



AMERICAN
ANTHROPOLOGICAL
ASSOCIATION



December 15, 2024

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

Dear Ms. Bronin and colleagues:

On behalf of the [Archaeology Division](#) (AD) of the [American Anthropological Association](#) (AAA), we write in strong support of the letter to you on December 13, 2024, from the Society for American Archaeology (SAA), and signed by SAA President, Daniel H. Sandweiss, which was written in response to ACHP's "Program Comment on Certain Housing, Building, and Transportation Activities." Alongside SAA President Sandweiss, the AAA Archaeology Division "urge[s] the ACHP to abandon [the revised draft] PC and work with the incoming administration and stakeholders to develop a different approach to bring further efficiencies to the Section 106 process without sacrificing either effectiveness or consultation."

Archaeological sites and archaeological materials are nonrenewable cultural resources, and careful stewardship of these resources is essential. We are concerned that the revised draft does not ensure adherence to federal statutes and contemporary practices related to cultural resource management, and the preservation and study of cultural resources. We are concerned as well that the revised draft undermines the importance of consultations among State Historic Preservation Offices, Tribal Historic Preservation Offices, and other stakeholders in cultural resource management projects mandated by law.

CRM is compatible with other forms of resource stewardship, it is compatible with public interests in and needs for smart and sustainable development, and it provides an essential public good: knowledge about our past, which helps us to understand the present and plan for the future.

We strongly support the viewpoints articulated in the recent letter to you from SAA, and we thank you for your consideration.

Sincerely,

Ruth M. Van Dyke, Ph.D.
President, Archaeology Division, American Anthropological Association

Chris Rodning, Ph.D.
President-elect, Archaeology Division, American Anthropological Association



December 14, 2024

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

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

Dear Chair Bronin:

The American Cultural Resources Association (ACRA), the trade association for private firms that specialize in cultural resource management (CRM), appreciates this opportunity to comment on the Advisory Council on Historic Preservation's (Council) Proposed Program Comment on Certain Housing, Building, and Transportation Activities (Program Comment).

ACRA-member firms undertake many of the legally mandated CRM studies and investigations in the United States and employ thousands of CRM professionals, including archaeologists, architectural historians, ethnographers, historians, and an increasingly diverse group of other specialists. To help guide smart, sustainable economic development and safeguard important historic and cultural heritage assets, ACRA members apply specialized research skills within a framework of federal, state, local, and/or Tribal law and facilitate an open dialog where every stakeholder has a voice.

Although ACRA commends the Council for its good-faith efforts to address a number of concerns with the Program Comment, it continues to believe that the scope of this proposed Program Comment is so broad and comprehensive that it will lead to a raft of unintended consequences that will impair the ability to preserve, protect and mitigate from harm our nation's cultural heritage. Worse, if adopted the Program Comment will set a precedent that may be abused by subsequent Councils and Council Chairs.

For these reasons, ACRA continues to recommend that the Council withdraw the Program Comment and work with individual agencies and other stakeholders to develop programmatic agreements appropriate to reach agency's unique mission, culture and program.

Improvements to the Program Comment

As stated earlier, ACRA welcomes a number of changes that the Council made to its original draft Program Comment. In particular, ACRA appreciates the fact that the proposed Program Comment stipulates that it "does not in any way supersede, replace, or change the terms of existing MOAs or PAs, or other program comments" and urges federal agencies that elect to amend or terminate an MOA or PA to engage in meaningful consultation with relevant Indian Tribes and Native Hawaiian Organizations even when not required by the underlying MOU or PA.

In a similar vein, ACRA supports provisions that require federal agencies to provide written notification prior to using this Program Comment to the Council, the National Conference of State Historic Preservation Officers (NCSHPO), and the National Association of Tribal Historic Preservation Officers (NATHPO). However, ACRA recommends that the Council amend this section to further require the agency to also notify the affected State or Tribal Historic Preservation Officer.

ACRA furthermore appreciates the Council's efforts to clarify that the Program Comment's lack of pre-emption of federal, state, local or Tribal laws or regulations includes both the federal rehabilitation tax credit, local historic preservation review or zoning ordinances, building codes, and permitting requirements.

ACRA welcomes changes to the reporting provisions that require agencies to provide annual reports every year for the duration of the Program Comment, as opposed to once every three years starting in 2029 as initially proposed. In addition, ACRA supports changes made in the document to require agencies to report on all instances where the Program Comment was utilized for undertakings covered by Section III.A.1.a., as opposed to just examples of such instances as in the initial draft. These changes will help improve transparency.

Lastly, ACRA welcomes the change in the duration of the Program Comment to 10 years, as opposed to the 20 years proposed in its initial draft.

Concerns with the Program Comment Approach

Although ACRA commends the Council for making the above revisions to its proposal following feedback from stakeholders, its core concerns with the proposal remain.

As ACRA noted in its October 8 letter, it is unprecedented for the Council to issue a program comment on its own initiative, much less one that covers every federal agency. While allowable under the Council's regulations, ACRA believes this approach is inconsistent with the purpose and intent of program comments.

In addition, ACRA remains concerned that that the Program Comment – like the initial draft - would enable agencies to make decisions without the use of qualified professionals. "III.C., The Use of Qualified Professionals" states that:

"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."

Although the language requiring that the type of qualified professional be appropriate to the circumstances is helpful, the draft Program Comment effectively gives agencies the authority to make decisions on whether specific undertakings affect historic properties without consulting with qualified authorities.

ACRA recognizes that there are many routine undertakings that reasonably would not be expected to have potential adverse effects on historic properties, and for which a full Section 106 review process is not warranted. However, the all-encompassing nature of this Program Comment, covering disparate kinds of projects and applying a blanket waiver across all agencies, is an approach that risks confusion and abuse.

Conclusion

ACRA respectfully recommends that the Council withdraw this Program Comment and instead work with individual federal agencies to craft programmatic agreements that take into account each agency's unique mission, staffing, culture and capacity. Such an approach may take longer than a single Program Comment. But the consultation and careful collaboration that this approach would entail will ensure a better balance between the goals of development and preservation.

More importantly, this approach will keep faith with the fundamental mission of the Council and avoid creating a precedent for sweeping Program Comments designed to advance any future Executive Branch policy goals at the expense of our cultural heritage.

