meetings

By March 31, 2026 and annually for the duration of this Program Comment, the ACHP must schedule an annual meeting and invite *federal agencies, Indian Tribes, SHPOs, THPOs, Native Hawaiian Organizations*, ACHP members, consulting parties, 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.

D. ACHP Reports and Recommendations for Amendments

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 at an ACHP business meeting a written and oral summary of information received from *federal agency* reports, annual meetings, comments provided pursuant to Section X.B. of this Program Comment, or other sources about the utility of this Program Comment and make any recommendations for amendments. The ACHP must make such written summary of information and such recommendations available to the public through posting on the ACHP website within 30 days of such meeting.

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, remove, or encapsulate.

Adverse effect, as provided in 36 CFR § 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

Number: 1 Author: hein Subject: Comment on Text Date: 12/4/2024 9:34:51 AM

This should be in place prior to adoption of the PC or the effective date of the PC should be dependent upon these templates. They are an integral safeguard to the terms of the PC. The template should also be created with input from SHPOs.

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.

Alternative transportation infrastructure means a *building* or structure used for pedestrian, bicycle, *micromobility vehicle*, and *transit* purposes.

Area of potential effects, as provided in 36 CFR § 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 is not physically separated from motor vehicle traffic and that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

Bicycle locker means a device or structure for storing personal or shared bicycles and *micromobility vehicles*, that may have a cover and enclosure to protect the bicycles and *micromobility vehicles* from weather or theft and is not intended for human occupancy.

Bicycle parking means a designated area to store a bicycle, whether personal or shared, including but not limited to *bicycle racks*, *bicycle lockers*, *bicycle shelters*, and dedicated docks and kiosks used in a shared system for bicycles or *micromobility vehicles*.

Bicycle rack means a rack for a personal or shared bicycle or *micromobility vehicle*.

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

Bicycle shelter means a canopy structure above a *bicycle rack* for a personal or shared bicycle or *micromobility vehicle* that provides partial weather protection of the rack and bicycles or *micromobility vehicles*.

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 but not limited to mobile and manufactured homes and *alternative 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.

Building safety system means fire alarm, fire suppression, and security systems and equipment.

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 *alternative transportation infrastructure*.

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.

Economic feasibility means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to estimated construction costs (including but not limited to the cost of *building* material and labor), estimated operational costs, material availability and life cycle, available budget, and the long-term sustainability of the *undertaking*.

Effect, as provided in 36 CFR §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative impact or 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 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 electric vehicle.

EVSE criteria means: (1) taking 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) using reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimizing *ground disturbance* to the maximum extent possible, and ensure that it does not exceed previous levels of documented *ground disturbance*; (4) using the lowest profile equipment reasonably available that provides the necessary charging capacity; (5) placing the EVSE in a minimally visibly intrusive area; and (6) using colors complementary to surrounding environment, where possible.

Federal agency means an agency as defined by 5 U.S.C. § 551(1), and for Section 106 purposes the term *federal agency* includes state, local, or Tribal governments that have been delegated legal responsibility for compliance with Section 106 pursuant to federal statutory authority such as that under the provisions of the Housing and Community Development Act of 1974 at 42 U.S.C. § 5304(g).

Flex post means flexible bollards or delineators used to separate motor vehicle traffic from a *bicycle lane* or *protected bicycle lane* 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.

Ground disturbance means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils.

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 but not limited to lead-based paint), asbestos, asbestos-containing material (including but not limited to 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 pavement using a polymer binder to restore or maintain pavement friction.

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, as provided in 36 CFR § 60.3(d), means a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of historic sites, *buildings*, structures, or objects united by past events or aesthetically by plan or physical development.

Historic property, as provided in 36 CFR § 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 significance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

Housing means any *building* containing or proposed to contain 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, barracks, and freestanding homes.

¹*Independent utility* means those aspects of a project, activity, or program without which the specifically approved project, activity, or program would not serve a rational need.

Indian Tribe, as provided in 36 CFR § 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 in composition, design, color, texture, size, dimension and other physical and visual properties.

In-kind replacement means *replacement* of *historic building materials* with *in-kind building materials* or *replacement* of other existing materials, elements, or equipment with new materials, elements, or equipment that are physically and visually similar in all possible respects.

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

Maintenance means activities required to maintain in an operational state, or to bring back to operating condition.

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, including but not limited to 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, waste heat recovery devices (including but not limited to desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment), adjustable speed drives, duct and pipe systems (including but not limited to return ducts, diffusers, registers, air filters, and thermostatic radiator controls), refrigeration lines, and building energy control systems.

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 approximately 15 to 30 miles per hour.

National Historic Landmark, as provided in 36 CFR § 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 CFR § 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 CFR § 800.16(s)(1), means any organization which serves and represents the interests of *Native Hawaiians*; has as a primary and stated purpose

Number: 1 Author: hein Subject: Comment on Text Date: 12/11/2024 2:53:39 PM

This definition needs work. A project with independent utility is a project that stands on its own and not in connection with or necessary for the completion of other projects. This definition states that it is of independent utility if without it a project would not be needed. This is backwards. This makes it a dependent utility, not independent.

the provision of services to *Native Hawaiians*; and has demonstrated expertise in aspects of historic preservation that are significant to *Native Hawaiians*.

Non-significant façade means any exterior façade of a *building* which does not contribute to the historic significance of the *building*.

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 materials* that are 45 years or older, including but not limited to those comprised of pavers, cobblestones, Belgian blocks, bricks, or wood and those involving earthworks or roofs of structures entirely underground.

¹*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, including *previously disturbed right-of-way*, and does not mean areas that have been shallowly disturbed (such as via plowing) and does not mean areas in which the previous disturbance occurred sufficiently long ago to allow for subsequent deposit of cultural resources that are now over 45 years old (such as historic urban deposits).

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 a historically significant property to remain, including but not limited to: the entire curb-to-curb roadway, existing sidewalks, existing drains, and parking areas, including but not limited to 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.

²*Primary space* means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other public space that contains a concentration of *character-defining features* of a *historic building* or *historic alternative transportation infrastructure*.

Protected bicycle lane means a bicycle or *micromobility vehicle* facility, whether one-way or two-way (such as a cycle track), that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

Qualified professional means a person who meets the relevant standards for the appropriate corresponding discipline 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 but not limited to 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 transportation manuals: 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,

Number: 1 Author: hein Subject: Comment on Text Date: 12/11/2024 2:45:42 PM

Who would make this determination? Without testing, you might be able to assess the horizontal breadth of disturbance but it is impossible to know the depth of the disturbance. The standard of "previously disturbed ground" is a well known mechanism for ignoring potential for subsurface deposits in developed areas.

Number: 2 Author: hein Subject: Comment on Text Date: 12/6/2024 10:07:47 AM

The National Register defines primary space as: Primary spaces are those that are essential in conveying the historic and architectural character of a building.. This should be incorporated into the definition for consistency.

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 and available *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, local preservation or planning office, and *federal agency* files, records, inventories, and databases, or other sources recommended by such parties, for information about whether *historic properties*, including but not limited to 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*.

Repair means fix or mend obsolete, broken, damaged, or deteriorated features, elements, materials, and systems. *Replacement* means substitution of new material, element, or equipment for an existing material, element, or equipment, including *in-kind replacement* and including substitution requiring a change in composition, design, color, texture, size, dimension, location, or configuration in order to improve the function and condition of the material, element, or equipment or the broader system of which the material, element, or equipment is a part.

Resilience means the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

Right-of-way means land developed or designated for the public passage of people using any mode of transportation, including *transit*.

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 CFR § 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*.

Technical feasibility means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to health, safety, energy efficiency, *resilience*, durability of materials, and sound professional judgment (including but not limited to architectural, archaeological, or engineering judgment).

Transit means mass transportation by a conveyance (including but not limited to 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 shelter means a canopy structure or other structure open to the elements on at least one side, which provides partial weather protection for users of *transit*, such as those provided at city bus stops or along rail platforms.

Tribal Historic Preservation Officer, as provided in 36 CFR § 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*

Number: 1 Author: hein Subject: Comment on Text Date: 12/11/2024 4:56:50 PM

Assuming this is meant to be a separate definition item. That said, the definition is too broad - Replacement is one term. In-Kind replacement is another.

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 CFR § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

Undertaking, as provided in 36 CFR § 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. ¹An *undertaking* must have ²*independent utility*.

Number: 1 Author: hein Subject: Comment on Text Date: 12/12/2024 10:46:02 AM

This is not in the statutory definition of undertaking and the definition provided for independent utility is flawed, instead seemingly describing what a project of "dependent utility." would be.

Number: 2 Author: hein Subject: Comment on Text Date: 12/11/2024 7:56:30 PM

Some of the undertakings described in this document cannot possibly have independent utility - they are rather of "dependent utility," in other words they are undertakings tied to a larger project.

APPENDIX A: ACTIVITIES NOT REQUIRING FURTHER REVIEW

1. Site Work

1 The following activities do not require further Section 106 review:

a. *Maintenance or repair* of any of the following elements, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

i. Concrete and asphalt ground surfaces such as streets, parking areas, driveways, alleys, ramps, sidewalks, and walkways, including repaving, restriping, replacing such surfaces with *permeable ground surface materials*, sealing (including *installation* of slurry seals, overlays, and seal coatings), filling, milling, grinding, grooving, 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, netting, basketball hoops, drinking fountains, and *ground surface materials*.

iii. Fencing.

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 landscape elements (such as planted beds), or in park and playground areas, and including but not limited to relamping and rewiring.

vi. Water features, such as decorative fountains, including but not limited to replumbing.

vii. Curbs, gutters, steps, ramps, and retaining walls.

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

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

x. *Bulb outs*, crosswalks (including but not limited to raised crosswalks across roadways and raised intersections), traffic calming devices (including but not limited to speed humps and speed tables), or islands (including but not limited to pedestrian islands and corner islands to separate or protect bicycles).

xi. *High friction surface treatments*, *cool pavements*, *permeable ground surface materials*, and rumble strips.

xii. *Green infrastructure*, sprinkler heads, irrigation lines, and gray water systems.

xiii. Benches, tables, and freestanding planters.

xiv. Vault toilets.

b. Any of the following landscaping, grounds, and water management activities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

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Generally, this section exempts maintenance and repair activities of **existing** materials and elements found on a building site/grounds or street scape. Many are minor, and many may not even be undertakings currently subject to review. As such, many would seem appropriate actions to cover in a program alternative, in certain circumstances.

- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, sheering, feeding, seeding, reseeding, mulching, aerating, 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, or within 10 feet of, its existing location.
 - iv. Removal of grass, shrubs, brush, leaves, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.
 - v. Removal of rocks, litter, and debris, but not rocks arranged in a rock wall or other man-made feature.
 - vi. Removal of small conifers growing between mature trees.
 - vii. Removal of sediment, silt, and debris from man-made drainage facilities, including retention and detention basins, ponds, ditches, canals, and sumps.
- c. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter
- d. *Installation* or removal of temporary construction-related structures, including but not limited to scaffolding, barriers, screening, sediment-capture devices, fences, protective walkways, signage, office trailers, cofferdams, and restrooms, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance* and that such activity does not damage any existing *building* or *structure*.
- e. Elevation of the ground surface within *previously disturbed right-of-way* by up to 18 inches to maintain, create, or connect *alternative transportation infrastructure*, or to facilitate boarding and disembarking at *transit* facilities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*.
- f. Removal of a deteriorated or damaged mobile or manufactured home or other temporary *building* or structure, not including removal of foundations.

