History Colorado

October 8, 2024

Honorable Sara C. Bronin
Chair
Advisory Council on Historic Preservation
401 F Street NW, Suite 308
Washington DC 20001-2637

RE: Colorado SHPO Response / Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities

Dear Chair Bronin:

The Colorado State Historic Preservation Office appreciates the opportunity to provide comment and feedback on the Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities.

In general, while we appreciate the stated intent motivating the Program Comment and believe a Program Alternative(s) of some variety could be the right approach for some of the activities included, the Program Comment as presented strays from the core tenets of the Section 106 consultative process and will almost certainly lead to more confusion and conflict, not less.

The Program Comment is exceptionally broad and deserves much additional consideration and collaborative development, which we strongly encourage the Advisory Council to authentically pursue.

While we have serious concerns about the Program Comment, in the spirit of SHPOs across the country working hard everyday to ensure that community-driven preservation outcomes are reached, we are providing a detailed response document that highlights areas of concern within the proposed Program Comment. You will find that attached.

My sincere thanks to our compliance team, who on top of an already significant workload, reviewed the draft and provided this feedback. Special thanks to Mr. Joseph Saldibar, a more than 20-year employee of the Colorado SHPO who brings a long and valued perspective to the importance of Section 106 and how it works best for Colorado communities and their historic resources.

Regards,

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Colorado State Historic Preservation Office Comments Regarding the Draft Program Comment on Accessible, Climate-Resilient, and Connected Communities

Section I: Introduction

Section 106 has been described as a 'stop, look, and listen' approach to federal undertakings. Indeed, federal agencies are encouraged by 36.CFR.800 to *stop* for a reasonable period of time (30 days) in the earliest stages of the project to gather their thoughts; to *look* to see if there are historic properties that might be affected by the undertaking, whether such resources are important to the nation as a whole or to a smaller, often marginalized community; and most importantly to *listen* to the advice of others.

This last point is critically important, in that it acknowledges that no one person or agency can be a master of all things, or the holder of all knowledge, and that outside voices are often able to suggest alternatives that may be cheaper, easier, and/or more protective of historic properties. At the Colorado SHPO, we have personally witnessed many examples in which a proposed federal action was improved, often radically so, after receiving input and advice from its consulting parties. We have also witnessed many examples in which the federal agency itself willingly changed its opinion of an undertaking- regarding the eligibility of the resource or the effects of the project or both- after receiving additional information from state, local, Tribal, and public sector parties.

We fear that this spirit of open and helpful cooperation between federal, state, local, and private interests- perhaps a perfect expression of America's democratic process- is about to be completely upended by the proposed Program Comment, bringing an unwanted return to the days when an all-powerful and unassailable federal government rode roughshod over the needs, desires, and wishes of everyone else.

Although the Program Comment stresses the pressing issues at hand- a need for housing, a need to conserve energy, a need to reduce reliance on fossil fuels- we note that the federal government of the 1950s and 60s was similarly driven by what *it* saw as the extremely pressing issues of *its* day- the need to replace transit with highways; to flatten downtowns for new office towers; to bulldoze farmland for new single-family sprawl. Any student of Historic Preservation can easily point to cases in which a zealous federal government refused to grant neither an inch nor a mile, when either might have been sufficient to reuse and restore existing building stocks, or to maintain the historic 'walkability' of downtowns instead of turning them into bleak canyons for combustion engines.

It was the senselessness of the destruction that brought about the creation of the National Historic Preservation Act in the first place. Tellingly, it did *not* allow for historic preservation concerns to *stop* projects- even ill-conceived ones- from going forward. All it asked was that federal agencies, those recipients of every taxpayer's hard-earned dollars, take a brief 30-day moment to *stop, look,* and *listen*. For more than six decades, this has been sufficiently flexible to allow the United States to build more than fifty million new homes; to construct a wireless

network of more than 600,000 cell towers and cellular nodes; to win the Cold War against the Soviet Union and to support the world's most sophisticated military; and to attain its highest level of renewable energy use in more than a century.

Historic preservation is sometimes falsely accused of being resistant, or even hostile to change. We categorically reject this notion. As evidence, we point to the decades we have spent advocating in favor of revitalization over sprawl; in favor of repairing over simply tossing away; and most importantly, advocating for the right of the disadvantaged, the poor, the underserved, and the often-marginalized communities within our state to celebrate their heritage and to not only have a voice, but have that voice listened to by their government.

With that in mind, the Colorado SHPO finds value in the proposed Program Comment. We are no stranger to Programmatic Agreements, Program Comments, and other means of facilitate reviews when appropriate, and where the gains are obvious and acceptable by all. We have extended the spirit of streamlining to our own state government, drafting Memorandums of Understanding with state agencies to similarly simplify their reviews.

However, the key point in these other agreement documents is that while they 'make life easier,' they do *not* do so at the expense of historic properties; the very nature of a Programmatic Agreement is in the very name, *Agreement*; with no one party assuming dominance over the others. It is here where we find fault with the proposed Program Comment.

The draft we have before us preserves the traditional ritual of *stop, look, and listen*, but with an unfortunate twist. Under it, the federal agency can choose where to look, and to whom it will listen. It may, if it so chooses, to listen only to itself before rendering a final, irrevocable decision regarding an undertaking. Doing so is like asking the man on the street to watch the armored car while the guard ducks into the bank; we are hopeful that no bags of money go missing, but it seems likely that a few will.