ACRA remains committed to working with the Council and other stakeholders to develop tools which help federal agencies deliver undertakings in a timely manner while striking the right balance between progress and heritage protection.

ACRA appreciates this opportunity to comment on the proposed Program Comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Amanda Stratton". The signature is fluid and cursive, with a large initial "A" and "S".

Amanda Stratton
Executive Director



Written Comment on Draft Program Comment on Certain Housing, Building, and Transportation Activities

Advisory Council on Historic Preservation

Submission by Amtrak

December 15, 2024

The National Railroad Passenger Corporation (Amtrak) appreciates the opportunity to respond to the Advisory Council on Historic Preservation (ACHP)'s Draft Program Comment on Certain Housing, Building, and Transportation Activities (HBT Program Comment), which revises the prior Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities (ACCC Program Comment).

ACHP states that the purpose of this draft is to adopt policies that “reflect increasing public awareness that historic preservation strategies — and historic properties themselves — can play an important role in addressing the three interrelated sectors covered in this Program Comment.” As noted in previously submitted comments, Amtrak works closely with federal agencies with involvement in our company’s projects, typically through grant funding but also permitting and licensing, to ensure compliance with Section 106 of the National Historic Preservation Act (as amended, now codified under 54 USC 306108) and its implementing regulations under 36 CFR 800 (collectively Section 106). Amtrak is pleased to provide comments on the proposed revisions to the draft now HBT Program Comment.

Revisions to the Program Comment simplify the document and create more clarity for future implementation, which reflects incorporation of some of Amtrak’s prior comments. We are particularly pleased with clarifications regarding test borings and acquisitions. However, issues of clarity remain, which affect the potential utility of this proposed Program Comment. Specific comments are as follows:

1. While section III.B. notes that Type B consultation with tribes must be conducted in accordance with the National Historic Preservation Act, it does not mention the implementing regulations and associated timelines for review and comment. Similarly, the consultation with the relevant SHPO and THPO under Type A (Appendix B. 1.a) describes no associated timeline. While a SHPO review period is defined in Appendix B.1.h., it is not referenced in the other determination types and does not include THPO review periods. Leaving timelines undefined introduces schedule uncertainty into use of the Program Comment, which may limit its utility. Amtrak suggests defining a timeline for tribal response similar to the 30-day response for SHPO reviews in Appendix B.1.h.
2. Section III.B. provides a list of seven sources to consult to identify potentially interested Indian Tribes, and this is not an exhaustive list, which demonstrates the difficulty of locating tribes and contact information. As Amtrak noted in its prior comments, searching for potentially interested tribes and appropriate contact information and methods represents a time- and resource-consuming process for agencies and project sponsors. Amtrak reiterates its call for reliable, up-to-date Tribal contact information and Tribal



consultation submission protocols in a centralized repository, such as a nationwide GIS-based tool, for this information that is *actively maintained*, inclusive of Tribes that do not have a Tribal Historic Preservation Officer (THPO).

3. Section III.C: “Consults with” language may be misleading. Suggest rephrasing.
4. Definitions:
 - a. Abatement: Suggest that this mention what is being eliminated, lessened, reduced, removed, etc.
 - b. Independent Utility: This definition seems to contradict the usual meaning of this phrase, which typically refers to a complete, stand-alone project. We suggest revising this definition to be in keeping with the usual meaning, consistent with established definitions.
 - c. Rail Infrastructure: It is unclear what “land lines” refers to in this definition.
5. Appendix A.4 and Appendix B.5 do not significantly expand activities beyond those already covered under ACHP’s *Program Comment to Exempt Consideration of Effects to Rail Properties Within Rail Rights-of-Way* (Rail ROW Program Comment). Notably, the replacement of catenary systems has been removed from the draft HBT Program Comment, which would have significantly reduced Section 106 review requirements for Amtrak’s upcoming electrification renewal programs.
6. Appendix B.1.b: The second paragraph is confusing as written and located within the document, and may be slightly inconsistent with section III.B.2.
7. Appendix B.6.a: Amtrak assumes that this is not intended to exempt replacement of historic bridges. Consider whether a Type C determination would be appropriate to exempt replacement of non-historic bridges from further review.

Amtrak appreciates the opportunity to comment on the draft HBT Program Comment, as well as ACHP’s consideration of Amtrak’s interests as the nation’s primary intercity passenger railroad. Thank you for your attention. Please feel free to contact Amtrak at regulatoryaffairs@Amtrak.com if you have any questions.

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Arbre Croche Cultural Resources LLC

Misty M. Jackson, Ph.D., Proprietor and Principal Investigator

ACCR is an Economically Disadvantage Woman-owned Small Business

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December 15, 2024

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

Dear Chair Bronin,

Thank you for the opportunity to review and comment on the *November 15, 2024 Proposed Program Comment on Certain Housing, Building, and Transportation Activities* (Program Comment). As an archaeologist in private consulting who partners with architectural historians for conducting the work of Section 106 and NEPA reviewed projects, changes proposed in the Program Comment are troubling for a number of reasons. This is a lengthy and complex document, but I will be brief in my comments. I see three primary reasons for concern, though there are others. The three concerns, or more accurately, criticisms, are the following.

First, the issue of overburdened SHPOs and THPOs, that appears to have triggered this movement for streamlining work and procedures under NEPA and the National Historic Preservation Act of 1966, which is due to the increased number of projects requiring review, which can result in delays in review, is a problem of underfunding for these governmental organizations, and not one of any deficiency in the regulations and procedures of NEPA and the National Historic Preservation Act of 1966.

Related to this, it is recognized by the Program comment that many MOAs and other programmatic agreements (PAs) are in place for projects of various types and should be left in place. These serve the needs of historic preservation. These should continue to be looked to as the way to solve issues of redundancy or “overburden” to deal with projects with low probability of negative impacts to historic resources. However, professionals in the SHPOs and THPOs should continue to be the persons involved with creating and implementing these MOAs and PAs.

Second, and most troubling, and related to the previous comment, is the approach now recommended by the Program Comment of allowing federal agency personnel rather than those who are qualified under Secretary of the Interior Standards to make decisions as to whether projects should undergo NEPA and NHPA review or be excluded from such review.