2. Work on a Building Exterior

The following activities do not require further Section 106 review when conducted on the exterior of a *building*:

- a. *Maintenance* or *repair* of any of the following elements:
 - i. Doors, including but not limited to insulated exterior doors and basement bulkhead doors.
 - ii. Windows, including but not limited to storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
 - iii. Siding.
- b. *Maintenance* or *repair* of any of the following elements, or *in-kind replacement* of any above-ground components of any of the following elements:
 - i. *Mechanical systems*.
 - ii. *Building safety systems*.

- iii. Canopies, awnings, and solar shades.
 - iv. Roofing, including but not limited to cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; fasteners and ties to attach roofing to structural elements; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.
 - v. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
 - vi. *Clean energy technologies*.
 - vii. Elevator systems.
 - viii. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
 - ix. Foundations and foundation vents.
 - x. Chimneys.
 - xi. Vents, including but not limited to continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.
 - xii. Energy and water metering devices.
 - xiii. *Building-mounted utility infrastructure*, including but not limited to wires and anchors.
 - xiv. ¹~~Installation of~~ stanchions, fasteners, or tracks for flood shields.
- c. ²~~Replacement or installation of building-mounted solar energy systems~~ if such system is installed with methods that do not irreversibly damage *historic building materials*, sits close to the roof, and has a profile that matches the roof profiles (such as pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.
- d. Any of the following *maintenance* or *repair* activities:
- i. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.
 - ii. Repointing of mortar joints with mortar matching in composition, joint profile, color, hardness, and texture of existing mortar.
 - iii. 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 and not including sandblasting of masonry over 45 years old.
- e. Paint or stain on previously painted or previously stained exterior surfaces, provided that no historic decorative paint schemes or colors (such as graining, stenciling, marbling) will be covered and provided that for masonry over 45 years old, there will be no use of nontraditional or historically inappropriate masonry coatings, including painting of previously unpainted historic masonry, masonry consolidants, and waterproof or water-repellant coatings.

 Number: 1 Author: hein Subject: Cross-Out Date: 11/22/2024 10:51:38 AM
For consistency, "installation" does not belong here.

 Number: 2 Author: hein Subject: Comment on Text Date: 11/26/2024 1:44:37 PM
Not in favor of blanket installation of solar systems on front-facing gabled roofs without any review. Flat roofs, rear-facing angled roofs, etc. are fine. And in some cases front-facing may be fine - but review would enhance outcomes.

f. *Abatement of hazardous materials* where *effects* of the *abatement* are not visible on the *building* exterior, and the *abatement* either is limited to *previously disturbed ground* or creates no new *ground disturbance*.

3. Work on a Building Interior

The following activities do not require further Section 106 review when conducted entirely in the interior of a *building*:

a. *Maintenance or repair* of any of the following elements:

- i. Walls, ceilings, and flooring.
- ii. Doors.
- iii. Light fixtures.
- iv. Elevator systems.
- v. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- vi. Chimneys.
- vii. Skylights, atria, courtyards, or lightwells.

b. *Maintenance, repair, or in-kind replacement* of any of the following elements:

- i. *Mechanical systems*.
- ii. *Building safety systems*.
- iii. Light bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
- iv. Battery energy storage systems.
- v. Thermal insulation, other than closed cell spray foam, in or around walls, floors, ceilings, attics, crawl spaces, *mechanical systems*, and foundations, where such insulation can be installed and removed without damaging exterior walls, and where such insulation will not cause condensation that could damage exterior walls – even if such insulation increases interior wall thickness.
- vi. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
- vii. Foundations and foundation vents.
- viii. Energy and water metering devices.

c. Maintenance, repair, replacement, or installation of household or kitchen appliances, where such appliances are Energy Star rated, or replace existing appliances with appliances with higher Energy Star ratings, or replace existing non-electric appliances with electric appliances.

 Number: 1 Author: hein Subject: Comment on Text Date: 12/6/2024 10:01:15 AM

If it increases interior wall thickness, it is not a repair, maintenance or in-kind replacement. Rather, it is installation of new material.

 Number: 2 Author: hein Subject: Comment on Text Date: 11/22/2024 11:05:48 AM

maintenance/repair OR replacement OR Installation of NEW appliances.

- d. Caulking, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.
- e. Painting or staining previously painted or previously stained interior surfaces, provided that no decorative paint schemes or colors (such as graining, stenciling, or marbling) will be painted or stained.
- f. *Abatement of hazardous materials* where *effects* of the *abatement* are only visible from within an individual *housing unit* or where *effects* are not visible from the *building interior*.

4. ¹ Work Involving Transportation Fixtures and Equipment

² ~~The following activities do not require further Section 106 review, provided 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, replacement, or installation of the following elements:~~

- ~~i. Bicycle racks or dedicated docks or kiosks used in a shared system for bicycles or micromobility vehicles.~~
- ~~ii. Bicycle rails.~~
- ~~iii. Flex posts.~~
- ~~iv. Concrete or stone blocks affixed to the ground by their weight.~~
- ~~v. Marks on the ground surface for visibility and delineation, including but not limited to striping for bicycle lanes, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, marks for bicycle parking, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.~~
- ~~vi. Detectable warnings on or before a curb, entry point, crosswalk, or accessible facility.~~

~~b. Maintenance or repair of any of the following elements, or in-kind replacement of any above-ground components of any of the following elements:~~

- ~~i. Signs, signals, traffic control devices, or signalization, including but not limited to any such elements that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.~~
- ~~ii. Cameras, masts, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.~~
- ~~iii. Tracks, including but not limited to ballasts and ties.~~
- ~~iv. Clean energy technologies supporting alternative transportation infrastructure.~~
- ~~v. Signal bridges.~~
- ~~vi. Transformers, breakers, switches, and other electrical components.~~

~~e. Maintenance or repair of the following elements, or in-kind replacement of any above-ground components of the following elements:~~

 Number: 1 Author: hein Subject: Comment on Text Date: 11/22/2024 11:07:48 AM

Once again, transportation activities and housing/energy efficiency measures are not related and should not be together in the same agreement document. It is simply poor, disorganized and random public policy for no justifiable reason.

 Number: 2 Author: hein Subject: Cross-Out Date: 11/22/2024 11:08:49 AM

~~i. Bollards.~~

~~ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures.~~

~~iii. Transit shelters, bicycle lockers, or bicycle shelters.~~

~~5. Work on Bridges~~

~~The following activities related to bridges built as or incorporated into *alternative transportation infrastructure* do not require further Section 106 review:~~

~~a. Maintenance or repair 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 but not limited to pin-and-hanger replacement and other retrofits.~~

~~e. Implementing countermeasures against scour.~~

6. Other Activities

The following activities lack any potential to cause *adverse effects* and therefore do not require further Section 106 review:

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

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* or by another entity receiving federal financial assistance (such as a state, Tribal, or local government, or joint venture, railroad commission, compact authority, port authority, transit agency or authority, private company, or other project sponsor), of: *buildings*, energy efficiency or *electrification* materials or equipment, *clean energy technologies*, railway *rights-of-way* for the *maintenance*, development, or expansion of rail-to-trail pathways or passenger rail service, and fleets of bicycles, *micromobility vehicles*, hybrid or electric vehicles, or electric locomotives, provided that any changes in use or access, or any physical actions related to such activities 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. Direct home mortgages or mortgage guarantees for homeowners.

e. Transfer, lease, or sale of a federal government-owned *building* or *alternative transportation infrastructure* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.



~~1. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, micromobility vehicle, or transit uses, including but not limited to “play streets,” “school streets,” “safe route to school” streets, “open streets,” tolling, or congestion pricing, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.~~

~~g. Maintenance, repair, replacement, and installation of electric vehicle supply equipment satisfying the EVSE criteria.~~

h. Treatment for pests, rodents, insects, and termites that does not visibly alter or obscure the structural, architectural, or decorative features of a *building*.

APPENDIX B: ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

1. Written Determinations

Certain *undertakings* listed in this Appendix B, ¹ due to their nature and potential *effects*, require a written determination before the *federal agency* may proceed with the *undertaking*. ² Applicable review processes and criteria for each type of determination are outlined below. After any such determination is made, the *federal agency* shall include the determination in its administrative record.

a. Type A Determination for Ground-Related Activities

A Type A Determination requires the *federal agency* to obtain a written determination that the *undertaking* is limited to *previously disturbed ground*, creates no new *ground disturbance*, or will have no *adverse effects* on any *historic property* from a *qualified professional* meeting the professional standards for archeology established by the Secretary of the Interior, the relevant *SHPO*, or the relevant *THPO*.

b. Type B Determination for Ground-Related Activities

A Type B Determination ³ requires the *federal agency* to identify the *area of potential effects* in accordance with 36 CFR § 800.4 and either (a) (i) consult with *Indian Tribes* and *Native Hawaiian Organizations* in accordance with Section III.B. of this Program Comment and (ii) obtain a written determination that the activity will have no *adverse effects* on any *historic property* from either a *qualified professional* meeting the applicable professional standards established by the Secretary of the Interior or the relevant *SHPO*; or (b) conduct a field survey of the *area of potential effects* or obtain a field survey of such area completed within the past 10 years, where such survey is acceptable to current state or Tribal standards and, if applicable, has been subject to consultation with *Indian Tribes* and *Native Hawaiian Organizations*, without such survey or consultation identifying any *historic properties* in the *area of potential effects*.

In addition to explicit provisions in this Program Comment requiring a Type B Determination, if the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering subsurface *historic properties* or burial sites, human remains, funerary objects, sacred objects, or items of cultural patrimony, then a Type B Determination must be made before work can proceed pursuant this Program Comment.

c. Type C Determination of *Historic Building* Status

A Type C Determination applies to ⁴ *buildings* placed in service 45 or more years ago and requires the *federal agency* to either (a) make a written finding that such *building* has not been identified as a *historic building* within the preceding 10 years after a *records check* and a review of its own records or (b) obtain a written determination from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or the relevant *SHPO* that such building is not a *historic building*. If a *building* was placed in service fewer than 45 years ago, then a Type C Determination is not required.

d. ⁵ *Track D* Determination for Window, Door, and Siding *Replacements*

A Type D ⁶ Determination applies to *undertakings* involving the *replacement* of a window, door, or siding of a *historic building* or of a *building* that has not received a Type C determination. A Type D Determination requires that (a) a *qualified professional* meeting the professional standards for