The authors of the National Historic Preservation Act of 1966 knew that the idea that any one project or endeavor is 'too important' to merit even the most basic of discussions regarding its potential effects is both false and self-defeating. It is indeed possible to have one's cake and eat it, too, and in support of this we can point to the hundreds of thousands- if not millions- of financially, historically, aesthetically, and publicly successful projects that have taken place in the six decades following the passage of the National Historic Preservation Act..

Older readers may recall that in the 1960s, the only way to 'save the village' was to burn the village- specifically, that America's walkable, durable, transit-oriented downtowns needed to be bulldozed and replaced by miles of federally-funded highways, skyscrapers, and parking garages. Younger readers will recall the time just before the turn of the century when 'urban renewal' gave way to 'downtown revitalization' while the prescribed solution- demolishing everything in sight- remained the same.

Today we are all faced with new challenges. And yet the cure- to demolish, to clear, to replace- remains stubbornly the same. The cure has always been needlessly confrontational. It proposes

a zero-sum game when there is, in fact, room for *both* historic buildings and affordable housing, for historic materials *and* energy efficiency, because in many cases these things are one and the same. Even as policymakers envisioned broad highways and acres of tract housing, preservationists embraced dense downtowns, mass transit, and reducing waste. Today, as those same policymakers return to the ideas of walkable, vibrant, equitable urban cores, preservationists continue to advocate for the very same things. Here, we see a tremendous opportunity for the two groups to work together, creating more together than either group could create on their own.

With that in mind, we ask the ACHP to consider whether the 'cure' it is proposing in this Program Comment is proportional to the disease it claims to fight, and whether the streamlining measures it envisions will truly result in more energy-efficient, affordable building options. We are told that delays 'caused' by Section 106 review are catastrophic, but we are not told how, or why, or who is responsible for the delays. We are told that it is foolish to hold up projects on minor undertakings, and we agree; however, the Program Comment is not content to settle for minor things. Rather, it includes within its generous reach such undertakings as large-scale redevelopment, whole-building rehabilitation, and urban corridor reconstruction. These are the types of undertakings that are most likely to attract the attention of, and comments from, multiple consulting parties, including the SHPOs, local governments, and the general public. It is one thing to exclude a minor project from review on the basis that it is unimportant in the larger scheme of things, or that it is nearly impossible to adversely affect historic properties. It is quite another to assume that a major undertaking such as the ones described above would fall under the same assumptions, or that they should be exempted consulting parties won't be interested in commenting on them, or that they should be exempted because they are 'too important' to allow consulting parties to delay them.

We offer a recent federal project as an example. 655 Broadway is a mid-rise office building constructed in 1957. The successful National Register nomination for the building states:

The 655 Broadway Building is a locally significant example of an early, mid-rise office tower built in the International in Denver. Its character defining features include its curtain wall construction and rhythmic exterior proportions. On the interior, finishes are generally modern, reflective of the building's continued use as office space for over 60 years. Overall, the building retains sufficient integrity to convey its significance as one of the first mid-rise commercial buildings built along south Broadway in the International style.

In 2023, the Denver Housing Authority rehabilitated and restored the building, using federal funding from the Department of Housing and Urban Development. Because the undertaking was a historic rehabilitation project, DHA and its partners were also able to take advantage of both the federal historic preservation tax credit and the Colorado commercial historic preservation tax credit. The two credits returned 45% of the project costs back to the owners, a major cost-savings that only occurred because the owners chose to restore the building and to follow the Secretary of the Interior's guidelines.

Today, “(t)he nine-story building houses 96 affordable units for seniors and disabled individuals. There are also an additional 14 apartments that will be used to help transition unhoused patients from Denver Health into housing after their hospital stay.”[1] 655 Broadway is located immediately adjacent to a large hospital (Denver Health). Prior to the rehabilitation of this building, homeless individuals who were treated at Denver Health had no place to go after they were released. This often led to them returning to the streets with no further support or resources, leading to them returning to Denver Health in an expensive and debilitating spiral. Use of the building for transitional housing allows those individuals to have a safe place to recover from their time in hospital. Likewise, the convenient location of 655 Broadway to Denver Health benefits the seniors who occupy the other 96 units in the building.

655 Broadway occupies a highly-visible location at the corner of Speer and Broadway, two major Denver streets. Its distinctive teal International Style facade is visible to the more than 26,000 drivers, pedestrians, and transit riders who pass through this intersection on a daily basis.

Photo courtesy of Denver Housing Authority: https://www.denverhousing.org/655-broadway

And yet this financially, socially, politically, environmentally successful would never have happened under the proposed Program Comment.

At the time the project was first proposed, in 2019, 655 Broadway was not listed on the National Register of Historic Places. It had not been formally evaluated for National Register eligibility. Neither the Denver Housing Authority nor Denver Health were aware of the building’s potential

[1] Mathurin, Desiree. “Denver Converts Old Office Building on Broadway into 110 Units of Affordable Housing” *Denverite* (13 Dec. 2023): https://denverite.com/2023/12/13/denver-housing-affordable-broadway/

historic nature, nor of the availability of historic preservation tax credits that would significantly lower their project costs.

After consultation with the Colorado State Historic Preservation Office and the Denver Landmarks Preservation Commission, the project backers revised their rehabilitation plans to meet the Secretary of the Interior's Standards for Rehabilitation, allowing them to receive *both* HUD funding and historic tax credits.The non-profit Enterprise Housing Credit Investments provided an additional $18 million in funding.

It is the 'after' that is critically important here, because the Section 106 process is the only reason the project became this successful.

Under the proposed Program Comment, this undertaking would have gotten no further than Appendix A-2.2.a, where it would have been deemed over 45 years old and "not a historic property," and thus exempted from all review of "(r)ehabilitation, replacement, and installation of doors, windows, canopies, roofing, and siding.

