



Maryland

DEPARTMENT OF PLANNING

MARYLAND HISTORICAL TRUST

October 2, 2024

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

Re: ACHP's Draft Program Comment on Accessible, Climate-Resilient and Connected Communities

Dear Chair Bronin:

Thank you for providing the opportunity to comment on the ACHP's proposed *Program Comment on Accessible, Climate-Resilient and Connected Communities*.

The Maryland Historical Trust (MHT), Maryland's State Historic Preservation Office (SHPO), is an active and legally mandated participant in Section 106 consultation for federal undertakings in Maryland. MHT typically consults on over 3,000 federal undertakings each year and an additional 2,000 state assisted projects. Through consultation with federal agencies, the recipients of their funds/permits/licenses, other defined consulting parties, and the public, we strive to facilitate the appropriate consideration of historic properties in project planning and delivery and to help ensure compliance with the Section 106 regulations.

MHT values the effectiveness of many current program alternatives applicable to Maryland, including Nationwide Programmatic Agreements, Program Comments, Exemptions, and multiple agency-specific programmatic agreements for federal agency programs and facilities in our state. Successful program alternatives include those with clearly defined goals and processes, and those developed through collaborative consultation with applicable parties. While we support the concept of the ACHP's proposed Program Comment, it is our opinion that the current draft needs considerable revision and further consultation with the full range of Section 106 participants and stakeholders in order to develop an achievable and defensible final document.

The proposed draft Program Comment (PC) would provide an alternative mechanism for all federal agencies to comply with Section 106 regarding the effects on certain *housing-related*, *climate-smart building-related*, and *climate-friendly transportation infrastructure-related* activities. While the basic premise for the PC is valid, specifically for eliminating and streamlining Section 106 reviews for certain categories of undertakings with *no or minimal potential to adversely affect historic properties*, we believe that the current draft is too expansive and cumbersome. More important, the proposed PC is inconsistent with key premises of the Section 106 process itself, and key relationships amongst preservation agencies and programs, specifically:

- It eliminates consultation with SHPOs and other defined consulting parties under Section 106 for a very wide-ranging group of not-necessarily related categories of housing, clean energy, and climate-friendly transportation infrastructure undertakings.

- It creates a definition of “undertaking” that is not aligned with current practice.
- It circumvents the Section 106 process by not requiring adequate efforts to identify and evaluate historic properties, including and especially landscapes and archaeological resources.
- It prioritizes the ACHP’s “policy statements” above the goals of the agencies and consulting parties who participate in the Section 106 process.
- It fails to reinforce the need for professionally qualified staff at federal agencies who meet the Secretary of the Interior’s *Professional Qualification Standards*.
- It creates unacceptable scenarios such as exemptions for adverse effects.
- It creates conflicts with guidance provided by the National Park Service related to the application of National Register criteria and the Secretary of the Interior’s *Standards*.
- It fails to address the delegation of federal agency responsibilities under Section 106 to funding or permit recipients or pass-through entities.
- The development of the PC does not follow the consultative and fact-based process that is expected of any federal agency that would propose a PC or other agreement document.
- The implementation of the PC would create conflicts with many other contractual agreement documents related to the Section 106 process that were developed in time-consuming and detailed processes and involve numerous federal agencies, SHPOs, and partners.
- The PC lacks reasonable dispute resolution provisions.
- The PC lacks specific goals, supporting data, solid reporting and measurable outcomes to gauge the impact of its implementation.

MHT offers the following comments on the draft PC, primarily focused on global issues rather than the detailed specifics of included project activities.

