



December 15, 2024

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

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

Dear Chair Bronin

The Match-E-Be-Nash-She-Wish Band of Pottawatomi (MBPI), also known as the Gun Lake Tribe, is a federally recognized Tribe located in Shelbyville, Michigan. As the MBPI Tribal Historic Preservation Officer (THPO), I submit the following comments regarding the Advisory Council on Historic Preservation's (ACHP) Proposed Program Comment on Certain Housing, Building, and Transportation Activities.

We are opposed to this Program Comment and hesitant to support any program comments due to our staff's experiences with the implementation of program comments and their potential infringement on Tribes' sovereignty and the trust responsibility of the US government. As mentioned in NATHPO's comment letter dated October 9, 2024, regarding the first draft of the proposed Program Comment, "of all available program alternatives, [program comments have] the greatest potential to preclude Tribal consultation as well as minimize transparency and accountability in the Section 106 process." Program alternatives have largely contributed to further confusion in how to meet consultation requirements with Tribes under the National Historic Preservation Act (NHPA), and the responsibility predominantly falls on Tribes to advocate for these Trust responsibilities to be met. It has been our experience that Agencies' staff are quick to disregard Tribal interests off Tribal Reservations and/or Trust Lands. Many staff forget that all of North America was (and remains) Native Land, and the recent boundaries and jurisdictions established in the last couple of centuries hold little consequence to where our historical, cultural, and religious places have existed since time immemorial.

We would like to express our support for and reiterate the concerns raised by various consulting parties and Tribes regarding the accelerated timeline. Based on our participation during the majority of the Tribal Listening Sessions for September and December 2024, we identified a significant increase in participation from Tribes and their THPOs during the December listening session. However, amongst informal discussions with other THPOs, it was shared with our staff that many Tribes/THPOs were not aware a second draft of the Program Comment had been circulated with the comment period being reopened. Due to the amount of correspondence our offices receive, many THPOs often request hardcopies of new consultation requests and drafts be provided by mail. In an annual letter sent out to our agency contacts, we explain,

"To assist with our efforts to provide timely and complete responses to NHPA and other related consultation and scoping requests, we request that all consultation initiation requests and subsequent formal communications (e.g., letters, memoranda for the record, final reports, agreement documents, etc.) be **emailed** to section106@glt-nsn.gov **AND mailed** to [Tribe's Headquarters address]."

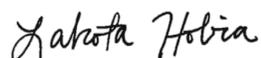
We are happy to add the ACHP to our contact list when we send out our letter for 2025. Additionally, with the most recent comment period encompassing a major holiday with another major holiday upcoming, in addition to possible traditional ceremonies and activities taking place around this time of year, it has made providing written comments difficult, particularly with many Tribes requiring a minimum of two-to-four week time frames for legal and leadership approvals to provide letters and comments of this nature.

We appreciate the efforts to incorporate specific Tribal concerns in this new draft, but it is a concern that many of the Tribes' largest concern—the use of Program Comments in general—has failed to be adequately addressed. This concern is systemic in nature. The only type of program alternatives that allows Tribes to a direct actor or party with voting or amendment authority are programmatic agreements. We have successfully found ways to ensure Tribal consultation expectations and protocols are clearly outlined for all parties to understand and implement in many programmatic agreements. However, we still face continuous disregard by agencies and their staff even with programmatic agreements, a program alternative that we generally support. If the ACHP has specific requests or questions regarding these ongoing concerns and challenges related to program alternatives, we would be able to share further in a government-to-government consultation meeting.

There are still remaining concerns that were raised by many other Tribes during the December listening session. We would like to reiterate those concerns, particularly the concerns raised regarding (1) the definition and proposed allowance of Program Comment activities within “previously disturbed” ground and (2) the buffer area surrounding an unanticipated encounter (80-100 meters minimum). We also still find Appendix B confusing and difficult to navigate. Additionally, we are struggling to understand why transportation-related activities are being included in this program comment, when most states have negotiated Section 106 Programmatic Agreements involving Federal Highways Administration (FHWA), state departments of transportation (DOTs), Tribes, SHPOs, and other identified stakeholders. Again, we welcome the opportunity to cover these concerns further during a consultation meeting.