We do not need to wonder what might have happened in this scenario, as we have the proposed drawings from the project architect to show exactly what would have happened to this "non-historic building":

Proposed rendering (2019) of 655 Broadway post-rehab. Courtesy Brent Schuettpelz

What could have been a lose-lose scenario- the loss of a historic building at a higher build cost to the project backers- became a win-win scenario instead because of, *and only because of* the Section 106 review process, and the *opportunity* given afforded by the NHPA to non-HUD

officials to:
1) Provide additional information unknown to HUD at the time of consultation (that the building was NRHP-eligible);
(2) Propose alternatives that avoided a finding of adverse effect whilst achieving all of the project's goals (rehabilitation versus a gut rehab);
(3) Inform the project proponents of additional financial incentives and programs available to them (state and federal historic tax credits)

In addition, we note that in this case, as in every Section 106 case, HUD and the project backers were completely free to decline the proposals and alternatives suggested by other consulting parties, and were completely free to gut the building and rebuild as they saw fit. Section 106 did not stop the project in any way, but it *did* allow all parties to plot a new path that was ultimately beneficial to everyone.

That is the heart of Section 106. That has always been the heart of Section 106- a mutual spirit of cooperation and a willingness to *stop, look, and listen* before proceeding. To be open to suggestions and to choose, should those suggestions prove useful, to accommodate them. To give other parties the satisfaction of being listened to, rather than ignored.

655 Broadway is only one of thousands of projects our office reviews on a yearly basis. We are but one of fifty states, and a younger one at that; we imagine that there are many 655 Broadways across the nation, historic structures of all shapes and types just waiting to be restored and put to good use as energy-efficient, affordable housing. This Program Comment would consign most of them to the dustbin of history, swept away just as efficiently as the Urban Renewal programs of the 1960s; the justifications slightly different, but the results all the same.

We strongly encourage ACHP to consider projects such as 655 Broadway as they deliberate putting this Program Comment into effect.

Section II: General Comments on the Program Comment Goals

II.A Developing a single Program Comment versus three – one each for Housing, Energy-Efficiency, and Transit

We encourage ACHP to consider dividing this Program Comment into three separate Program Comments, each dealing with its assigned project type: housing, energy efficiency, and transit. We note that at present there is significant overlap among the three, particularly housing and energy efficiency, and that the Program Comment does a poor job of steering project applicants and federal agencies towards the appropriate set of guidelines (i.e., appendix A, B, or C) for the undertaking at hand.

For example, a major goal of the Program Comment at large (as stated in Section I.A.) is "to reduce (the nation's) energy use and greenhouse gas emissions (and) and improve climate resilience." Another, equally important goal is "to produce and rehabilitate affordable, *energy-efficient* (emphasis ours) and hazard-free housing."

Here, we find it odd that the Program Comment treats energy-efficiency and affordable housing as separate creatures rather than two sides of the same coin, as they often are, and as we feel they should be. We would not wish to encourage a developer to build one without the other, especially given the high and growing costs of energy use and the resulting impact on low-income households. Yet the Program Comment provides confusing guidance all around. On the one hand, it seems to provide the very thing we are trying to avoid, outlining Path A for developers who *do* wish to build housing without energy-efficiency, as well as a Path B for developers who put energy savings ahead of housing units. Left out in the cold, confused, are the developers who want both things. Which path do they follow, A or B?

This confusion extends to the federal agencies that would be tasked with administering the Program Comment. Say that a developer arrives seeking federal assistance with a proposal to convert a former warehouse building to 100 units of housing, and to cover its substantial roof with an equally substantial solar array. Is this a housing project? Is it an energy-efficiency project? Which rules should be applied? Or is the review split down the middle, housing taking Path A, the solar panels Path B?

To illustrate this point, we note that in Appendix A-1 and A-2, when work is being conducted "on or near the exterior of *housing* (emphasis original)," roof-mounted solar energy systems may only be installed under certain conditions and in certain locations to be exempt from Section 106 review. In Appendix B-1 and B-2, to be used when the project is primarily to *reduce energy use or greenhouse gas emissions* (emphasis original), "solar energy systems" receive a blanket exemption. Presumably, it would be far easier to simply assume that housing and energy-efficiency go hand in hand in nearly all modern building projects, be they new builds or rehabilitation efforts, and to tailor the Program Comment to reflect this reality.

Finally, we feel that Appendix C is also worthy of its own Program Comment. Added to the end of this draft version, it feels orphaned, included solely for the sake of inclusion. Transit projects differ quite a bit from housing and energy-efficiency efforts. They largely impact infrastructure, versus buildings, and the work is much more likely to impact archaeological and Tribal cultural resources, rather than the built environment. We would venture that careful pre-project consultation and consideration is even more important here than in the other two parts of this Program Comment, as the resources that will be adversely affected are often unknown to the federal agency at the start of the undertaking, and as even small changes to a transit route can make the difference between an adverse and a no adverse effect funding.

There is no such discretion to be found here. Appendix C-2 allows for raising ground surfaces, as well as excavating them. It allows such work in both dense urban areas that have been occupied by humans for centuries, as well as in more rural areas that have not been impacted by intense development. Appendix C-2 allows these things to take place "if a qualified authority makes a written determination that such activity will have no adverse effects on any historic property," but we note here the flaws in this approach:

(1) The qualifying authority may or may not be familiar with defining and assessing adverse effects on archaeological resources, particularly subsurface ones that are not visible to the public;
(2) The difficulty in establishing where such resources might be prior to the start of the project, leading federal agencies to mitigate unanticipated discoveries/effects when they might have avoided them;
(3) A complete lack of guidance to federal agencies on how to handle visual adverse effects to historic properties, historic districts, and traditional cultural places, particularly given the proposed inclusion of visually-intrusive features (overhead lines, etc) in the list of exempted undertakings

II.B. Lack of training for agency staff

Appendices A-2, B-2, and C-2 all allow a qualified authority to "make a written determination that such activity will have no adverse effect" on historic properties. This action then allows that authority to exempt large numbers of projects from the Section 106 review process.

