



## **ADVISORY COUNCIL ON HISTORIC PRESERVATION**

### **Program Comment on Certain Housing, Building, and Transportation Undertakings**

**AGENCY:** Advisory Council on Historic Preservation.

**ACTION:** Notice of approval.

**SUMMARY:** The Advisory Council on Historic Preservation (ACHP) has approved a program comment that provides all federal agencies with an alternative way to review effects to historic properties for certain housing-related, building-related, and transportation infrastructure-related undertakings.

**DATES:** The Program Comment went into effect on December 20, 2024.

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**SUPPLEMENTARY INFORMATION:** Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108 (Section 106 and NHPA), requires federal agencies to consider the effects of projects they carry out, license/permit/approve, or assist (undertakings) on historic properties, and provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment with regard to such undertakings. The ACHP has issued the regulations that set forth the process through which federal agencies comply

with these duties. Those regulations are codified under 36 CFR part 800 (Section 106 regulations).

Under Section 800.14(e) of those regulations, agencies can request the ACHP to provide a "program comment" on a particular category of undertakings in lieu of conducting individual reviews of each individual undertaking under such category, as set forth in 36 CFR 800.4 through 800.7. An agency can meet its Section 106 responsibilities with regard to the effects of those undertakings by taking into account an applicable program comment and following the steps set forth in that comment. The ACHP may also provide a program comment on its own initiative.

The ACHP developed the "Program Comment on Certain Housing, Building, and Transportation Undertakings" (Program Comment) on its own initiative to promote actions that advance historic preservation goals, including the reuse of historic materials and buildings and the upgrading of infrastructure in historic neighborhoods. On December 20, 2024, the ACHP approved the Program Comment, the text of which is reproduced at the end of this notice.

## **I. Background**

The ACHP developed the Program Comment to harmonize policies and procedures for the preservation of the 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 improve access to transportation. These needs have received attention from Congress, as well as state, local, and Tribal governments and private parties.

## **II. Program Comment Summary**

The Program Comment is national in scope and can be used by any federal agency that elects to utilize it, after notifying the ACHP and others of its intent to do so. The Program Comment does not supersede, replace, or change the terms of existing Section 106 memoranda of agreement or programmatic agreements, or other program comments. Additionally, the Program Comment cannot be used in a variety of circumstances, including in situations in which the federal agency knows or has reason to believe there may be any likelihood of encountering historic properties in which an Indian Tribe or Native Hawaiian Organization may have an interest, and undertakings that would occur on or have the potential to affect a number of National Park Service units and sites of religious and cultural significance to Indian Tribes and Native Hawaiian Organizations. In addition, the Program Comment can only be used on Tribal lands if the Indian Tribe provides explicit written consent for its application.

Appendices A and B provide a detailed list of undertakings covered by the Program Comment.

Appendix A provides a list of undertakings not requiring further review, including the following:

- Maintenance or repair of certain site work-related elements, building elements and systems, building equipment, building interior features, and transportation fixtures and equipment;

- Certain landscaping activities;

- Installation of certain temporary structures;

- Certain boring, drilling, and testing activities;

- Abatement of hazardous materials on the exterior or interior of a building, where such abatement does not cause ground disturbance and/or is not visible from the building exterior and/or interior; and

- In-kind replacement or installation of certain above-ground elements.

Appendix B provides a list of undertakings that can proceed without further Section 106 review after the satisfaction of certain conditions, exclusions, or requirements, including federal agencies making one (or more) of seven distinct determinations that require consideration of the impact of a proposed undertaking on historic properties. These undertakings include the following:

- Replacement, installation, or removal of certain site work-related items, building elements and systems,

building equipment, building interior features, and transportation fixtures and equipment;

- Planting trees under certain conditions;
- Certain boring, drilling, and testing activities;

and

- Abatement of hazardous materials on the exterior or interior of a building, where such abatement may cause ground disturbance and/or is visible from the building exterior and/or interior.

The Program Comment requires consultation with Indian Tribes and Native Hawaiian Organizations, recommends financial assistance to certain consulting parties conducting activities beyond the scope of their obligations under Section 106, establishes a process for unanticipated discoveries, promotes the inclusion of Indigenous Knowledge, and includes a provision on confidentiality. As noted above, the Program Comment also explicitly excludes any undertakings that have the potential to affect sites of religious and cultural significance to Indian Tribes or Native Hawaiian Organizations and any situations in which the federal agency knows or believes that there is likelihood of encountering such historic properties, and requires such undertakings be subject to other existing Section 106 agreements or the full Section 106 review process. The Program Comment offers a dispute resolution

procedure that requires the involvement and notification of specific consulting parties.

The Program Comment provides specific requirements for annual federal agency reports, annual ACHP reports, annual ACHP-led meetings, and ACHP training. The Program Comment will last for an initial period of 10 years, with the ACHP chairman having the ability to extend its duration one time by an additional 5 years, and thereafter will either terminate due to the passage of time or be extended or amended by the ACHP membership. In addition, the ACHP membership may withdraw the Program Comment at any time.

### **III. ACHP Consultation Summary**

In May 2024, the ACHP Regulations and Governance Committee met to discuss the concept of initiating program comments to fulfill the goals of its 2023 Policy Statements. Also in May, the ACHP released a 60-day open call for public comment and invited Indian Tribes and Native Hawaiian Organizations to provide feedback on potential topics for a program comment or comments. A detailed list of proposed activities that might be appropriate was provided to illustrate the range of potential topics and to guide feedback. In June 2024, the ACHP hosted four public listening sessions, with approximately 100 attendees at each session. Two additional sessions were available specifically for Indian Tribes and Native Hawaiian Organizations, which had no attendees. In

addition to the listening sessions, the ACHP received written comments from State Historic Preservation Officers (SHPOs), transportation advocates, representatives of city governments, and economic development professionals that covered a range of concerns and topics, including specific undertakings that should and should not be included in the program comments.

In July 2024, the ACHP Regulations and Governance Committee met again to discuss the development of proposed program comments. On July 18, 2024, the ACHP discussed feedback and solicited additional ACHP member input at its triannual business meeting. Through those meetings and other internal staff and member discussions, several proposed activities to be covered by the program comments listed in the public prompt for the May-July feedback period were removed from consideration, including highway removal, transmission, large-scale solar, and offshore wind activities. Other potential topics were refined. On August 1, 2024, the ACHP chair called a meeting of the ACHP members to discuss this feedback and next steps. The ACHP members and staff coalesced around the notion that issuing four separate program comments for feedback from consulting parties and the public would be repetitive and burdensome to consulting parties and potentially introduce inconsistencies in the review strategy for similar

undertakings. Instead, the ACHP members and staff urged the ACHP to propose a single, unified program comment.

On August 8, 2024, the ACHP released the first draft of the Program Comment, combining the proposed covered activities within one Program Comment and providing a 60-day period for public feedback and consultation with Indian Tribes, Native Hawaiian Organizations, and other consulting parties. Prior to the release of the first draft, the ACHP developed, and later implemented, a plan to consult with Indian Tribes and Native Hawaiian Organizations in accordance with 36 CFR 800.14(e)(4) and 800.14(f) and various applicable executive orders. The ACHP also arranged for public participation by scheduling two public meetings, inviting written feedback, and arranging for the ACHP chair to present at a number of additional meetings as well as consultation with SHPOs and Tribal Historic Preservation Officers (THPOs) by scheduling two consultation meetings and inviting written feedback.

In September 2024, the ACHP hosted six consultation meetings/listening sessions (two with Indian Tribes and Native Hawaiian Organizations, one with SHPOs, one with Federal Preservation Officers, and two for other consulting parties and the general public), with 341 total attendees across the six sessions. The ACHP chair also convened government-to-government consultation meetings with three Indian Tribes that requested such consultation. During this

first comment period, 148 written comments (including seven from Indian Tribes) were received, encompassing approximately 1,800 individual comments, with the largest number of specific comments (approximately 750) related to the six appendices. The comment period closed on October 9, 2024.

Throughout and after this first comment period, the ACHP members continued to meet to discuss feedback as it was received and after the comment period closed. On August 19, 2024, the ACHP chair called a meeting of the ACHP Ad Hoc ACHP-Initiated Program Alternatives Forum Committee (the Ad Hoc Committee) to enable members of that committee to discuss the contents of the first draft and the process for the Program Comment's development, and to allow the Ad Hoc Committee members to raise questions and offer ideas on improving the Program Comment. Additional meetings of the Ad Hoc Committee took place on September 5, October 17, and October 24, 2024. On September 18, 2024, and November 14, 2024, the ACHP Regulations and Governance Committee convened to discuss the development of the Program Comment, and the full ACHP membership received an update on the progress regarding the Program Comment at the November 19, 2024, ACHP business meeting.

On November 15, 2024, the ACHP shared a revised draft of the Program Comment and opened a second, 30-day period for public feedback and consultation with Indian Tribes,

Native Hawaiian Organizations, SHPOs, and other consulting parties. In December, the ACHP hosted four consultation meetings/listening sessions (one each with Indian Tribes and Native Hawaiian Organizations, SHPOs, Federal Preservation Officers, and other consulting parties and the general public), with 171 total attendees across the four sessions. The ACHP chair also convened a government-to-government consultation meeting with one Indian Tribe that requested such consultation. During that period, 48 written comments (including four from Indian Tribes) were received, encompassing nearly 700 individual comments, with the largest number of specific comments (approximately 250) related to Appendix A and Appendix B. The comment period closed on December 15, 2024.

