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October 3, 2024

HPO-J2024-040

The Honorable Sara Bronin, Chair
Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001
Sent via email to: program_alternatives@achp.gov

Re: ACHP's Proposed Program Comment for Accessible, Climate-Resilient, and Connected Communities

Dear Chair Bronin,

Thank you for providing the opportunity to comment on the ACHP's Proposed Program Comment for Accessible, Climate-Resilient, and Connected Communities. The New Jersey Historic Preservation Office (NJHPO) has reviewed the proposed program comment. While we support efforts to streamline Section 106 consultation for projects that have little to no potential to cause effects to historic properties, we have several concerns about the draft Program Comment. These concerns are outlined in more detail below:

General Concerns

- The breadth of the Program Comment is inconsistent with the requirements of the National Historic Preservation Act (the Act). The Act 54 U.S.C. § 302303 requires State Historic Preservation Officers to consult with appropriate Federal agencies on undertakings that may affect historic properties and consult on the content and sufficiency of plans developed to protect, manage, or reduce or mitigate harm to that property. The current draft of the Program Comment allows federal agencies to exempt overly broad categories of projects from review and comment by State Historic Preservation Officers.
- The draft Program Comment removes the voice and knowledge of state and local governments, local organizations, and the public out of the federal decision-making process which is counter to the spirit and intent of the National Historic Preservation

Act. It is also counter to one of the primary tenets of the Section 106 consultation process – that the views of the public are essential to informed federal decision-making.

State and local governments, local organizations, and the public often have knowledge of local properties that the federal government does not have. For example, in NJ, there was a transportation project that would reconfigure existing roadways to link to segments of interstate highway. A house within the project's area of potential effects (APE) that was proposed for acquisition and demolition as part of the project was determined not to be significant in an architectural survey of the APE. However, through public involvement, we learned this was actually a patterned brickwork house, a historically significant house type unique to the Delaware Valley, and were able to document the house and its history and develop meaningful mitigation. Had the voices of the public been excluded from the consultation process, any knowledge and consideration of this resource would have been lost. This is especially true for under-represented communities where resources important to those communities are often significant for their association with important events or people in our past. This information is not always captured in existing surveys which tend to be overly reliant on Criterion C for significance.

- The Program Comment would result in lack of transparency in the federal decision-making process. Because the Program Comment could be used by any federal agency for a large number of project types, it would not be possible for anyone to identify which federal agency was applying the provisions of the Program Comment for a particular project. Furthermore, the reporting requirements in the Program Comment further contribute to this lack of transparency. Essentially, the Program Comment will allow federal agencies to make decisions in secret without accountability to the citizens who may be concerned about the projects being undertaken.
- The provisions of the Program Comment appear to facilitate projects by allowing federal agencies to proceed with these undertakings without consultation. However, given the breadth of the project types covered and the lack of specificity in its provisions, we are concerned that there is great potential for abuse. As currently drafted, federal agencies could define any project as housing-related or climate-change related and exempt the project from review under Section 106 without recourse.
- It is unclear how use of the Program Comment will be handled by delegated authorities and pass-thru entities.
- The Program Comment could create confusion since a project may be exempt from Section 106 consultation under the Program Comment, but still require compliance with state law and local ordinance. As currently drafted, the Program Comment may potentially create a situation where different preservation standards could apply to different aspects of the same project. This could lead to confusion, more complex project reviews, and potentially, project delays.
- The provisions outlined in the Appendices raise significant concerns about the future of historic preservation. As currently structured, these provisions allow a general exemption from review for qualifying activities on most properties or features that are 45 years old or younger. This conflation of properties and features complicates matters, as they do not hold equal status. While the intent behind structuring the Program Comment around these properties is understandable—since they are typically not considered



historic properties, except in very specific circumstances—the identified actions, if executed, could severely impact the integrity of historic properties. Consequently, there is a disconnect between the application of this Program Comment and the *Standards*. Furthermore, the broad scope of the Program Comment raises questions about whether any property interacting with it would retain sufficient integrity to be evaluated as a historic property in the future.

- The Program Comment may undercut property owner’s ability to take advantage of Federal and State Historic Rehabilitation Tax Credits.