The Biden Administration has voiced a clear commitment to strengthening government-to-government relations with Tribal Nations and supporting Tribal sovereignty. Tribes do not wish to impede or delay projects, but it is critical that we have a full seat at the table to meet both the purpose and intent of NHPA as well as the federal trust responsibility to Tribes. While we understand some of the specific needs this proposed Program Comment is trying to address, we ask that the ACHP seriously consider potential unintended harms of the proposed Program Comment. As the federal experts on and policy makers for historic preservation, what are the ACHP's peer agencies going to take away from this Program Comment and then begin to define as “acceptable practice” for consultation with local, state, and Tribal entities and the identification and evaluation of historic and cultural places.

Sincerely,



Lakota Hobia
Tribal Historic Preservation Officer
Lakota.Hobia@glt-nsn.gov
Section106@glt-nsn.gov

Osage THPO

Verbal Comments re: revised draft *Program Comment on Certain Housing, Building and Transportation Activities*

December 16, 2024

[Jaime Loichinger met with Colleen Bell, Deputy THPO, and Delaney Cooley, Archaeologist, of the Osage Nation THPO, as their computer servers were down and they were unable to electronically submit comments. The following are comments that were verbally submitted to be added to the administrative record.]

To begin, the main, overarching issue is the Program Comment itself, and the fact that issuing a Program Comment is, in essence, saying that Section 106 does not work, and there needs to be this alternative. The Osage THPO sees that when agencies engage in meaningful government to government consultation early in the Section 106 process, it goes quickly and successfully.

This office has said for years, we're open to alternatives when they're agency or project specific, and alternatives can be fruitful when there is direct consultation. But when it comes to nationwide alternatives, it gets complicated to capture the diversity and nuances of these projects. Nationwide program alternatives create more confusion, and they disrupt and inhibit relationship building. They also undo the progress Tribes have made with agencies.

The fast timeline on this Program Comment did not give the Nation adequate time to review and provide in-depth, meaningful comments. The timeline did not leave room for any accidents or any breakdowns like a server outage. While 30 days is an industry standard for comment periods, for something of this complexity and significance, it is not enough time to understand the issues at hand. Other Tribes may not have the resources the Osage THPO has, and that may preclude other Tribes from being able to participate.

Specifically:

- Section V. It is crucial to prioritize NAGPRA in any discussion regarding the treatment of Native American human remains and cultural items, especially given the lack of familiarity with burial laws among federal agencies and the absence of state-level burial laws in some regions. For these reasons, NAGPRA should be listed before the ACHP guidance and state burial laws within the proposed Program Comment to ensure that Native American remains and cultural items are treated in accordance with the established federal protections and respect for Tribal sovereignty. There have been instances where an agency has said it would comply with state burial laws, but the state doesn't even have a burial law. Parties can be unaware to those types of issues, which is why words matter and referencing the strongest law on the topic first makes the most sense. NAGPRA is also the most clear if you're doing something nationwide, as it applies nationwide.
- Section V. The Osage Nation strongly objects to the concept of a predetermined stop-work buffer. NAGPRA does not require a specific distance of stop-work and instead requires to "stop any activity that could threaten the discovery" (43 CFR 10.5(b)). A predetermined and presumptively narrow stop-work buffer runs counter to NAGPRA. This may also violate the NAGPRA Discovery Plan of Action regulations and/or previously developed NAGPRA Agreements between federal agencies and Tribes that have created more appropriate buffers for work stoppages and avoidance areas during discoveries. The Program Comment should defer to these existing agreements.
- We remain deeply concerned about the proposal to use *previously disturbed ground* to exempt certain undertakings from Section 106 review. While we appreciate the improved definitions and