We note that unlike a Programmatic Agreement, the mantle of this Program Comment may be taken up by any federal agency at any time, as it sees fit. It may do so regardless of its size, its structure, and/or its expertise. We note that there are wide disparities between the agencies in their ability and propensity to carry out consultation pursuant to 36 CFR Part 800:

(1) Agencies which routinely handle Section 106 activities and which employ dedicated cultural resource professionals, who are specifically tasked with handling the tasks envisioned by this Program Comment;
(2) Agencies which task their recipient entities with engaging in consultation, utilizing staff who do not have a background in cultural resources and who hold many other job duties and responsibilities;
(3) Agencies whose programs and services rarely trigger the Section 106 review process, and who may not have staff familiar with either cultural resources nor the review process;
(4) Agencies which rely on their private sector applicants to complete the bulk of the Section 106 review process.

As the above list illustrates, agencies may have a wide range of expertise on this topic, or none at all. Those who do are also impacted by staff turnover and the loss of institutional knowledge, especially at smaller agencies.

There is no training provision in this Program Comment, even though federal agency employees are specifically empowered to make critical decisions, including:

-If something is a character-defining feature;

-If replacement of a feature qualifies as 'in-kind';

-If the 'records check' of known historic properties was conducted appropriately and accurately;

-If the appropriate Tribal Historic Preservation Offices were contacted;

-If a building facade is “primary” or “non-primary”;

-If an unanticipated discovery or effect qualifies as an “Unanticipated Discovery” per Stipulation V of the Program Comment.

We note that the Program Comment leaves the duty of choosing a qualified authority to the federal agency, who are given no further guidance in this task other than to select a qualified authority who is “appropriate to the circumstances.” In most cases, this will require the agency to turn to the private sector for help. However, without training, it is hard to envision how the federal staff person is going to know how to hire a qualified authority, how to choose a *good* one, or even how to tell the difference between an expert authority and a sloppy one. We highly suspect that ‘price’ and ‘expediency’ will be the main drivers of these selections, not expertise or accuracy.

In the current Section 106 consultation process, other consulting parties provide a safety net for untrained federal staff (or their untrained recipient entities) through their ability to raise concerns when that agency has gathered insufficient, incomplete, or inaccurate information. Under the Program Comment, these safety nets are swept away, to the detriment of all.

II.C. Conflicts with other historic preservation programs

Colorado offers two state-level financial assistance programs for owners of historic commercial buildings, one for owners of historic commercial (income-producing) properties and one for historic buildings used for housing. By statute, applicants for both credit programs must adhere to the Secretary of the Interior’s Standards for Rehabilitation.

Our state also has 143 local historic preservation commissions, each of which has its own set of historic preservation-related guidelines for historic buildings within its jurisdiction. Of these, 67 are also NPS-Certified Local Governments (CLGs) whose guidelines and regulations meet standards set by the National Park Service. Both CLGs and non-CLGs also base their review guidelines on the Secretary of the Interior’s Standards for Rehabilitation.

Colorado also has one of the country’s largest historic preservation grant programs. The State Historical Fund issues more than ten million dollars in grants each year. As with the tax credit program, applicants for grants must demonstrate that they meet the Secretary of the Interior’s Standards for Rehabilitation.

We note that many potential applicants for HUD funding would also be eligible for historic preservation tax credits. This is not a trivial matter- an applicant who successfully utilizes federal and Colorado historic tax credits can recover up to 55% of their total project expenditures. In rural communities where housing has always been a scarce commodity, and where capital is similarly hard to come by, use of tax credits and grants often mean the difference between a successful project and one that never breaks ground.

There is, therefore, significant overlap between tax credits, grants, and federal funding. There is also significant overlap (and shared goals) between federal funding meant for housing and energy efficiency and tax credits/grants meant to accomplish the same.

The Program Comment threatens to introduce uncertainty into this equation. We note that no mention of the Secretary of the Interior's Standards for Rehabilitation are found within its pages; federal agencies and qualified authorities are not bound by its recommendations when making a finding of "no adverse effect" to historic properties.

It does not take much imagination to envision a scenario in which a project applicant receives a finding of "no adverse effect," a thumbs-up, and federal funding from a federal agency, only to be told at the next step that their proposed undertaking does not meet the Secretary of the Interior's Standards for Rehabilitation, and is therefore ineligible for further financial assistance. It also does not take much imagination to predict the applicant's reaction when a federal agency (say, Housing and Urban Development) approving a project, only for a different federal agency (the National Park Service) rejecting it- even though both are part of the same federal government, and both are purportedly assessing the project's effect on historic properties.

ACHP has, in the recent past, proposed to address this disconnect through the creation of an additional set(s) of preservation standards that would be more compatible with the Program Comment, but these standards have yet to emerge, and there is no indication that they ever will. In the meantime, we anticipate numerous conflicts in this arena, with no solution short of requiring the applicant to meet the Standards that the Program Comment told them were not applicable to their undertaking, or asking them to forgo the financial assistance they need.

This, we note, is another example of the Program Comment creating the very thing it exists to prevent- *uncertainty for applicants*.

