



June 21, 2024

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

Via email: sbronin@achp.gov

RE: Call for comments on Program Comment proposals.

Dear Chair Bronin:

We are submitting comments, at your invitation, on a series of five sweeping “program alternative” proposals, originally outlined in a May 24th communication, and now more recently referred to in a June 11th communication as four potential Program Comments.

Before we dive into specific observations on the four broad topics you are proposing, we must first express our concern with the undue and ill-advised haste by which program alternatives are emerging. We do appreciate innovation and new ways of approaching complex problems. But one of the most fundamental components of the Section 106 process, and the aim of the National Historic Preservation Act, is to provide citizen input into federal decision-making. In our view, Program Comments, in particular, run contrary to the spirit of that foundational statute, and have instead relied upon inconsistent, inadequate public outreach efforts for their initial development, and then exacerbating the situation, subsequently forego any additional future consultation – even when stakeholders specifically express their desire for it. The program comment approach further allows an agency to ignore citizen and state input, and instead focus entirely upon an increasingly politicized aim of achieving a successful vote of the members of the Advisory Council on Historic Preservation (ACHP), largely made up of fellow federal agency representatives.

In 2021, the ACHP attempted to address some of the issues inherent to Program Comments by convening a panel of stakeholders – of which NCSHPO was a member. It was concluded at that time that “program comments are especially advantageous to agencies that may have repetitive management actions for a large inventory of similar historic properties or for agencies that have programs that generate a large number of similar undertakings.” In this instance, the proposals you are seeking feedback on are not tied to any particular agency, action, or historic property type. It is also unclear whether they would be “repetitive,” or “similar.”

Additionally, to implement some of the recommendations of that panel, the ACHP developed a chart to illustrate the steps that a federal agency take to develop a Program Comment. While we realize that this did not reflect the possibility of the ACHP pursuing a Program Comment of its own initiative, we would expect the ACHP to follow its own guidance. Given that, it is unclear whether the intention will be to

follow your agency's recommended process or whether it has even formally been initiated. We look forward to some clarity on this as these proposals progress.

We also want to acknowledge that there are numerous existing national and state-level agreements already in place that cover a variety of the undertakings being contemplated. Before proposing a new series of sweeping national program alternatives, we think a comprehensive examination of the instruments already in place, what they cover and their corresponding successes and challenges would much better inform whether or not new superseding agreements or alternatives are necessary.

Despite our concerns and the difficulty of commenting on such a seemingly unlimited number of potential undertakings, we do offer these observations:

Housing

Recently, the Department of Housing and Urban Development (HUD) contacted NCSHPO to discuss a potential Program Comment for a wide number of public-housing facilities that would cover many potential undertakings and, specifically, focus upon interiors. This, in our view, is an example of a potential set of similar undertakings in a similar resource-type that may be appropriate for such an action.

Beyond this, we think a broad Program Comment covering housing across multiple agencies, multiple housing types and with a wide-variety of potential undertakings and effects is impractical. What we have learned, over the years, is that program alternatives do indeed work best when they take into account a federal agency's staff qualifications and available resources, a well-defined set of undertakings, a set of similar resources, and a path by which more important resources or exceptions can benefit from some level of consultation.

Energy Efficiency

Several years ago, we participated in the development of a Prototype Programmatic Agreement that covers several Department of Energy programs focused on energy efficiency. This agreement took into account agency resources, potential effects, and since it is a prototype, allows for processes to be minorly tailored to each state and/or territory. In our view, this represents a sensible approach. Rather than pursuing a new agreement, a better place to start would be to explore whether or not additional programs and/or agencies would be appropriate to be added or form the basis of a similar agreement.

Clean Energy

Most of the types of renewable energy projects contemplated for a Program Comment, in our view, do not make sense for such an approach. What might be appropriate in one setting may not be appropriate in another – and we do not think that a national program alternative makes sense or can be structured to navigate the many variables that should be taken into account when considering location, installation methods or mitigation measures.

That said, there may be some merit to pursuing "standard treatments," which are another type of program alternative in the ACHP's toolbox. Under very specific circumstances, for example, if certain conditions are met, there may be a way to create an easier path for the installation of solar panels on flat roofs, the installation of geothermal wells, or other examples where there is virtually no visibility.

Climate-friendly Transportation

Of all of the proposals, we believe this one to be the most unnecessary. The types of undertakings suggested for this Program Comment are frequently already covered in state level programmatic agreements in place for “minor transportation projects.” These agreements are already reflective of the processes and priorities of individual states. Since the funding for these projects comes through state Departments of Transportation, it makes sense that an agreement be tailored to reflect the overall process as well as level of consultation with State Historic Preservation Officers and other stakeholders appropriate for that state.

Other Thoughts

NCSHPO is concerned that in the ACHP’s quest to pursue ever more “efficient” Section 106 reviews, it is running the risk of undermining and abandoning the very intent of the National Historic Preservation Act as well as its own underlying regulations. Increasingly, instead of pursuing improved and successful use of the standard Section 106 process, the ACHP seems to have determined that virtually every national policy priority is ripe for a program alternative – which, at this point, is leading to a growing perception that the entire 106 process must be broken and in need of a larger and potentially preservation-adverse remedy.

In other words, if the ACHP sees the need to support some 15 national program alternatives, and is now considering four broad-based topical Program Comments, because the 106 process is so “burdensome,” then isn’t there a bigger problem? To be clear – we believe if the 106 process were used as intended and designed, it need not be such a burden. But the ACHP seems to itself be questioning that very notion. Agencies have all but admitted that their fear of “adverse effect” determinations can lead to prolonged disagreements over National Register eligibility, interpretations of the standards, or other fundamental aspects of consultation.

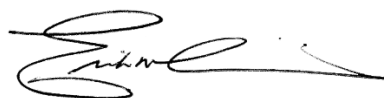
SHPOs will tell you the number one delay in the project review process is insufficient, inadequate submission materials and/or agencies having already pre-determined an outcome. There are ongoing questions whether the interpretation of the Secretary’s Standards in the 106 environment is or should be different than in other settings and how to reasonably evaluate effects and corresponding mitigation. These are broad and holistic issues that, in our view, would make sense for the ACHP to examine and develop revised or new guidance - instead of focusing on specific political policy objectives and tailor-made processes which leave the overall 106 process even more complex.

We appreciate the opportunity to comment and appropriately request to serve on any working group established regarding these proposed initiatives.

Respectfully,



Ramona Bartos
President



Erik Hein
Executive Director