clarification that “a *qualified professional* meeting the professional standards for archaeology established by the Secretary of the Interior, the relevant SHPO, or the relevant THPO” (Appendix B), we do not endorse the inclusion of exemptions for ground disturbance. Disturbance does not necessarily mean that an area has lost its cultural or historical significance. Sacred places hold enduring value regardless of whether they have been disturbed or developed. Because existing constructions listed in Appendix B predate the legal framework for protecting cultural resources, the full potential for encountering sacred objects or human remains may often be underestimated. It must also be stated that federal agencies do not always fully consider the historic context of disturbances and will miss critical information relevant to the protection of significant cultural sites and the presence of human remains. Local records often indicate entire burials and sites being located underneath construction projects or being used as fill for roads, bridges, and buildings. Adequate consultation must occur to engage in a good faith effort to avoid effects to these sites, artifacts, and human remains, regardless of disturbance. We fear this consultation may not occur if the Program Comment is implemented. There are many examples of sites being found within previously disturbed grounds, and that should not be the basis for excluding activities from further review.

In closing, there are many other issues, but these are the ones that highlight that the Program Comment itself is problematic and adds more confusion. When Program Comments are made or streamlining is proposed, they are a means of cutting out the Tribal voice. When it comes to actually streamlining this process and making it faster, the best thing the ACHP can do is to encourage agencies to learn Section 106 and for those agencies to establish long-term relationships with Tribes and other CPs. Section 106 works quickly and efficiently when you have those lines of communication.



December 12th, 2024

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

To Advisory Council on Historic Preservation (ACHP) Chair Sara C. Bronin:

This letter is written on behalf of *sduk^walbix^w*, the Snoqualmie Indian Tribe (“Snoqualmie” or “Tribe”), a federally recognized Indian Tribe and sovereign and self-determined government. The Tribe appreciates the consultation meeting held with you and other ACHP staff and personnel on November 1, 2024, regarding the ACHP’s proposed Program Comment (PC) on “Accessible, Climate Resilient, and Connected Communities” associated with housing-related, climate-smart building-related, and climate-friendly transportation infrastructure-related activities. The Tribe also appreciates the opportunity to comment on the second iteration of this PC, now curiously titled, “Draft Program Comment on Certain Housing, Building, and Transportation Activities.”

The first immediate question the Tribe has before continuing with our comments is: ***why specifically have the terms “climate,” “[climate] resilient/resiliency,” and “connected communities” been removed from what was presented as the very purpose and substance to address with the original PC draft iteration?*** A necessary follow up question is a modified one asked to you by the Tribe on November 1, 2024, to which you have still given no direct response: ***what are the origins of the first iteration of the PC, and now what has impelled this draft version and its changes?***

The Tribe reminds the ACHP that in our November 1, 2024, meeting, it was made clear that the wisest course of action for ACHP to respect Tribal concerns, honor your agency’s obligations to tribes, *and* fulfill broader historic preservation responsibilities abiding by the publicly stated mission of the ACHP would be to either (1) ***terminate this PC in its entirety***, as it was completely misguided and held very real potential to undermine tribal rights and opportunities under the National Historic Preservation Act (NHPA) Section 106 process, as the Tribe outlined to you in an October 7, 2024, letter, or (2) ***ensure that each and every undertaking would require free, prior, and informed consent of affiliated and affected tribes and that the full 106 process, in alignment with ACHP’s 2024 Indigenous Knowledge (IK) policy and guidance, would be followed in its entirety for all affiliated and affected tribes.***

Rather than adopt an approach with this current PC that honors and respects this guidance for best practices and honors obligations for the Tribe’s rights and all tribal rights, ***the ACHP’s current PC iteration amplifies the potential harms that will occur to tribes and our historic properties/properties of traditional religious and***



cultural importance (PTRCIs) if this PC is implemented. The attempt to exempt any bridge work, for example, as the PC attempt to do from Section 106 review is egregiously negligent and fails to consider the multitude of ways extant bridge infrastructure was often constructed without any tribal consultation, and that sacred places and associated traditional religious and cultural practices, such as ritual bathing locations, may be located within the areas of standing bridges. Just a few more examples from the current PC's Type A and Type B determinations further demonstrate the harmful potential of the current PC.

