



Oregon

Tina Kotek, Governor

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October 5, 2024

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

RE: Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities

Dear Chair Bronin:

The Oregon State Historic Preservation Office appreciates the opportunity to comment on the draft Program Comment on Accessible, Climate-Resilient, and Connected Communities. The draft Program Comment allows all federal agencies that are undertaking housing development, building decarbonization projects, or climate-friendly transportation projects the latitude to assess their effects on historic properties through Section 106 of the National Historic Preservation Act without consultation with State Historic Preservation Offices (SHPOs), the public, or Tribes if certain conditions and requirements are met.

The Oregon SHPO recognizes and applauds the ACHP for addressing historic preservation's role in supporting national policies on affordable housing and climate resiliency. That said, we align with the positions of many of our colleagues, including the National Conference of State Historic Preservation Officers, the American Cultural Resources Association, the National Alliance of Preservation Commissions, the Society for American Archaeology, the U.S. Department of the Interior, and others, in the collective concerns about the draft Program Comment initiated by the chair of the Advisory Council on Historic Preservation (ACHP).

Many of the letters submitted by the entities noted above contain detailed descriptions of the technical and philosophical problems inherent in the draft Program Comment. While the Oregon SHPO agrees with most of these comments, this letter is not meant to cover the same ground. We are going to frame our comments around some of the outcomes we know the ACHP is seeking on behalf of federal agencies with this draft Program Comment. The outcomes below are absolutely reasonable, but as practitioners of Section 106 at the state level, we see some pitfalls that could unintentionally create obstacles to the efficiencies you are seeking.

Better Consistency in Section 106 Outcomes

We understand that federal agencies working in many states encounter inconsistencies among the SHPOs they work with. That is no surprise, given the wide variation in capacity, funding, technology, and staffing that characterizes the SHPOs. But we do not think this Program Comment is going to provide that consistency.

Fundamentally, Section 106 is process-driven; it is not outcome-driven. One can build more consistency into the process by consolidating similarities: similar property types, or repetitive actions that have been demonstrated, by monitoring over time, to have no adverse effects to historic properties. Those are precisely the kind of elements that Program Comments are suitable for, according to the ACHP's own guidance. However, in the case of this Program Comment, there are few similarities to reasonably consolidate. The project elements that justify the use of this Program Comment could be built in to essentially any project by any federal agency. There is no consistency in the mission or capacity of the agencies. There is a wide range of property types that could be impacted, including archaeology. The matrix of conditions and requirements and exclusions in the appendices are far too complicated to result in any kind of consistent outcome. The undertakings themselves share some similarities by section, but the effects of the undertakings will not be consistent. Simply said, the expectation of consistent outcomes for the profoundly wide range of projects that could justifiably use this Program Comment is unrealistic.

More Latitude for Federal Agencies

The ACHP's regulations already allow several mechanisms for federal agency latitude in the Section 106 process through its program alternatives. In fact, it is our understanding that the stipulations and exclusions in the draft Program Comment were drawn from existing Programmatic Agreements (PA). Indeed, there are plenty of exclusions in the draft Program Comment that are reasonable and that regularly show up in SHPO-signed PAs around the country. Having said that, exclusions that work in one state may not work in another. That is why the most successful ones are state specific. Oregon is 53% federal land and only 5% of it is surveyed. That ratio will influence what exclusions are and are not appropriate here.

Programmatic Agreements also build in public and tribal participation, which the draft Program Comment eliminates. Oregon has nine federally recognized tribes, and while they may or may not sign PAs, they usually participate in the process. The SHPO represents the state's public interest in the process, and our decisions reflect our strong relationships with Oregon's non-profits and cultural organizations, including constituents representing historically disadvantaged communities. The breadth of federal latitude in our PAs depends on the individual agency, its staff expertise and capacity, and its record over time. Accountability is built into the process in the form of agency training, annual meetings, and annual reporting subject to SHPO review and concurrence.

Plain and simple, latitude comes with check and balances that protect the agency as well as the resources. We are concerned that several areas of the draft Program Comment put federal agencies in an awkward position. Specifically,

Appendices A-, B-, and C-1

- Federal agencies are not required to determine eligibility of any building when conducting the listed activities, and they are not required to engage with a "qualified authority." But they still face some decision points based on "character-defining features of historic properties," "ground surface materials 45 years or older," and "known historic properties." They are also required to understand the difference between a primary and non-primary facade, a specific historic building's primary spaces, and to identify historic building materials. Federal agencies are being asked to make decisions based on guesswork, which puts the agency and the integrity of historic buildings at risk.

