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LAND
STATE PARKS

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IN REPLY REFER TO:

Project No.: NA

Document No.: 2410JLP01

Architecture

Hon. Sara Bronin
Chair, Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington, DC 20001
c/o achp@achp.gov

Dear Chair Bronin,

RE: Advisory Council on Historic Preservation Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities

Thank you for the opportunity to review the *Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities* (Program Comment). We have reviewed the proposed draft and have determined that, in its current state, the proposed Program Comment is not ready to be implemented at this time. Please note, that we have not been able to make a complete and substantive review of all of the appendices and will submit a revised comment letter once we have been able to complete a substantive review of Appendix B1 thru C2. That being said, we have the following questions and comments for your consideration:

1. Fidelity of Claims Made Throughout the Program Comment Relative to Policy Statements

Page 1; I. INTRODUCTION; A. Background, paragraph 2

States that the ACHP policy statements on housing and climate change, “commit the ACHP to explore new opportunities to use program alternatives to enable federal agencies to advance historic preservation while meeting the nation’s housing and climate goals.” However, neither policy statement commits ACHP to explore program alternatives nor does either policy statement appear to identify ACHP as the appropriate entity to develop an program alternative that would lead to eliminating the need of an agency to consulting with SHPOs, THPOs, NHOS, and the community. Instead, the policy statements simply recognize that program alternatives could be developed to address housing and climate change needs.

Furthermore, both policy statements recognize and promote the importance of and necessity to consult with communities and preserve historic properties while addressing housing and climate change issues, respectively. ACHP's assertion here is an exaggeration of the cited policy statements and the need for developing a single programmatic alternative, as evidenced in the draft Program Comment on Accessible, Climate-Resilient, and Connected Communities.

2. Clarification of Connections among “Interrelated Sectors” and Appropriateness of Utilizing One Program Comment to Address Differing Project Types and Program Areas

Page 1; I. INTRODUCTION; A. Background, paragraph 2

States that the program comment address three interrelated sectors; however, the three sectors are not clearly defined. The first paragraph suggests that the sectors are housing and energy efficiency, but it also mentions transportation. Please provide explicit clarity as to the three sectors you are referring to and expand upon why ACHP believes that these three sectors are sufficiently interrelated to merit one Program Comment to cover their distinct areas and goals. The breadth of programs covered by this one program comment does not appear to be appropriate. Each area identified is vastly different with vastly different project types that require particular thought and consideration relative to their project scopes of work and impacts to historic and cultural resources. Please clarify how the projects for housing are repetitive and the same as those for transportation, so much so that they should be covered by the same program comment. If, however, the housing projects are different transportation and other sectors covered by this program comment then each sector should get its own program alternative.

3. Purpose and Intent of the Program Comment

Page 1; I. INTRODUCTION; A. Background, paragraph 3

Pg. 1, Paragraph 3 states that, “the ACHP developed this government-wide Program Comment to help accelerate the review of projects carried out, permitted, licensed, funded, assisted, or approved by federal agencies to rehabilitate existing housing or create new housing in existing buildings, to maintain and update buildings and their immediate environs in response to climate concerns, and to rehabilitate or develop new climate-friendly transportation infrastructure.” A program comment developed for the purpose of creating an alternative to the Section 106 historic preservation consultation process should state how the program comment will preserve historic resources; otherwise, it might be interpreted as an exemption to historic preservation requirements. Historic preservation should be the foremost goal of any Section 106 program alternative and should clearly communicate how preservation of historic resources will be realized under the program alternative.

4. Limited/Lack of Recognition for Federal Agency’s Responsibility to Consider Historic Preservation/Historic Properties

Page 1-2; I. INTRODUCTION; B. Current Federal Agency Action

Summarizes the various undertakings that are the responsibility of federal agencies and are supported and/or expanded by recent Congressional and Executive action. References the requirement for Section 106 review but does not explain what it is or the need for federal agencies to take into account the

effects their undertakings, listed previously within this section, have on historic resources. Omitting an explanation or the importance of Section 106 to the preservation of historic and cultural resources suggests that ACHP does not view Section 106 as an important check-and-balance system in comparison with the programs listed within this section. Please revise and reflect the purpose and need for Section 106 and compliance with the National Historic Preservation Act as it pertains to “Current Federal Agency Action.”