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- Number: 1 Author: hein Subject: Comment on Text Date: 12/12/2024 12:41:38 PM
Activities exempted provided the agency follows certain conditions - usually just by hiring someone or using staff meeting the SOI Professional Qualification Standards. The problem is there is no check and balance. An agency can hire/pay for someone meeting the standards, or utilize their own staff and heavily influence the outcome. This may be appropriate for agencies with proficiency in 106 and strong protocols - but since this is government wide, this is too subject to potential abuse and poses some Conflicts of Interest. The nature of these undertakings - usually material replacement, installation of new materials, etc., alterations... these are more intrusive than repair/maintenance activities. They are in some cases adverse effects, per the ACHP's own regulations. Sanctioning adverse effects with no consultation or discussion of mitigation, is not appropriate in many of these instances.
-
- Number: 2 Author: hein Subject: Comment on Text Date: 12/6/2024 10:12:14 AM
Eliminating actual DOE processes and substituting new ones sets a confusing government wide precedent giving the entire federal government unilateral discretion. While consultation is allowed, since it isn't required, it creates a government-wide parallel process that sets a dangerous new precedent for a sweeping set of potential undertakings.
-
- Number: 3 Author: hein Subject: Comment on Text Date: 11/22/2024 2:14:08 PM
Requires the agency to identify APE following standard regulations - which requires to identify historic properties in consultation with others, including in consultation with SHPOs and tribes - and then either consult with tribes and obtain written determination activity will have no adverse effects from a SOI qualified professional OR SHPO; or they conduct a survey. This is an odd arrangement - the agency would have to consult with SHPO on APE, but then could use a SOI qualified professional (but not the SHPO) to assess effects. Or after consulting on the APE, they complete a survey and then proceed without further consultation?
-
- Number: 4 Author: hein Subject: Comment on Text Date: 11/22/2024 2:25:16 PM
For buildings over 45 years old agency can perform a "records check" and determine on its own it is NOT a historic building. While the definition of "records check" in the document is fairly thorough, it is unclear whether the agency has to actually speak with the SHPO/THPO/NHO or whether they may only rely upon publicly available data. Perhaps definition of records check could be clarified?
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- Number: 5 Author: hein Subject: Comment on Text Date: 11/22/2024 2:22:12 PM
Track or Type?
-
- Number: 6 Author: hein Subject: Comment on Text Date: 11/22/2024 2:33:51 PM
For buildings that failed Type C (meaning they are historic properties), an agency can have a SOI qualified individual make a determination that a replacement window, door or siding is an in-kind material OR that a substitute material is appropriate... AND if the agency determines that the replacement will reduce energy use. This potentially conflicts with the concept of using an in-kind material. In other words, it would only apply if in-kind material will reduce energy use. If a material is in-kind it may be hard to quantify an energy reduction. There are some requirements for considering life cycle and carbon.... but would this still incentivize replacement of these elements with substitutes in instances where the better choice might still be in-kind?

historic architecture or architectural history established by the Secretary of the Interior or the *SHPO* make a written determination that any *replacement* window, door, or siding is an *in-kind building material* or make a Type G Determination; and (b) the *federal agency* make a written determination that the *replacement* of a window or windows, door or doors, or siding as applicable, will reduce energy use of the *building*, after consideration of the lifespan and embodied energy of the existing element, the cost and carbon impact (including transportation-related impacts) of producing the *replacement* element, the *technical feasibility* of modifying the existing element to align it with current energy efficiency standards and codes, and the payback period of the *replacement* element.

e. Type E Determination for *Character-Defining Features* and *Non-Significant Facades*

A Type E Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type E Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *character-defining feature* of the *building* façade or that the *effects* of a proposed action will be limited to a *non-significant façade*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*. If a *building* was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type E Determination is not required.

f. Type F Determination for *Character-Defining Features* and *Primary Spaces*

A Type F Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type F Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *primary space* at all, or will not affect a *character-defining feature* in a *primary space*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*, and all lobbies, ceremonial rooms, and ground-floor hallways (unless primarily used for utility purposes) shall automatically be deemed *primary spaces*. If a *building* was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type F Determination is not required.

g. Type G Determination for Substitute Building Material *Replacements*

A Type G Determination applies to *undertakings* involving the *replacement* of *historic building materials* with substitute building materials. A Type G Determination requires that the *federal agency* obtain a written determination from either a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*, that the substitute building material is appropriate based on the following factors: (a) the character of existing *historic building materials* in terms of condition, design, material properties, performance (including but not limited to insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*; (b) the *technical feasibility* and *economic feasibility* of *repairing* or *replacing* the *historic building materials*; and (c) the suitability of available substitute building materials, with attention to composition, design, color, texture, size, dimension and other physical and visual properties.

Number: 1 Author: hein Subject: Comment on Text Date: 11/22/2024 2:41:34 PM

An agency can have an SOI qualified individual determine that a proposed action won't affect a "primary space" or not affect a character-defining features of a "primary space." For buildings over 45 years deemed not historic, it is to be treated as it is anyway. HOWEVER....see next comment.

Number: 2 Author: hein Subject: Comment on Text Date: 11/22/2024 2:41:15 PM

Why are lobbies, ceremonial rooms, ground-floor hallways deemed primary spaces in buildings 45 years or older that are not historic.... but for buildings that are, there is no similar provision?

h. *State Historic Preservation Officer Reviews*

The *State Historic Preservation Officer* shall have 30 days to review and respond to an adequately documented request by a *federal agency* for a determination pursuant to this Section. If the *State Historic Preservation Officer* requests additional, missing information in order to make its determination, the *State Historic Preservation Officer* shall have 30 days from receipt of the additional information to respond. If the *State Historic Preservation Officer* does not respond within 30 days of receipt of the request or the amended request, as applicable, then the determination shall be deemed to have been made.

2. Site Work

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

1. Replacement of any element listed in Appendix A, Section 1.a., after a Type A Determination has been made.

2. Removal of any element listed in Appendix A, Section 1.a., after a Type B Determination has been made.

3. Installation of any element on the same lot as a *building* or within an existing *right-of-way* and listed in Appendix A, Section 1.a., after a Type B Determination has been made.

d. Planting a tree (other than replacing a tree per Appendix A, Section 1.b.iii.), after a Type A Determination has been made.

e. Test borings, soil sampling, well drilling, or perc tests more than eight inches in diameter, after a Type B Determination has been made.

f. Any of the activities listed in Appendix A, Sections 1.d., 1.e. or 1.f. that have the potential for new *ground disturbance*, after a Type B Determination has been made.

g. Removal of oil tanks, septic tanks, or hazardous materials, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*, after a Type B Determination has been made.

3. Work on a Building Exterior

The following activities do not require further Section 106 review, when conducted on the exterior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

4. Replacement or installation of any of the elements listed in Appendix A, Section 2.a., after a Type C Determination has been made.

5. Replacement or installation of any of the elements listed in Appendix A, Section 2.a., if a Type C Determination cannot be made or is inconclusive, after a Type D Determination has been made.

6. Replacement or installation of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 2.b., if a Type E Determination has been made.

d. Abatement of hazardous materials where effects of the abatement may be visible from the *building* exterior, if a Type E Determination has been made.

-
- Number: 1 Author: hein Subject: Comment on Text Date: 12/12/2024 12:52:43 PM
This allows for the **replacement** of streets, sidewalks, retaining walls, fences, lighting, fountains, gutters, utilities, signage, etc. provided an agency decides via a SOI qualified individual that there is no new ground disturbance and no adverse effects. We are not comfortable with agency staff or consultants making their own adverse effect determinations without any consultation on the replacement - given the definition offered for replacement, in this document is so broad and inconsistent with SOI Standards. With the more permissive definition of replacement offered in this document leading to work not in keeping with the standards, per the ACHP's own regulations, an adverse effect determination is required. But this document suggests by meeting the definition of replacement contained here, a no adverse effect determination would be possible. This is a conflict.
-
- Number: 2 Author: hein Subject: Comment on Text Date: 12/12/2024 12:59:34 PM
This allows the agency to **remove** streets, walkways, playgrounds, fences, signage, lighting, retaining walls, etc. if their staff or consultant determines, after consultation on APE, there is no new ground disturbance or no adverse effect. Again uncomfortable with the removal of elements simply because an agency or their consultant says there is no adverse effect, without any consultation.
-
- Number: 3 Author: hein Subject: Comment on Text Date: 12/12/2024 1:00:43 PM
This allows for the **installation** of new streets, sidewalks, retaining walls, fences, lighting, fountains, gutters, utilities, signage, etc. if the agency staff or consultant determines, after consultation on APE, there is no new ground disturbance or no adverse effect. Uncomfortable with the installation of new elements because an agency or their consultant says there is no adverse effect, without any consultation.
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- Number: 4 Author: hein Subject: Comment on Text Date: 11/22/2024 3:31:43 PM
agency can replace or install doors, windows, siding if its staff or consultant determines it isn't a historic property.
-
- Number: 5 Author: hein Subject: Comment on Text Date: 12/12/2024 1:05:54 PM
This allow an agency to replace elements if it can't determine whether a building is historic or not if their staff or consultant determines it uses in-kind or substitute materials AND it determines it would reduce energy usage. What metric/who determines the energy reduction? What happens if the best choice does not result in a reduction? Is there to be a preference towards selections that have more energy efficiency but may not be the best material choice? All because no consultation is required to determine if a building is a historic property or not? This is not responsible.
-
- Number: 6 Author: hein Subject: Comment on Text Date: 12/12/2024 1:07:20 PM
This allows replacement or installation of new HVAC, canopies, roofs, ADA, elevators, foundations AND SOLAR if agency staff or consultant determine it won't impact a character defining feature or facade or will be limited to insignificant facade. Note that replacement or installation of solar is additionally covered in A, Section 2.c. So there is confusing redundancy and perhaps inconsistency with A Section 2.b.vi. since solar is included in the definition of "clean energy technologies." We are not comfortable with agencies determining the significance of facades without any consultation.

e. *Abatement of hazardous materials* where *effects* of the *abatement* have the potential for new *ground disturbance*, after a Type B Determination has been made.

4. Work on a Building Interior

The following activities do not require further Section 106 review, when conducted entirely in the interior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

¹ a. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., after a Type C Determination has been made.

² b. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., if a Type C determination cannot be made or is inconclusive, after a Type F Determination has been made.

c. *Abatement of hazardous materials* where *effects* of the *abatement* may be visible from the *building* interior (other than from the interior of an individual housing unit), after a Type F Determination has been made.

~~3. Work Involving Transportation Fixtures and Equipment~~

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

~~a. *Replacement* of any of the elements (whether above ground or below ground) listed in Appendix A, Section 4.b. after a Type B Determination has been made.~~

~~b. *Installation* of signs, signals, traffic control devices, or signalization supporting *alternative transportation infrastructure*, or *installation* of any of the elements (whether above ground or below ground) listed in Appendix A, Section 4.b.ii., after a Type B Determination has been made.~~

~~c. *Installation* of *clean energy technologies* supporting *alternative transportation infrastructure*, after a Type B Determination has been made.~~

~~d. *Installation* of any of the following elements after a Type A Determination has been made:~~

~~i. Bollards no taller than 48 inches and no larger in diameter than 12 inches.~~

~~ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures, 6 feet or less in height and 3 square feet or less in horizontal cross-section area, in addition to height or cross-section needed to incorporate solar power into such structures.~~

~~iii. *Transit shelters, bicycle lockers, or bicycle shelters* 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.~~

~~6. Work on Bridges~~

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

 Number: 1 Author: hein Subject: Comment on Text Date: 12/12/2024 1:12:27 PM

Agency staff or consultant can replace or install walls, doors, lights, HVAC, insulation, ADA, foundations, etc. if they can't find record of it being a historic building. This is why relying just on records checks is not the best way to determine if a building is historic or not. Actually talking to a SHPO is a responsible step. With some qualifiers here, there is interest in reducing reviews and giving more latitude in interior spaces - but more than a records check and delegating the identification of "character-defining" or "primary" spaces alone to an agency should be necessary. Clearer pathways and guardrails, if thoughtfully employed, could provide some real efficiencies and take unnecessary reviews off the table. NCSHPO supports continuing the conversation on these.