We believe that the best and easiest solution to this conflict is to excise the portions of the Program Comment that grant unilateral authority to federal agencies and qualified authorities to declare 'no adverse effect' for undertakings. In support, we note that the Program Comment is designed to be amended in the future. Should ACHP and NPS reach an agreement on a new set of 'Standards for Housing Rehabilitation' or similar in the future, the Program Comment may be amended to allow federal agencies and qualified authorities to use this new Standard. Until then, we argue that discretion is the better part of valor, and that the Program Comment should avoid creating potentially catastrophic disruptions in the current 'financial stack' of beneficial historic rehabilitation projects.

II.D. On moral hazards

We note that the Program Comment, as written, makes it exceptionally easy for a federal agency to avoid all consultation under 36 CFR Part 800. While it is true that all 'streamlining' Agreements encourage federal agencies to consider ways to *reduce* consultation, there will always remain a smaller subset of undertakings that require consultation between parties.

This is not the case in this Program Comment, which contains off-ramps for its off-ramps, to the point where it seems unlikely that any undertaking would make it all the way to the very end. Agencies here are given broad incentives to see that their undertakings are exempted- their reward is to be able to fund/permit the project immediately, without having to wait thirty days for consultation. When deciding- as the Program Comment allows- to make the sole deciding decision between a finding of "adverse effect" that requires additional days or weeks of consultation, and a finding of "no adverse effect" that immediately concludes the process, the obvious outcome seems inevitable. This is especially true in cases where the federal agency is under financial or political pressure to approve a proposed project, or if the agency thinks that it will not have the resources or time necessary to see an adverse effects finding to its conclusion.

The same can be said of 'qualified authorities,' the definition of which is given broad latitude in the Program Comment. Our experience with the 2004 Nationwide Programmatic Agreement for Cell Towers informs us that the quality of third-party qualified authorities varies wildly. There is significant market pressure to underbid the competition by submitting sparse information to agencies. The counterbalance to that market pressure is that a consultant who provides poor documentation risks introducing delays into the process (by virtue of consulting parties requesting additional information). FCC and their telecom partners are thus incentivized to seek a reasonable balance between cost and quality.

This counterbalance does not exist in the Program Comment, unless it is the agency itself that decides that the information it receives is inadequate to make a proper finding under Appendix A-2 or B-2. Given that choosing to do so means that the Agency must continue to spend time, money, and resources on the undertaking in front of it, whereas *not* raising questions brings an immediate end to the consultation process, we find it difficult to envision a scenario in which the agency (particularly a small or inexperienced one) would refuse whatever it has received.

The other 'safety net' in the standard Section 106 process is the existing opportunity afforded to consulting parties and the general public to comment upon (1) a specific undertaking and how the federal agency has handled it; and (2) the general manner in which that agency manages its responsibility to be a good steward of historic resources.

This protective oversight is also eliminated by the Program Comment. Section VI of the Comment encourages "any person" to file a dispute over implementation of the Program Comment, "or its use for any particular undertaking." But as others have noted, the very purpose of the Program Comment is to streamline significant portions of the Section 106 process, *including* the public comment period. At best, the general public, historic societies, and local governments are left to find out for themselves whether or not the federal agency carried out its duties accurately and diligently; they are likely to do so only *after* the project has been reviewed, the funding issued, and the work completed.

At best, this approach serves only to antagonize potential project partners by excluding them entirely from the discussion table. At worst, it encourages those same affected parties to conduct their own form of 'consultation' via litigation and FOIA requests, hardly a cost- or time-efficient solution for anyone involved.

Section III: Clause-Specific Comments

A. Main Body Clause-Specific Comments

II.E.2. Standard Section 106 Review

Our staff had difficulty parsing this clause. Is it meant to say that the federal agency could, in cases where some portions of its undertaking fall under the Program Comment and others do not, use the Program Comment to exempt portions of the undertaking from review? Or does the Program Comment, in such cases, apply to the agency's "review of the *entire* undertaking," even if it does not entirely fall under its reach? Does the entire undertaking 'kick back' to the standard Section 106 process?

II.E.3. National Historic Landmarks

The National Historic Landmarks program is one of the oldest federal-level preservation initiatives. As such, it has undergone significant evolution over time. One of the most important changes has been the level of documentation expected of aspiring nomination writers. Currently, a person wishing to list a historic district as a National Historic Landmark must evaluate every building within its boundaries, determining whether each meets the criteria for being considered a 'contributing building.'

However, this was not always the case. Surveys of historic properties and districts under the National Historic Sites program (the precursor to the Landmarks program) continued sporadically through the Great Depression before being suspended during World War II. The definitions of 'quality' and 'completeness' of research were in their infancy in this time period, and in any case were quite secondary to the primary goal of providing employment to out-of-work historians, architects, and archaeologists.

When the National Historic Landmarks program was revived in the late 1950s, the standards of quality and completeness were still in flux. Nevertheless, numerous National Historic Landmark listings, of both individual sites and historic districts, were completed during this time period, including here in Colorado.

This brings us to the issue at hand. The proposed Program Comment would not apply to "(a)ny site, object, building, or structure individually designated as a National Historic Landmark or designated as a contributing property to a National Historic Landmark district." We must reconcile this clause with the fact that many of Colorado's earliest National Historic Landmark districts make little, if any effort to distinguish between 'contributing' and 'non-contributing.' The Leadville National Historic Landmark District (1961) nomination includes 71 city blocks and more than 600 individual buildings; only a dozen are specifically mentioned in the text. The writers of the Pikes Peak National Historic Landmark nomination (also 1961) took an even more expedient route, drawing the boundary line at 14,000 feet above sea level without describing or evaluating any site, object, or building above that geographic line.