Appendices A-, B-, and C-2

- Agencies are required to obtain “written documentation” from a “qualified authority” who must determine that listed actions have no or “minimal adverse effect” on the building, while also conducting an analysis of technical and economic feasibility, “including long-term operational costs and climate resilience of the building.” That’s a heavy lift for even a seasoned architectural historian. Not only is “minimal adverse effect” not a legitimate finding under 36 CFR 800, the expertise needed to conduct the technical analysis falls well outside the skill set of a historian.
- If the agency happens to be a Housing and Urban Development-delegated “Responsible Entity” (RE), which it will be in many cases, it may not have the capacity to find and hire a “qualified authority” who is truly qualified, especially in less-populated states or rural areas. Even in urban areas, REs often rely on the SHPO to do that work for them (or to correct the well-meaning but amateur findings they have attempted).
- The draft Program Comment puts extreme pressure on the administrative record of federal agencies when many of them have antiquated tracking technology and unreliable internal processes. Poorly defined requirements for “written documentation” and annual reports only add to the confusion for the agencies, who will have to rely solely on their record-keeping to defend its decision-making against inquiries or legal action.
- The Program Comment adds multiple layers of confusing circumstances to agencies that are already limited in capacity and expertise, and that have to build in time to comply with the National Environmental Policy Act, the Endangered Species Act, and state and local permitting authorities anyway. Furthermore, many of the activities, even in Appendices A-1 and B-1, would be subject to design review at the local level if the building is designated, which the agency may not know until the last minute, because they are not required to conduct determinations of eligibility and they do not have the SHPO in the mix to alert them.

Finally, the mechanisms meant to avoid adverse effects in this draft Program Comment are fundamentally flawed. They depend on the findings of non-professionals in most cases, and when professionals are required, they are determined “qualified” by the federal agency and are accountable, in the end, by way of the integrity of the agency’s administrative record-keeping, only to another federal agency, the ACHP. Such unilateral federal decision-making contravenes the very intent of Section 106 and calls into question the integrity of any determination that results from the process.

Faster Deployment of Federal Initiatives

Removing SHPO consultation from the Section 106 process may or may not expedite the deployment of the federal projects addressed in the draft Program Comment. But it will almost certainly deprive federal agencies of a layer of expertise that helps them avoid potential pitfalls, surprise encounters, and expensive delays. The SHPOs assist agencies in identifying historic properties, interested parties, tribal concerns and other subject matter experts appropriate to their projects. They fill in the gaps when agencies don’t have the capacity to do that work for themselves. SHPOs have strong relationships with state non-profits and cultural organizations, including constituents representing historically disadvantaged communities. They provide trainings, craft solutions, and more often than not, absorb the political fallout when the agencies stumble. Not consulting with the SHPOs forces federal agencies to fly blind and hope they don’t hit something important. It puts them at risk for inadvertent discoveries, neighborhood pushback, and Tribal tensions.

Unfortunately, the assumptions made in the draft Program Comment reflect a lack of acknowledgement of the role of the SHPOs and the reality of our experience as 106 reviewers. It assumes all federal agencies

will use the Program Comment in good faith. It assumes qualified professionals will be available and appropriately employed. It assumes all federal agencies will be compelled to keep a thorough administrative record based on public expectation. It assumes SHPOs and Tribes will discover (after the fact) bad actors, poor decision-making, and adverse effects “through the grapevine” of our contacts and constituents. Based, unfortunately, on daily experience, SHPOs view these assumptions with skepticism.

There are fifty-nine SHPOs. We encourage the ACHP to push pause on the draft Program Comment and engage us in surveys and conversations to obtain actual data about our on-the-ground experiences, our relationships with federal agencies and Tribes, how program alternatives such as Programmatic Agreements are working, what we use for stipulations and exclusions in our states, and our average review times.

In summary, we want to thank the ACHP for the opportunity to comment on the draft Program Comment and respectfully ask that it be withdrawn and redrafted. We also ask that you please share all the comments you receive with every Council member. We understand most are not Section 106 practitioners and they will benefit from the context presented in the letters to fully understand our concerns.

I know I can speak for my fellow SHPOs when I say that we stand at the ready to assist federal agencies and the ACHP in reaching the goals noted above. But we also have a federal mandate, and a duty to the public we serve, to speak for the cultural heritage in our states, to be at the table, and to do the best we can to protect our special places.

Sincerely,

A handwritten signature in cursive script, appearing to read "Christine Curran".

Christine Curran
Deputy State Historic Preservation Officer