The Type A determinations presented and proposed in the PC fail to understand how and account for the fact that notions of "disturbance" are culturally saturated judgments. As such, this proposed exemption determination process undermines procedures required to inform such determinations and ignores the fact that ground disturbance is not the only kind of disturbance that requires consideration for direct, indirect, *and* cumulative adverse effects.

The Type B determinations presented and proposed in the PC neglect White House IK guidance and your agency's own IK guidance. For example, White House IK guidance states:

Since Indigenous Knowledge is often unique and specific to a Tribe or Indigenous People, and may exist in a variety of forms, Agencies often lack the expertise to appropriately consider and apply Indigenous Knowledge. As a result, consultation and collaboration with Tribal Nations and Indigenous Peoples is critical to ensuring that Indigenous Knowledge is considered and applied in a manner that respects Tribal sovereignty and achieves mutually beneficial outcomes for Tribal and Indigenous communities [emphasis added; Prabhakar and Mallory 2022:2].

The ACHP's own 2024 IK policy and guidance states:

Members of the preservation community are not the experts on what constitutes Indigenous Knowledge or how it should be utilized to identify or evaluate the eligibility of a property that may be of religious and cultural significance to an Indian Tribe or NHO, including, but not limited to, ancestral materials recorded and documented as "archaeological" [emphasis added; ACHP 2024:5].

Deference can and should be provided to the expertise of designated representatives about Indigenous Knowledge that is provided to inform decision making in the Section 106 process. A reasonable and good faith effort includes the responsibility that federal agencies, consistent with 36 CFR § 800.2(c)(2)(ii)(A), consider Indigenous Knowledge in a successive and cumulative manner throughout the four-step Section 106 process [emphasis added; ACHP 2024:3].



The proposed exemption language does not *explicitly* identify Tribal expertise, and subsumes the sequential steps of compliance to ecologies of negligence of the so-called “qualified professionals” of mainstream cultural resources management practices and their narrow and thinly informed surveys, limited education, training, and disciplinary biases, and dominant and dominating preservation interests and disinterests, which—the ACHP should be very well aware—often undermine and contradict Tribal IK, values, relationships, and practices, resulting in adverse effects that both erode the integrity of historic properties/PTRCIs for tribes and disenfranchise, alienate, and harm tribes from the entire process. Moreover, Secretary of Interior standards as identified in the PC speak only to the *past*, and do not and cannot account for the *living* traditional cultural significance of places and properties to the identities, relationships, and practices of living communities that must be considered—and *already often are not*—under Section 106. See National Register Bulletin 38 and the ACHP’s own IK policy and guidance for clarification on these facts.

Just these few points underscore that the ACHP has not addressed or taken seriously comments from the Tribe informed by and through our IK and provided in our previous PC response letter, dated October 7, 2024, or during our consultation meeting on November 1, 2024. This neglect, combined with changes in language to the current PC iteration, amplify the Tribe’s concern over the potential harms ACHP is manifesting with this PC.