 Number: 2 Author: hein Subject: Comment on Text Date: 12/12/2024 1:14:32 PM

This provides the same things as above if they can't determine if it is historic or not if their staff or consultant thinks it won't impact a primary space. Again, if we can settle the historic property question and define the process for identifying primary and character-defining features and spaces, there is great interest in reducing reviews of various interior rehabilitation elements.

 Number: 3 Author: hein Subject: Cross-Out Date: 11/22/2024 3:51:40 PM

Again, we believe transportation does not belong in a vehicle primarily covering buildings.

~~a. Replacement or installation of a bridge built to serve pedestrian, bicycle, micromobility vehicle, or transit use, after a Type B Determination has been made.~~



APPENDIX C: 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] Ohio SHPO's Comments on the Revised Program Comment on Certain Housing, Building, and Transportation Activities

From Kristen Koehlinger <kkoehlinger@ohiohistory.org>
Date Sat 14-Dec-24 5:28 PM
To Program Alternatives <program_alternatives@achp.gov>
Cc Diana Welling <dwelling@ohiohistory.org>

 1 attachment (196 KB)

PC_11_15_24_AppendixA_OHSHPO_Comments.pdf;

Dear Advisory Council, Chair Bronin, and ACHP Staff,

First, thank you for considering the comments and concerns that were previously raised. We feel that this revised program comment is a good step forward, however, we do still have some concerns that we would like to bring to your attention. Most of these are based on our experiences with programmatic agreements that specifically use personnel who do not meet the Secretary of the Interior's Professional Qualification Standards.

1. If a federal agency determines that only one work item cannot be exempt, are they allowed to only send that work item to the SHPO for coordination or do they send in the entire project? We would prefer that the entire project be sent to us. We do not want to say that the one work item would not affect historic properties and then find out that the accumulative affect of the work, or a work item that was wrongly exempted would have been an adverse effect if we had known the full scope of the undertaking.
2. We appreciate the additional monitoring that was added, but please also consider adding required example projects. Those are the most helpful in catching that the exemptions were not being followed. In our monitoring reports, we usually have a list of projects that give us the address, age of the building, what the work entailed, and what stipulation was used to exempt the project and by whom. We also request that they send us three example projects that include the information they used to exempt the work. There have been many times where the list says that the roof was replaced, and then in the example for that project there was a work item that removed the chimney. Luckily, we were able to see the property and determine it was not eligible for listing in the National Register, so we could let it go. By seeing the example information they provided, we were able to have the conversation and help train the community and the person as to what is exempt. With just a list, a full story isn't always provided.
3. In the definitions, the term "non-significant" facade needs to be clarified. Is this referring to all secondary elevations? What happens when there is a building that takes up an entire block and all four elevations are visible, highly decorative, and significant? The building I am thinking about is an old post office building in Toledo. Yes, we did allow more changes to the loading dock because they had historical evidence that the area had been significantly altered. If they had not had that proof and if the amazing loading dock canopy had still been in place, all four sides might have been considered significant. We just caution the Council and want to bring to your attention that based on our experience, the people doing the work every day are usually not qualified professionals, but they will still make that judgement call to move the project along. Are there repercussions if something like this happens or if things are exempted that should not have been?
4. In the exemptions, there are some concerns about the ground disturbing activities that are being exempted. I have attached the draft Appendix A with our comments.

5. Are federal agencies required to do their typical public notifications for projects reviewed under the program comment? From the meeting, many of the SHPO's had concerns about projects happening and the public coming to them to complain if they do not like something that is being done but the SHPO's will not even know anything about the project. If they do still need to this, can they please send the appropriate SHPO a copy and make it clear that the project is being reviewed under this program comment in the public notice?
6. In addition to item 2 above, if they are not required to do public notifications, then is the only way to comment on an exempt project and bring up a dispute by going to ACHP's website every day to see what new projects have been posted?
7. In Appendix B, they talk about different types of reviews. If the Federal Agency decides to use a qualified professional to determine eligibility, and they determine that the property is eligible, can we get notified so that we can document it on our mapping system and hopefully in our historic inventory? Chair Bronin did state in the meeting that based on some of the feedback ACHP has received from federal agencies, they are more likely just to come to the SHPO for these determinations instead of a qualified professional. We hope that pans out, so that we can keep track of all resources that have been determined eligible in our state.
8. Also, for Appendix B, we would recommend that the qualified professional making these determinations, if they are not consulting with the SHPO, either work for the federal agency or be contracted by the federal agency. They should not be the consultant working for the project applicant.
9. In the meeting with the SHPOs, there was a discussion about the dividers between the vehicular lanes and the bike lanes. We agree that there are many historic districts here in Ohio that would consider those an adverse effect to the district. Many of those districts do have local design review boards, that according to Stipulation II.B. will have the ability to say no to items they feel would be an adverse effect. Is this a correct interpretation? If so, please make that clear in any training you do with the federal agencies and the people doing the exemptions for them. In the past, we have asked for comments from the review board, because we were going to let an item go if the local community was fine with it. Usually, the response is that they did not know there was a local design review board and that the project was required to be submitted to them.

Again, thank you for considering our concerns regarding the *Program Comment on Certain Housing, Building, and Transportation Activities*. If you have any questions or would like more information about the concerns and comments stated above, please feel free to contact me.

Sincerely,

Kristen Koehlinger, PE | Department Head & Deputy State Historic Preservation Officer for Resource Protection and Review, State Historic Preservation Office

Ohio History Connection | 800 E. 17th Ave., Columbus, OH 43211-2474
p. 614-298-2000 | f. 614.298.2037 | kkoehlinger@ohiohistory.org

Did you know the Ohio SHPO now accepts electronic-only submissions for state and/or federal review under Section 106 and ORC 149.53? Please send your submissions to section106@ohiohistory.org.

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APPENDIX A: ACTIVITIES NOT REQUIRING FURTHER REVIEW

1. Site Work

The following activities do not require further Section 106 review:

a. *Maintenance or repair* of any of the following elements, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

i. Concrete and asphalt ground surfaces such as streets, parking areas, driveways, alleys, ramps, sidewalks, and walkways, including repaving, restriping, replacing such surfaces with *permeable ground surface materials*, sealing (including *installation* of slurry seals, overlays, and seal coatings), filling, milling, grinding, grooving, 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, netting, basketball hoops, drinking fountains, and *ground surface materials*. 

iii. Fencing.

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 landscape elements (such as planted beds), or in park and playground areas, and including but not limited to relamping and rewiring. 

vi. Water features, such as decorative fountains, including but not limited to replumbing.

vii. Curbs, gutters, steps, ramps, and retaining walls. 

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

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

x. *Bulb outs*, crosswalks (including but not limited to raised crosswalks across roadways and raised intersections), traffic calming devices (including but not limited to speed humps and speed tables), or islands (including but not limited to pedestrian islands and corner islands to separate or protect bicycles).

xi. *High friction surface treatments*, *cool pavements*, *permeable ground surface materials*, and rumble strips.

xii. *Green infrastructure*, sprinkler heads, irrigation lines, and gray water systems.

xiii. Benches, tables, and freestanding planters.

xiv. Vault toilets.

b. Any of the following landscaping, grounds, and water management activities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, sheering, feeding, seeding, reseeding, mulching, aerating, 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, or within 10 feet of, its existing location. 
 - iv. Removal of grass, shrubs, brush, leaves, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.
 - v. Removal of rocks, litter, and debris, but not rocks arranged in a rock wall or other man-made feature.
 - vi. Removal of small conifers growing between mature trees.
 - vii. Removal of sediment, silt, and debris from man-made drainage facilities, including retention and detention basins, ponds, ditches, canals, and sumps.
- c. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter
- d. *Installation* or removal of temporary construction-related structures, including but not limited to scaffolding, barriers, screening, sediment-capture devices, fences, protective walkways, signage, office trailers, cofferdams, and restrooms, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance* and that such activity does not damage any existing *building* or *structure*.
- e. Elevation of the ground surface within *previously disturbed right-of-way* by up to 18 inches to maintain, create, or connect *alternative transportation infrastructure*, or to facilitate boarding and disembarking at *transit* facilities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*.
- f. Removal of a deteriorated or damaged mobile or manufactured home or other temporary *building* or structure, not including removal of foundations.

2. Work on a Building Exterior

The following activities do not require further Section 106 review when conducted on the exterior of a *building*:

- a. *Maintenance* or *repair* of any of the following elements: 
 - i. Doors, including but not limited to insulated exterior doors and basement bulkhead doors.
 - ii. Windows, including but not limited to storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
 - iii. Siding.
- b. *Maintenance* or *repair* of any of the following elements, or *in-kind replacement* of any above-ground components of any of the following elements:
 - i. *Mechanical systems*.
 - ii. *Building safety systems*.

- iii. Canopies, awnings, and solar shades.
- iv. Roofing, including but not limited to cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; fasteners and ties to attach roofing to structural elements; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.
- v. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
- vi. *Clean energy technologies.*
- vii. Elevator systems.
- viii. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- ix. Foundations and foundation vents.
- x. Chimneys.
- xi. Vents, including but not limited to continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.
- xii. Energy and water metering devices.
- xiii. *Building-mounted utility infrastructure, including but not limited to wires and anchors.*
- xiv. Installation of stanchions, fasteners, or tracks for flood shields.

c. *Replacement or installation of building-mounted solar energy systems* if such system is installed with methods that do not irreversibly damage *historic building materials*, sits close to the roof, and has a profile that matches the roof profiles (such as pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%. 

d. Any of the following *maintenance* or *repair* activities:

- i. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.
- ii. Repointing of mortar joints with mortar matching in composition, joint profile, color, hardness, and texture of existing mortar.
- iii. 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 and not including sandblasting of masonry over 45 years old.

e. Paint or stain on previously painted or previously stained exterior surfaces, provided that no historic decorative paint schemes or colors (such as graining, stenciling, marbling) will be covered and provided that for masonry over 45 years old, there will be no use of nontraditional or historically inappropriate masonry coatings, including painting of previously unpainted historic masonry, masonry consolidants, and waterproof or water-repellant coatings.

f. *Abatement of hazardous materials* where *effects* of the *abatement* are not visible on the *building* exterior, and the *abatement* either is limited to *previously disturbed ground* or creates no new *ground disturbance*.

3. Work on a Building Interior

The following activities do not require further Section 106 review when conducted entirely in the interior of a *building*:

a. *Maintenance or repair* of any of the following elements:

- i. Walls, ceilings, and flooring.
- ii. Doors.
- iii. Light fixtures.
- iv. Elevator systems.
- v. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- vi. Chimneys.
- vii. Skylights, atria, courtyards, or lightwells.

b. *Maintenance, repair, or in-kind replacement* of any of the following elements:

- i. *Mechanical systems*.
- ii. *Building safety systems*.
- iii. Light bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
- iv. Battery energy storage systems.
- v. Thermal insulation, other than closed cell spray foam, in or around walls, floors, ceilings, attics, crawl spaces, *mechanical systems*, and foundations, where such insulation can be installed and removed without damaging exterior walls, and where such insulation will not cause condensation that could damage exterior walls – even if such insulation increases interior wall thickness.
- vi. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
- vii. Foundations and foundation vents.
- viii. Energy and water metering devices.

c. *Maintenance, repair, replacement, or installation* of household or kitchen appliances, where such appliances are Energy Star rated, or replace existing appliances with appliances with higher Energy Star ratings, or replace existing non-electric appliances with electric appliances.