I must tell you that in my work I frequently if not daily interact with clients who assure me that they have no cultural resources within their project boundaries. They are commonly wrong. It is individuals similar to my clients, who have no knowledge or expertise in the identification of cultural resources, who would be responsible under the new approach of the Program Comment for making determinations whether an undertaking is now an undertaking requiring review. Please note that I have in my personal experience found that those with above ground cultural resources expertise have no expertise for making determinations in regard to archaeological resources, and archaeological sites have been ignored and destroyed when they have been allowed to make those determinations. Similarly, as an archaeologist, I am not qualified to comment and make determinations on most above ground reviews. It is imperative that those with expertise *in their respective fields*, whether above or below ground, are the ones who review projects and that their determinations and recommendations are followed by federal agency representatives. In short, unless they have direct education and experience and are qualified under the SOI Standards, federal agency personnel are not qualified to make determinations of project exclusions. Simply stated, this is why for decades it has been the work of qualified professionals to make those recommendations to the federal agencies.

Third, I note that among the categorical exclusions in Appendix A, page 20 of the Draft for Public Comment – Dated 11/15/2024 is the following:

1. Site Work

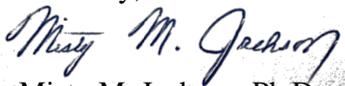
The following activities do not require further Section 106 review:

- 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.

I must emphasize to you that I have in my work as an archaeologist found burials of pre-contact Native Americans beneath a street in Bay City, Michigan and in a “dump” context beneath a street in Detroit. Furthermore, an historic dump might be considered a “disturbed” context by a non-professional, non-historical archaeologist. These are in fact archaeological sites with much to tell us about those who lived by the dump and whose ‘trash’ accumulated there. These are but examples of how historic preservation will not be served if federal agencies are allowed to make decisions in regard to exclusions from review and if “disturbed” contexts are blanketly removed from review without first undergoing research and recommendations by professionals.

I appreciate your consideration of my comments.

Sincerely,



Misty M. Jackson, Ph.D.



December 15, 2024
By Email

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

Dear Ms. Bronin:

For the second time, Cultural Heritage Partners, PLLC writes to express profound concerns about the ACHP's Revised Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities. The ACHP's revisions do not address sufficiently the broad objections that we and others raised in earlier stages of the Revised Draft Program Comment review.

We concur with the legal review of the Revised Draft Program Comment prepared by NCSHPO's attorney, Andrea C. Ferster, who is respected nationally for her work on Section 106 matters. Even though numerous parties have requested it, ACHP has not supported the Revised Draft Program Comment with data or any comprehensive analysis or study, a puzzling omission that questions its purpose and need and undermines its proponents' calls for "efficiency" and "streamlining." In addition, as NCSHPO's legal review demonstrates, the Revised Draft Program Comment creates an end-run around the statutory and regulatory requirements for determining Section 106 exemptions. Thus, the Revised Draft Program Comment will create more risk, not only for the ACHP, but for all other federal agencies that elect to apply it, and developers who will be required to guess to what extent the Program Comment may or not apply to their situation. Finally, the Revised Draft Program Comment has still left unresolved how it will affect existing Memoranda of Agreement or Programmatic Agreements. Considering this confusion, the Revised Draft Program Comment—if approved—will invite federal courts to disregard the ACHP's interpretation of Section 106 in the new legal landscape of *Loper Bright*, a changed legal landscape the Revised Draft Program Comment's proponents have either ignored or do not appreciate to the ACHP's detriment.

For these reasons, the Revised Draft Program Comment is fundamentally flawed and counterproductive. The ACHP should abandon it.

Respectfully submitted

William J. Cook, Partner



Outlook

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

From Kendra Parzen <kparzen@landmarks.org>**Date** Fri 13-Dec-24 4:20 PM**To** Program Alternatives <program_alternatives@achp.gov>**Cc** Bonnie McDonald <bmcDonald@landmarks.org>; Frank Butterfield <fbutterfield@landmarks.org>

Chair Bronin:

Landmarks Illinois would like to reiterate our support for the goals of the proposed Program Comment now titled Program Comment on Certain Housing, Building, and Transportation Activities, as expressed in Bonnie McDonald's letter of October 9. We thank the ACHP for its receptiveness to the concerns that we expressed in that letter. We appreciate the opportunity to continue to provide our perspective as this document evolves.

Having reviewed the updated draft, we would like to provide the following comments and suggestions:

1. In Section II.C, the program comment states "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." We request that the ACHP extend this recommendation to all consulting parties.
2. Appendix B, Determinations C through G cover historic building status and provide qualifications for scenarios related to historic buildings. Limiting these Determinations to buildings omits historic resources that are not buildings according to the definitions of the National Register. In particular, structures often have many of the same physical features as buildings and/or are often part of transportation infrastructure (for example, bridges). We recommend extending the Determinations to cover other types of historic resources, at a minimum including structures.
3. Appendix B, Item 6 identifies replacement or installation of a bridge as an activity that does not require Section 106 review provided that a Type B Determination has been made. We are concerned that this leaves open the opportunity for historic bridges to be replaced without Section 106 review. After addressing our second comment, above, we recommend extending Determinations C through G to this section.

Thank you for your consideration.

Sincerely,

Kendra Parzen
Advocacy Manager
[Landmarks Illinois](#)

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[Have a threatened historic place in your community? Nominate it to the 2025 Most Endangered Historic Places in Illinois. Deadline: January 10, 2025.](#)

December 15, 2024

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

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

Dear Chair Bronin,

The National Alliance of Preservation Commissions (NAPC) appreciates the opportunity to provide comments on ACHP's draft Program Comment on Certain Housing, Building, and Transportation Activities. [NAPC's Core Values and Principles](#) Statement recognizes that preservation policy must adapt and respond to change. Our previous participation in the development of the ACHP policy statements and this draft program comment underscores the critical role that historic resources and existing buildings play in meeting affordable housing and climate action goals.