The dilemma we face here is that, to use Leadville as an example, more than 95% of the buildings in the district have *no* historic designation, contributing or not. We may assume, given that this is a historic district, that at least 50% of the buildings within its boundaries are historic, or at least were when the district was listed in 1961. The district has not been resurveyed in the subsequent six decades. We are left, then, with the issue of how to classify these buildings under the Program Comment. Taken literally, the Program Comment would apply only to the dozen buildings specifically called out in the text, even though a district of this size could not exist, and could not be legally listed, if those twelve buildings constituted the entirety of historic structures within its boundaries. The writers of the nomination no doubt envisioned that the majority of the 600 buildings were contributing- they would not have drawn the boundaries as large as they did otherwise- but would a federal agency using this Program Comment treat them this way? If not, is the Program Comment's language sufficient to protect the buildings this clause intends to protect?

III.A.1: We note that "minimal potential to adversely affect historic properties is undefined here. While this phrase is sometimes used in everyday Section 106/historic preservation conversations, it could stand to use a more formal designation within the context of this Program Comment. We remind ACHP that this Program Comment is meant to be used by a variety of federal agencies with a corresponding variation in expertise and education. Without definition, one person's "minimal" will be quite different from another's.

III.A.2: We note that there is a disconnect the requirements in this clause- that the agency must document "the manner in which it has satisfied such conditions, exclusions, or requirements) with the language in Stipulation X, in which the agencies must only provide "examples of undertakings covered" by Section III.A.1 and III.A.2. It is not clear which path federal agencies are to take here, and whether there are any penalties to be assessed should they fail to do either.

VI: Dispute Resolution

We have discussed previously the challenge presented by expecting "any person" to file "a dispute over the implementation of the Program Comment" when one of its central goals is to bypass most of the consulting parties/public comment period altogether. This is especially true of "members of the public," as presumably they are not closely engaged with the undertakings and everyday dealings of federal agencies. How will ACHP assist these members of the public with filing disputes? How will the public know that an undertaking was exempted by this Program Comment, or which federal agency was responsible? How will they be able to differentiate between a federal agency that has acted correctly and one which has not? What forms, websites, and procedures will be set up for them?

We also note that vesting authority to "issue advisory opinions about the use of this Program Comment to guide federal agencies" solely in the hands of a single individual (the Executive Director of the ACHP) does not provide us with much encouragement. While present and future

Executive Directors are knowledgeable, they are not infallible, nor are they free from political influence. Placing the ability to address disputes and concerns into a wider set of hands would go a long way towards neutering these issues and concerns.

VII: Duration

Programmatic Agreements typically extend for either five or ten years. The length of the Agreement typically depends on whether the parties foresee significant changes in policy or funding in the short term- if everyone is comfortable with the terms of the Agreement, and stability is assumed, a ten-year duration is preferred.

Duration periods are specifically intended to encourage retrospection. Has the Agreement worked as intended? Is everyone happy with how its terms are being carried out? Are there additional work items or undertakings that could be exempted from review? At each renewal, the signatories are encouraged to consider these issues.

The Program Comment extends for twenty years (to 12/31/44). While this guarantees that it will remain in effect for a significant period of time, it also raises the very real possibility that it will not be examined, evaluated, or questioned in any significant way until the middle of the 2040s. We note that, according to the U.S. Census, the population will grow by more than thirty million in that time frame (all of them needed some form of housing); current energy technologies (such as solar and geothermal) will continue to advance; and both the public and private sectors will continue to evolve as people choose how they wish to work, live, and play.

We see no reason why a twenty-year timeline is required for this document. Surely its drafters are aware of current apprehension other consulting parties hold towards the implementation of this Program Comment. Offering to ‘reopen the box’ in five years so that a frank discussion of ‘what works and what doesn’t’ can take place would, we feel ameliorate many of those concerns. By contrast, opening with a proposal to run the Comment largely unchained for two decades sends the exact opposite message.

XI: Definitions

Area of Potential Effects: Our assumption on reading that the Area of Potential Effect “may be different for different kinds of effects caused by the undertaking” refers to the difference between *direct and indirect* effects, but this is not explained in this clause; it is left, instead, for the reader to determine just how effects may differ for different projects. This leaves the clause open for misinterpretation at best, and misuse at worst. We note here, as elsewhere, that this Program Comment is intended for use by multiple federal agencies of different levels of staffing, experience, and attitude towards historic properties- ambiguity is not something the Program Comment can afford.

Contributing Property: The language here should match the language used in 36.CFR.60.4.

Primary Facade and Primary Right-of-Way: We feel compelled to point out here that there are many historic properties that have *no* public right-of-way. This includes, but is by no means limited to:

Military facilities where public access is limited or non-existent;
Properties in non-public areas of public property, such as employee housing;
Agricultural properties where most or all buildings are set far back from the main road, surrounded by farmland;
Properties in rural areas where road of any kind are in short supply;
Properties that are nominally on a public street but which are deliberately screened from public view by vegetation, high fences, or both;
Properties that have nothing but primary facades (e.g., train stations, state capitol buildings, etc.)
Contributing outbuildings;

We note that while the language here states that "one building may have more than one primary facade," it does not say the same about having more than one primary right-of-way, or how agencies are supposed to handle buildings that have no primary right-of-way.