The ACHP’s anticipatory acquiescence in language, content, and rhetoric in the current PC iteration to expectations of what may come with the new administration is blatantly evident, and creates the suspicion that ACHP is less concerned with fulfilling its obligations to tribes and fulfilling its mission as a fair arbiter than advancing its own political positionings and existential interests. The Tribe reminds the ACHP that “communication and rhetoric [are] not ... merely accomplices to settler colonialism but ... primary organizing vehicles through which settler coloniality is deployed and maintained” (Brandley and Stanley 2022:63). The change in language and anticipatory in/action by ACHP is already complicit with entrenching pathways to potentially damage Native lands, airs, and waters for the benefits of settler colonial privilege and profit that depend on the disappearances of Native peoples for so-called advancements and successes. It flies in the face of the very role and mission of ACHP and undermines the NHPA in function, spirit, purpose, and process. By altering the focus away from colonially- and -industrially induced climate change and undermining holistic considerations while presenting the PC’s purpose under the false guise of “alternatives” to “advance historic preservation goals ..., and to harmonize them with the nation’s pressing needs to expand access to housing, improve resilience, and offer transportation alternatives,” ***you have rendered the very development of this PC irrelevant for any concerns outside of nebulous federal agency “critical policy needs” that will inevitably be (mis)used and formulated to disenfranchise tribes and undermine tribal rights and opportunities currently afforded under the NHPA Section 106 process.***



While the Tribe thanks Chair Bronin and the ACHP for the opportunity to comment on the revised proposed PC, this current PC iteration is as equally—if not more—troubling than the first. The Tribe reiterates that ***the best course of action will be to terminate and do away with this PC as a whole and for ACHP to reinforce the imperative of abiding by the NHPA Section 106 process in its entirety for all applicable undertakings.*** The Tribe is committed to reasonable, meaningful, and good faith communication and consultation to fulfill our stewardship responsibilities for the lands, airs, and waters and all of the diverse, dynamic, and living resources that help comprise our ancestral territories, traditional use areas, traditional cultural land/waterscapes, and other historic properties/PTRCIs. It is unfortunate that it appears that the ACHP is not as equally committed to these goals and its publicly stated mission. If you have any questions or need additional information, please contact Steven Moses, Director of Archaeology & Historical Preservation, at steve@snoqualmietribe.us.

Sincerely,

DocuSigned by:
Jaime Martin
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Jaime Martin
Executive Director
Governmental Affairs & Special Projects

CC:

Dr. Allyson Brooks, Washington State Historical Preservation Officer
Steven Moses, Snoqualmie Tribe Director of Archaeology & Historic Preservation
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
Jamie Lee Marks, Advisory Council on Historic Preservation
Wm. Dancing Feather, Advisory Council on Historic Preservation

Sources Cited



ACHP (Advisory Council on Historic Preservation). 2024. Advisory council on historic preservation policy statement on indigenous knowledge and historic preservation, 11 January, 2024. <https://www.achp.gov/sites/default/files/2024-01/DRAFTIndigenousKnowledgeHistoricPreservationPolicyStatement11Jan2024.pdf> (last accessed 29 February 2024).

Brandley, ben and Liahnna Stanley. 2022. Muddying the Pioneer Past-Present: Indigenous Erasure and Settler Colonial Memory at Mormon Historic Sites. *Rhetoric, Politics & Culture* 2(1):61–86.

Prabhakar, Arati and Brenda Mallory (Executive Office of the President, Office of Science and Technology Policy, and Council on Environmental Quality). 2022. *Memorandum for Heads of Federal Departments and Agencies–Implementation of Guidance for Federal Departments and Agencies on Indigenous Knowledge*. Arati Prabhakar and Brenda Mallory. Washington, D.C.: Executive Office of the President, November 30, 2022. <https://www.whitehouse.gov/wp-content/uploads/2022/12/IK-Guidance-Implementation-Memo.pdf>.



THE COWLITZ INDIAN TRIBE
COMMENTS ON THE ADVISORY COUNCIL ON HISTORIC PRESERVATION'S
DRAFT PROGRAM COMMENT ON CERTAIN HOUSING, BUILDING, AND
TRANSPORTATION ACTIVITIES