The NHPA was enacted in recognition that historic places were being lost or irreversibly altered, **and to ensure that preservation serves the public interest**. For this reason, the establishment of SHPOs, CLGs and local government engagement in Section 106 is specifically designed to provide the public and the historic preservation community with a meaningful voice in federal undertakings. This balance—between addressing societal needs and ensuring those most directly affected by federal actions have input—is fundamental to the intent of the NHPA.

Generally, local commissions and staff participate in the Section 106 process by applying local knowledge and data to help identify historic or eligible cultural resources, communicating any additional requirements for the project as a result of local regulations, and participating in the development of mitigation strategies when applicable. The process also fosters collaboration among stakeholders, including local preservation program staff, commissions, and advocacy groups.

Federal undertakings often impact communities that have been underrepresented and have witnessed the loss or adverse impacts to historic resources that represent their history and heritage. One of the critical roles of local stakeholders in the Section 106 process is to ensure that the voices of these underrepresented and marginalized communities are heard. In some instances, Section 106 is their only opportunity to engage in projects that impact cultural resources within their community. Granting federal agencies the authority to unilaterally make decisions on broad categories of federal undertakings without the input of these local voices risks undermining the foundation on which historic preservation is built – public interest and the public's trust that they are guaranteed a voice through the process.

We acknowledge that the prior draft has been greatly revised to incorporate comments from stakeholders, partner organizations and agencies, industry professionals, and the general public. However, the Program Comment, in its draft form, is far-reaching and will exempt an **unknown volume of undertakings** from the Section 106 process altogether.

General Comments / Concerns:

- PROCESS - NAPC shares concerns about the process of developing this Program Comment. These concerns about the process are referenced in a letter submitted to the Council on behalf of a Preservation Partners cohort group of national preservation organizations. This proposed Program Comment is unique in its conception, design, and scope, and will likely set a precedent for future ACHP actions.
- LOCAL CONSULTATION - While the revised program comment includes a notification to NCSHPO and NATHPO, NAPC is still concerned that federal agencies would be granted authority to move forward with undertakings with no notification or good faith consultation with local governments and other knowledgeable stakeholders. This could have a proportionately larger impact on historic resources in underrepresented communities and other areas where prior survey and designations have not been done. Local communities should likewise be invited to review written determinations as provided for in Appendix B.
- SURVEY - Identification of cultural resources and formation of determinations of eligibility for potentially impacted properties is fundamental to the Section 106 process. This also provides an opportunity for local communities to gain critical survey data which informs their own programs. Local designations likewise often support eligibility determinations and those properties are treated as historic resources under Section 106. This results in a missed opportunity as new, federally funded projects come forward in these communities.
- MESSAGING - Local preservation programs and policies have been developed over time to reflect community values and goals. In most cases, local policy follows the general guidance provided at the federal level. Despite the fact that case history has long upheld the regulations enforced by local governments, local staff, commissions, and other stakeholders are often left to defend their programs and face accusations of NIMBYism and obstruction. While **sound preservation policy is proven to support the common goals of housing and climate action**, preservation is too often cited by developers as yet another regulatory barrier to achieving those goals. NAPC is extremely concerned that the proposed Program Comment perpetuates rhetoric that historic preservation is somehow a barrier to smart growth and sustainable development.

Thank you for consideration of these comments.

Sincerely,



Abigail Christman
Chair, National Alliance of Preservation Commissions



Stephanie Paul
Executive Director, National Alliance of Preservation Commissions



December 13, 2024

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

Dear Chair Bronin,

The National Preservation Partners Network (NPPN) Board of Directors applauds ACHP's ambitions to position preservation to more readily address the nation's pressing needs to expand access to housing, improve resilience, and offer transportation alternatives. Going back to the roots of the National Preservation Act, we wholeheartedly support efforts to work collaboratively on solutions that get all parties to a satisfactory "yes" on a historic building's future, and believe historic resources play critical roles in fulfilling today's needs.

NPPN's members' involvement with the Section 106 process varies, based on their core programs, services, and geographic scope. Often our members are called upon as potentially interested parties during Section 106 review and are instrumental in gathering stakeholder input.

This letter is a follow up to our October 9, 2024, letter regarding the original Program Comment Draft published in August 2024.

We still think that including data in the Program Comment Introduction would help us understand where and to what degree delays within the Section 106 process are impeding the stated goals and to better assess how this Program Comment might improve existing processes. That aside, in the spirit of championing continual improvements to the preservation movement, we offer the following constructive comments.

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Knoxville, TN 37901
(781) 491-2082
PresPartners.org

Type E Determination for Character-Defining Features and Non-Significant Facades; and Type F Determination for Character-Defining Features and Primary Spaces.

We previously expressed concerns about how primary interior spaces and facades would be determined by *federal agencies* and are pleased to see clarification that these determinations require consultation with a *qualified professional* or the relevant SHPO.

Qualified Professional Consultation:

We are pleased to see the term *qualified authority* as used in the original draft has been replaced with *qualified professional* and that the definition references the Secretary of the Interior's Professional Qualification Standards.

However, we don't think that consulting a *qualified professional* is necessarily an appropriate substitute for SHPO or THPO consultation in every situation described and hope those offices will still be consulted regularly. As an example, an unintended consequence could be conflicting independent determinations of appropriate treatment on a historic resource when an additional action on the same property, such as tax credit or grant application, does require SHPO review. Because the SHPO and THPO are central to a variety of review processes, including SHPO or THPO consultation on the various determinations listed in Appendix B could produce more harmonious outcomes and thus avoid project delays.

Type C Determination of Historic Building Status (Appendix B)

In reading this most recent draft, we recommend improvements to the process outlined for a Type C Determination of *Historic Building* status (Appendix B. 1.c.,p.27).

First, the paragraph suggests a Type C Determination can be made by checking records for the preceding 10 years, yet many buildings have been determined eligible to be listed on the National Register of Historic Places by a SHPO or TPO prior to that. We recommend striking "within the preceding 10 years".

Secondly, it appears this determination is allowed to be made by a *qualified professional* as an alternative to checking records (either/or), which we fear may invite *federal agencies* to skip the valuable record-checking step. We recommend step (b) is required if no records per the process outlined in (a) are identified.

Most notably, option (b) circumvents the usually efficient consultation or determination-of-eligibility process standardly conducted by SHPO and THPO offices. Having a *qualified professional* make a negative determination of status rather than a SHPO or THPO inserts a potential gray work-around that does not benefit public process.