We further note that even local historic preservation ordinances rarely, if ever focus solely on the "primary right-of-way," given that the properties they deal with rarely save all of their best historic features for that one elevation. One can find no shortage of examples of stained glass, bay windows, porches, turrets, entrances, porte cocheres, and other elements that exist on the side elevations of historic buildings. Contrary to the expectations of the language in this Program Comment, such elements were always meant to be part of the architectural expression of the building they are part of.

Under a broad reading of the Program Comment- a path a federal agency might take- there is nothing to stop said agency from approving the replacement of a stained-glass window, or approving it being heavily modified to accommodate mechanical equipment, if the agency determines that it is on a 'non-primary facade.'

We harbor significant worries about a definition that may be interpreted as "if I can't see it, it doesn't exist," and encourage ACHP to reconsider.

B. Appendices Review and Clause-Specific Comments

Appendix A and Appendix B divide their instructions into two broad categories:

(1) Activities associated with properties that are less than 45 years old and are "not known after a records check to be a historic property"; properties that were previously determined to be ineligible for listing on the National Register; or work on a non-primary facade of a buildings of any type that is not listed on the National Register;

(2) Activities associated with properties that are more than 45 years old if the federal agency or qualified authority determines that it is not historic, or that the activity is determined by one of the above that the activity will result in no adverse effect.

Appendix A

A1.1.a: A possible question here is how a reviewer would know whether one or more of the elements enumerated here is “less than 45 years old,” particularly in the absence of good record-keeping on the part of the property owner.

A1.1.d: This clause appears to assume that any area “within 10 feet of existing paved areas” and “within 10 feet of the building” is an area that is automatically devoid of potential cultural resources. We are inclined to disagree. In the Mountain West, we can cite numerous examples in which roads were routed around buildings which are no longer standing (but whose remains are still less than ten feet away from the road, buried under the soil), and of buildings that formerly had associated additions, porches, latrines, privies, sheds, and other structures/resources of archaeological interest “within ten feet.”

Additionally, this clause creates confusion with A2.1.a, which speaks of “new ground disturbance in previously undisturbed soils.”

A1.2.a: This is an example of where the Program Comment could be stronger in meeting its goals. Here, the project applicant may choose to replace doors, windows, roofing, siding, etc. with immunity, as long as the definition of ‘housing’ in the Program Comment can be appended to the project in some manner.

In this clause, the project applicant and the federal agency are considering the replacement of a wide variety of materials. The doors, windows, etc. covered here might be less than 45 years old, or they may be older (and on a non-primary facade of an older building). In either case, one would assume from the Program Comment (Introductory Section) that ensuring energy-efficiency would be a given here. Yet, this is not the case. Indeed, nothing in this clause requires a project applicant to replace doors, windows, etc. with anything that is demonstrably energy-efficient, or even allegedly energy-efficient. Should the applicant choose to replace historically-accurate double-pane windows with inaccurate single-pane units, no review is required. Should they choose to have those new windows shipped from across the country, or across the globe, rather than repair the existing ones, no pause is given. Should wood siding be sent to the landfill, and oil-based vinyl siding put up in its place, the Program Comment can only offer its regards.

We disagree with the idea that housing may be treated separately from energy-efficiency, particularly in a Program Comment that purports to support both. Rather, we believe that this section (and its companion, A2.2.a) should *require* that the project applicant demonstrate the following:

1) That each window, door, etc. is being replaced by a unit of superior energy-efficiency;

2) That the applicant has considered not only the raw r- or u-value of the original versus replacement, but also disposal costs, embodied energy, transport costs, and the use of non-renewable resources.

Given the oft-stated goal of the Program Comment to reduce energy waste and combat climate change, we do not see this provision as being burdensome or superfluous.

A1.2.b.iii: There is a significant and important distinction between “similar in composition” and “identical in composition” when it comes to mortar; one is not a substitute for the other. Mortar in older buildings is softer

A1.2.e: There is a point of confusion here, given that A1.2.a.viii also lists “solar energy systems” as a broadly-exempted activity.

A1.3: It is difficult to envision how any “work on the building interior” would be “visible from the primary right-of-way,” and we question whether this should be a criteria used when evaluating interior work.

A1.3.b.vii: Our office would be happy to send example photos of can lights being cut into highly character defining interior plasterwork as a reason for why this type of work should not be exempted.

A1.3.b.xi: This clause is one of several examples where separating “character-defining features” from the rest of the interior becomes problematic. Altering what is deemed to be a non-character-defining feature can easily affect features that are character-defining, and this is a good example of how that can happen. Insulation installations that change the wall depth can have a cascading effect that results in changes to sills, trim, windows, fireplaces, and relationships to other walls/features, including in character-defining rooms and spaces (and/or specific character-defining features). No guidance is provided in the Program Comment to federal agencies when they are confronted with a situation such as this, where an action is exempt from review but results in secondary adverse effects elsewhere.

A1.4.e: We suggest that this clause be rewritten for clarity. As it stands, it is difficult to imagine how replacement of a deteriorated mobile or manufactured home could be construed as “emergency work.”

Appendix A-2

As noted above, this section replicates most of the language found in Appendix A-1. Most of our comments listed in Appendix A-1 would apply equally to their counterparts in A-2.

We previously noted the moral and logistical challenges of giving an agency official or qualified authority the sole power to make the determinations and judgments tasked to them in this appendix.