On December 17, 2024, the ACHP chair convened an Ad Hoc Committee meeting to discuss comments and feedback received and to provide an overview about how the ACHP could revise the second draft of the Program Comment to respond to such comments and feedback. ACHP members discussed a variety of issues related to the scope of covered undertakings, certain process-related provisions, and certain definitions and requirements.

#### **IV. Comments and ACHP Response**

As described above, in addition to earlier opportunities for review and comment on the concept and proposal for a program comment, the ACHP provided two

review and comment periods on the draft Program Comment, ending in October 2024 and December 2024. In the October review and comment period, 148 total written comments were received (seven from federal agencies, 37 from SHPOs, eight from Tribes, 13 from local/state governments, 53 from industry/other, and 30 from the public). In the December review and comment period, 48 total written comments were received (six from federal agencies, 20 from SHPOs, four from Tribes, 13 from industry/other, and five from the public). The following summaries are intended to provide a general overview of the comments that were received on the draft Program Comment. They are organized by section, although the comments from Indian Tribes are included within a separate summary in recognition of the government-to-government relationship between Indian Tribes and the ACHP.

#### **October 2024 Comment Period for Initial Draft Program**

##### **Comment:**

*Comments from Indian Tribes:* Generally, the Tribal comments opposed the draft Program Comment and asked for early and meaningful consultation in the process. Tribal commenters were concerned that the Program Comment would be likely to result in potentially significant harm to sites of religious and cultural significance to Indian Tribes and Native Hawaiian Organizations. Tribal commenters stated this likelihood was due to the breadth of activities and

federal agencies proposed to be covered in the Program Comment and its potential to allow federal agencies to predetermine that covered activities are not likely to affect sites of religious and Tribal significance on their own. Tribal commenters stated that the Program Comment as written would allow a federal agency to decide to use the Program Comment instead of using previously negotiated agreements that are specific to various situations, programs, and undertakings. Additionally, Tribal commenters expressed concern about the inclusion of ground disturbance in activities described in the appendices and asked that ground disturbing activities be removed from the appendices. Generally, Tribal commenters identified the importance of removing references to "previously disturbed ground" and "previously disturbed rights of way," as they disagreed with a general assumption that previously disturbed areas have a reduced likelihood of possessing or intersecting with sites of religious and cultural significance to Indian Tribes or sacred sites.

*Comments on Approach:* Commenters generally supported the intent of the Program Comment. Several commenters supported the efforts to streamline the Section 106 process; however, many commenters questioned whether a program comment was the appropriate tool for streamlining, given the breadth and scope of covered undertakings. Commenters noted that the most effective program

alternatives are focused on specific resource types, repetitive project or program types, and specific responsible agencies and professionals. Some commenters asked for additional data to support the need for the proposed Program Comment, asserting that the data would help demonstrate the need to address ongoing compliance and timing issues related to Section 106 reviews for the covered undertakings. Some commenters emphasized that the Program Comment, as currently drafted, was difficult to understand and would potentially result in delays and confusion due to the large number of undertakings to be included and the level of detail and requirements to be met. Numerous commenters requested additional consultation on the concept of a program comment, as well as a dialogue on the issues that were being encountered in Section 106 that the Program Comment was meant to address.

*Role of SHPO:* Commenters questioned the role of SHPOs in the proposed Program Comment and raised concern about removing or diminishing the involvement of SHPOs in the review process.

*Training:* Commenters requested that the ACHP consider whether broader Section 106 training would achieve the Program Comment's same goals. Commenters also noted that if adopted, the Program Comment would require the development of extensive guidance and training.

*Format:* Many commenters noted the length of the draft Program Comment and the complexity of the overall document, including definitions and cross references, as a potential concern for its implementation, should it be adopted.

*Comments on Section I (Introduction):* Overall comments on this section requested renaming the Program Comment to reflect the undertakings it would cover, rather than policy goals.

*Background:* Several commenters suggested reframing the background to emphasize the ACHP's mission of promoting the preservation and sustainable use of historic properties, and how the Program Comment would promote preservation as an outcome. Other commenters requested the removal of transportation-sector undertakings due to coverage within existing Section 106 programmatic agreements and the different types of effects those undertakings create compared to housing and building undertakings.

*Prior ACHP Action:* Commenters requested additional data to support the rationale for the proposed Program Comment and the successes of past program alternatives.

*Goals:* Commenters supported the Program Comment's broad goals for streamlining and efficiency and the need for finding a way of making it easier to create needed housing. Other commenters emphasized that those goals should be balanced with historic preservation values.

*Comments on Section II (Scope):* Most commenters on this section asked how the proposed Program Comment would address the issue of delegation to applicants or permittees.

*Overall Effect:* Commenters noted the potential conflation with this section's use of "effect" and the Section 106 regulations' definition of "effect." Other commenters noted that because of the Program Comment's proposed breadth and scope, it would be difficult to track its use and ensure that effects to historic properties would be avoided. Several commenters observed that the Program Comment appeared to acknowledge that minimal adverse effects may occur, with no further discussion of mitigation or resolution of adverse effects. Some commenters noted that the Program Comment assumed adequate or appropriate identification efforts would have already been completed, which may not always be the case. The potential for effects to archaeological sites and Traditional Cultural Properties (TCPs) were also noted in comments. Some commenters questioned the provision allowing for use of the proposed Program Comment for components of larger undertakings and noted potential concerns with the segmentation of undertakings.

*Effect on Other Applicable Laws:* Commenters on this section questioned whether the proposed Program Comment would conflict with local processes in addition to state

laws that often require SHPO review, and whether it would achieve meaningful efficiencies without other streamlining efforts, for example, under the National Environmental Policy Act. Several commenters also noted the potential conflicts with the requirements of the federal rehabilitation tax credit standards.

*Effect on Existing Agreements:* Commenters noted that the proposed Program Comment should not supersede existing Section 106 agreements without consultation by the federal agency and the agreement of the signatories, at a minimum. Commenters also raised questions regarding disputes, asking whether the Program Comment's dispute resolution stipulation could be used if a signatory objected to the use of the Program Comment. Commenters also raised concerns about opportunities for Tribal involvement in amending existing agreements or resolving disputes.

*Effect on Tribal Lands:* Commenters questioned whether program comments could ever apply on Tribal lands. One commenter noted the need to clarify where any Tribal authorizations would be posted.

*Standard Section 106 Review:* Commenters noted that a perceived piecemeal application of the Program Comment to components of an undertaking could result in segmentation or an incomplete consideration of an undertaking's effects on historic properties. Other commenters noted that without consultation a federal agency would not know if a property

of religious and cultural significance could be affected by a covered undertaking, thereby raising questions as to whether the Program Comment could be utilized.

*Comments on Section III (Alternative Compliance Approaches):* Commenters raised concerns with the proposed elimination of consultation with the SHPO, Indian Tribes, THPOs, consulting parties, and the public. Others questioned the meaning of "minimal potential to affect historic properties." Commenters also questioned how federal agencies would determine which appendix would be followed. Some commenters also asked how federal agencies would document their compliance with the Program Comment's various conditions, and how that documentation could or would be shared.

*Consultation with Indian Tribes and Native Hawaiian Organizations:* Commenters asked for further clarity on consultation with Indian Tribes and Native Hawaiian Organizations, as they perceived it to be limited to consultation on the use of the Program Comment, rather than consulting on effects to properties of religious and cultural significance to Indian Tribes and Native Hawaiian Organizations.

*Use of Qualified Authorities:* Many commenters asked whether the definition of "qualified authorities" was needed, given its similarity to "qualified professional." Commenters also noted that the inclusion of qualified

professionals should be a requirement to use the Program Comment. Other commenters questioned who would be considered a qualified authority, who was making decisions regarding who met that threshold, how "appropriate to the circumstances" would be determined, and what constituted "reasonable judgment."

*Determinations of Eligibility:* Commenters asked how federal agencies would be able to reasonably determine that there is minimal potential to affect a property without understanding whether a property was eligible for the National Register of Historic Places. Commenters also questioned the identification of unknown historic properties and whether the reliance on existing data would be sufficient for identifying significant properties. Commenters observed that determinations of eligibility were not required, but activities in the appendices were limited to primary facades and primary rights-of-way. Commenters requested clarification on who would be making those determinations.

*Comments on Section IV (Assistance to Consulting Parties):* Commenters questioned the relevancy of this section within the Program Comment given that the compliance approaches established by this Program Comment would largely eliminate consultation. Further, commenters questioned the applicability of stipulations related to

mitigation within a compliance approach designed to avoid adverse effects.

*Comments on Section V (Unanticipated Discoveries):*

Commenters stated that the alternative compliance approaches established by this Program Comment would increase the likelihood of unanticipated discoveries due to the lack of adequate consultation, lack of adequate identification, and overreliance on assumptions regarding previously disturbed soils.

*Discovery of Human Remains, Funerary Objects, Sacred Objects, or Items of Cultural Patrimony:* Commenters recommended the Program Comment reference 36 CFR 800.13 and include a stronger reference to state and local laws. Further, commenters questioned the adequacy of the proposed 50-foot perimeter/buffer zone for discoveries.