Therefore, we recommend that the language in (b) is replaced with: “obtain a written determination from the relevant SHPO or THPO that such building is not a historic building.”

Indeed, our members report that the process of successfully nominating a building to the National Register of Historic Places after receiving a determination of eligibility can sometimes take years. But this potential pinch-point or capacity issue should be analyzed and addressed outside of the current focus on Section 106.

Public Input Opportunities

While the revised Draft Program Comment has successfully addressed several of the concerns raised in our October 9 letter, we would like to see further assurance of public comment opportunities. The public process of preservation defined in the National Historic Preservation Act is of utmost importance, and each element of the Program Comment should reinforce that, especially as it is available for use by any *federal agency* on a wide variety of undertakings.

We request consideration of a public notification requirement reflective of requirements built into Section 106 each time this Program Comment is to be utilized for an undertaking set forth in Appendix B. While we appreciate the notice provision outlined in Program Comment Section III. 2., it falls short of notifying other potentially interested parties regarding application of this Program Comment to a specific property or resource. As with Section 106, other potentially interested parties can and do contribute information regarding previously unidentified historic properties or unanticipated effects, which can lead to a better solution for all. Foregoing opportunities for local stakeholder engagement could have the unintended consequence of irreparable damage or destruction of historic resources, especially those not previously identified or listed on the National Register of Historic Places. Potentially, there could be a disproportionate impact on historic resources in underrepresented communities and other areas where survey and designations have not been completed.

A robust public input process regarding utilization of the Program Comment will provide the opportunity to evaluate how well the Program Comment advances and harmonizes historic preservation goals - including the reuse of historic materials and buildings, and the upgrading of infrastructure in historic neighborhoods - with the nation’s pressing needs to expand access to housing, improve resilience, and develop transportation alternatives. Since the scope of the Program Comment will impact historic resources in communities across the country, when unintended negative outcomes become apparent there should be an opportunity to adjust accordingly.

NPPN recommends the ACHP initially launch the Program Comment as a pilot program with a three-year sunset date in order to evaluate its impact and adjust accordingly.

Again, we appreciate your efforts to position preservation practices to address important issues our country faces and hope to collaborate with ACHP on practical solutions.

Sincerely,



Samantha Bosshart
Chair



Kim Trent
Executive Director



National Trust *for*
Historic Preservation®

December 15, 2024

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

via email to program_alternatives@achp.gov

Re: Draft ACHP Program Comment on Certain Housing, Building, and Transportation Activities

Dear Sara,

Thank you for inviting feedback on the revised draft Program Comment on Certain Housing, Building, and Transportation Activities, and for your responsiveness, evident in this version, to the concerns and suggestions we and others have offered. Specifically:

- We support the decision not to preempt existing Section 106 agreements that have been negotiated and are already in place.
- We support the addition of State Historic Preservation Officers as an optional source for the professional determinations called for in Appendix B. In our view, this option is likely to be utilized because it will often be the most efficient.
- We support the elimination of the “primary façade” determination, instead replacing it with the option to designate a “non-significant façade.”

Attached are additional recommendations for revisions that will help to minimize adverse effects to historic properties and to reduce confusion. Thank you in advance for considering these additional recommendations.

We also endorse the “big picture” comments submitted on December 13th by the Department of the Interior related to consultation, the use of qualified professionals, and overall program comment scope. With respect to Tribal consultation, of particular note is the concern, reiterated in the Department of the Interior’s letter, that abbreviated procedures could compromise the government-to-government obligations of federal agencies. Further, NTHP joins the Department of the Interior in supporting the increased required use of qualified professionals, especially for ground disturbing activities, and we support the removal of transportation-related activities from the scope of the Program Comment, since these are adequately addressed by existing Section 106 agreements.

The National Historic Preservation Act charts a path for public participation in decisions that identify and impact historic resources. We urge you to ensure opportunities for broad public input in instances where the Program Comment is invoked.

We would welcome the opportunity to discuss these proposed revisions, as we have found these prior meetings to be meaningful and productive. We know you will be responding to a large number of comments within a short window, but we hope it will be possible to find a mutually convenient time.

Finally, we want to express our gratitude for the extraordinary work of your staff in compiling and analyzing the comments submitted to date. Their experience will continue to be valuable in shaping the revised Program Comment to maximize its potential effectiveness.

Sincerely,

A handwritten signature in blue ink, appearing to read "Carol C. Quillen". The signature is fluid and cursive, with the first name "Carol" and last name "Quillen" clearly distinguishable.

Carol Quillen
President and Chief Executive Officer

Enclosure:

- NTHP Track change comments on text of proposed Program Comment

cc: Reid Nelson, Executive Director, ACHP
Javier Marques, General Counsel, ACHP
Caroline Henry, Federal Preservation Officer, U.S. 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 becomes effective upon the ACHP’s issuance of the Template for Reports pursuant to Stipulation X.A.4. 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*. However, if a *federal agency* elects to terminate an MOA or PA, it may not use this Program Comment as a substitute to satisfy its Section 106 responsibilities unless it has received written concurrence to do so from the applicable SHPO.

If a *federal agency* elects to amend or terminate an MOA or PA, and if that MOA or PA includes an amendment or termination provision, the *federal agency* must follow the procedures of that provision, including consultation with all signatories to the MOA or PA.

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 unit under the jurisdiction of the National Park Service (*National Park Unit*).
 - 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*, if the *federal agency* elects to use this Program Comment, aside from keeping a record of its determinations to use Appendix A of the Program Comment.

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* elects to use this Program Comment, and (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. Where the geographic scope is less than national, the *federal agency* must also notify the relevant SHPO(s) and THPO(s). 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-governance. 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

In the event that an *Indian Tribe* or *Native Hawaiian Organization* notifies the *federal agency* 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 *effects*; 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)* and *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, and 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 respond to the ACHP's written comments, and must notify the objecting party, any consulting parties previously notified of the dispute, and any relevant *THPO* or *SHPO* regarding its decision as to compliance 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*, NCSHPO, NATHPO, and other parties as it deems appropriate and as set forth below.

A. Amendment by the Chair, ACHP to Extend the Duration

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 by a majority vote.