However, we also take the time here to call out the 'balancing test' described in Appendix A-2, in which the government agency/qualified authority is given a further opportunity to exclude projects from Section 106 review based on an examination of multiple 'factors.' These include:

1) Weighing historic value versus physical hazards;
2) Weighing historic value versus technical and economic feasibility;
3) Evaluating in-kind and substitute materials *solely* on technical and economic feasibility

As others will likely note, this approach is likely to produce nothing but uncertainty and confusion. It tasks the qualified authority with comparing apples and oranges, or in this case, the 'value' in keeping a historic element versus the 'value' of replacing it. It does not provide the qualified authority with a 'scoring system' to determine when A trumps B, or vice-versa. It does not how *much greater* the economic feasibility of replacement must be to justify said replacement, or even if it needs to *be* greater. If window rehab costs $1,000 a unit and replacements costs $999, should replacement automatically win out? Should the ratio be lower, i.e. $500 versus $1000? Would a higher replacement cost *still* be justifiable? Appendix A-2 seems to anticipate that it may.

The problem with this complicated calculus is that it introduces inconsistency into a Program Comment that was specifically developed to *reduce* inconsistency. There seems no doubt that different agencies will interpret this 'test' different ways, some more liberal than others. The problem is further exacerbated by the fact that the qualified authority is acting alone in this endeavor; there are no consulting parties to provide the equivalent of a 'second opinion,' no fact-checkers to contest cost estimates, no professionals who might suggest a cheaper or simpler solution. Even the federal agency offers no help, for an agency directive that "economics always trumps historic' (or vice-versa) would itself violate the letter and spirit of this Program Comment.

Accordingly, we suggest striking this unwieldy and confusing section.

Appendix B

We note that there is also significant overlap between Appendix A and Appendix B; the latter contains clauses that make sense when applied to housing, but much less so if the sole goal is to "reduce energy use" or "to enhance climate resilience of the building."

B1.1.a: As an example of the above, we question what role items like fencing, curbs, and ramps play in reducing energy use, reducing greenhouse gas emissions, or enhancing climate resilience. We cannot imagine a scenario in which these would be considered "climate-smart building activities"; rather, they seem to have been copied verbatim from Appendix A.

If the goal of the Program Comment is to provide a list of exempted activities for projects that are “primarily” to reduce energy use, etc., then the list of exempted activities should be limited *solely* to those which are conducted in attainment of that goal.

B1.2.a: Our comments mirror our comments in Appendix A. However, we assign them even greater importance in Appendix B, given that the explicit goals of this Amendment are to enhance climate resilience and reduce energy use. Like A1.2.a, B1.2.a does not *require* the use of energy-efficient materials. It does not require the project applicant to demonstrate that they are improving climate resilience, only that their purported goal is to do so. As the Russians would say, *doveryai, no proveryai* (*‘trust, but verify’*).

Further, we note that while economic considerations are given weight in other sections of this Program Comment (*see, for example, our comments on Appendix A2)*, they are conspicuously absent here. The challenges presented by replacement windows are well known and well-documented. These include:

(1) The embodied energy cost in removing a useful window before the end of its lifespan;
(2) The energy costs associated with producing, shipping, and installing a new window unit, particularly if the unit is shipped long distances, or is made from non-renewable resources (such as vinyl);
(3) The payback period of a new window compared to its predecessor, which depends on a variety of factors and which can take up to 40 years.

We feel that this section of the Program Comment is a waste of a tremendous opportunity. If the goal is to improve the thermal performance of buildings- and the Program Comment is quite clear that it is- then there should be no reason why this clause should not *mandate* that all materials and products in this section must meet a certain standard (for example, EnergyStar) in order to be exempt from review. Without such a requirement, we are simply drawing a regressive and damaging loophole for others to exploit.

B2.2.a: See above. There seems to be no reason why these materials must be certified as being energy efficient and that they will directly positively affect the performance of the building if they are to be allowed to bypass review.

Appendix C

C.2.1.a: “Elevation of the ground surface by more than 10 inches” does not come with an *upper* height limit, raising questions as to how ACHP envisions this clause will be used and, perhaps more importantly, how a federal agency may envision it.

C.2.2.a.iv: We wonder if there is a typographical error here. A flex post, almost by definition, is meant to be a lightweight road maker separating lanes of traffic or users of roads. A flex post

with a circumference of 22 inches would be seven inches thick, in effect making it a bollard rather than a flex post.

C.2.2.b: The terms “maintenance,” “repair,” “rehabilitation,” and “replacement” are used interchangeably here, even though they are quite different from one another in terms of complexity, expense, and technique.

This clause references ‘historic street furniture,’ a term that is not defined in the Program Comment and is left open to interpretation. This is likely to become a problematic issue given that it may be difficult for an inexperienced reviewer to determine the age of said furniture, much less its relationship to a particular building, landscape, street, or plaza. It will certainly be tempting to treat any piece of street furniture younger than its surroundings as entirely disposable, and to treat original pieces of street furniture as secondary to the building/park/street they are associated with. Essentially, the Program Comment is acknowledging that a park bench *can* be a historic park bench, but does not offer any guidance as to how, or why, or when. Making a blanket determination that “park benches maybe historic, but none of *my* park benches are historic” is an expedient solution, and one that is not prohibited by this clause or by the Program Comment as a whole.

C.2.2.b.v: The provided definition of a shelter for transit users as having a combined dimension of 30 linear feet *or more* (emphasis ours)” has no upper size limit, and the Program Comment does not provide a definition for ‘shelter.’ Under this clause, New York City’s Grand Central Terminal qualifies, as it is certainly larger than 30 combined linear feet, and it provides shelter to bus and train passengers.

While we assume that this clause envisions ‘shelters’ in the traditional sense- a simple city bus stop, or an open-sided rail platform- the Program Comment provides no such clarification. Given that this clause allows for the unilateral decision to rehabilitate or even replace ‘shelters’ of any size, we feel that this is an extremely important issue to clarify.