- d. Caulking, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.
- e. Painting or staining previously painted or previously stained interior surfaces, provided that no decorative paint schemes or colors (such as graining, stenciling, or marbling) will be painted or stained.
- f. *Abatement of hazardous materials* where *effects* of the *abatement* are only visible from within an individual *housing* unit or where *effects* are not visible from the *building* interior.

4. Work Involving Transportation Fixtures and Equipment

The following activities do not require further Section 106 review, provided 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, replacement, or installation* of the following elements:
 - i. *Bicycle racks* or dedicated docks or kiosks used in a shared system for bicycles or *micromobility vehicles*.
 - ii. *Bicycle rails*.
 - iii. *Flex posts*.
 - iv. Concrete or stone blocks affixed to the ground by their weight.
 - v. Marks on the ground surface for visibility and delineation, including but not limited to striping for *bicycle lanes*, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, marks for *bicycle parking*, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.
 - vi. Detectable warnings on or before a curb, entry point, crosswalk, or accessible facility.
- b. *Maintenance or repair* of any of the following elements, or *in-kind replacement* of any above-ground components of any of the following elements:
 - i. Signs, signals, traffic control devices, or signalization, including but not limited to any such elements that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
 - ii. Cameras, masts, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.
 - iii. Tracks, including but not limited to ballasts and ties.
 - iv. *Clean energy technologies* supporting *alternative transportation infrastructure*.
 - v. Signal bridges.
 - vi. Transformers, breakers, switches, and other electrical components.
- c. *Maintenance or repair* of the following elements, or *in-kind replacement* of any above-ground components of the following elements:

- i. Bollards.
- ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures.
- iii. *Transit shelters, bicycle lockers, or bicycle shelters.*

5. Work on Bridges

The following activities related to bridges built as or incorporated into *alternative transportation infrastructure* do not require further Section 106 review:

- a. *Maintenance or repair* 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 but not limited to pin-and-hanger *replacement* and other retrofits.
- e. Implementing countermeasures against scour.

6. Other Activities

The following activities lack any potential to cause *adverse effects* and therefore do not require further Section 106 review:

- a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies.
- 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* or by another entity receiving federal financial assistance (such as a state, Tribal, or local government, or joint venture, railroad commission, compact authority, port authority, transit agency or authority, private company, or other project sponsor), of: *buildings*, energy efficiency or *electrification* materials or equipment, *clean energy technologies*, railway *rights-of-way* for the *maintenance*, development, or expansion of rail-to-trail pathways or passenger rail service, and fleets of bicycles, *micromobility vehicles*, hybrid or electric vehicles, or electric locomotives, provided that any changes in use or access, or any physical actions related to such activities 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. Direct home mortgages or mortgage guarantees for homeowners.
- e. Transfer, lease, or sale of a federal government-owned *building* or *alternative transportation infrastructure* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

f. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, *micromobility vehicle*, or *transit* uses, including but not limited to “play streets,” “school streets,” “safe route to school” streets, “open streets,” tolling, or congestion pricing, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

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

h. Treatment for pests, rodents, insects, and termites that does not visibly alter or obscure the structural, architectural, or decorative features of a *building*.



**New York State
Parks, Recreation and
Historic Preservation**

KATHY HOCHUL
Governor

RANDY SIMONS
Commissioner *Pro Tempore*

December 12, 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 Certain Housing, Building, and Transportation Activities

Dear Chair Bronin:

Thank you for the opportunity to comment on the revised Program Comment. We are pleased to see that several of our concerns have been addressed with the deletion of the reference to “minimally adverse” and the removal of certain exemptions that might have led to inappropriate work to historic buildings. We feel that this document is organized in a manner that is easier to follow than the previous version, and that many of the exemptions continue to be reasonable.

However, we remain concerned with the lack of accountability on the part of federal agencies and also the ACHP. We appreciate the gesture of adding the option for federal agencies to consult with the relevant SHPO (Appendix B, Section 1), but it seems unrealistic that that will occur in practice. Additionally, Sections VI and X discuss the Dispute Resolution and Reporting and Meetings procedures in concept, but fail to provide enough detail to make it clear how and when any SHPO or Consulting Party would become aware of an undertaking covered by Section III.A.1.b. Would there be an opportunity to file a Dispute, consult with the relevant federal agency, and resolve such Dispute prior to construction starting on an undertaking?

We are concerned with the vague and noncommittal language in Section X.A.4 that describes procedures the ACHP would establish in order to share information on the implementation of this Program Comment with the public and with SHPOs, specifically: “The ACHP must also endeavor to create an online reporting and tracking system for undertakings covered by this Program Comment.” It is our opinion that a reporting and tracking system must be created, and more detail is needed to flesh this out.

Finally, we note that “non-significant façade” has no statutory basis; under 36 CFR Part 60, the regulations governing the National Register of Historic Places, a building is either contributing or non-contributing in whole, not in part.

Thank you for considering the comments of the NYSHPO.

Sincerely,

A handwritten signature in black ink that reads "R. Daniel Mackay". The signature is written in a cursive style with a large, sweeping initial "R".

R. Daniel Mackay
New York State Historic Preservation Officer
daniel.mackay@parks.ny.gov

via e-mail only



December 13, 2024

Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001

RE: Draft Program Comment on Certain Housing, Building, and Transportation Activities

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 Certain Housing, Building, and Transportation Activities* and have the following comments/questions regarding said draft:

- Appendix A.1.x. – With the introduction of some of the items listed, there is the potential that the integrity of a historic district could be impacted if not properly consulted on with the appropriate State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer (THPO).
- Appendix A.4.a. – Installation of any new element that did not previously exist should be reviewed under Section 106 of the National Historic Preservation Act of 1966, as amended, as it may have an impact on historic properties.
- Appendix B.1.b. – For projects that fall into the category that “federal agencies knows, believes, or has been informed that there may be moderate or high likelihood of encountering subsurface historic properties or burial sites, human remains, funerary objects, sacred objects, or items of cultural patrimony,” it should be required that a qualified professional be present to monitor the project activities during all ground disturbing activities in order to identify any subsurface historic properties or burial sites, human remains, funerary objects, sacred objects, or items of cultural patrimony as soon as possible to avoid any further damage to those items.
- Appendix B.1.c. – If a building is 45 years or older, the federal agency should need to record the said property and have the building evaluated for inclusion to the National Register of Historic Places prior to project implementation.

- Appendix B.1.e. – “Non-significant façade” is non-standard language when referring to the elevations of a building that are not the primary façade(s). Introducing non-standard language into a Program Comment may cause confusion for the field in due time.

The staff of the South Dakota office of the State Historic Preservation Officer 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 or 605-773-2906.

Sincerely,



Garry Guan
State Historic Preservation Officer



Katie Wasley
Review & Compliance Coordinator





Pennsylvania State Historic Preservation Office

PENNSYLVANIA HISTORICAL AND MUSEUM COMMISSION

December 13, 2024

Sara C. Bronin, Chair
Advisory Council of Historic Preservation
401 F Street NW, Suite 308
Washington DC 20001
Sent by email: Program_alternatives@achp.gov

Dear Chair, Bronin.

We appreciate the opportunity to comment on the revised Draft Program Comment on Certain Housing, Building and Transportation Activities (draft PC). The PA SHPO fully supports the spirit of the draft to “foster conditions under which our modern society and our historic properties] can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.” We also encourage and actively develop mechanisms to streamline certain activities under Section 106 to ensure that undertakings receive the meaningful consultation they deserve.

Although the revised draft PC is an improvement over the original draft, the scope of the proposed PC continues to be too broad and problematic. The scope of activities of a PC should be tied to a program associated with a specific agency, action or property type. In addition, the draft PC may not be the most appropriate program alternative; Advisory Council on Historic Preservation (ACHP) guidance indicates program comments should not just outline exemptions but should also address resolution of anticipated adverse effects. We believe that a more appropriate, effective, and efficient approach that would align with ACHP’s own guidance would be to prepare separate program alternatives for Housing/Energy Efficiency and Alternative Transportation Projects.

The PA SHPO is dedicated to building relationships with our partners and has well-established agreements that have overlap with the proposed PC. Our statewide programmatic agreements with HUD and FHWA provide for the comprehensive and efficient review of projects and cover many of the exemptions included in the draft PC, and we appreciate the revised draft PC does not void these agreements. Based on experience with our statewide HUD PA and other agreements, it is important that a template for annual reporting be created and put in place at the time the PC is adopted. In addition, we are concerned about the capacity of HUD to provide training on the draft PC to all entities who receive federal funds, as Pennsylvania is divided into 67 counties which contain over 2,500 municipalities. Presumably these entities would be responsible for implementation of the draft PC, and many lack any knowledge of Section 106 process.

Section 106 is a consultative process that requires consultation appropriate to the scale of the undertaking and scope of federal involvement. As written, there are no opportunities for consultation with local preservation interests and the public beyond the Dispute Resolution, Opportunity to Provide Comment, and Annual Meetings sections. How would a preservation interest or the SHPO know about an undertaking being reviewed under the draft PC to file a dispute over the implementation of the draft PC? In addition, to improve consultation, we suggest annual reports be sent to the SHPOs directly as well as direct notification to SHPOs of an agency’s plans to use the PC.

We generally agree with the exempted activities recognized in Appendix A, Activities Not Requiring Further Review, as they appear to be routine activities that have minimal potential to adversely affect historic properties, provided there is some clarification of definitions. The definition of maintenance should be clarified to align with the definition of preservation as outlined in the Secretary of the Interior’s Standards for the Treatment of Historic Properties, noting that repair is

prioritized over replacement. Similarly, the definitions of repair and replacement included in Section IX should recognize the goal is to minimize changes to the materials and character of historic buildings and districts.

Regarding Appendix B, Activities Not Requiring Further Review After the Satisfaction of Conditions, Exclusions, or Requirements, the process for making determinations is difficult to understand as written. We suggest the outlined process and language be further clarified to ensure the draft PC improves and does not hinder the efficiency of Section 106 compliance. For example, Type A-G determinations may be carried out by either a qualified professional or by the SHPO which confuses the process. Regarding Type C, Determination of Historic Building Status for buildings 45 years in age or older, determinations of eligibility require a check of records, but it is unclear what records are to be consulted or if there will be coordination with the SHPO regarding the determination of eligibility, as outlined in 36 CFR 800.4. Regarding Type E determinations, reference is made to non-significant facades. To avoid confusion, we suggest the draft PC use terminology more common to historic preservation such as primary and secondary elevations. For Type F determinations, the list of primary spaces is limited to lobbies, ceremonial rooms, and ground-floor hallways. To better identify and clarify those interior elements and spaces of a building that are worthy of preservation consideration, we recommend the document reference existing National Park Service guidance available at: <https://www.nps.gov/subjects/taxincentives/interiors-identifying-primary-secondary.htm>. Finally, we would like to reiterate that most federal agencies and applicants to whom 106 responsibility is often designated have neither sufficient staff nor appropriate processes in place to apply the conditions and make determinations as outlined in Appendix B. Clarifying the process and assisting agencies in the development of training and tools to ensure appropriate and consistent implementation of the PC will be critical to its success.