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, if the *federal agency* has approved the use of the Program Comment by the delegated entity. 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 each of the separate activities and *undertakings* covered by Appendix A, and include: the location of each *undertaking* for which Appendix A is invoked and the date on which the decision to apply Appendix A was approved;
- b. For any *undertakings* covered by Appendix 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, in consultation with NCSHPO and others it deems appropriate, a template for *federal agencies* to collect information about any *undertakings* covered by Appendix B. The Program Comment will go into effect once the template has been made available. The ACHP must also 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 annually during the initial five-year period in 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, or *micromobility vehicles*. 

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 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, setting, 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* materials 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* does not include 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), unless the *federal agency* has specifically approved the use of the Program Comment by that government with delegated responsibility.

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-related activities

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.

Historic structure – [this would be helpful regarding historic bridges]

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*.

National Park Unit . . . [see DOI comments]

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*.

P*rotected 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 Qualification Standards, as amended and annotated.

Rail infrastructure means structures, *buildings*, 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, including the *federal agency's* own records, and 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, 54 U.S.C. § 302301(1), 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, 54 U.S.C. § 302702.

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 existing elements:
 - i. Doors, including but not limited to insulated exterior doors and basement bulkhead doors.
 - ii. **Win**dows, 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 existing 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. Existing 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. Existing *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 existing 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 existing 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. Existing 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. Repairing 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

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, including consultation with the *SHPO/THPO*, 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 and the relevant *SHPO/THPO*; 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 Section 106 consultation pursuant to 36 C.F.R. Part 800 must be completed before work can proceed.

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* 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*. 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 (No Adverse Effect) has been made.
- b. Removal of any element listed in Appendix A, Section 1.a., after a Type B Determination (No Adverse Effect) 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 (No Adverse Effect) has been made.
- d. Planting a tree (other than replacing a tree per Appendix A, Section 1.b.iii.), after a Type A Determination (No Adverse Effect) has been made.
- e. Test borings, soil sampling, well drilling, or perc tests more than eight inches in diameter, after a Type B Determination (No Adverse Effect) 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 (No Adverse Effect) 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 (No Adverse Effect) 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 (No Historic Properties) 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 (No Adverse Effect) 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 (No Historic Properties) 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 (No Historic Properties) 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 (No Adverse Effect) 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 (No Adverse Effect) 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 (No Adverse Effect) 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 C Determination (No Historic Properties) 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

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

Dear Chair Bronin:

Thank you for the opportunity to comment on the revised Program Comment on Certain Housing, Building, and Transportation Activities. On behalf of the undersigned New York-based preservation nonprofit organizations, the Preservation Colleagues network, the Preservation League of New York State respectfully submits the following comments.

We appreciate that many of our concerns were addressed and that the document is easier to follow. We have no major concerns with the processes and activities covered under Appendix A of the revised Program Comment.

However, we remain concerned that State Historic Preservation Offices (SHPOs) are essentially cut out of the Section 106 process for any activities covered under Appendix B. We appreciate the gesture of adding the option for federal agencies to consult with the relevant SHPO (Appendix B, Section 1) but this is unlikely to occur in practice. By not consulting with SHPO, federal agencies and/or their consultants are left with little accountability and are left to make their own determinations regarding National Register eligibility.

The lack of notification requirements remains a concern as well. With respect to Dispute Resolution (Section VI), how and when would a member of the public, local government, SHPO, or other entity become aware of an undertaking? Without consultation requirements, how will there be any consulting parties?

Finally, the lack of notification requirements and the lack of SHPO input could result in the intentional or unintentional loss of historic resources and/or character defining features that have not yet been identified in surveys or listed in the National Register. This could disproportionately impact historically marginalized communities, which are generally less well documented.

Thank you for your consideration.

Sincerely,

Adirondack Architectural Heritage, Erin Tobin, Executive Director
Friends of the Upper East Side Historic Districts, Nuha Ansari, Executive Director
Historic Albany Foundation, Pamela Howard, Executive Director
Historic Districts Council, Frampton Tolbert, Executive Director
Historic Ithaca, Susan Holland, Executive Director
Landmark Society of Western New York, Wayne Goodman, Executive Director
New York Landmarks Conservancy, Peg Breen, President

Preservation Association of Central New York, Nicole M. Fragnito, Executive Director
Preservation Buffalo Niagara, Bernice Radle, Executive Director
Preservation League of New York State, Jay DiLorenzo, President
Preservation Long Island, Tara Cubie, Preservation Director
Saratoga Springs Preservation Foundation, Samantha Bosshart, Executive Director
TAP Inc., Barb Nelson, AIA, Executive Director
Village Preservation, Andrew Berman, Executive Director

December 13, 2024

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

Dear Chair Bronin:

Preservation Action (PA) appreciates the opportunity to provide comments on the Advisory Council for Historic Preservation's (ACHP) revised draft of the "Program Comment on Certain Housing, Building, and Transportation Activities" (PC). Preservation Action is a 501(c)4 nonprofit organization created to serve as the national grassroots advocacy organization for historic preservation. We represent an active and engaged grassroots constituency from across the country, including thousands of members and supporters from nearly every state.

PA recognizes the ACHP's work to consider comments and efforts to make substantive changes to the PC in the revised draft. Again, we share the desire for historic preservation to be an active partner in solving the pressing issues of creating more affordable housing and enhancing energy efficiency in buildings. We also share an understanding that preservation – and the policies that guide it – should evolve with the field and the environment to which it contributes. We are not anti-change. **While we feel the revised draft addresses several consistent concerns raised by Preservation Action and many in the preservation community, most of our underlying issues with the PC still remain.** We've outlined some of these issues below and refer you to our Oct. 9th comments for more details. For these reasons, we continue to recommend the ACHP withdraw the PC and consider alternative approaches.