- MHT supports the basic premise of the PC for eliminating and streamlining Section 106 reviews for those categories of undertakings with *no or minimal potential to adversely affect historic properties*. However, the PC as drafted is too expansive and goes beyond this scope to include actions with the potential to adversely affect historic properties. For federal agencies electing to implement the PC, it would essentially eliminate the need for consultation with SHPOs, and other defined consulting parties under Section 106, for a very wide-ranging group of undertakings - many of which would involve historic properties.
- Consultation is one of the core principles of the Section 106 process established in the ACHP's regulations in 36 CFR Part 800. Key participants in the Section 106 process include the federal agency, SHPOs, tribes, local governments, applicants for federal assistance/permits/licenses, and other individuals and organizations with a demonstrated interest in the undertaking, along with the public. Consultation affords these parties the opportunity to comment on undertakings that may affect historic properties in their communities. Such input is vital to guiding project planning and the decision-making process for projects that may affect significant resources. The current draft PC would essentially eliminate this consultation and the associated benefits, transparency, and community engagement that such a consultation process provides.

- The categories of undertakings covered by the PC are too broad to be combined into a single PC. Other existing PCs developed by ACHP and federal agencies have focused on very specific agency programs, project categories, and resource types and reflect a manageable alternative approach to Section 106. At a minimum, this PC should be separated into two PCs – one focused on housing and climate-smart building-related undertakings and the other devoted to climate-friendly transportation infrastructure undertakings.
- The climate-friendly transportation infrastructure undertakings are generally more straightforward and as a class are less likely to result in adverse effects. States may already have Programmatic Agreements to address these project types as we do here in MD with FHWA and FTA. These project types would work well in a single PC.
- A PC that is focused on clearly defined activities not requiring further review/exemptions - those actions with *no or minimal potential to adversely affect historic properties* - would meet the stated goals and be easier and more defensible to implement. Including actions in the PC that have the potential to adversely affect historic properties, without achievable parameters and applicable consultation with SHPOs and consulting parties, creates challenges and concerns regarding effective implementation.
- How federal agencies will implement this PC is entirely unclear and left to the discretion of the agency. Other than cases where states may have existing PAs, there is no notification or consultation with SHPOs regarding the use of the PC (see Section II.C). SHPOs may be contacted by applicants for federal assistance for undertakings that may be covered by the PC, yet it is not the SHPO's decision whether an undertaking would be handled under the PC. This will likely lead to considerable confusion among applicants, consultants, SHPOs, and even federal agencies regarding an undertaking's applicable Section 106 status.
- It is unclear how federal agencies will handle consultation for undertakings that include BOTH activities listed under the PC Appendices as well as components that fall outside those parameters. Are SHPOs going to be consulting about partial undertakings as opposed to a project as a whole (see Section II.E and III.A)? Such a separation of project components will be confusing to consulting parties involved in the standard Section 106 consultation.
- The use of Qualified Authorities/Qualified Professionals (QAs/QPs) (Section III.C) is vague and does not have clearly defined parameters. Who is determining that an individual is a QA/QP? Is the federal agency confirming those qualifications? Is a federal agency providing preservation staff to meet those qualifications? The decisions of the QA/QP do not require any review or consultation with SHPOs, and there is a huge category of projects that will be exempted from 106 review if the QA/QP makes a finding of no historic properties or no adverse effect. In the standard Section 106 consultation process, SHPOs help provide quality control, ensure adherence to applicable standards, and facilitate compliance with Section 106. Including consultation with SHPOs, instead of some unspecified QP, for those actions that must meet certain parameters would help provide checks and balances to safeguard the appropriate treatment of historic properties.
- The PC asserts that Determinations of Eligibility (DOEs) are not needed (Section III.D) because "Undertakings covered by this PC, due to their nature and potential effects, do not require a federal agency

to determine whether an involved or affected property is a historic property except where explicitly stated.” However, for those activities where the QA/QP is determining their adherence to the Secretary of the Interior’s *Standards*, they would need to know if the involved resource was eligible or not. Such evaluations of National Register eligibility should involve SHPOs for consistency and adherence with 36 CFR 800.4(c).