In conclusion, we appreciate the revisions that were made to the August 2024 draft, we support streamlining that preserves the intent of Section 106 process, and we request additional revisions to improve the effectiveness, efficiency, and transparency of the draft PC. Thank you for your consideration.

Sincerely,



Andrea L. MacDonald
Deputy State Historic Preservation Officer
PHMC – Pennsylvania State Historic Preservation Office

cc: Erik Hein, NCSHPO



Allyson Brooks Ph.D., Director
State Historic Preservation Officer

December 12, 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 revised ACHP Program Comment on Certain Housing, Building and Transportation Activities. While it is improved in terms of being easier to understand and more straightforward the proposal remains flawed. The need to use professional archaeologists for determining ground disturbance remains an issue, the lack of consultation on Traditional Cultural Properties located off tribal lands is problematic, and the removal of the state partnership is a violation of the intent of the National Historic Preservation Act.

As the State Historic Preservation Officer of Washington, I continue to *agree* with some of the basic principles involved in developing this comment, namely, the concept of streamlining for housing projects, and transportation projects. Our current programmatic agreement for transportation has been very effective in streamlining reviews and project delivery. We continue to *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.

Based on the concern above, I continue to respectively *object* to this agencywide 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.

Another reason for our continued objection is the Advisory Council on Historic Preservation has still *not* provided us with data demonstrating that projects are being delayed due to the Section 106 regulatory process. We have yet to receive data demonstrating the need for a regulatory change. This proposal continues 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 is better served under the existing programmatic agreement process. 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. The revised proposal, while better, still lacks a justifiable reason for excluding reviews of tribal lands that may impact tribal resources. The information off tribal lands is held by both the tribes themselves and the state historic preservation office. This is particularly true of non-land managing federal agencies. The removal of consultation by the state and tribes endangers tribal cultural resources and will lead to inadvertent discoveries. The 1992 amendments to the National Historic Preservation Act made it clear that the federal government must consult with tribes on properties of religious and cultural significance. The amendment did not identify tribal lands only but was targeted at federal undertakings regardless of location.



The amended proposal is still problematic around the issue of ground disturbance. The area of potential effect should be considered three dimensional. While previous ground disturbance may exist only a professional archaeologist should be determining the level of ground disturbance as compared with the vertical and horizontal extent of the project. Consultation should also be required with affected tribes to identify any cultural and sacred areas that may still be significant.

The Chair of the ACHP should not have unilateral authority to amend the timeline of the program comments. This should be done in consultation with states and tribes. The concept of unilateral government decision making is exactly what has frustrated the public.

Finally, with the change in Administration it is unlikely that federal agencies will want to take the risk of changing regulations before the new administration is in place with new federal agency leads who have a different agenda. The changing of regulations immediately before the transfer in Administration will just lead to regulatory chaos.

The proposal should be abandoned due to the reasons above and the change in Administration.

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





December 13, 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 updated *Program Comment on Certain Housing, Building, and Transportation Activities*. We laid out identified concerns in our letter of October 7 and appreciate that some of these were incorporated in the current version. However, areas of concern remain in the current version.

We offer the following comments on the current version:

II.C.2. There is no stated requirement to consult with signatories other than Indian Tribes or Native Hawaiian Organizations regarding the *termination* of existing MOAs or PAs. SHPOs, as well as other signatories to these documents should be participants in the process.

II. D.a. It is unclear why only certain types of NPS managed units are included in the list. In Wisconsin, we have the Apostle Islands National Lakeshore, which contains many identified historic properties.

III.A.2. Per the draft, if a federal agency chooses to use the Program Comment, they only need to notify the ACHP, NCSHPO, and NATHPO. Why is there no requirement of notification of potentially affected SHPOs or Tribes?

VII. and VIII. We appreciate the shortened duration. However, we continue to request SHPO consultation on the extension.

IX. The definition of *maintenance* may be open to broad interpretation.

IX. We continue to be concerned about work that will be permitted and as defined in the *Previously disturbed right-of-way*. Consultation with SHPO is needed to assess the archaeological record to determine the likelihood of immediate subsurface archaeology or burial sites.

X.A.1. As written, a federal agency that chooses to use the Program Comment is required to provide annual reports only to ACHP. This disregards our current annual reports from agencies, and the existing cooperation between SHPO and federal agencies.

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X.A.2. It is our experience that many delegated authorities do not have an adequate understanding of the Section 106 process and may lack the capacity or ability to produce the required annual reports.

Appendix A:

1.b.iii. The replacement of a tree, especially outside of the existing location, is a ground disturbance.

1.c. Any borings, or other noted activities, are ground disturbing activities that may require archaeology permits, review or monitoring.

1.f. There is no definition of a *temporary building*. In Wisconsin, we have World War II era military buildings that were considered temporary at the time of construction. The collection is now considered a potentially eligible historic district.

6.g. Installation of electric vehicle supply equipment should be reviewed for potential adverse effects or non-reversible damage to historic properties.

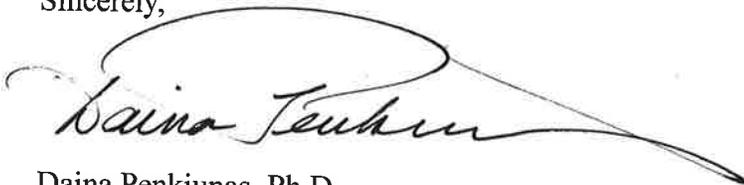
Appendix B:

6. The replacement of installation of a bridge should also require a Type A determination.

In conclusion, we continue to advocate for full participation of SHPOs in the review process and in the assessment of effects for many of the types of projects permitted by the Program Comment. We believe that our involvement leads to better preservation outcomes without slowing down the process. We continue to work at being good partners with federal agencies and we tend to resolve issues at the statewide or regional level.

The Wisconsin SHPO looks 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.

Sincerely,

A handwritten signature in cursive script, reading "Daina Penkiunas". The signature is written in black ink and is positioned above the typed name and title.

Daina Penkiunas, Ph.D.
State Historic Preservation Officer - Wisconsin

December 15, 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 11/15/24 draft Program Comment on Certain Housing, Building, and Transportation Activities (formerly 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 comment on the proposed draft Program Comment from the Texas Chief Deputy State Historic Preservation Officer, the Deputy Executive Director for Preservation Programs of the Texas Historical Commission (THC). We appreciate that revisions have been incorporated based on some of the substantial feedback provided by states, tribes, and historic preservation stakeholders. Despite concerns that follow, we consider this version to be notably improved, especially in a tightening of technical issues and a clearer organization of the document. It is evident that some of the concerns from SHPOs have been heard regarding challenges of ground disturbance, removing the unilateral voiding of pre-existing agreements, as well as the strengthened role of Secretary of the Interior (SOI) qualified professionals in at least some undertaking decisions. We continue to support facilitation of federal agencies 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.

It remains difficult to evaluate this document and its implementation process without inferring that ACHP views its own Section 106 regulations, as well as consultations with SHPOs and any interested parties as hinderances and obstacles to be overcome rather than valued. In essence the development of this document can only be read as framing historic preservation as an impediment to federal agencies and explicitly to housing, building, and transportation projects not to mention the many other disparate types of activities gathered into one large exemption effort from Section 106 consultation or the checks and balances inherent in the current system. This is despite decades of successful implementation of Section 106 consultation, federal statutes that already clearly grant final decision-making authority to the federal agency, huge volumes of review data, and timeframes of 30 days or less for all but the most complex consultations.

Rather than identifying and addressing perceived inadequacies of the ACHP's own regulations through rule changes, the vehicle being used is a unilateral Program Comment, despite not being in response or applicable to any specific federal program or agency. As precedent, the Introduction section cites several Program Comments and ACHP policy statements. Notably, the cited program comment examples all relate to requests by specific federal agencies to address specific agency programs. To date, the rationale for this specific program comment has been primarily anecdotal. We appreciate that this version has reduced the confusion regarding applicability of the comment, connection implementation to types of activities rather

than goals. However, in doing so it appears to have broadened the scope of the comment to include both maintenance and repair on virtually any building or transportation resource in the federal portfolio or subject to federal assistance, albeit with some caveats and guardrails.

By almost entirely excluding SHPOs and other interested parties once the comment is enacted, ACHP is unilaterally determining what federal activities are permitted to be of interest to stakeholders and the public, the direct opposite approach from the legacy of Section 106 implementation. Further, this document largely prevents State Historic Preservation Officers, each state's appointed leader for its own historic resources, from engaging with or influencing how the federal government considers and impacts historic and cultural places within our boundaries. In fact, given the limited documentation stipulated, SHPOs will largely never be aware that the undertakings are planned, underway, or have happened within their jurisdictions nor know the specific resources impacted.

Our specific comments and concerns about this version of the Program Comment follow on subsequent pages. 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 comments, or if we can be of further assistance, please contact me at 512-936-2315 or brad.patterson@thc.texas.gov.

Sincerely,



Bradford Patterson,
Chief Deputy State Historic Preservation Officer

cc: Erik Hein, National Conference of State Historic Preservation Officers

(continuation follows)

We believe that this 11/15/24 Program Comment (PC) will benefit if the following considerations are addressed:

- III.A.2. Federal Agency Notice of Alternative Compliance Approaches: We recognize that the volume of certain activities under this PC could make advance notification of those activities challenging for a federal agency. However, as written, notification prior to an agency utilizing the PC will be inherently broad. Essentially the agency will be required to notify ACHP and NCSHPO that it intends to implement the PC, possibly just “nationally”. That is the extent of the required notification. No scope, no program or activity identification, let alone geographic or resource specifics are required. This is not useful or transparent beyond perhaps ACHP being able to know how many and which agencies are implementing their PC.
- III.A.3. Request for ACHP Advisory Opinions: It makes sense for the federal agency to seek ACHP advisory opinions about the applicability of the PC to an undertaking whether a specific undertaking or broad category of undertakings. In the case of a specific undertaking or groups of undertakings, the relevant SHPOs might have perspective on the resources and even agency track records with those resources, but SHPOs are not part of the step or even made aware of the requested opinion(s).
- III.C. The Use of Qualified Professionals: We appreciate the clearer inclusion of SOI qualified professionals in specific circumstances and determinations. This section creates a major exception, freeing federal agencies from utilizing qualified professionals they already should be utilizing at some reasonable level. While every maintenance and repair activity of an agency isn’t being directly implemented or overseen by a qualified professional, accountable agencies in our experience that have taken their responsibility for historic resources seriously, such as GSA, NPS, or the Texas Department of Transportation, create appropriate technical procedures for their staff implementing the day-to-day maintenance and repairs, often in consultation with SHPOs. That is often one of the key factors in creating a programmatic agreement to facilitate the work under the guidance of qualified professionals. This PC neither requires nor encourages that stewardship, even when the resources are or may be historic, beyond making certain evaluations.
- VI. Dispute Resolution: The primary issue SHPOs have tried to express concerning this clause is that the SHPO or other stakeholders are highly unlikely to even know an undertaking is happening, let alone and specifics, in time to raise considerations or disputes. Further, while based on annual reporting, a SHPO *may* become aware of a completed undertaking, they are likely to remain without details that would reveal positive or negative issues.
 - Secondly, the clause as written places the obligation for notifying multiple parties, known and unknown, on those invoking the dispute resolution. The federal agency, not “any person”, should be responsible for notifying relevant and specified parties that an issue has been raised.
 - Unless the objecting party is a SHPO, nothing calls for the SHPO to be engaged in resolution. Yes, the federal agency is required to notify the relevant SHPO of their final decision after taking ACHP’s comments into account, but post-final decision making doesn’t constitute consultation or good faith dispute resolution.
 - Regardless of any mutually agreeable desire to continue resolution consultation, as written, the federal agency is obligated to cease discussions and refer the dispute to ACHP after 60 days. It may make sense for the agency to be able to terminate consultation, but this obligates it to do so.
- VIII. Amendment: This section makes clear that SHPOs are regarded as afterthoughts regarding this PC and any future amendments to extend the agreement. We appreciate being notified that the

ACHP Chair has extended the PC but that is very much after the decision has already been made by the Chair.