In NJ, there have been several projects that have combined the use of U.S. Housing and Urban Development (HUD) funds with the Federal Historic Rehabilitation Tax Credit and the Low-Income Housing Tax Credit programs. These projects involved the Lawnside School in Lawnside, NJ, the Springside School in Burlington Township, NJ; and the Duffy School in Florence, NJ. All of these schools were rehabilitated and adaptively reused for affordable senior housing. These projects initially had a HUD funding component and involved a substantial number of interior changes to the buildings. These changes required a significant amount of consultation with the NJHPO to ensure that character-defining features were retained while still meeting the goals of the affordable housing project and the requirements of both the Federal Historic Rehabilitation Tax Credit and the Low-Income Housing Tax Credit. If the Program Comment had been used for these projects for the HUD funding, the changes that would have been allowed to happen without Section 106 consultation would have disqualified the projects from the Federal Historic Rehabilitation Tax Credit program.

- The proposed Program Comment does not provide adequate consideration for archaeological resources in project planning and could, in fact, lead to delays in project implementation if resources are discovered during construction without prior planning. The Program Comment exempts activities from review under Section 106 if they are in previously disturbed soils, within 10 feet of a building, or within 10 feet of existing paved areas or in previously disturbed rights-of-way. Seemingly, the purpose of this language is to capture all situations in which there are not likely to be archaeological deposits. However, in any urban environment, one cannot assume that prior construction destroyed all potential for significant archaeological deposits to exist. In New Jersey, there are numerous examples of intact pockets of significant archaeological resources that have been documented in urban environments. For example, in the late 1990s, a project in downtown Trenton involved the removal of additions to the back of a row of townhouses and the construction of a new addition in their place. Archaeological survey in advance of the project identified two intact Native American burials in between 2 of the neighboring townhouses. Each burial was within 10 feet of a building. Under the ACHP’s proposed Program Comment, these Native American burials would either would have been destroyed without having been identified or they would have been discovered during construction and caused major delays to project implementation. The definitions of previously disturbed ground and previously disturbed right-of-way are too broad and should be amended.

Comments on Specific Sections

- II.C.1
 - Notes that the federal agency must first consult with the signatories of a Memorandum of Agreement (MOA)/Programmatic Agreement (PA) and then



provide notice of decision to use the Program Comment. What if the signatories object?

- II.C.2
 - The use of existing MOAs/PAs alongside the existence of the Program Comment will likely cause significant confusion due to the lack of clarity regarding which provisions of which agreement will be applicable or take precedence.
- II.E.2
 - This is incredibly confusing. This also sounds a lot like segmentation. Would the undertaking be broken down into components where this Program Comment would apply to certain aspects of a larger undertaking, but another PA would cover the rest? There is a strong potential for this to go awry.
- III.C
 - This references the standard of “reasonable judgement.” How is this quantifiable?
 - The Program Comment proposes the use of “Qualified Authorities” and “Qualified Professionals” on behalf of federal agencies who meet the Secretary of the Interior’s Professional Qualification Standards. It is unclear whether the use of these “Qualified Authorities” and “Qualified Professionals”, and by extension, the reviews conducted in accordance with the Program Comment, will be at the national level or the local level.
 - There is a concern with the use of non-local “Qualified Authorities” and “Qualified Professionals” who may not be familiar with local historic properties, historic contexts, regulatory requirements, etc. as these may differ depending on where an undertaking is implemented. This is further concerning if these “Qualified Authorities” and “Qualified Professionals” are exempting certain undertakings from further review while lacking local expertise to fully understand the local historic preservation landscape. For example, archaeological survey and site identification standards vary state-to-state.
- III.D
 - This provision directly conflicts with Section 106. Unless a federal agency knows what historic properties are within the area of potential effects, why they are eligible for listing on the National Register of Historic Places, and what their character-defining features are, it is not possible to determine the effect of the project on those properties.
- V
 - There is a direct conflict between III.D and V. III.D, which generally exempts federal agencies from determining whether historic properties are present, unless otherwise specified. This leaves treatment to previously unidentified historic properties that are identified during implementation to be covered under V (Unanticipated Discoveries). Handling unanticipated discoveries is a time consuming and costly treatment. The purpose of Section 106 is to address these issues to avoid handling them as unanticipated discoveries, as this is not an appropriate treatment and is a means of last resort.
- VI
 - If undertakings do not require consultation and reporting is only a general accounting of activities that have taken place, how would disputes even arise?
- VII
 - Twenty (20) years is too long a timeframe for this agreement. If adopted, it should be a pilot program to test its effectiveness, given the sweeping scope of this Program Comment
- XI