- The applicability of Section IV: Assistance to Consulting Parties is unclear. Does it solely apply to tribes? Since the PC does not require consultation with SHPOs and other Consulting Parties, why is this language included? The language should be clarified or eliminated.
- Why does Section IV.E include *Carry out mitigation measures*? The premise of the PC is to address projects with no to minimal potential to have adverse effects, so mitigation should not be discussed.
- How would an individual or SHPO know that a given project has been covered under this PA, what federal agency was involved, etc., to be able to file a dispute over the implementation of the PC pursuant to Section VI: Dispute Resolution? SHPOs regularly receive inquiries from concerned public, local governments, and other non-profit organizations regarding projects taking place in their communities. How would SHPOs respond or redirect those inquires appropriately when they had never been notified of the project?
- The PC duration is 20 years which seems excessive, particularly when the ACHP does not generally encourage MOAs or program PAs with a duration of more than 5 years. Given the expansive scope of this PC, it should have a more reasonable duration (5-10 years), with mechanisms for amendment and extension.
- Section X: Reports and Meeting does not have a very robust plan for federal agencies to report and ACHP to provide ongoing oversight of the effectiveness of this PC.
- Why is *mitigation* included in Section XI: Definition, since the premise of the PC is to address projects unlikely to have adverse effects?
- The defined use of *Primary Façade* is challenging and not consistent with the general treatment of historic properties and application of the Secretary of the Interior’s *Standards*.
- The definitions of *Replacement* and *Substitute building materials* are also problematic and should be consistent with those used in the Secretary of the Interior’s *Standards*.
- The various activities listed in the Appendices are cumbersome and confusing, particularly when they combine work at non-historic properties and work meeting certain parameters at historic properties. While there may be exemptions that we can agree to, activities fall into a gray area when they involve replacement materials, primary facades, QA/QPs applying the Secretary of the Interior’s *Standards* and making findings of no adverse effect, etc. Further consultation with all involved parties is needed to refine the activity list and provide clear separation and description of applicable activity types.
- Appendix C-1 and C-2 are probably the clearest with regard to the list and categories of activities. As noted above, these should be covered in a stand-alone PC focused on the transportation infrastructure actions.

- The flowcharts are both helpful and difficult to follow. Also, the flowcharts do not show a kick out for those activities where the QA/QP has **not** made a finding of no adverse effect. Those projects should follow the standard Section 106 consultation path and that should be represented on the flowcharts by notation and/or asterisk.
- There are no checks and balances in this PC. That is the role SHPO typically plays in the Section 106 consultation. QA/QPs will review and make findings under the PC, and unless an individual chooses to file a dispute, SHPOs will never know about these projects.
- The use/application of this PC may result in projects being ineligible for rehabilitation tax credits, where applicable, since many of the allowed activities are counter to recommended treatments in the Secretary of the Interior's *Standards*. That would seem to defeat one of PC's goals, to promote reuse of historic housing, and result in project sponsors not being able to leverage these financial incentives.
- If this PC goes into effect, it will impact and may conflict with the way SHPOs handle project reviews under their respective state historic preservation legislation, as well as conflict with local historic preservation requirements.
- MHT agrees with comments submitted by the Maryland Department of Transportation's State Highway Administration sent via email by Steve Archer on September 27, 2024.
- Finally, MHT endorses the comments and detailed edits on the PC provided by NCSHPO in Erik Hein's letter dated September 27, 2024.

MHT supports the implementation of Section 106 program alternatives that are defensible, transparent, well defined to achieve specific goals, and developed through good faith collaboration with all involved parties. We would support substantive reworking of the draft PC to incorporate the considerable comments provided by many consulting parties and produce a sound PC that meets the spirit and intent of a Section 106 program alternative. Thank you for your consideration of views shared on this proposed Program Comment.

Sincerely,



Elizabeth Hughes
Director / State Historic Preservation Officer

Cc: Erik Hein (NCSHPO)
Steve Archer (MDOT SHA)