*Comments on Section VI (Dispute Resolution):*

Commenters focused on the challenge of filing a dispute regarding the implementation of the Program Comment without notification to consulting parties of the federal agency's decision to utilize the Program Comment or a comprehensive report of the agency's use of the Program Comment. Further, commenters noted that a federal agency should be required to forward unresolved disputes to the ACHP for its advisory opinion.

*Comments on Section VII (Duration):* Commenters

considered the duration too long and made recommendations

primarily ranging from five to 10 years as an appropriate duration.

*Comments on Section VIII (Amendments):* Commenters recommended requiring consultation for amendments and defining the term "other parties" used in this section.

*Comments on Section IX (Withdrawal):* Commenters noted the need for SHPOs and Indian Tribes to be made aware of the Program Comment's withdrawal. Commenters stated that publication in the Federal Register alone would likely not be sufficient for formal notification to all consulting parties.

*Comments on Section X (Reports and Meetings):* Commenters requested metrics and data rather than examples so that the ACHP could meaningfully analyze the Program Comment's usage. Other commenters shared concerns with the lack of reporting after five years, raising questions of transparency and accountability. Commenters stated that reports should be shared with SHPOs and THPOs in addition to the ACHP and that report due dates should track the federal fiscal cycle, with a due date after the fiscal year closes. Commenters mentioned that the public should be afforded a meeting. Commenters stated that the ACHP members and preservation organizations should also be invited to participate in the annual meetings, which should occur for the duration of the Program Comment.

*Comments on Section XI (Definitions):* Comments in this section fit into one of three categories: standardization, where commenters state that the Program Comment has a conflicting definition with other guidance or regulations; definition content, to include additional detail or provide suggested revisions; or additional terms, for definitions that should be added. Some commenters disagreed with how terms such as "qualified authority" or "previously disturbed soil" were defined.

*General Comments on the Appendices:* General comments throughout the appendices noted concern regarding the use of the phrase "minimal adverse effect" and the lack of any mitigation discussion. Comments were also submitted regarding the potential for effects to "character-defining features" within buildings. Several commenters raised questions regarding the clarity and/or the organization of excluded activities, because they found it unclear which conditions must be met. Commenters questioned how an agency would differentiate between different categories of undertakings to determine which appendix applied. Some commenters noted the need for consultation with SHPOs and THPOs to be able to make determinations about whether an activity should be excluded, and potential conflicts with other existing program alternatives and Section 106 agreements. Most other comments related to a property's eligibility for listing on the National Register of

Historic Places, with commenters raising questions regarding the 45-year age of a building as the cutoff date and whether these modifications may render the property ineligible for federal rehabilitation tax credits in the future. Commenters also noted the extent of ground disturbance as a general concept in the appendices, with questions regarding the need for an archaeologist and the use of previously disturbed soil as a threshold.

*Comments on Appendix A:* Commenters requested that the activities to be listed in this appendix pose no potential to cause effects to historic properties even if historic properties are present and that they would require minimal value judgments to determine applicability. Commenters pointed to the challenge of conducting the balancing tests that would be required to apply the provisions of this appendix, especially without input from consulting parties. Other commenters supported the allowance for certain activities without triggering Section 106. Commenters requested clarification on the phrase "minimal adverse effects," raising concerns that without clear parameters and consultation the term could be misapplied or abused and may result in disputes over the Program Comment's applicability. Commenters requested clarification on the meaning of "adjacent to" for when an activity would be "conducted in areas adjacent to or on the same lot as housing." Concerns were raised over identifying and

impacting charactering-defining features, and potential effects to historic districts, landscapes, and archaeological resources.

*Comments on Appendix B:* Commenters questioned the applicability of the listed activities to the stated goals. Other commenters highlighted the overlap between Appendix A and Appendix B by noting that their comments apply to both appendices. Some commenters expressed concern with treating all buildings the same, rather than as separate categories. Commenters raised concerns about the potential subjectivity of federal agencies, pointing to the perceived lack of clarity about who qualifies as a qualified authority/professional and the absence of SHPO/THPO and local involvement in eligibility determinations. Commenters also highlighted a need for comprehensive understanding of environmental impacts of buildings and prioritization of materials with low or no embodied carbon. Commenters also raised concerns about potential effects to archaeological resources, and impacts to historic districts and landscapes.

*Comments on Appendix C:* Multiple comments on this appendix requested that it be removed from the Program Comment. Commenters raised concerns with the potential overbroad scope of the Program Comment, believing that the nature of the activities covered in this appendix was controversial, that the risk of inadvertent discoveries and

adverse effects to archaeological resources was increased, that clarity was needed about who would qualify as a qualified authority/professional, and that the listed activities were already covered by other tailored Section 106 programmatic agreements and memoranda of agreement. Commenters were also concerned about potential effects to historic districts and landscapes, as well as to individual historic properties such as bridges, roads, sidewalks, and curbs. Commenters in support of the inclusion of this appendix pointed to the provisions for public transportation (rail and bus transport) and requested that those provisions be further expanded.

#### **December 2024 Comment Period for Revised Draft Program**

##### **Comment:**

*Comments from Tribes:* In addition to verbal comments received during the December 10, 2024, consultation meeting/listening session with Tribes, THPOs, and Native Hawaiian Organizations, the ACHP received three letters from Tribes about the revised Program Comment. The ACHP also received detailed verbal comments from one Tribe on December 16, 2024. The ACHP did not receive comments from Native Hawaiian Organizations. Several Tribal commenters appreciated the ACHP's effort to address their concerns in the revised Program Comment. Other Tribal commenters stated that remaining ambiguities in the revised draft meant that the Program Comment might not be effective and might not

fully protect Tribal cultural resources and the remains of Tribal Ancestors. Tribal commenters expressed opposition to the Program Comment as written and requested that the ACHP either significantly revise the draft Program Comment or abandon it altogether. Tribal commenters communicated that the Program Comment was likely to result in potentially significant harm to sites of religious and cultural significance to Tribes. Tribal commenters also asserted that program comments in general infringe on Tribal sovereignty and undermine the federal government's Trust responsibility to the Tribes. One Tribal commenter advised the ACHP that streamlining is best achieved by encouraging federal agencies to learn the Section 106 process and establish long-term relationships with Tribes and other stakeholders.

Tribal commenters expressed concerns with the ACHP's development of the Program Comment, flagging the need for the ACHP to meaningfully and systematically consult early in and throughout the process to ensure Tribal input is appropriately considered. Several Tribal commenters emphasized that the abbreviated comment period on the revised draft of the Program Comment did not give adequate time to review and provide in-depth, meaningful comments.

Generally, Tribal commenters expressed concerns about the existence of a predetermined stop-work buffer for unanticipated discoveries and continued to dispute the

provisions regarding ground disturbing activities. One Tribal commenter emphasized the importance of prioritizing the Native American Graves Protection and Repatriation Act (NAGPRA) in any discussion regarding the treatment of Native American human remains and cultural items. This Tribal commenter requested that the Program Comment include language deferring to existing agreements between federal agencies and Indian Tribes that have created more appropriate buffers for work stoppages and avoidance areas during discoveries. While several Tribal commenters appreciated the improved definitions and clarification, they continued to reject the lack of further Section 106 consideration for ground disturbing activities. These Tribal commenters asked that ground disturbing activities be removed from the appendices citing concerns about potential harm. Several of the Tribal commenters indicated that previous disturbance does not necessarily result in a property losing its cultural or historical significance, and adequate consultation must occur to engage in a good faith effort to avoid effects to these sites, artifacts, and human remains, regardless of previous disturbance. The Tribal commenters voiced concern that such consultation may not occur if the Program Comment is implemented.

Tribal commenters stated that while the Program Comment requires further Tribal consultation, there are components of the consultation process that are still

unclear. They stated that the Program Comment attempts to kick out to the standard Section 106 process any undertakings that would affect sites of religious and cultural significance to Tribes; however, it remained unclear to the Tribal commenters how federal agencies would know if a site was of religious and cultural significance to a Tribe without Tribal consultation. One Tribal commenter requested more specific Tribal consultation procedures and that a greater reliance on THPOs be included in the Program Comment, both to assist agencies in evaluating Tribal interests in a particular undertaking and in making required written determinations that a proposed undertaking could result in an effect on a historic property with religious and cultural significance to a Tribe.

*Comments on Approach:* Commenters generally recognized and appreciated the ACHP's efforts to address concerns raised during the first written comment period. Commenters supported changes in the revised draft that helped resolve concerns with how the Program Comment would affect existing Section 106 agreements and program alternatives, the need for greater SHPO/THPO involvement, the role of qualified professionals, and the identification and evaluation of historic properties. Several commenters expressed concern with the consultation process undertaken to develop the Program Comment. These commenters underscored that the

second comment period was shorter than the first comment period, with a more limited number of consultation meetings. Commenters emphasized the need for continued consultation with SHPOs/THPOs, Indian Tribes, and other stakeholders. Some commenters asked again for additional data to support the need for the Program Comment based on Section 106 implementation challenges, encouraging the ACHP to focus its efforts on gathering data necessary to pinpoint precisely why Section 106 review may not be occurring in an expeditious manner for certain project types. Several commenters noted that many of the purported issues with efficiency could be resolved through proper funding and staffing for SHPOs/THPOs, as well as increased training and education for federal agencies, delegated authorities, and pass-through entities. Commenters pointed to concerns that the lack of consultation with SHPOs/THPOs and the public could slow down the Section 106 process and lead to more negative outcomes and delays.