5. Program Comments as Appropriate Program Alternatives

Page 3; I. INTRODUCTION; C. Prior ACHP Action; Paragraph 2

States, “the ACHP has also issued or participated in other 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 appropriate programs, housing constructed during specific eras, and housing designed and built with similar form, style, and materials...Prior program comments addressing housing have reduced the operational and maintenance costs of historic housing, made homes more comfortable for occupants, and facilitated the preservation and reuse of existing buildings.” ACHP goes on in the following paragraphs within this section to outline the other various program comments the agency has developed and suggests that their involvement alone has streamlined reviews and lowered costs for housing projects. The number of program comments for which ACHP is solely in control and development of is concerning. This escalating trend of establishing Program Comments appears to be categorically exempting an alarming number of project and resource types across the country—effectively gutting the National Historic Preservation Act without meaningful consultation with local communities and stakeholders. Has ACHP conducted any kind of study or analysis to evaluate the effect these program comments have had to historic properties and accounted for the number of historic resources that have been adversely impacted by their implementation without consultation or mitigation? How will ACHP account for such adverse impacts created by this Program Comment? ACHP has suggested that undertakings that would result in adverse effects cannot use this and other Program Comments, but has an audit ever been done to back up that assertion? Why is ACHP utilizing a Program Comment instead of having federal agencies develop their own Programmatic Agreements and/or turning this Program Comment into a Prototype PA that can be consulted on at the local level with local stakeholders?

6. Nullification of Local Agreements

Page 5; II. Scope; C. Effect on Existing Agreements

States that a federal agency should notify and consult with signatories of agreement documents that already cover undertakings included within the proposed program comment but ultimately leaves the decision on whether or not to apply the program comment up to the federal agency. This program comment has the ability to recognize the respect existing agreement documents and declare that this program alternative cannot be used in place of an existing agreement. Can ACHP provide clarity about ACHP has not included such language and instead leaves it up to the federal agency on whether or not to uphold existing agreements and mitigation measures? How are local SHPOs, THPOs, NHOs, and consulting parties expected to trust that federal agencies are making a good faith effort to consult if they ignore previous consultation efforts and agreements if ACHP’s Program Comment nullifies them?

7. Diversity, Equity, and Inclusion for Aboriginal, Indigenous, and Marginalized Communities

Pg. 6; II. Scope; E Standard Section 106 Review

States that must follow the Section 106 process found at 36 CFR Part 800 if the undertaking will occur on or have the potential to affect, “sites of religious and cultural significance to Indian Tribes and Native Hawaiian Organizations.” You have not, however, indicated how a federal agency will identify said religious and culturally significant historic properties prior to implementing this Program Comment; if they will consult with local communities to determine if such religious and culturally significant historic properties are present; or, what the dispute resolution and appeals processes are if a federal agency refuses to recognize that their undertaking may or will affect a site of religious and cultural significance to Indian Tribes and Native Hawaiian Organizations. Furthermore, it only requires that a federal agency is prohibited from using this Program Comment for properties previously identified and listed as NHLs; it does not require federal agencies to identify or consider their undertaking’s impact to historic and cultural resources that are eligible for listing as National Historic Landmarks, which would preclude such sites that belong to marginalized and underrepresented communities from being recognized, avoided, and preserved. Can ACHP include language that requires federal agencies to consider whether such sites are present within their project area and to required that if an historic property that appears to be eligible for listing as an NHL is found within their APE they must follow the Section 106 process found at 36 CFR Part 800?

8. Documenting and Reporting

Pg. 6; III. Alternative Compliance Approaches; A. Available Alternative Compliance Approaches

This section of the Program Comment includes not alternative approach other than a federal agency’s ability to self-determine whether their undertaking meets one of the Appendices of the Program Comment. What recordation and reporting mechanism has ACHP created to account for these decisions, the undertakings they belong to, and how ACHP will evaluate and determine whether an agency is applying the Program Comment correctly? Such language should be included; and should afford SHPOs, THPOs, NHOs, and consulting parties the ability to review and comment on an annual report that identifies all of the undertakings this Program Comment was applied to within their respective state or territory.