- IX. Withdraw: The sole criteria for possible withdraw of the PC is determination that it is not being carried out in a manner consistent with the PC. That is a good criteria but shouldn't be the sole criteria that permits a withdraw. With appropriate notice and consideration of undertakings already underway, the ACHP ought to be able to withdraw for ANY reason. It's a voluntary PC, self-initiated by the ACHP as an alternative to codified procedures, so it makes no sense for ACHP to lose the ability to determine that the PC is no longer in the ACHP's, federal agencies, public or any other stakeholder's interests.
- X.3.a. Content of Reports: Federal agencies will be required only to report the annual number of times they have utilized Appendix A. While it makes sense that reporting for these essentially exempted activities would be minimal, there can be no evaluation of the implementation with only a single possibly just nationwide number. None of the parties, ACHP, SHPOs, or the public will have any record to consider. In fact, the agency itself isn't required to retain ANY records for activities under Appendix A. Oversight and accountability will be non-existent for any party. It is worth noting that documentation of thoughtful implementation by agencies would improve SHPO and stakeholder comfort with this entire agreement.
- XI. Definitions:
 - Alternative transportation infrastructure definition is unclear if it requires each of the criteria or only at minimum of one and its applicability is not specifically tied to transportation. Any building or structure that accommodates pedestrians appears covered and since buildings are defined as constructed for human use and habitation this needs tightening. Similarly, most highway bridges, unless they exclude pedestrians AND lack use by mass transit would be covered.
 - "Non-significant façade" appears to be a new and untested term. Although possible, it would be unlikely to find a façade that doesn't contribute to conveying the historic significance. Substituting the term "secondary façade" might make sense here and it is utilized within the appropriate professions. Note, while SHPOs, NPS, and locals often permit wider latitudes for impacts to secondary facades it is usually building dependent and some buildings will not have any secondary facades due to their design.
 - The intent and definition of primary space may be adequate, but primary spaces should not have to be public. A residence for example inherently has both primary and secondary spaces despite not being a public building. For guidance, as written suffices but as a definition to be enforced it becomes problematic.
 - The formatting has run together the definitions of repair and of replacement. They need to remain distinctly two different definitions.
- Appendix A Activities Not Requiring Further Review: This list of activities is clearly intended to cover maintenance and repair. We find this generally reasonable despite a wide and almost random list of activities and the occasional inclusion of replacement or even new installations within the appendix. This would be especially true if we knew these would be planned and carried out under the supervision and guidance of SOI qualified professionals or if the purpose here was to incentivize good stewardship and maintenance practices rather than to just expedite project completions. We agree that many of these activities carry a low risk of adverse effects and often there may be no historic properties present to be affected. Extensive experience suggests that there will in fact be adverse effects and damage to historic properties from the implementation of Appendix A. Repair and other techniques will be misapplied and these will impact historic properties and character-defining features that may be generically on the list. ACHP and even SHPOs may be willing to take

these risks, but adverse effects will happen periodically under these stipulations due to the incentives to not include professionals and no consultation. The clear purpose of this PC section is to avoid consideration of historic properties because ACHP has deemed it to be a burden and finds it unnecessary.

- 2.c. Replacement or installation of building-mounted solar energy systems: This item carries several conditions regarding historic materials and irreversible damage that are open to interpretation, especially given that Appendix A is designed to avoid determinations about historic eligibility, features, or materials and does not involve SOI Qualified Professionals.
- 2.d.ii-iii and 2.e.: Care has been taken to craft these items in a manner that is clearly attempting to make the work have no adverse effect if the building is historic. We applaud that and in fact if these are carried out exactly as specified, that would be the most likely outcome. We are concerned from experience that masonry repointing and various kinds of cleaning and paint removals, even as specified, can and will do harm the materials when poorly implemented or when the work is done by poorly trained personnel or contractors. Many contractors and suppliers will insist that their methods are non-destructive and can easily convince those without expertise. With no SOI Qualified Professionals, this can and will at times go horribly wrong despite best intentions. Incorrectly made or applied mortar can cause structural damage. Heat plates and “hot air guns” can and do burn materials and start structure fires. 500 psi water pressure can destroy wood or other materials, occasionally even masonry in addition to examples where the pressure at the application wand or nozzle is uncontrollable or unmeasurable and varies by distance from materials. Chemical paint removal can and will destroy materials if not properly applied and requires experience with dwell times as well as run off and corrosive action for different metals. *These are not minimal risks appropriate to Appendix A, if applied to historic buildings or materials – which will not be identified or known in many cases due to the design and requirements of this PC and Appendix.*
- 4. Work Involving Transportation Fixtures and Equipment: We continue to believe that transportation infrastructure doesn’t naturally belong with the other work and resources included in this PC. However, our experience in Texas suggests that despite concerns many of these activities pose limited impacts to historic resources as described.
- 5. Work on Bridges: This is a pretty broad category with potential major repairs depending on the specific scope of a project. Many work items have notable risk should the bridge be historic which is frequently the case. However, at least in Texas, repair work is overseen by knowledgeable structural engineers or other professionals so we think the practical risks are low for maintenance and repairs. We may already exclude this work from our review through our state agreement.
- 6.a-b.: These studies in fact have no potential to effect historic resources and never needed Section 106 review. PC or not.
- 6.c. and e.: Some of these examples such as refinancing would already have no potential to effect historic resources. Some of these examples include facilities being purchased or leased by non-federal entities yet include conditions that future physical actions would require Section 106 consultation. In some of those cases, Section 106 would not apply to future non-federal work at all. That means they cannot use this exemption which may not be the intention. It is also ambiguous on how far into the future these considerations go. Transfer from one federal entity to another may be fine since the considerations of Section 106 would still apply due to continued federal ownership and control of the property. It would certainly be useful for SHPOs to know that property has transferred to another federal or non-federal agency so that we can fulfill our responsibilities. There is no notification provision and the limited annual reporting wouldn’t serve that purpose after the fact either. By our reading,

had it been in effect at the time, the nationwide privatization of military housing effort in the 2000s could have been implemented under this Appendix C, though after the transfer was completed, Section 106 consultation may still have occurred for the rehabilitation, demolition etc. due to the use of ground leases or similar. *That gives us significant pause and cause for concern about the scope of this PC.*

- 6.f.: Exempting the decision to limit motor vehicle access to streets provided certain other decisions follow Section 106 could in some cases be problematic. First, the major decision is not the physical changes that may follow, but the removal of access. That may be positive or negative depending on perspective, but it can have major implications for the community, stakeholders, surrounding property owners etc. This wouldn't always be a historic issue or concern, but this could be a major and controversial decision locally. Of course, there may be other laws and considerations in play and examples where removal of vehicles is agreeable but to prevent historic preservation input in such a decision is poor public policy.
- Appendix B: Activities Not Requiring Further Review After the Satisfaction of Conditions, Exclusions, or Requirements:
 - The list of different determination options is a complex mixture of decision making and assumptions. Some determinations require two different sets of expertise to implement. For example Type A determination is potentially archeology, landscape and/or building eligibility in order to determine if the work or feature now being replaced is historic itself and/or related to any buildings that may or may not be historic. However, the stipulation calls specifically only for archeological expertise. Once the complexity of these steps is combined with annual reporting and record keeping, we fail to see how implementing this Appendix will be notably an improvement over the legacy Section 106 beyond the fact that the federal agency avoids and consultation, input or questioning. When done in good faith by qualified professionals, most projects, especially of the types intended to be covered by this PC, would not require difficult or time-consuming consultation.
 - We do applaud the intent to involve and require SOI Qualified personnel in critical decisions which is a vast improvement over the last version, despite the somewhat convoluted wording and organization of this section.
 - Type C determination requires the agency to determine if a building has been previously determined eligible based on their records. It doesn't require actual determination. Thus, a building could indisputably be eligible if it were evaluated, but so long as it has not been evaluated in the past 10 years, no determination must be made and projects specified can proceed. As written, the trigger isn't that it was identified as *not* eligible in the last 10 years, its that no determination that it is eligible has been made in the 10 year period. That of course also negates earlier determinations, though we don't think that was the intent. This determination also ties determinations to 45 years which we agree is generally appropriate to accommodate buildings approaching the 50 year mark or where there is some uncertainty of exact age. It should be noted that the 45-year window isn't specifically called out. For example, as from the time of the undertaking or the date of PC issuance. Should be straightforward but as written, it is not.
 - 3.b.: This stipulation is problematic in concept. Type C determination is itself a flawed version of eligibility determination but in this stipulation the agency can proceed with work even if for some reason eligibility "cannot be made or is inconclusive". If the agency cannot determine this, the PC shouldn't apply. This is a loophole waiting to be exploited.
 - The Type D determination criteria is that the replacement, possibly of a character-defining door, window or element will reduce the energy use of the building. It admirably wraps in

- multiple other legitimate criteria such as embodied energy, carbon footprints, payback period etc. but those may impact the environment but don't change the energy use of the building itself as written. If the federal agency wants to replace these elements under the guise of energy, this stipulation all but assures that they can do so.
- 4.b.: Our concerns mirror that of 3.b.
 - 6: The complete replacement or entirely new installation of a bridge simply should not be exempt from full and traditional Section 106 consultation. This is broad and problematic, despite the Type B determination which is not an adequate substitution for Section 106.
 - Type G determination: Need for this determination may be implied but isn't called out anywhere specifically. The use of substitute materials within preservations continues to evolve and can be controversial and challenging. Certainly, there are instances where substitute material is necessary or the only option. Occasionally it can be a good option to meet preservation requirements. Professional opinions will differ at times in these instances. This is an issue where the traditional consultation can substantially improve the final decision. The criteria laid out here are reasonable considerations, but they do appear to favor the substitution over preservation of historic materials, potentially contradicting the Secretary of the Interiors Standards (were they to be applied) and then by definition resulting in an adverse effect.
 - 1.h.: State Historic Preservation Officer Reviews: We appreciate the change to the typical 30-day review period for which the state systems are already equipped to track and manage. Only time will demonstrate if agencies are able to provide adequate information for SHPOs given the nature of the PC. The ability of the agency to proceed if no response is provided within the time frame is fine and fits within the traditional Section 106 framework. Except that in these instances of PC, the agency is specifically requesting a determination by the SHPO, not making a determination and requesting concurrence as with Section 106. Therefore, the result "the determination shall deemed to have been made" is inconsistent because a determination will in fact have not been made by either the SHPO or agency.