*Use of a Program Comment:* While commenters generally supported efforts to tailor the Section 106 process, many expressed continued concern with whether a program comment was the appropriate tool, given the breadth and scope of the covered undertakings. These commenters continued to note a preference for programmatic agreements (including nationwide and prototype), which could be more closely tailored to specific states and localities. Commenters

continued to cite the ACHP's guidance on program alternatives, noting that most effective program alternatives are customized to specific resource types, repetitive project or program types, and specific federal agencies.

*Clarity:* Commenters noted that the revisions clearly sought to resolve concerns with the general organization, clarity, and complexity of the prior draft. Commenters appreciated that the appendices had been further refined and consolidated and that the revised draft clarified the Program Comment's application. Some commenters continued to raise concerns that the Program Comment, as revised, was still difficult to understand and would potentially result in delays and confusion due to the large number of undertakings to be included and the level of detail and requirements to be met.

*Legality of a Program Comment:* Commenters stated that the Program Comment would be a departure from previously issued program comments and approved exemptions to the Section 106 process. Commenters stated that the ACHP should have complied with the procedures and criteria set forth in the Section 106 regulations for developing an exempted category. Commenters also asserted that the Program Comment would exempt activities across multiple federal agencies and such use appeared to be an effort to avoid the three-step notice-and-comment process for formulating, amending,

and repealing an administrative rule under the Administrative Procedures Act. Commenters observed that the Program Comment may create legal questions about whether federal agencies would be properly complying with Section 106, and for developers who would be required to ascertain to what extent the Program Comment may or may not apply to a particular situation.

*Role of SHPO:* Commenters appreciated the increased involvement of SHPOs in the process in the second draft, though many commenters continued to express concern that the Program Comment would establish a process for unilateral decision making by federal agencies and effectively remove states' voices. Many commenters recognized the likelihood that federal agencies, delegated authorities, and pass-through entities would continue to rely on SHPOs. Other commenters felt otherwise, raising concerns that federal agencies would choose to not consult with SHPOs, which would likely result in loss of historic resources and/or character-defining features and would disproportionately impact certain communities. Several commenters raised concerns about loss of cultural resource data because SHPOs may not receive information from federal agencies on eligible historic properties identified and evaluated under the Program Comment.

*Contents:* Many commenters continued to emphasize that activities covered by the Program Comment seem incongruous.

Specifically, the commenters stated that transportation-related activities were dissimilar to undertakings related to housing and buildings. Many commenters called for the removal of the entire section on transportation-related projects. Several commenters urged the ACHP to instead consider the development of a focused programmatic solution tailored to transportation and based on careful analysis of any identified gaps or problems. Some commenters also continued to encourage the ACHP to focus on building interiors, rather than building exteriors and transportation. Commenters underlined the controversial nature of many of the included activities, particularly the increased potential for adverse effects to historic building exteriors, archaeological resources, and properties of traditional religious and cultural importance to Indian Tribes and Native Hawaiian Organizations.

*Timing:* Several commenters noted a concern with the change in the Presidential Administration and questioned whether proceeding with the Program Comment under the current circumstances may cause confusion among federal agencies and stakeholders regarding future implementation of the Program Comment.

*Ground Disturbance:* Many commenters continued to express strong concern regarding the treatment of ground disturbance, noting that the Program Comment could result in unnecessary damage to archaeological sites and project

delays. Commenters requested that ground disturbing activities be removed entirely from the Program Comment, citing past experiences where archaeological resources, human remains, funerary objects, sacred objects, or objects of cultural patrimony were found in previously disturbed areas.

*Comments on Section I (Introduction):* Commenters reiterated questions about the purpose and need of the Program Comment and noted that additional data illustrating the need for the Program Comment would be helpful.

*Comments on Section II (Scope):* Commenters appreciated the clarification regarding the Program Comment's effect on existing agreement documents, but there remained questions about whether the Program Comment would conflict with local ordinances and the federal rehabilitation tax credit program.

*Comments on Section III (Alternative Compliance Approaches):* Many commenters requested that notification regarding the application of the Program Comment be provided to SHPOs/THPOs by the federal agency. Commenters further noted that the notification requirement was vague and asked if the notification would be project by project or by program. Commenters noted that the Program Comment would provide for most of the substantive requirements of 36 CFR Part 800 Subpart B except for consultation and noted the lack of mitigation. Commenters appreciated the

revisions in this section but still had concerns about the role of SHPOs/THPOs, the lack of dispute provisions if there is a disagreement regarding findings, and the lack of timelines. Commenters recommended that resumes be included in annual reports to verify professional qualifications. Further, commenters recommended the term "relevant discipline" instead of the proposed language "appropriate to the circumstances."

*Comments on Section IV (Assistance to Consulting Parties):* One commenter asked if the ACHP had the authority to tell agencies to pay different entities.

*Comments on Section V (Unanticipated Discoveries):* Commenters asked that the Program Comment more clearly state the applicability of NAGPRA and state burial laws. Many commenters objected to predetermined buffer zones and asked that SHPOs/THPOs be notified of unanticipated discoveries. A few commenters noted that not all federal agencies have adopted the ACHP Burial Policy.

*Comments on Section VI (Dispute Resolution):* The majority of the comments on this section noted the lack of notification to consulting parties and the public regarding the use of the Program Comment or a dispute associated with the use of Program Comment, stating that it would make it challenging to file or weigh in on a dispute.

*Comments on Section VII (Duration):* Commenters appreciated the change to a 10-year duration and some recommended shorter durations or pilot periods.

*Comments on Section VIII (Amendments):* Commenters expressed concern about the proposed ACHP chair's unilateral authority to amend to extend the Program Comment and supported a full ACHP council member vote for amendments. Further, commenters encouraged consultation on any amendments.

*Comments on Section IX (Withdrawal):* The majority of the commenters noted that the parameters for withdrawal were too limited.

*Comments on Section X (Reports and Meetings):* Some commenters noted that the annual report requirements appear to add a significant burden while other commenters stated that it appeared the reports may lack sufficient information to fully understand how federal agencies would be implementing the terms of the Program Comment. Many commenters requested that the report template be developed prior to the issuance of the Program Comment and asked that more clarity about reports from entities with delegated authority be added. Commenters asked for public notification about the availability of reports and timing of meetings.

*Comments on Section XI (Definitions):* Many commenters expressed concern that some definitions were too broad.

Commenters noted that "repair" and "replacement" should remain distinct. Commenters highlighted the definitions for "independent utility" and "undertaking" as still needing additional refinement. They also expressed a desire for the definitions to more closely align with industry standards, such as "secondary spaces" instead of "non-primary façade". Commenters raised concern regarding the definition and utilization of "previously disturbed" to remove consultation requirements.

*Comments on Appendix A:* Commenters stated that many of the activities listed could result in adverse effects to historic properties, yet the Program Comment lacked specificity about how federal agencies would ensure that adverse effects were resolved. More specifically, commenters noted potential visual effects, effects to historic districts, and effects caused by ground disturbance as particular concerns. Commenters asked for more conditions, qualifiers, and limitations to clarify what types of activities would fall within categories requiring no review. Actions that included installation of new features, removal of features, and activities requiring ground disturbance were noted as needing additional conditions and clarifications. Commenters questioned the manner in which the term "previously disturbed" was utilized as a qualifier to indicate that no further review was needed, and many commenters noted that "previously

disturbed" does not indicate the absence of historic properties. Additionally, many commenters noted that the Program Comment was unclear about who makes the decision about whether a specific activity meets the conditions and limitations described in this appendix. Commenters further noted that the transportation activities did not seem to fit into the Program Comment.

*Comments on Appendix B:* Overall, commenters found this appendix difficult to follow. Many commenters stated that creating a parallel process to Section 106 would not result in streamlined reviews. Commenters noted that roles and responsibilities were unclear between SHPO staff and agency qualified professionals in addition to lacking clear delegation authorities. Many commenters asked how decisions regarding energy efficiencies and reductions would be made during the process. Commenters highlighted a variety of industry standards and policies that this appendix appeared to not align with, including eligibility criteria for the National Register of Historic Places, the Secretary of the Interior's Standards for the Treatment of Historic Properties, the Department of the Interior's and the ACHP's Indigenous Knowledge policies, and various documentation standards. In particular, comments focused on the determination of eligibility process within this appendix. Commenters asked a number of clarifying questions highlighting how the process lacked consultation

requirements with those who hold special expertise regarding certain historic properties as well as standard documentation and evaluation requirements. Commenters also noted that the Program Comment did not consider cumulative effects, a process for assessing adverse effects, and mitigation measures. Ground disturbance was a major concern, with commenters reiterating that previous ground disturbance does not necessarily imply a lack of historic properties. Further, commenters noted that transportation activities, due to the scale, nuance, and existing agreements, should not be included in this Program Comment.

**ACHP Response to Comments in Final Version of the Program Comment:**

*Concerns Raised by Indian Tribes:* The final version of the Program Comment responds to a variety of concerns raised by Indian Tribes, which include concerns about the potential for ground disturbance, the process for dealing with undertakings that may have adverse effects, the need for greater specificity about consultation requirements and procedures, issues related to inadvertent discoveries, the need for notification to and involvement from Indian Tribes and THPOs at various points in the Program Comment, the inclusion of references to other areas of law, deletion of a proposed "qualified authority" definition, and the duration of the Program Comment, among others.