The Cowlitz Indian Tribe appreciates the efforts of the Advisory Council on Historic Preservation (ACHP or Council) to issue a revised draft Program Comment on Certain Housing, Building, and Transportation Activities. The revised draft Program Comment, released November 15, 2024, attempts to address many of the concerns that the Cowlitz Indian Tribe (Tribe) raised in its October comments on the Council's initial proposed Program Comment released August 8, 2024. The Council's revised draft Program Comment (Revised Program Comment) includes important clarifications and revisions – including modifying the definition of “previously disturbed ground” and no longer allowing bridge replacement projects to be exempt from further review under National Historic Preservation Act (NHPA) Section 106 if the project affects only previously disturbed ground. The Revised Program Comment requires agencies to conduct Tribal consultations for undertakings and provides clearer guidance for identifying which Tribes should be consulted prior to an agency beginning an undertaking. But the Tribe's basic concern with the draft Program Comment remains: the attempt to “expedite” Section 106 review and provide an alternative way for agencies to comply with their Section 106 responsibilities outlined in the Revised Program Comment will not achieve that objective and will continue to create opportunities for potential damage to Tribal human remains and cultural resources. Section 106 review for transportation projects, and bridge replacement work in particular, is best and most efficiently handled through the existing Section 106 process, together with any existing Programmatic Agreements.

The Council's Revised Draft Program Comment

The Tribe's concerns about the ACHP draft Program Comments arise in the context of the ongoing I-5 Interstate Bridge Replacement Project (IBR), as explained in our October 2024 comments on the initial draft Program Comment.¹ The IBR is replacing a section of Interstate 5 – a federal highway whose initial construction in the 1950s disturbed the graves of at least 14 Native American individuals. The Federal Highway Administration and the Federal Transit Administration already have determined that the IBR would have adverse effects to historic properties (including sites and artifacts

¹ See Cowlitz Indian Tribe Comments on the ACHP Proposed Program Comment on Accessible, Climate-Resilient, and Connected Communities (Oct. 4, 2024).

of Tribal and religious and cultural significance).² As explained in detail in our October comment³, the Cowlitz Indian Tribe has had a presence within the footprint of the IBR for centuries, and we are gravely concerned about the IBR's potential to damage Tribal remains and cultural resources that are protected under Section 106 of the NHPA.

Revised Draft Program Comment Procedures for Transportation Projects - Type B Determinations

The Revised Program Comment includes new and clarifying language that attempts to address many of the concerns raised by the Cowlitz Indian Tribe in its October comments. As an initial matter, the revised draft makes clear in Section II.C. that the Revised Program Comment (if finalized) does *not* affect existing Memoranda of Agreement (MOA) or Programmatic Agreements (PA). The Revised Program Comment provides that the final Program Comment will not in any way supersede, replace, or change the terms of existing, executed Section 106 MOAs or PAs.⁴

For activities not subject to existing MOAs, PAs, or other exceptions, the Revised Program Comment requires that certain federal undertakings require a written determination before the federal agency may proceed. The Revised Program Comment provides that bridge replacement and installation will *only* be exempt from further Section 106 review after a "Type B Determination" is made.⁵ A "Type B Determination" requires the federal agency to identify the area of potential effects (APE) under the regulations, consult with Indian Tribes using the procedures specified in Section III.B. of the Revised Program Comment, and obtain a written determination from either a "qualified professional" (defined by Department of the Interior standards) or the relevant SHPO (State Historic Preservation Officer) that the undertaking will have no adverse effects on any historic property (including Tribal cultural resources and remains). Agencies also must consult with Tribes and make a Type B Determination in cases where the agency knows or has been informed that there may be a moderate or high likelihood of encountering subsurface historic properties or burial sites, human remains, funerary objects, sacred objects, or items of cultural patrimony.⁶ If the agency determines through consultation with Indian Tribes that a proposed undertaking covered in the Program Comment could have an effect on a historic property with Tribal traditional religious and cultural significance (or Tribal artifacts), the agency is not to use the Program Comment but instead must follow the usual Section 106 review process.⁷ The consultation procedures in Section III.B. of the

² See Cowlitz Indian Tribe Comments at p. 2.

³ See Cowlitz Indian Tribe Comments at pp. 2-3.