- **We want preservation to be progressive and adaptable, but it is still unclear what problem the PC is attempting to solve.** The foundation on which this PC was developed is unsupported by concrete data – via statistics like delays or denial rates as well as qualitative interviews with State and Tribal Historic Preservation Officers (SHPOs/THPOs), federal agencies, consultants, etc. – that demonstrates how the Section 106 process is a barrier to housing affordability or energy efficiency in buildings. We agree that there are inconsistencies and that there is a need to streamline processes, but due diligence surrounding a tool as strong as a Program Comment necessitates a foundation based on data and facts. As we offered previously, we stand ready to collaborate with ACHP to tackle clearly defined barriers with the section 106 process.
- **We appreciate the clear language in the revised draft that the proposed PC would not supersede, replace, or change the terms of existing state specific programmatic agreements.** PA appreciates language in the updated draft ensuring that the PC would not supersede existing state agreements, but we continue to be concerned that much of the **PC would be in conflict**

with local preservation ordinances, leading to complexity, confusion, and further project delays. We strongly feel that the revised draft of the PC gives too much power to federal agencies to make their own determinations on how historic resources will be impacted.

- **We also were pleased to see changes to add clarity to the document including updated definitions, revised reporting requirements, and outlining specified roles for SHPOs and THPOs.** While the revised PC took steps to clarify the roles of State and Tribal Historic Preservation Offices, we are still concerned that the **lack of consultation with SHPOs, THPOs and the public at-large**, will actually slow down the process and lead to more negative outcomes and delays. We understand the desire for more efficiency and expediency, but feel that this would be better accomplished with proper funding and staffing for SHPOs and THPOs.
- **We remain very concerned by the process in which the PC was developed, the broad scope, the leeway given to federal agencies to make their own determinations, and the potential to set a precedent for future ACHP and federal agency actions.** We remain very concerned that the revised draft of the PC gives federal agencies essentially unchecked power to make their own decisions. Instead of requiring consultation with states and tribes – the local entities that know their areas and historic resources best – the PC relies on loosely defined “qualified professionals” or “qualified authorities” to make determinations on how historic resources are impacted.
- **The revised PC continues to allow federal agencies to side-step a key component of the Section 106 that requires the consideration of adverse effects to historic resources and evaluate alternatives to avoid, minimize or mitigate these adverse effects.** The PC would eliminate the requirement for federal agencies to identify alternatives or mitigate damage for projects that have “minimal” adverse effects. This is a very subjective term that could easily be abused to suit a federal agency's needs. This again, gives far too much leeway to federal agencies.

Preservation Action recognizes the important role historic preservation should play in creating affordable housing and addressing the climate crisis and stands ready to work with the ACHP on these shared goals. While we appreciate the consideration of our issues laid out in our initial comments submitted on Oct. 9th and many of the changes made to improve the PC, we continue to be deeply concerned about the PC, the process in which it was initiated, and ultimately feel it will do more harm than good. Respectfully, we again must urge the ACHP to withdraw the PC and consider alternative approaches.

Sincerely,



Russ Carnahan, President
Preservation Action



Briana Paxton, Chairwoman
Preservation Action



SOCIETY FOR AMERICAN ARCHAEOLOGY

December 13, 2024

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

Dear Chair Bronin,

The Society for American Archaeology (SAA) submits the following comments on the Advisory Council on Historic Preservation's (ACHP) revised draft program comment (PC), now titled "Program Comment on Certain Housing, Building, and Transportation Activities." We once again welcome the opportunity to provide input on this important proposal.

The SAA is an international organization that, since its founding in 1934, has been dedicated to research about and interpretation and protection of the archaeological heritage of the Americas. With more than 6,000 members, the SAA represents professional and avocational archaeologists, archaeology students and faculty in colleges and universities, and archaeologists working at tribal agencies, museums, government agencies, and the private sector. The SAA has members throughout the United States, as well as in many nations around the world.

The SAA appreciates the time and effort that went into making the extensive revisions contained in the current draft. We also agree with the intent of the PC—to make the Section 106 process more efficient and effective. While the revisions address some of the concerns with the earlier version, as outlined in our letter of September 20, we remain convinced that the new draft PC is fundamentally flawed for the following reasons:

1. The document still constitutes a de facto rulemaking, and as such cannot permit actions that run counter to the explicit requirements of the statute upon whose authority the rulemaking rests. While the change in the PC removing some consultations with Tribal Historic Preservation Officers (THPOs) from the proposed exemption is welcome, agencies would still be allowed to forego consultations with THPOs for undertakings not located on tribal lands. Meanwhile, agencies could waive consultations with State Historic Preservation Officers (SHPOs). To reiterate our earlier objection, this is the direct opposite of the process set forth by the statute. The legal justifications for the draft PC, as outlined by the ACHP general counsel in October, simply sidestep the concerns raised by the comments of the SAA and other organizations. The delegation of authority to the ACHP by the law is not unfettered, and it does not give the ACHP the ability to write rules outside the boundaries of the statute. Together, the SAA believes that the general counsel's response and the revised PC continue to make a mockery of the consultation process that is intended to occur between state and federal entities. The National

Historic Preservation Act is not and was never intended to be a one-way street, with the ACHP dictating terms to SHPOs and THPOs.

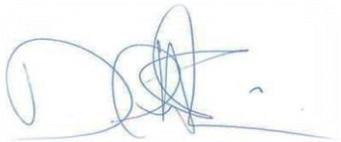
2. The revised draft continues the error of the earlier document by being virtually silent when it comes to archaeology and undertakings eligible under the PC. To reiterate, the SAA strongly believes that exemptions from ground disturbance, even for ground that was already examined at some point in the past, must be determined by archaeologists. By short-circuiting the consultation process, especially when it comes to SHPOs, the draft PC would remove protections from as yet unidentified archaeological sites.

3. Section VIII part A is particularly troubling. The 10-year duration of the proposed PC, though reduced from the earlier draft, is still a long time. There is no need for an extension of any duration at the discretion of a single individual. It is notable that Section IX seems, by contrast, to imply that in order for the PC to be withdrawn, a vote by the entire ACHP is needed. This provision should be withdrawn.

4. As of this writing, the current administration has 38 days remaining in office. The new administration will undoubtedly wish to closely scrutinize all rulemakings made by the outgoing one, particularly those promulgated after the election. It is highly likely, if not certain, that even if the current draft PC is finalized before January 20, 2025, that agencies will be unable to use it before the next president's appointees seek to implement new policies that reflect their outlook. To proceed with the draft PC under these circumstances would only cause unnecessary confusion among government organizations and stakeholders.