- “Climate-friendly” is used throughout, but it is unclear what this means. How many undertakings could be forced under this umbrella term simply by using it?
- “Previously disturbed ground” and “Previously disturbed right-of-way” presents a number of issues. These are not agreed-upon standard site conditions and reasons for which this definition could be used to exempt undertakings may not be consistent with the local interpretation of these definitions.
 - Case in point, using the definition of “Previously disturbed right-of-way” a resource like the Halsey Street Cemetery in Newark would not have been identified or addressed, as it was located below an existing parking lot. Through careful archaeological survey during project planning, 335 graves were discovered, disinterred, and reinterred in accordance with a human remains treatment plan. Under the draft Program Comment, resources like this would have to be treated as an Unanticipated Discovery and would create significant project delays.
 - Additionally, in many cases, it is not defined who is making these decisions to apply these definitions.
- Appendices - Because many of these comments are repetitive, I have classified them under the general heading that are used throughout.
 - Site Work
 - Who is determining the application of “previously disturbed ground?” This stipulation should specifically qualify that the “Qualified Authorities” and “Qualified Professionals” reviewing the proposed undertaking must meet the Secretary of the Interior’s *Professional Qualification Standards* for archaeology, as the evaluation outlined deals with archaeological issues related to the proposed undertaking.
 - This conflates addressing rehabilitation/replacement of features less the 45 years of age, but also includes installation. Under these conditions, new features could be added to historic properties in direct conflict with the *Standards*.
 - A number of ground disturbing activities are outlined that don’t even address the issue of “previously disturbed ground” but could create ground disturbance in archaeologically sensitive areas.
 - Under this heading, historic sewer systems could be exempted from further review, because they generally “serve housing”
 - How do you limit ground disturbance in these situations?
 - There are number of existing sewer systems that qualify as historic properties. Why would effects to these systems not warrant consideration?
 - In New Jersey, the New Jersey Department of Environmental Protection’s Division of Water Quality retains delegated authority from the United States Environmental Protection Agency (EPA) for projects receiving certain EPA-funded infrastructure funding. The use of the provision on certain undertakings would be in direct conflict with the delegated authority from EPA for the identification, evaluation, and treatment of water and sewage infrastructure-related historic properties.



- In situations where the federal agency is allowed to proceed based on clearance from a “Qualified Authority,” it is unclear what standards and metrics are being utilized to make these assessments. Essentially, as long as they have a written signoff from someone under this category, they can proceed. This is incredibly vague and can lead to abuse.
- Work on Building Exterior
 - This essentially reads as sanctioned facadism, which does not meet the Secretary of Interior’s Standards for the Treatment of Historic Properties.
 - The draft Program Comment introduces the term “minimal adverse effects” which is not defined in the draft Program Comment and does not exist in the Advisory Council on Historic Preservation’s regulations. In addition, in spite of acknowledging adverse effects to irreplaceable historic resources, the draft Program Comment does not discuss or offer any mitigation.
- The inclusion of Climate-Friendly Transportation-related activities as an appendix seems incongruous with the rest of the document. Furthermore, many of these provisions are already covered by our existing state-level agreement documents and are redundant. Also, many of the provisions fail to recognize situations in which the elements listed in the Program Comment are themselves character-defining features of a historic property. The HPO recommends removing Transportation from this Program Comment.

In light of the many issues with the proposed Program Comment, we urge the Advisory Council on Historic Preservation to withdraw this draft Program Comment on Accessible, Climate-resilient, and Connected Communities and initiate the process outlined in the ACHP’s own regulations to engage with SHPOs, THPOs, archaeologists, local governments, and other stakeholders to develop a program alternative that balances historic preservation goals with the goals of addressing housing and climate-related undertakings.

Thank you for the opportunity to review and comment on the draft Program Comment on Accessible, Climate-resilient, and Connected Communities. Please do not hesitate to contact me if you have any questions or would like to discuss any of these comments in more detail.

Sincerely,



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Deputy State Historic Preservation
Officer

Cc: Erik Hein, NCSHPO