⁴ See ACHP Revised Draft Program Comment, Section II.C. at p. 3.

⁵ See ACHP Revised Draft Program Comment, Appendix B.6.

⁶ See ACHP Revised Draft Program Comment, Section III.B. and Appendix B.1.b. Appendix B.1.b. also provides that an agency may conduct a field survey of the APE (or obtain a field survey from the last ten years), where such survey is acceptable to current state or Tribal standards, and if applicable, has been subject to consultation with Tribes, and such survey does not identify any historic properties in the APE. Although this language is somewhat unclear, it appears that for such surveys, agencies have an obligation to identify and consult with any Tribes that may attach religious or cultural significance to historic sites in the APE, pursuant to Section III.B.

⁷ See ACHP Revised Draft Program Comment, Section III.B.3., at p. 6.

Revised Program Comment are more detailed and provide better guidance for how relevant Tribes should be identified for purposes of Tribal consultations than the language in the August 2024 draft Program Comment, which did not adequately specify which Tribes should be consulted in connection with which federal undertakings.

Nevertheless, the Tribe is still concerned about the overall approach the Council is proposing in the Revised Program Comment. As explained in further detail below, while some aspects of the Revised Program Comment resolve ambiguities, a number remain. These uncertainties mean that the new consultation regime incorporated in the Revised Program Comment may not be effective and may not fully protect Tribal cultural resources and the remains of Tribal Ancestors, and it may not have the desired effect of expediting the Section 106 review process.

Cowlitz Indian Tribe's Comments

Type B Determinations and Tribal Consultation Procedures

The Tribe commends ACHP for making clear that projects where a federal agency already has an MOA or PA in place would not be superseded or affected by the Program Comment, should it become final. In such cases, the federal agency must comply with the terms of existing MOAs or PAs to the extent they cover bridge replacement work (or other covered undertakings) – the Program Comment does not apply. That clarification is useful and makes good sense. The existing agreement that applies to transportation undertakings in Washington State is the product of negotiations between the State's Tribes, the Federal Highway Administration, and the Washington State Department of Transportation, and has been effective at streamlining transportation projects. A Program Comment initiated by ACHP should not replace that agreement.

In addition, the alternative Section 106 compliance approach in the Revised Program Comment – which makes bridge replacement and installation subject to a Type B Determination before it may be exempted from further Section 106 review -- is certainly preferable to the Council's earlier approach, which focused on whether the project involved previously disturbed ground. The Tribe also appreciates that the Revised Program Comment requires agencies to consult with Tribes and includes some specifics about how the agency must make a reasonable effort to identify relevant Tribes that may have an interest in the historic properties or traditional cultural and religious items within the area of potential effects of a project. The Revised Program Comment also properly requires consultation with any Tribe that requests in writing to consult, and it provides that the federal agency must defer to determinations made by an Indian Tribe that a particular individual has expertise in identifying potential effects on historic properties of religious and cultural significance, including Tribal artifacts and remains related to such properties.

Despite these positive changes, there are components of the Type B Determination consultation process that still are less than clear. For example, rather than relying primarily on agency databases and staff expertise to identify relevant Tribes for consultation, and just assuming that interested Tribes will ask to be consulted if not invited, the Council should add additional criteria to the list of resources that inform agency consultation efforts. A requirement that agencies consult with any Tribe that has trust/reservation lands within 25 miles of the area of potential effects would help

agencies to identify and consult with those Tribes “that might attach religious and cultural significance to historic properties [and related Tribal religious and cultural resources] in the area of potential effects...”⁸ The Council also should rely on existing Interior determinations of historical significance for Tribal lands within the area of potential effects, so that Tribes that have been determined by Interior to have such historical connections are included in the consultation process. These additional consultation criteria would add clear and measurable standards for agencies to use when identifying consulting Tribes and would make the process work better.