Specifically, the Program Comment was significantly revised to do the following:

- Eliminate from inclusion in the Program Comment any undertakings for which a federal agency knows or believes there is any likelihood of encountering historic properties in which an Indian Tribe or Native Hawaiian Organization may have an interest. (Section II.E.4.)

- Eliminate from Appendices A and B a number of undertakings with the potential to cause ground disturbance; add "above ground" language to confirm that certain elements may only be included in a covered undertaking if above ground; and recategorize undertakings to require heightened review if they have any potential to cause ground disturbance.

- Increase the buffer area for inadvertent discoveries of human remains or certain Native American cultural properties from 50 feet to "no less than 100 feet, or within a buffer area previously agreed upon by an Indian Tribe and the federal agency, whichever is greater". (Section V.B.)

- Refine the definition of "previously disturbed ground" to require certain considerations by federal agencies before ground may be considered previously disturbed. (Section XI.)

- Establish two types of determinations, Type A Determination and Type B Determination, that lay out clear

steps for assessing the impact of certain ground-related activities. (Appendix B)

- Establish a process by which the ACHP members may choose to expeditiously delete a category of undertakings or impose conditions, exclusions, or requirements (including mitigation measures) on a category of undertakings that, when completed in accordance with the Program Comment, has resulted in a pattern of adverse effects. (Section VIII.C.)

- Require federal agencies to notify the National Association of Tribal Historic Preservation Officers (NATHPO) of its intent to utilize the Program Comment; require additional direct notification to relevant Indian Tribes and Native Hawaiian Organizations if less than national geographic scope; and require the ACHP to post all notices submitted by federal agencies. (Section III.A.2.)

- Require federal agencies to notify relevant Indian Tribes and Native Hawaiian Organizations in the case of a dispute. (Section VI.)

- Clarify consultation-related obligations, including eliminating inconsistent language, adding specifics regarding identifying Indian Tribes and Native Hawaiian Organizations with interests in the undertaking, requiring federal agencies to recognize any request by an Indian Tribe or Native Hawaiian Organization to be a consulting

party, and setting forth consultation protocols. (Section III.B., Appendix B)

- Increase the type of activities for which Indian Tribes may be compensated for participation in this Program Comment. (Section IV.)

- Provide specific protocols for notification and documentation, prohibited activities, and incorporation of Indigenous Knowledge in the case of an inadvertent discovery. (Section V.A.)

- Update or include reference to state burial laws, Tribal ordinances, and NAGPRA. (Section V.B.)

- Increase federal agency reporting requirements, including increased frequency and more specific content required; and require that these reports be made public on the ACHP website. (Section X.A.)

- Require more frequent meetings and training by the ACHP (also discussed below). (Section X.)

- Invite Indian Tribes, Native Hawaiian Organizations, and THPOs to provide comments about the Program Comment at any time. (Section X.B.)

- Delete the definition and concept of "qualified authority" and incorporate Indigenous Knowledge elsewhere in the document.

- Reduce the proposed duration of the Program Comment to 10 years. (Sections VII., VIII.)

In addition, the Program Comment now omits reference to all activities related to bridges.

*Legality of a Program Comment and Role of the SHPO:*

Several concerns were raised regarding the legality of the use of program comments in general, this Program Comment in particular, and the required involvement of SHPOs in program comments. The final draft of the Program Comment includes strengthened provisions for the involvement by, notification of, and reliance on SHPOs' opinions on a number of matters. In addition, SHPOs are invited to provide feedback at any time on the use of the Program Comment. In the second round of comments, a letter appended to the National Conference of State Historic Preservation Officers' (NCSHPO) submission suggested, among other things, that the process for developing this Program Comment should have followed the process for an exemption. The ACHP Office of General Counsel advised that a program comment is an acceptable choice of program alternative to use for the categories of covered undertakings, noting that many existing program comments involve undertakings like the ones covered in the Program Comment (including undertakings with no potential for adverse effects, undertakings with some potential for adverse effects, and undertakings requiring the satisfaction of certain conditions, exclusions, or requirements). The nature of activities covered by the Program Comment differs from

activities that would be covered by an exemption. The intent in the Program Comment was to recognize the work already done or conditions imposed on covered undertakings to avoid or minimize adverse effects. Additionally, language was added to the Program Comment in Section VIII.C. to clarify that some listed undertakings may have unintended adverse effects on historic properties and to provide a process for the ACHP members to act more expeditiously to remove these activities from Appendix A or Appendix B, and consider mitigation measures if appropriate.

*Format and Complexity:* In response to comments received about the format and complexity of the first draft of the Program Comment, the Program Comment was simplified. Rather than six appendices covering overlapping items that were dependent on resource type and use, the Program Comment was reduced to two appendices. Additionally, the "certain conditions, exclusions, or requirements" previously required for the first draft's appendices part-2 activities have been simplified into seven specific processes for determinations (Types A-G) that are detailed in Appendix B.

*Effect on Other Applicable Laws and Existing Agreements:* In response to comments received about the effect of the Program Comment on other applicable laws and existing agreements, Section II was updated to clarify the

Program Comment's application, including an explanation that the Program Comment does not change applicable laws or regulations related to the federal rehabilitation tax credit or local historic preservation reviews.

Additionally, the Program Comment was revised to clarify that for undertakings covered by existing Section 106 memoranda of agreement or programmatic agreements, a federal agency must follow those terms, and the Program Comment in no way supersedes those existing agreements. Finally, the Program Comment now clarifies the relationship between it and other program comments.

*Segmentation:* In response to concerns about potential segmentation of undertakings, the Program Comment was revised to clarify that if an undertaking includes activities not in Appendix A or Appendix B, the whole undertaking must be submitted to relevant Indian Tribes, Native Hawaiian Organizations, SHPOs, THPOs, and other consulting parties through the ordinary Section 106 process, with the submission indicating which activities are covered in this Program Comment and requesting review of only noncovered activities.

*Determinations of Eligibility:* In response to comments about the absence of determinations of eligibility to the National Register of Historic Places, a determination of eligibility continues to not be required for the use of the Program Comment. A Type C Determination, however, requires

federal agencies to determine that a building is not eligible for the National Register of Historic Places. Type D-G Determinations require treating buildings as if they were eligible for the sake of such determinations.

*Unanticipated Discoveries:* In response to comments about unanticipated discoveries, Section V.B. was updated to include detailed processes for federal agencies to follow in the event of an unanticipated discovery. Additionally, for the unanticipated discovery of human remains or Native American funerary objects, sacred objects, or items of cultural patrimony, the 50-foot perimeter was increased to be "no less than 100 feet, or within a buffer area previously agreed upon by an Indian Tribe and the federal agency, whichever is greater".

*Dispute Resolution Procedures:* In response to comments received requesting clarification about the dispute resolution process, Section VI of the Program Comment now requires additional notice to consulting parties (including Indian Tribes, THPOs, SHPOs, and Native Hawaiian Organizations, and other consulting parties) and further articulates federal agency obligations, including the need to respond to any comments received by the ACHP.

*Duration:* In response to comments received about the duration of the Program Comment, the Program Comment now has an initial 10-year duration, half of the originally proposed 20 years.

*Amendments:* In response to comments concerned about the unilateral ability of the ACHP chairman to indefinitely extend the Program Comment, the Program Comment now permits the chairman of the ACHP to extend the duration of the Program Comment for only a single five-year period.

*Withdrawal:* To increase transparency with regard to any withdrawal of the Program Comment by ACHP membership, the ACHP is now required to notify SHPOs, THPOs, Indian Tribes, and Native Hawaiian Organizations if the Program Comment is withdrawn.

*Reporting:* In response to comments requesting greater transparency and specificity in federal reporting requirements, the timing of federal agency reports was adjusted to better reflect federal agency reporting cycles. The content of reports is now more specific and includes the articulation of any significant issues or disputes. Additionally, the Program Comment requires the ACHP to develop a template for collecting information about the use of the Program Comment to facilitate reporting and transparency, to summarize annual agency reports for the ACHP members and others, to deliver reports orally and in writing, and to provide recommendations for amendments.

*Annual Meetings:* In response to comments seeking greater opportunities to learn about the effectiveness and utility of the Program Comment, the Program Comment requires annual meetings.

*Invitation to Comment:* In response to comments seeking opportunities to provide feedback, the Program Comment now states an explicit invitation that 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. Such comments must be taken into consideration during the development of the ACHP's annual reports on the Program Comment.

*Assistance and Training:* In response to requests for ACHP guidance and training, Section X.E. now outlines case-specific technical assistance and training the ACHP will provide on the use of the Program Comment.

*Definitions:* Broadly, definitions were adjusted to better conform to existing regulations or guidance and to provide additional detail. In places, definitions were added or removed to reflect changes in the rest of the document or to make the appendices more concise.

*Concerns Related to the Appendices of the Program Comment:*

*Use of Qualified Authorities and Qualified Professionals:* In response to confusion about the term and use of "qualified authorities," it was removed from the Program Comment. However, the reliance upon qualified professionals and holders of Indigenous Knowledge was articulated and expanded, particularly in the procedures

established by Type A-G Determinations. Additionally, it was specified that a qualified professional must have expertise in the specific area of study in which they are opining.

*Minimal Adverse Effect:* In response to comments about the phrase and use of "minimal adverse effect," it was removed from the Program Comment.