Oregon

Tina Kotek, Governor

Parks and Recreation Department

Oregon Heritage Division

725 Summer St. NE, Suite C

Salem, OR 97301-1271

(503) 986-0690

www.oregonheritage.org



December 13, 2024

The Honorable Sara Bronin, Chair
Advisory Council on Historic Preservation
401 F St., NW, Suite 308
Washington, D.C. 20001

RE: Proposed Program Comment on Certain Housing, Building, and Transportation Activities
(11.15.2024 DRAFT)

Dear Chair Bronin:

Thank you for the opportunity to take a look at the revised Program Comment (PC) noted above. After reviewing the new document, the Oregon State Historic Preservation Office continues to be very concerned about the lack of required State Historic Preservation Office (SHPO) consultation and the one-size-fits-all approach to such a broad range of activities. Allowing the federal agency to choose between consulting with a qualified professional **or** the SHPO presumes that expertise is the only value in question. The qualified professional acting on behalf of a federal agency does not play the same role as the SHPO in the compliance process; they are not interchangeable. While they may be professionally qualified, consultants and agency staff paid and directed by the federal agency are often subject to pressures and other decision-making metrics that are out of their control. SHPOs bring statewide context and represent the public's interest in preservation, not directly for every tiny action, but in policy and intention. This is clearly a priority in the regulations that your own agency created.

Having said that, we have been very clear in previous comments on this PC that there are many activities that do not have the potential for adverse effects and do not need to be reviewed by the SHPO. The Oregon SHPO has dozens and dozens of existing programmatic agreements to demonstrate our flexibility on this issue. It is our belief that the ACHP would see widespread support for a PC that focused on fast tracks for interior projects and for most of those already listed in Appendix A. Transportation projects are too multi-faceted and geographically influenced to be handled appropriately under this Program Comment. One size does not fit all, and most states have Department of Transportation programmatic agreements that work fine as they are. Appendix B remains, frankly, unusable. With multiple determinations, and multiple choices within each determination, we cannot conceive of a scenario in which, say, a HUD Responsible Entity staff would be able to use this successfully. Should this PC become operational, a detailed flow chart would be crucial, along with examples showing how each determination could play out given a specific situation.

Below you will find some specific issues we think would benefit from additional attention.

III. ALTERNATIVE COMPLIANCE APPROACHES

III.A.1(b) Available Alternative Compliance Approaches

- **Issue: SHPOs, THPO/Tribes/NHOs Opportunity for Review**
 - There is no opportunity for SHPOs and Tribes/NHOs to review these undertakings. If an undertaking meets the requirements, a notification or memo should be sent to all consulting parties for their records, additional opportunity for consultation, and to file a dispute in a timely manner if needed. With the current draft, SHPOs and Tribes/NHOs would not be able to file a dispute until the federal agency's report to the ACHP is published on the ACHP website, which could be more than a year later.

VI. DISPUTE RESOLUTION

- **Issue: “Any person may file a dispute over the implementation of this Program Comment or its use for any particular undertaking...”**
 - It is not clear how SHPOs, Tribes/NHOs, local governments, or members of the public will be notified of such undertakings so that they *can* dispute the use of the Program Comment. See above suggestion regarding notification of undertakings in section III.A.1(b).

VIII. AMENDMENT

- **Issue: No clear role for SHPOs or Tribes and NHOs in amendment process**
 - It should not be up to the ACHP to “deem appropriate” amendment consultation with SHPOs and Tribes/NHOs. They should be called out specifically and required to have a role in amendments as these procedures have broad implications for Section 106 and potential effects to historic properties.

X. REPORTS AND MEETINGS

X.A Federal Agency Reports

- **Question:**
 - Entities with delegated authority often lack cultural resource staff and may not be familiar with cultural resources and associated laws. What is the role of the federal agency to ensure those with delegated authority are complying with Section 106 and the Program Comment appropriately?

X.A.5 Publication of Reports

- **Issue: Additional burden for SHPOs, Tribes/NHOs, and the public to find reports**
 - The current draft states that the annual reports submitted by federal agencies will be posted on the ACHP website, however this creates additional burden for SHPOs and Tribes/NHOs to track and download these reports for review. Federal agencies should submit these annual reports to consulting parties as required by many programmatic agreements.

There should also be consideration for how local governments and the public might gain access to these reports, who may not know the ACHP exists. Consultation with stakeholders is an important aspect of Section 106 and this Program Comment draft presents significant barriers for other stakeholders to participate, if at all.

XI. DEFINITIONS

- **Issue: In-kind Replacement Clarity**
 - There are three different definitions of “in-kind” replacement, under *In-kind building materials*, *In-kind replacement*, and *Repair*. All three contradict each other in some way. In-kind building materials are defined as new materials that match the old exactly. In-kind replacement is defined as replacing old materials with exact new ones, AND replacing old materials with non-exact new ones. Go over to Repair and you see a definition for replacement that includes the substitution of old material with anything as long as it improves the function and condition of the thing being replaced, AND in-kind replacement.

- **Issue: Language Clarity**
 - The usability of this document would be much improved by using existing National Park Service terms with which all preservation professionals, developers, and agency staff regularly encounter in their identification and evaluation work. Instead of, say, *Non-significant facade*, use “secondary” facade. Facades are not distinguished in surveys or nominations as “significant” or “not significant,” but they are often called out as “character-defining” or “primary and secondary.” That reserves the word “significant” for understanding the importance of the building as a whole, and what components may be more or less important to preserve.

- **Issue: Clean energy technologies**
 - The provided definition is too broad. The size of these clean energy systems may be quite large (horizontally and vertically) dependent upon the size of the building(s) being served. In addition to the concern about project scale, the definition leaves too much room for interpretation regarding what constitutes a system that serving a building or buildings. As an example, is a large solar farm which provides clean energy to a neighborhood considered an exempt undertaking under this Program Comment because it is serving buildings, regardless of the scale? The proposed ground disturbance associated with these projects has the potential to adversely affect historic properties. ACHP needs to provide clearer parameters for the scope of these systems.

- **Issue: Previously disturbed ground**
 - A disturbed context does not preclude a historic property from being significant or retaining integrity. There are plenty of projects where cemeteries and other historic properties are located within soils considered “previously disturbed” due to prior

development. One example of this includes cemeteries that extend into the right-of-way and under existing roadways.

Providing exemptions for ground disturbing activities under this Program Comment would likely result in disproportionate impacts to cemeteries and other historic properties associated with communities of color and Tribes/NHOs whose heritage has historically been ignored and subject to disturbance which is resulting in "previously disturbed ground".

As with prior comments on the definitions of in this Program Comment, the definition of previously disturbed ground does not provide any requirements that the federal agency provide sufficient evidence that the project area meets this definition.

- **Issue: Previously disturbed right-of-way**
 - See comment above. There needs to be consideration for historic properties located in these “previously disturbed” areas. There is no consideration within this Program Comment for historic properties such as burials and streetcar or trolley lines located within right-of-way and potential adverse effects from ground disturbance in these areas.

APPENDIX A: ACTIVITIES NOT REQUIRING FURTHER REVIEW

- **Issue: Appendix A.1.a *Maintenance or repair of any of the following elements, provided such activity is limited to previously disturbed ground or creates no new ground disturbance:***
 - For undertakings with below-ground utilities as outlined here, there is still the potential to adversely affect historic properties. The amount of ground disturbance required is often quite deep and there may not be good documentation for previous disturbance associated with the installation. Additionally, these types of utilities may have been installed prior to or without Section 106 consultation.

Previously disturbed ground does not indicate there are significant historic properties present including archaeological sites, TCPs, etc. There are numerous cases where fill has included ancestors in utility trenches, roadbeds, and other miscellaneous fill, as sources of fill may have come from archaeological deposits off-site, or archaeological site present at the location that was excavated and reused as native fill.

- **Issue: Appendix A.1.b *Site Work, landscaping, grounds, and water management***
 - Recommend clarifying the parameters of the proposed methods. There is precedence in other agreement documents for the use of hand tools and non-mechanized removal methods within historic properties to reach a finding of no adverse effect.

In regard to plants and vegetation in particular, this Program Comment does not address potential adverse effects to cultural resources like culturally modified trees (CMT). There also needs to be a consideration for plants that are sacred and traditionally used by Tribes

and NHOs, particularly within known historic properties. As an example, the removal of these plants, particularly with no parameters regarding methods, horizontal, or vertical limits, and physical numbers or amounts of plants could result in an adverse effect to a Traditional Cultural Property (TCP).

- **Issue: Appendix A.1.b Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a character defining-defining feature of a historic property**
 - The method of removal can result in the adverse effect to a historic property, even if the rocks are not a character-defining feature of that property. An example from a recent project was the proposed use of a backhoe to move boulders to prevent erosion. This project was considered a no adverse effect, and our office did not concur with the project as proposed because it required the backhoe to drive over an archaeological site and scoop rocks from the surface of the site and move them to the cut bank.

APPENDIX B: ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

- To reduce confusion, recommend changing “Written Determinations” to another term to avoid confusion with determinations of eligibility.
- THPOs, Tribes, and NHOs must be consulted on all Appendix B activities, regardless of prior surveys or SHPO consultation. The government-to-government consultation is a separate responsibility from federal agency consultation with SHPOs.
- **Issue: Appendix B.1.a and Appendix B.1.b**
 - Recommend that all ground disturbing activities be subject to the conditions and requirements of the proposed "Type B" determinations. Documentation of previous ground disturbance is often poor, if it exists at all, and as previously stated, it does not mean that significant archaeological sites, TCPs, and human remains are not located within the APE.
- **Issue: Language Clarity**
 - What is the meaning of “placed in service” versus noting the age of the building? It begs additional questions – placed in service by the agency making the determination or by a potential former owner? Placed in service for the current use or a former use? Please just use “45 years or age or older.”
- **Issue: Cumulative effects**
 - It does not appear that cumulative effects of these undertakings have been considered. As an example, linear resources are infamously difficult to document and evaluate because many such resources extend outside of the APE for a single undertaking. Without SHPO review, there is no way to ensure that multiple projects conducting climate resilience projects aren't contributing to an overall adverse effect. An example of this situation is the continued piping of irrigation canals in the Oregon to reduce evaporation. Individually,

these projects may or may not result in an adverse effect, but collectively, they could result in an adverse effect and with no resulting mitigation due to a lack of SHPO review. We see arguments for a lack of integrity already due to alterations of other segments along linear resources like this.

This issue applies to other historic properties as well because while one activity exempted in this Program Comment may not adversely affect a historic property, it is possible that multiple alterations could be made under this Program Comment. Due to the lack of SHPO and tribal review, there is no oversight to ensure that these actions are not collectively or cumulatively creating an adverse effect, particularly when multiple federal agencies may be involved.

Finally, since this is an ACHP-initiated alternative, does your agency intend to train federal agency staff on this PC? A nationwide alternative this broad and complex will certainly need the benefit of an intentional training program, much like the BLM has with its Nationwide Programmatic Agreement (Protocol) and the US Forest Service has for its statewide Programmatic Agreement. The ACHP cannot, in good faith, light the fuse and leave the building. That is not fair to the SHPOs, the federal agencies, the local governments, the Tribes, or importantly, the historic resources whose futures depend on our thoughtful decisions. This PC has the potential to create long-term disruptions in public agency service, generally, and in the way the SHPOs role is viewed in the Section 106 process, specifically. If that is not the intent, we expect to see a rigorous and detailed training protocol on this PC by the ACHP that will add clarity to the process and instill confidence in the users that the ACHP has the best interest of our country's historic resources at heart.

Sincerely,



Christine Curran
Deputy State Historic Preservation Officer