Another component that is missing from the Tribal consultation process or Type B Determinations is reliance on Tribal Historic Preservation Officers (THPOs) – both to assist agencies in evaluating Tribal interests in a particular undertaking, and in making the required written determination that a proposed undertaking could result in an effect on a historic property with traditional and religious significance to an Indian Tribe. The description of the Type B Determination in Appendix B states that the agency should obtain a written determination that the activity will have no adverse effects from a qualified professional meeting the Secretary’s standards *or* the relevant SHPO – but does not mention the THPO.⁹ As noted in the Tribe’s October 2024 comments,¹⁰ the Secretary of the Interior’s professional qualification standards do not directly address knowledge of Tribes and their cultural practices. If ACHP wants to rely on the “qualified professional” definition in the Revised Program Comment, the Tribe again suggests that it include more specific criteria about who is a qualified professional, and that it specifically include THPOs within that definition.

The Council’s Approach Generally

Even if the Council were to implement these recommendations, the Tribe remains skeptical that the processes and procedures laid out in the Revised Program Comment are the right tools for achieving the Council’s goals. The Section 106 process is thorough and ensures that all parties have a say, including Tribes, when undertakings have the potential to affect historic properties, including Tribal remains and Tribal cultural and religious items. State and Tribal cultural resources professionals are familiar with the process and have entered various MOAs and PAs that make the process work well, and protect the Tribal cultural and religious artifacts that NHPA Section 106 is intended to protect. The Council’s attempted drafts of Program Comments – both its August 2024 and the revised November 2024 version – add unneeded uncertainty to this process. The “Type B Determination” process that the Council has added for bridge projects to its Revised Program Comment, while an improvement in many respects from the alternative compliance process in the

⁸ *Id.*

⁹ We note that the “relevant THPO” is one of the entities that can make a Type A Determination, where the undertaking is limited to previously disturbed ground or will have no adverse effects on any historic property (which includes related Tribal artifacts) – this determination is required for less intrusive maintenance or repair of concrete and asphalt surfaces like streets, parking areas, sidewalks, and walkways, and is limited to repaving or replacing such surfaces, but not changing vertical alignment. *See* Appendix A.1.a.i. at p. 20. It is unclear who is the “relevant THPO” in this circumstance and unclear why the THPO is not designated to make Type B Determinations. We also note that the entire regime for Type A and Type B Determinations and what is required for a particular activity is difficult to follow and should be made clearer.

¹⁰ *See* Cowlitz Indian Tribe Comments at p. 5.

August 2024 version, will not likely expedite large projects like the I-5 Interstate Bridge Replacement. It also is not clear that it will in fact protect Tribal religious and cultural resources, because the addition of a new process without sufficient time to develop all its component pieces will almost certainly result in mistakes and the potential for adverse and unintended effects.

Conclusion

The Cowlitz Indian Tribe thanks the Council for its sincere effort to respond to concerns from Tribes like Cowlitz in developing its Revised Program Comment. Although the Revised Program Comment provides a greater level of detail and requires Tribal consultation in connection with specifying which undertakings may be exempted from full NHPA Section 106 review, the approach in the Revised Program Comment will not streamline the Section 106 review process, nor will it fully protect Tribal resources. Large projects like the I-5 IBR are undertakings that the Cowlitz Indian Tribe believes would benefit from a full Section 106 review process, including existing agreements, and the Tribe would prefer that the Council not add further obstacles to that. Traditional Tribal Knowledge will be an important contribution to avoid delays and associated costs that have happened in past major projects due to taking shortcuts.

If you have further questions about these comments, please feel free to contact me or James Gordon, the Cowlitz Tribal Historic Preservation Officer, at (360) 957-3004 and jgordon@cowlitz.org. Thank you for your consideration.

Sincerely,



William Iyall (Dec 13, 2024 13:12 PST)

William Iyall, Chairman
Cowlitz Indian Tribe

Cowlitz - Comments on ACHP Revised Proposed Program Comment (Dec. 2024)

Final Audit Report

2024-12-13

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