*The Nature of Type A-G Determinations:* In response to comments about the nature of and appropriate party to make a "determination," the Program Comment now clearly states that federal agencies make determinations pursuant to information or statements provided to or obtained by the federal agencies. Additionally, it was further clarified that for undertakings that cannot obtain a necessary determination, full Section 106 procedures must be followed pursuant to 36 CFR 800.3 through 800.7 or 36 CFR 800.8(c), or another applicable agreement or program alternative. In addition, Section III.A.4. was added to indicate that agency officials were to be the individuals making key decisions for the federal agencies.

*Character-defining:* In response to comments about "character-defining features," Type E and Type F Determinations offer a consistent approach for determining if a feature is "character-defining." Further, federal agencies may rely on "context studies" for Type E and Type

F determinations concerning historic properties that share similar histories and designs.

*Ground Disturbance:* See changes referenced above in response to concerns raised by Tribal commenters.

*Other Activities:* In response to confusion about including "other activities" in the Program Comment, activities that do not normally require a review under Section 106 are now identified in a single, consolidated section in Appendix A.

*Nearness and Adjacencies:* In response to comments that the Program Comment would be applied too broadly from a land-use perspective, the Program Comment no longer uses the words "near" or "adjacent to" to describe proximity to a specific land use (e.g., housing) or buildings.

*Windows, Doors, Siding, and Other Exterior Features:* As suggested by commenters, Type D Determinations provide a framework for determining if the replacement of a window, door, or siding is appropriate. Type E also provides a consistent approach for determining if an exterior feature is "character-defining" and what is or is not a "nonsignificant" façade, recognizing that some commenters called for the use of the term "secondary" façade.

*Building Interiors:* As suggested by commenters, Type E Determinations provide a framework for determining if an element of a building interior is "character-defining" or in a "primary space." To reduce the potential for

duplication noticed by some commenters, the Program Comment no longer has separate appendices for interior activities for buildings whose primary purpose is residential versus other uses. Additionally, the Program Comment clarifies that interior rehabilitations can take place within housing units and within upper stories of certain spaces of buildings.

*Content of Final Draft:* As is the nature of any public process, a number of comments were not integrated in the final Program Comment. Comments to abandon the development of the Program Comment were not heeded. As stated above, the Program Comment is intended to promote actions that advance historic preservation goals, including the reuse of historic materials and buildings and the upgrading of infrastructure in historic neighborhoods. It also advances the goals of the ACHP's 2023 Policy Statements. Further, the development of this Program Comment followed applicable statutory and regulatory requirements. While the transportation-related activities were significantly trimmed, a limited number remain in the Program Comment given the lack of consistent treatment of certain covered activities in existing Section 106 programmatic agreements, the fact that not all states have programmatic agreements, and the need to continue to harmonize reviews of these activities in light of significant federal investments. Comments to shorten the duration to five years, or even one

year, were not heeded because of the need to provide a reasonable amount of time for the Program Comment to be operationalized across federal agencies. However, the annual meeting and reporting requirements, along with the amendments and withdrawal provisions, will help with providing opportunities to assess the effectiveness of the Program Comment and adjust as needed. Comments to remove the "other activities" found in Section 6 of Appendix A as not undertakings were not heeded because the ACHP heard from commenters and the ACHP members that such activities were sometimes incorrectly considered undertakings and subjected to the full Section 106 review process.

#### **V. Text of the Program Comment**

The full text of the program comment, with various typographical and grammatical errors corrected, is provided below.

#### **Program Comment on Certain Housing, Building, and Transportation Undertakings**

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on December 20, 2024, on its own initiative pursuant to 36 CFR 800.14(e), and went into effect on that date. It provides all federal agencies with an alternative way to comply with their responsibilities under Section 106 of the National Historic Preservation Act, 54 U.S.C. 306108, and its implementing regulations, 36 CFR part 800 (Section 106), regarding the

effects of certain housing-related, building-related, and alternative transportation infrastructure-related undertakings.

## **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 the Department of Housing and Urban Development related to projects and programs subject to 24 CFR Parts 50 and 58.

With regard to building rehabilitation, the 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 (both related to rail infrastructure), along with a government-wide exemption for certain electric vehicle supply equipment (EVSE). 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 the 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), advance historic preservation goals including the reuse of historic materials and buildings and the upgrading of infrastructure in historic neighborhoods, and to harmonize historic preservation goals 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 and Regulations**

This Program Comment does not modify, preempt, or replace any other federal laws or regulations (including those related to 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. A federal agency whose undertakings are covered by another program comment currently in effect may elect to follow the terms of that program comment, or utilize this Program Comment after notice of its intent to follow this Program Comment per Section III.A.2. of this Program Comment, for undertakings covered by both program comments. 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 MOAs or PAs per their stipulations and follow this Program Comment to satisfy their Section 106 responsibility for the covered undertakings.

If a federal agency elects to amend or terminate an MOA or PA, and if the applicable amendment or termination provision of such MOA or PA does not require consultation with relevant Indian Tribe(s), Native Hawaiian Organization(s), SHPO(s), THPO(s), or consulting parties, the ACHP strongly recommends that the federal agency meaningfully consult with such parties 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.

A federal agency need not amend or terminate an existing MOA or PA if the MOA or PA addresses undertakings similar to, but distinct from, the undertakings covered by 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 the 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. Undertakings Not Covered and Exceptions**

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

1. The federal agency elects, for any reason, not to utilize this Program Comment for an undertaking.
2. The undertaking is not listed in the Appendices to this Program Comment.
3. The undertaking would occur on or have the potential to affect the following historic properties:
  - a. Any National Monument, National Historic Site, National Historic Trail, National Historical Park, National Military Park,

National Battlefield, National Battlefield Park, National Battlefield Site, National Lakeshore, or National Seashore.

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.

4. The federal agency knows, has reason to believe, or has been informed that there may be any likelihood of encountering historic properties in which an Indian Tribe or Native Hawaiian Organization may have an interest.

### **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, other than keeping a record of its determinations to use Appendix A of this 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 (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 any relevant Indian Tribe(s), Native Hawaiian Organization(s), SHPO(s), THPO(s), and representative(s) of local government(s). The ACHP must make available on its website any such notices submitted by federal agencies to the ACHP pursuant to this Section.

3. Identifying a Covered Undertaking Subject to this Program Comment

When an undertaking includes multiple activities, including any undertaking or undertakings listed in Appendix A or Appendix B as well as nonlisted activities, the federal agency shall submit the entire undertaking for review under 36 CFR 800.3 to 800.7 to the relevant Indian Tribes, Native Hawaiian Organizations, SHPO(s), THPO(s), and other consulting parties, as applicable. The federal agency shall include with the submittal a description of the undertaking or undertakings that are listed in Appendix A or Appendix B and note the federal agency's reliance on this Program Comment for those select undertakings, and request review only of the nonlisted activities.

4. Federal Agency Determinations

Federal agency determinations made in accordance with this Program Comment must be made by the head of the federal agency or another federal agency official delegated legal responsibility for compliance with Section 106 of the National Historic Preservation Act and having jurisdiction and approval authority over an undertaking. When taking action, including making determinations, pursuant to this Program Comment, such person must comply with the provisions in 36 CFR 800.2.

**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. 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, 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. Department of Housing and Urban Development Tribal Directory Assistance Tool; State Historic Preservation Officer (SHPO) 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 identification by an Indian Tribe or Native Hawaiian Organization of certain individual or individuals as holders of the Indigenous Knowledge of the Indian Tribe or Native Hawaiian Organization in light of their expertise (including but not limited to Indigenous Knowledge-based expertise) in identification, evaluation, assessment of effects, 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.

## 2. Finding of Potential Effect on Certain Properties

Should the federal agency determine through consultation with Indian Tribes or Native Hawaiian Organizations or otherwise that a proposed undertaking covered in this Program Comment could result in an effect on a historic property with traditional religious and

cultural significance to an Indian Tribe or Native Hawaiian Organization, including but not limited to a Tribal identified sacred site or a site identified by Indigenous Knowledge of Indian Tribes or Native Hawaiian Organizations, the federal agency will not use this Program Comment and must instead follow the Section 106 review process under 36 CFR 800.3 through 800.7, or 36 CFR 800.8(c), or another applicable agreement or program alternative.

### 3. 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.

#### 4. Opportunities for Outreach

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 nonfederal 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 engages 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 do the following:

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 out 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 that could affect the discovery and institute interim measures to protect the discovery from looting, vandalism, weather, and other threats. The federal agency must then follow the procedures set forth in 36 CFR 800.13(b) or the following processes:

#### 1. Notification and Documentation

Within 48 hours of the discovery, the federal agency must notify any relevant Indian Tribe(s), Native Hawaiian Organization(s), SHPO(s), and THPO(s), and any identified consulting parties, of the inadvertent discovery. It must also document in writing the condition of the items from

visual inspection, and any detailed information that may benefit the recovery plan and decision-making process.

The federal agency must determine within five business days of the original notification, in consultation with the relevant Indian Tribe(s), Native Hawaiian Organization(s), SHPO(s), or THPO(s), and any identified consulting parties, whether the unanticipated or post-review discovery is eligible for the National Register of Historic Places, or has been identified by an Indian Tribe as a historic property, and to determine the contents of a discovery plan, including ways to minimize, avoid, or mitigate adverse effects and appropriate methods of identification, transport, and storage of materials.