9. Consultation and Process

Pg. 7; III. Alternative Compliance Approaches; B. Consultation with Indian Tribes and Native Hawaiian Organizations; 3. Effect of Finding of Potential Effect on Certain Properties

How will an NHO be consulted with if a federal agency is making the determination about whether or not to apply the Program Comment? Please outline a process that an agency will follow that can be understood by SHPOs, THPOs, NHPs, and consulting parties to identify how a federal agency will decide how to apply the Program Comment and when they might be consulted to identify or confirm the presence of historic properties and whether or not to apply the Program Comment. This program comment lacks specificity throughout or an alternative process. Instead, it appears to give a categorical exemption to Section 106 provided that a project is in accordance with one of the Appendices. Please include details about, when, how, who, duration, etc. a federal agency is required to consult under this

Program Comment. Also, the title of this section should be edited to be clearer; perhaps remove “Effect of” from the front of the title.

10. Qualified Authority

Pg. 8; III. Alternative Compliance Approaches; C. The Use of Qualified Authorities

Please expand upon and explain the difference and purpose of recognizing and utilizing the input from a Qualified Authority and not also SOI Qualified Professionals.

11. Dispute Resolution

Pg. 10; VI. Dispute Resolution; paragraph 1

States that, [a]ny 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 the consulting parties involved in the undertaking and any relevant Tribal historic preservation officer or state historic preservation officer.” However, the use of this program comment would preclude the involvement of consulting parties who are not THPOs or NHOs. The language provided suggests that SHPOs and other entities may also be consulting parties; but this Program Comment forecloses on their ability to consult and takes away their right to be a consulting party for undertakings that fall under this Program Comment. Can ACHP edit this section to clarify/reflect which entities are actually consulting parties under this Program Comment? Specifically, limit consulting parties to THPOs, NHOs, and any signatory of this Program Comment or voting member of the advisory council.

12. Duration

Pg. 11; VII. Duration; paragraph 1

A twenty year duration period is far to extensive a period of time for any agreement document, let alone one that is drafted to create a program alternative for executive and congressional policies—which may change from administration to administration. Best practices typically limit agreement documents to no more than 10 year increments, with the ability to amend to extend as necessary. Furthermore, this program comment’s breadth should require that the program comment be evaluated at the one, three, and five year increment of time to ensure that there is no significant loss in historic and cultural resources and that it is working effectively. Such an evaluation should allow for SHPOs, THPOs, NHPOs, and consulting parties to meet with ACHP and discuss the impact of the program comment and whether it should be amended or withdrawn.

13. Annual Reporting

Pg. 12; X. Reports and Meetings; A. Federal Agency Annual Reports

Does not require federal agencies to provide SHPOs, THPOs, NHOs, or consulting parties with annual reports or inform them of which undertakings they applied the program comment to. This effectively hides a federal agency’s activities from consulting parties and eliminates their ability to voice concerns

or objections to the federal agency or ACHP. This section should include a requirement that the federal agency provide SHPOs, THPOs, NHOs, and consulting parties with an annual report every year.

Furthermore, all federal agencies should have to report every year and not every three years. Only requiring a report every three years means that neither the ACHP or the public will be able to see or evaluate how federal agencies are applying the program comment. Such reports will be too large to evaluate and too difficult for agencies to produce.

14. Annual Meetings

Pg. 13; X. Reports and Meetings; B. Annual Meetings

States that for four years after the Program Comment is executed the ACHP will meet with federal agencies, Indian Tribes, state historic preservation officers, Tribal historic preservation officers, Native Hawaiian Organizations, and others it deems appropriate to discuss the implementation of the Program Comment. However, it will be difficult for said entities to consult if they are not informed about what projects the program comment have been used for and what the outcome of the projects were. Furthermore, this stipulation should be required for every year the program comment is in existence.

15. Appendix A; Pgs. 21-28

a. Ground Disturbance

This appendix does not account for depth of ground disturbance or soil type. In many places the type of soil and depth of ground disturbance may indicate the likelihood of subsurface historic properties or iwi. Some of the activities identified (whether planting a tree, digging a posthole, altering utility lines, or repaving a road would result in the identification of subsurface historic properties and/or iwi—both previously known and inadvertent). Such activities should not be done in those locations without an Archaeological Inventory Survey, Archaeological Monitoring, and/or Cultural Monitoring.

b. Work on Building Exterior

Many of the activities identified within this appendix have best practices that should be followed (see SOI Standards, Preservation Briefs, etc.) and such best practices are location specific. The general nature of the activities listed, the assumed appropriateness does not work in all locations and is confusing to follow. This list of work would be better defined in a Programmatic Agreement developed between a SHPO, THPO, NHOs, and consulting parties with HUD, USDA, delegated authorities, and the like rather than listed as they are in a program comment of this sort. There are too many variables that if not considered would affect a building's integrity, eligibility, and consideration for preservation incentives at a later date. For example, as written, projects listed under item #2 suggest that a historic building could have non-historic and non-compatible roofing placed on one half of the roof and historic or compatible roofing placed on the front of the building. If this section does remain, it would be better to separate what activities and in what scenario it would be appropriate to rehabilitate, versus replace, versus install something new rather than lumping them all together and hoping that the person reading this section will interpret it appropriately.