For the above reasons, we urge the ACHP to abandon this draft PC and work with the incoming administration and stakeholders to develop a different approach to bring further efficiencies to the Section 106 process without sacrificing either effectiveness or consultation.

Sincerely,

A handwritten signature in blue ink, appearing to read "D. Sandweiss", with a horizontal line underneath.

Daniel H. Sandweiss, Ph.D., RPA
President



December 12, 2024

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

Re: Proposed Advisory Council on Historic Preservation Program Comment on Certain Housing, Building, and Transportation Activities.

The Society for Historical Archaeology (SHA) appreciates the opportunity to comment on the Advisory Council on Historic Preservation's (ACHP) revised proposed program comment on Certain Housing, Building, and Transportation Activities. Formed in 1967, the Society for Historical Archaeology is the largest scholarly group concerned with the archaeology of the modern world (A.D. 1400-present). The main focus of the Society is the era since the beginning of European exploration. SHA promotes scholarly research and the dissemination of knowledge concerning historical archaeology. The Society is specifically concerned with the identification, excavation, interpretation, and conservation of sites and materials on land and underwater.

The SHA agrees with the ACHP's effort to streamline Section 106 compliance for the classes of federal undertakings covered by the proposed program comment and appreciates the ACHP's numerous improvements to the earlier version of the proposed program comment. The SHA, however, still has major concerns. The revised proposed program comment is still too sweeping, covering disparate, non-related and non-intuitive categories of undertakings. The intent of program comments, following the ACHP's own guidance and policies, is to cover specific agency or program-related undertakings, not a broad government-wide set of activities. Therefore, there is no "Program" being commented upon. Further, the primary focus of this proposed program comment is the identification of undertakings that are not subject to further review, or "exemptions." This proposed program alternative is in fact an Exempted Category as described in 36 CFR § 800.14(c). Therefore, while the proposed program comment has been improved, it is still an improper vehicle. In addition to this overall comment, we have more specific comments below:

II SCOPE

E. Activities Not Covered and Exceptions

The proposed program comment needs to require federal agencies to follow the standard Section 106 process under 36 CFR §§ 800.3 through 800.7, or an applicable Section 106 agreement or other program alternative for **all** National Park Service (NPS) lands, not just the categories of lands listed in the proposed program comment. All NPS lands have a high potential to contain significant archaeological resources. The distinction currently listed in

the program comment appears arbitrary and will introduce complications in the application of the program comment.

III. ALTERNATIVE COMPLIANCE APPROACHES

A. Available Alternative Compliance Approaches and Federal Agency Use

2. Federal Agency Notice of Alternative Compliance Approaches

This section states that 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 (NCSHPO), and the National Association of Tribal Historic Preservation Officers (NATHPO) of its decision to use this program comment. If a federal agency decides to use this program comment, it should also notify the affected State Historic Preservation Officers (SHPOs) and Tribal Historic Preservation Officers (THPOs), not just NCSHPO and NATHPO.

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

Under Section 1: Written Determinations, for Type A Determination for Ground-Related Activities, the program comment states:

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*.

In the majority of program alternatives that have similar stipulations involving ground-related activities, the SOI qualified archaeologist either works for the federal agency, SHPO or THPO, or historic preservation/cultural office of a federally recognized Tribe, or if the qualified professional does not work for these entities, the latter's determination is reviewed by a qualified professional within the agency, SHPO or THPO, or historic preservation/cultural office of a federally recognized Tribe. This should be the standard used in the revised program comment.

The above comment also applies to the text for Type B Determination for Ground-Related Activities. The definition of an APE and findings of no adverse effects need to be made by an SOI qualified archaeologist either working for the federal agency, SHPO or THPO, or historic preservation/cultural office of a federally recognized Tribe, or if the qualified professional does not work for these entities, the latter's determination is

reviewed by a qualified professional within the agency, SHPO or THPO or historic preservation/cultural office of a federally recognized Tribe.

Type B Determination for Ground-Related Activities also includes the following:

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.

If this situation occurs, then the program comment **must** not apply and the standard Section 106 review process must be followed. No federal undertaking where there is the potential for significant archaeological resources, and more importantly, the potential for burial sites, human remains, funerary objects, sacred objects, or items of cultural patrimony, should be exempted from the standard Section 106 review process. In such a scenario, it is critical that the federal agency conduct comprehensive consultation with SHPOs, THPOs, federally recognized Tribes, Native Hawaiian organizations (NHOs), and other consulting parties. Not doing so undercuts the fundamental consultation requirements of NHPA and Section 106.

Alternative Approaches to the Proposed Program Comment

The sweeping nature of the revised program comment still ignores the different missions and capacities of federal agencies whose programs would fund, permit, or license the covered undertakings (a comment SHA made on the earlier version of the program comment). The majority of past program comments and exempted categories were advanced by a federal agency or agencies to address specific issues associated with one or more of their programs or categories of undertakings. These program comments and exempted categories were customized to the structure, staffing and resources of the federal agency or agencies, and balanced the needs of the agency program(s) with historic preservation goals and objectives. This is not the case for the revised program comment. As a result, this proposed program comment will result in scattered, uneven, and poorly monitored implementation which will impact significant archaeological resources.

To more effectively streamline these federal undertakings, while also complying with the consultation requirements of NHPA, the ACHP should work with specific federal agencies to develop nationwide or state-specific programmatic agreements that are customized to an agency's program or programs. These agreements would take into account the staffing and resource capacities of each agency. These agreements would also be tailored to regional and state conditions and circumstances. More importantly, the preparation of these programmatic agreements requires consultation and negotiation with

SHPOs, THPOs, federal recognized Tribes, NHOs, and other consulting parties, and also the public. This is a collaborative effort among all parties, as opposed to a top-down approach to Section 106 compliance.

In conclusion, we strongly recommend that the ACHP withdraw the revised program comment. The SHA would be glad to work with the ACHP to advance a more effective approach to streamlining the review process associated with classes of federal undertakings included in the revised program comment; an approach that more fully considers input from states, Tribes, NHOs, and local communities.

Thank you for the opportunity to comment on the ACHP's revised program comment.

Sincerely,

Rick Veit

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President Society for Historical Archaeology