## 2. Prohibited Activities

The federal agency must prevent photographs, videos, sketches, renderings, materials, records, or social media posts identifying or discussing human remains or material objects associated with burial contexts, unless the federal agency obtains consent from relevant Indian Tribe(s), Native Hawaiian Organization(s), or other descendants. The federal agency must take special care to ensure that details, location and photographs of artifacts, funerary objects, and human remains associated with burial contexts are not provided to the public.

## 3. Incorporation of Indigenous Knowledge

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 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 or Native American Funerary Objects, Sacred Objects, or Items of Cultural Patrimony**

The federal agency must ensure that in the event human remains or Native American funerary objects, sacred objects, or items of cultural patrimony are discovered during implementation of an undertaking, all work within no less than 100 feet of the discovery, or within a buffer area previously agreed upon by an Indian Tribe and the federal agency, whichever is greater, must cease. In addition, 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 applicable state burial laws, including where such laws apply to land that is not federal or Tribal land, and applicable ordinances of Indian Tribes. The federal agency will also comply with Section 3 of the Native American Graves Protection and Repatriation Act and its implementing regulations, 43 CFR part 10, in regard to any Native American human remains, funerary objects, sacred objects, or items of cultural patrimony found on federal or Tribal land or otherwise subject to that statute.

## **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 Indian Tribes, THPO(s), SHPO(s), and Native Hawaiian Organizations. Objecting parties may include, but are not limited to, Indian Tribes, THPO(s), SHPO(s), Native Hawaiian Organizations, local governments, preservation organizations, owners of historic properties, and members of the public. The federal agency must consult with the objecting party to resolve the

dispute for not more than 60 days. Any disputes over the evaluation of unanticipated discoveries must be resolved in accordance with the requirements of 36 CFR 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 days, the federal agency must forward to the ACHP all documentation relevant to the objection, including the federal agency's proposed resolution if any, request the ACHP to provide within 30 days its written comments to resolve the dispute, and take the ACHP's comments into account before making a decision regarding its approach to complying with Section 106. The federal agency must 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(s) or SHPO(s) 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 chairman may amend the Program Comment to extend its duration in accordance with Section VIII.A. of this Program Comment. If an Indian Tribe authorizes the use of this Program Comment on its Tribal lands in accordance with Section II.D. of this Program Comment, such authorization will be in effect from the date of the issuance of the authorization until the termination of such authorization by the Indian Tribe or the expiration or withdrawal of this Program Comment, whichever is earlier.

## **VIII. AMENDMENT**

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

### **A. Amendment by the Chairman, ACHP**

The chairman of the ACHP, after at least 30 days' notice to the rest of the ACHP membership and federal agencies, and after publication on the ACHP website of the

chairman'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 five 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. Amendment by the ACHP Membership**

Through federal agency reports, comments received by the ACHP, ACHP staff analysis, or otherwise, the ACHP may come to learn the application of this Program Comment to a particular category of undertakings listed in Appendix A or Appendix B has resulted in a pattern of adverse effects on historic properties. Upon notification of any such pattern, the ACHP chairman, in consultation with the ACHP executive director, may convene a meeting of the ACHP membership or

may include in an ACHP business meeting agenda the opportunity for the ACHP executive director to present all available information, in writing and orally, regarding the category of undertakings and the types and frequency of such adverse effects and to make specific recommendations about the category to the membership. At or within a reasonable time after such presentation, the ACHP chairman, in consultation with the executive director, may call for a vote by ACHP members to amend this Program Comment with regard to the category of undertakings as follows. If the category of undertakings is listed in Appendix A, members may consider an amendment to either delete the category or move the category to Appendix B with appropriate conditions, exclusions, or requirements (including mitigation measures). If the category of undertakings is listed in Appendix B, members may consider an amendment to delete the category or to modify the conditions, exclusions, or requirements (including mitigation measures) on the category. Any such amendment will be subject to approval by a majority of ACHP members present and voting. The ACHP must notify federal agencies and publish notice in the Federal Register regarding such amendments within 30 days after their issuance.

#### **D. 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 in accordance with the applicable voting provisions in the ACHP Operating Procedures, as amended from time to time.

## **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 chairman 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, MEETINGS, AND GUIDANCE**

### **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 to other entities or assumed by other entities 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 or other entities that have assumed such responsibility must directly submit reports to the ACHP in accordance with this Section, using their own reporting mechanisms. In any report required by this Section, the ACHP encourages federal agencies to also propose for the 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 do the following:

- a. Identify the number of times the federal agency has utilized this Program Comment for undertakings covered by Appendix A;
- 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 any entities that have assumed such responsibility in accordance with federal law, whose undertakings are included in the report.

#### 4. Template for Reports

Within two months of the adoption of this Program Comment, the ACHP must develop a template for federal agencies to collect information about any undertakings covered by Appendix B. The ACHP must also endeavor to create an online reporting and tracking system for individual undertakings covered by this Program Comment.

#### 5. Publication of Reports

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

#### **B. Invitation to Provide Comment**

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

#### **C. Annual Meetings**

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

consulting parties, and others it deems appropriate, to discuss implementation of the Program Comment. At the meeting, attendees will have an opportunity to provide their views on the overall effectiveness of the Program Comment in meeting its intent and purpose. Such views may inform decisions such as those regarding amendments to the Program Comment. Annual meetings may take place in-person, by phone, virtually using electronic meeting platforms, or any combination of such means.

#### **D. ACHP Reports and Recommendations for Amendments**

At any time, but at least once during the initial three-year period during which this Program Comment is being used, and every three years thereafter, ACHP staff must provide at an ACHP business meeting a written and oral summary of information received from federal agency reports, annual meetings, comments provided pursuant to Section X.B. of this Program Comment, or other sources about the utility of this Program Comment and make any recommendations for amendments. The ACHP must make such written summary of information and such recommendations available to the public through posting on the ACHP website within 30 days of such meeting.

#### **E. ACHP Guidance on the Use of this Program Comment**

##### 1. 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.

## 2. Training Materials and Meetings

In addition to issuance of advisory opinions in accordance with the preceding section, the ACHP will produce an e-learning course providing an overview of the application, interpretation, and requirements of this Program Comment and may produce other relevant training materials.

## **XI. DEFINITIONS**

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

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

*Accessibility improvement* means a physical, constructed work, such as a ramp or a railing, that addresses the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.

*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 (including rail infrastructure) used for pedestrian, bicycle, micromobility vehicle, and transit purposes.

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

*Bicycle lane* means a portion of a roadway that has been designated by striping, signage, pavement markings, flex posts, or other physical separation 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 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 percent 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.

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

*Economic feasibility* means the viability, suitability, and practicality of a proposed undertaking in light of a range of considerations, including, 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 nonelectric 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, nonpermanent 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 purposes of this Program Comment, the term federal agency includes state, local, or Tribal governments that have been delegated or assumed legal responsibility for compliance with Section 106 pursuant to federal statutory authority such as that under the provisions of the Housing and Community Development Act of 1974 at 42 U.S.C. 5304(g).

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

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

solutions used to treat stormwater as close to the source as possible and improve resiliency.

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

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

*Hazardous material* means lead, lead-containing material (including, but not limited to, lead-based paint), asbestos, asbestos-containing material (including, but not limited to, floor tile, plaster, insulation, glazing putty, roofing material, and flashing material), radon, and other similar materials detrimental to human health and safety.

*High friction surface treatment* means application of very high-quality aggregate to pavement using a polymer binder to restore or maintain pavement friction.

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

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

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

*Historic property*, as provided in 36 CFR 800.16(1), means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural significance to an Indian Tribe or Native Hawaiian Organization that meet the National Register of Historic Places criteria.

*Housing* means any building containing or proposed to contain one or more dwelling units, including, but not limited to, multi-unit apartment buildings, single-family homes, administrative and employee dwelling units, and recreation residences, in a variety of building types and configurations, including, but not limited to, buildings served by an elevator or elevators, "walk-up" buildings, rowhouses, semi-detached homes, mobile and manufactured homes, barracks, and freestanding homes.

*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 replacing something, including, but not limited to, materials, mechanical systems and components, appliances, and equipment, or of being installed, in a particular location.

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

*Mechanical system* means any heating, cooling, indoor air quality, ventilation, dehumidification, air conditioning, plumbing, or electrical system, and the individual elements and components of each system, including, but not limited to, heat pumps, electric furnaces and boilers, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, ventilation systems, waste heat recovery devices (including, but not limited to, desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment), adjustable speed drives, duct and pipe systems (including, but not limited to, return ducts, diffusers, registers, air filters, and thermostatic radiator controls), refrigeration lines, and building energy control systems.

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

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

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

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

*Nonsignificant 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, in the determination of the federal agency and in consideration of the vertical and horizontal dimensions of as-built drawings and plans, available information about original construction and installation techniques (including the use or presence of fill), and available surveys: 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 more than 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 following: 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.

*Primary space* means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other public space containing a concentration of character-defining features and located in a historic building.

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

*Rail infrastructure* means structures, buildings, land, and equipment used for rail travel, 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, SHPO, THPO, Native Hawaiian Organization, local preservation or planning office, and federal agency files, records, inventories, and databases, 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 to, solar hot water equipment, community solar systems, and solar photovoltaic equipment and all components.

*State Historic Preservation Officer, or SHPO*, 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 such official.

*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, or THPO*, 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 SHPO 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.