Also, should include a footnote or qualifying statement that if a project proponent is also interested in capturing historic preservation tax credits not all treatment measures that ACHP has identified under this Program Comment as “not needing further review” does not mean that the treatment measures are appropriate for an historic property, are in keeping with SOI standards, and/or would qualify a project for historic preservation tax credits.

c. Work on Building Interior

Many of the activities identified within this appendix have best practices that should be followed (see SOI Standards, Preservation Briefs, etc.) and such best practices are location specific. The general nature of the activities listed, the assumed appropriateness does not work in all locations and is confusing to follow. This list of work would be better defined in a Programmatic Agreement developed between a SHPO, THPO, NHOs, and consulting parties with HUD, USDA, delegated authorities, and the like rather than listed as they are in a program comment of this sort. There are too many variables that if not considered would affect a building’s integrity, eligibility, and consideration for preservation incentives at a later date. For example, the use and definition of a primary space is vague enough to allow a federal agency to take gross liberties that would result in the loss of key interior walls that subdivide spaces original to a property that were primary spaces at the time for key occupants (such as interior walls of butler’s pantries and quarters for servants or enslaved persons) that are key to understanding the history of a place.

Also, should include a footnote or qualifying statement that if a project proponent is also interested in capturing historic preservation tax credits not all treatment measures that ACHP has identified under this Program Comment as “not needing further review” does not mean that the treatment measures are appropriate for an historic property, are in keeping with SOI standards, and/or would qualify a project for historic preservation tax credits.

d. Other Activities

The transfer, lease, or sale of property outside of federal ownership, regardless of “restrictions or conditions” should always require Section 106 compliance because the federal agency cannot guarantee local enforcement of restrictions or conditions without a local entity as a signatory to the agreement that ensures preservation. Furthermore, such transfers have consistently been determined to be adverse effects to historic properties and no undertaking that results in an adverse effect should be included within this Program Comment.

16. Appendix A-2: Housing-Related Activities Not Requiring Further Review After the Satisfaction of Conditions, Exclusions, or Requirements

This section is confusing and hard to differentiate from the previous appendix. It might help to provide a narrative summary at the beginning of the appendix to explain when to apply this appendix and how it differs from the others. Furthermore, it suggests that conditions, exclusions, and requirements would or should be put into place but does not identify who would place those conditions, exclusions,

and requirements, nor does it identify who would enforce them or if/how the federal agency would consult on those conditions, exclusions, and requirements.

a. Site Work

If this section is intended to place restrictions on these activities, then the restriction should include language that an SOI Qualified Archaeologist has reviewed the proposed scope of work and determined that it is in a location and scale of ground disturbance with a low likelihood of encountering subsurface historic properties or iwi. Additionally, it should provide provisions where archaeological monitoring is required for ground disturbance below the base course in areas where an SOI Qualified Archaeologist has determined that there is a moderate to high likelihood of encountering subsurface historic properties or iwi.

b. Work on the Building Exterior

The use of the term “qualified authority” alone without also including SOI Qualified Professional is something that may need to be clarified. One may not be recognized as a qualified authority but may meet SOI professional qualifications for architect, historic architect, or architectural historian and be able to make such determinations on non-Native historic properties and, in some cases, on Native historic properties. What is ACHP’s intent to limit determinations to someone identified as the “qualified authority”? How is that universally more appropriate than allowing for a “qualified authority” and/or SOI Qualified professional?

The Hawaii State Historic Preservation Division (SHPD) looks forward to continuing to consult with the Advisory Council on Historic Preservation about this and future drafts of the Program Comment as it’s further developed.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Puff', with a stylized flourish at the end.

Jessica L. Puff
State Historic Preservation Administrator
Deputy State Historic Preservation Officer