**APPENDIX A: UNDERTAKINGS NOT REQUIRING FURTHER REVIEW**

1. Site Work

The following undertakings do not require further Section 106 review:

a. Maintenance or repair of any of the following existing 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, penetrating the ground beneath the lowest depth of the existing ground surface materials, 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, within 10 feet of a building.

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 by hand or using small equipment, 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 undertakings 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. Windows, including, but not limited to, storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
  - iii. Siding.
- b. Maintenance or repair of any of the following existing elements, or in-kind replacement of any above-ground components of any of the following existing 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. Accessibility improvements.
- vi. Clean energy technologies.
- vii. Elevator system equipment.
- viii. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- ix. Foundations and foundation vents.
- x. Chimneys.
- xi. Vents, including, but not limited to, continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.
- xii. Energy and water metering devices.
- xiii. Building-mounted utility infrastructure, including, but not limited to, wires and anchors.
- xiv. Installation of stanchions, fasteners, or tracks for flood shields.

- c. Replacement or installation of any of the following elements:
  - i. Above-ground elements of an accessibility improvement, if installed with methods that do not irreversibly damage historic building materials.
  - ii. Above-ground elements of a radon mitigation system, if any pipe used in a radon mitigation system and visible from the building exterior has a diameter of no more than four inches and is painted or colored to match or complement the color of the building exterior.
  - iii. Building-mounted solar energy system if such system is installed with methods that do not irreversibly damage historic building materials, sits within eight inches of 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 exceeding 20 percent.
- 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 nondestructive 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 more than 45 years old.
- e. Application of 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 more than 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, including the maintenance, repair, replacement or installation of equipment or materials necessary to abate 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 undertakings 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 system equipment.
- 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 existing 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. Accessibility improvements.

vii. Foundations and foundation vents.

viii. Energy and water metering devices.

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

d. Replacement, installation, or removal of interior walls, ceilings, flooring, doors, light fixtures, hardware, mechanical systems, building safety systems, thermal insulation, or accessibility improvements within an individual housing unit or in areas on upper floors that are not lobbies and not ceremonial rooms.

e. Caulking, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and mechanical systems.

f. Application of paint or stain on 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.

- g. Abatement of hazardous materials, including the maintenance, repair, replacement or installation of equipment or materials necessary to abate hazardous materials, where effects of the abatement are not visible from the building interior or are only visible from within an individual housing unit and not otherwise visible from the building interior.

#### 4. Work Involving Transportation Fixtures and Equipment

The following undertakings 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, installation, or removal 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 existing elements, or in-kind replacement or removal 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 are accessibility improvements.

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.
  - vii. Catenary systems supporting alternative transportation infrastructure.
- c. Maintenance or repair of the following existing elements, or in-kind replacement or removal 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. 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: UNDERTAKINGS NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS**

1. Written Determinations

Certain undertakings listed in this Appendix B, due to their nature and potential effects, require a federal agency to make 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 making any such determination, the federal agency shall include the determination and relevant documents (such as SHPO and THPO comments, completed surveys, or context studies, as applicable) forming the basis of such determination in its administrative record. If the federal agency cannot make a written determination required by this Appendix B to proceed with the undertaking, the 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.

a. Type A Determination for Certain Activities

A Type A Determination requires the federal agency to determine that the undertaking is limited to previously disturbed ground, creates no new ground disturbance, or will have no adverse effects on any historic property based on a written statement from a qualified professional meeting the professional standards for archaeology

established by the Secretary of the Interior, or from the relevant SHPO or the relevant THPO.

b. Type B Determination for Certain Activities

A Type B Determination requires the federal agency to identify the area of potential effects in accordance with 36 CFR 800.4 and to determine that the undertaking will have no adverse effects on any historic properties within the area of potential effects: (a) after (i) consultation with Indian Tribes and Native Hawaiian Organizations in accordance with Section III.B. of this Program Comment and (ii) receipt of a written statement that the undertakings will have no adverse effects on any historic property from either a qualified professional meeting the applicable professional standards established by the Secretary of the Interior or from the relevant SHPO or THPO; or (b) after completion of or receipt of a field survey of the area of potential effects 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 consultation or survey identifying any historic properties in the area of potential effects.

c. Type C Determination of Historic Building Status

A Type C Determination applies to buildings 45 or more years old and requires the federal agency to make a written

determination that such a building is not a historic building on the basis of either: (a) a records check for prior determinations of historic building status; or (b) in lieu of a records check or if the records check yields no information about the subject property, the receipt of a written statement from a qualified professional meeting the professional standards for historic architecture, history, or architectural history established by the Secretary of the Interior or the relevant SHPO that such building is not a historic building. In making such a determination, the federal agency should be aware that buildings less than 50 years old may still possess "exceptional significance" in accordance with the National Register of Historic Places criteria. If a building is less than 45 years old, then a Type C Determination is not required.

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

A Type D Determination applies to undertakings involving the replacement of a window, door, or siding of a historic building or of a building that has not received a Type C determination. A Type D Determination requires that the federal agency make a written determination: (a) after receipt of a written statement from a qualified professional meeting the applicable professional standards established by the Secretary of the Interior or the SHPO that any replacement window, door, or siding is an in-kind

building material; or (b) after the federal agency makes a Type G Determination and determines that the replacement of a window or windows, door or doors, or siding as applicable, will reduce energy use intensity, carbon use intensity, and/or total carbon emissions of the building when both embodied and operational carbon are calculated over a 40-year life cycle for replacement versus retrofit of the existing element.

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

A Type E Determination applies to historic buildings and buildings 45 or more years old. A Type E Determination requires that the federal agency make 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, after receipt of a written statement indicating as much from a qualified professional meeting the applicable professional standards established by the Secretary of the Interior or from the relevant SHPO. In making such a statement for a building 45 or more years old but not deemed to be a historic building, the individual making the statement must apply identical standards to such building as if it were a historic building. If a building is less than 45 years old or a Type C Determination has been made, then a Type E Determination is not required. If

a federal agency has developed a context study or other survey for a particular type of historic building, and that study or survey identifies typical character-defining features or non-significant façades for such historic buildings, the federal agency may rely on that study or survey in determining whether particular features are character-defining features or non-significant façades.

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

A Type F Determination applies to historic buildings and buildings 45 or more years old. A Type F Determination requires that the federal agency make a written determination that a proposed action will not affect a primary space at all, or will not have adverse effects on a character-defining feature in a primary space, after receipt of a written statement indicating as much from a qualified professional meeting the applicable professional standards established by the Secretary of the Interior or from the relevant SHPO. In making such a statement for a building 45 or more years old but not deemed to be a historic building, the individual making the statement 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 is less than 45 years old or a Type C

Determination has been made, then a Type F Determination is not required. If a federal agency has developed a context study or other survey for a particular type of historic building, and that study or survey identifies typical character-defining features or primary spaces for such historic buildings, the federal agency may rely on that study or survey in determining whether particular features are character-defining features or primary spaces.

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 make a written determination—on the basis of a written statement from either a qualified professional meeting the applicable professional standards 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 and Tribal  
Historic Preservation Officer Reviews

When a federal agency elects to request a statement from a SHPO or THPO pursuant to this Appendix B, the SHPO shall have 30 days to review and respond to an adequately documented request by a federal agency for a statement pursuant to this Section. If the SHPO or THPO requests additional, missing information in order to make its statement, the SHPO shall have 30 days from receipt of the additional information to respond. If the SHPO or THPO does not respond within 30 days of receipt of the request or the amended request, as applicable, then the statement shall be deemed to have been made. If the SHPO or THPO declines to make the requested statement, then the federal agency must either obtain the requested statement from a qualified professional as prescribed above or 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.

2. Site Work

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

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

disturbance, after a Type B Determination has been made.

### 3. Work on a Building Exterior

The following undertakings 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, installation, or removal of any of the elements listed in Appendix A, Section 2.a., after a Type C or Type D Determination has been made.
- b. Replacement, installation, or removal of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 2.b., if a Type C or Type E Determination has been made; provided, however, that replacement, installation, or removal of an accessibility improvement or solar energy system as set forth in Appendix A, Section 2.c., may be made without a Type C or Type E Determination.
- c. Abatement of hazardous materials where effects of the abatement may be visible from the building exterior, if a Type C or Type E Determination has been made.
- d. Abatement of hazardous materials where effects of the abatement have the potential for new ground disturbance, after a Type B Determination has been made.

#### 4. Work on a Building Interior

The following undertakings 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, installation, or removal of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., after a Type C or Type F Determination has been made; provided, however, that replacements or installations set forth in Appendix A, Section 3.d., may be made without a Type C or Type F Determination.
- b. 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 C or Type F Determination has been made.

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

The following undertakings 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 or removal of any of the elements listed in Appendix A, Section 4.b., but if

replacement is other than in-kind replacement of exclusively above-ground elements or removal involves below-ground elements or otherwise causes ground disturbance, only after a Type B Determination has been made.

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

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

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

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

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

iii. Transit shelters, bicycle lockers, or bicycle shelters with a combined dimension (length plus width plus height) less than 30 linear feet and with advertising space no greater than 24 square feet visible at any one time.

**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 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:

(END OF DOCUMENT)

Authority: 36 CFR 800.14(e)

Dated: March 25, 2025.

**Kelly Y. Fanizzo,**

*Deputy General Counsel.*

[FR Doc. 2025-05438 Filed: 4/1/2025 8:45 am; Publication Date: 4/2/2025]