

October 9, 2024

*e-submittal*

The Honorable Sarah C. Bronin  
Advisory Council on Historic Preservation  
401 F Street NW, Suite 308  
Washington, DC 20001

Dear Chair Bronin:

Thank you for the opportunity to provide comments on the proposed Advisory Council on Historic Preservation's (ACHP) Draft Program Comment on Accessible, Climate Resilient, and Connected Communities (PC) that addresses certain housing-related, climate-smart building-related, and climate-friendly transportation infrastructure-related activities. Several Minnesota State Historic Preservation Office (MN SHPO) team members participated in the virtual discussions for the public and for SHPOs offered by the ACHP.

We request that our comments included here and those of the NCSHPO, SHPOs, and our preservation partners in the federal program are taken into consideration so that a better path forward is ultimately adopted. Especially a path that meets the broad intent of the PC but still preserves the very basis of the National Historic Preservation Act of 1966, as amended. In addition to the many comments already provided by our preservation partners, especially, NCSHPO (dated September 27, 2024) and other SHPOs, we emphasize these general concerns regarding the current draft PC:

- The length, broad application, and complexity of the draft PC will add to the existing widespread confusion about the Section 106 purpose and process. Major nationwide efforts, such as this PC, should instead focus on training, improving technology to assist in the process, and supporting practitioners on the state-level by highlighting best practices across agencies.
- The draft PC undermines established and ongoing relationships MN SHPO has with their federal preservation partners. Minnesota's programmatic agreement (PA) for transportation related activities already streamlines Section 106 reviews pursuant to Section 101(b)(3) of the National Historic Preservation Act. An amended PA will be executed in 2025 which will also include a procedures manual. The draft PC should not void existing state-level PAs that are already streamlining reviews, were developed in partnership and consultation with partners, and are based on the Council's established regulations in 36 CFR Part 800.
- *Section II.E. Standard Section 106 Review.* The wording in item two is unclear – is the federal agency able to utilize the PC for its review of the entire undertaking if the undertaking includes components that include activities not listed in the Appendices?
- The PC introduces new terminology not currently used, including “minimal potential to adversely effect” and “minimal adverse effect,” but provides no definition to apply appropriately.

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- Of great concern is that undertakings covered by the PC “do not require a federal agency to determine whether an involved or affected property is a historic property except where explicitly stated.” Without determining whether a property meets the definition of a historic property under Section 106 of the NHPA, which includes definition of its area(s) and period(s) of significance and boundary, there cannot reasonably be an awareness or understanding of the effects of an undertaking to the property – nor whether those effects meet the “minimal” threshold, however that is understood as used in this PC.
- The federal agency is only directed to identify potentially interested Indian Tribes and Native Hawaiian Organizations and invite them to consult on whether use of the PC is appropriate if the federal agency, “based on the location of the undertaking and the area of potential effects, determines that an effect on the historic properties of religious and cultural significance to Indian Tribes or Native Hawaiian Organizations [...] may occur.” However, 36 CFR 800.3 through 7 is circumvented for PC activities and there is no step in the PC to determine and document the area of potential effects, which under the regulations is done “in consultation with the SHPO/THPO” (36 CFR 800.4(a)(1)). This underscores the PC process’s lack of compliance with Section 106 of the National Historic Preservation Act (NHPA).
- *Section III.A. Available Alternative Compliance Approaches.* Proposes that the federal agency may proceed with an undertaking that in whole or part meets the conditions in Appendices A-2, B-2, or C-2 provided “it documents the manner in which it has satisfied such conditions, exclusions, or requirements.” What information must this documentation minimally include, where is it kept on file, to whom is it made available, and under what circumstances?
- *Section III.C “Use of Qualified Authorities.”* There will be no third-party monitoring of the agency's use or selection of a “qualified authority” in project planning. The PC relies too heavily (and naively) on the federal agency’s ability to use “reasonable judgment” in deciding whether to use a qualified authority to fulfill the intent of the National Historic Preservation Act. Agencies are reluctant to hire qualified professionals either in-house or as a contractor, and instead pass on the cost and responsibility of doing so to applicants/grantees. Qualified authorities, including qualified professionals meeting the Secretary of the Interior’s Professional Qualifications Standards, are absent from key decision points in the PC process which can and will result in adverse effects (treatments to historic properties that do not meet the Secretary of the Interior’s Standards for the Treatment of Historic Properties).
- The draft PC relies heavily on non-preservation professionals (and non-building construction specialists) to interpret and apply it as intended. Responsible entity staff often rely too heavily on SHPO staff to make decisions about projects involving historic properties. Misinterpretation and misapplication of the PC could have very detrimental effects, and with no oversight, these effects will not be realized until after the project’s completion.
- The draft PC eliminates consultation with the public, THPOs, SHPOs, and other stakeholders.
- The draft PC makes no provision for training agency staff to use and interpret the PC. In our experience, federal agency guidance and training on Section 106 compliance has been minimal or absent, leaving SHPOs to fill the gaps. The ACHP is asking SHPOs to trust that federal agencies will conduct adequate training and oversight when that hasn’t occurred in the past nor currently.
- The draft PC assumes that federal agencies—and, increasingly, authorized representative agencies/grantees—have the skills to classify property types and make decisions about whether the nature of the proposed work is exempt from review. In practice, often the least experienced employees are tasked with the environmental review “screening” for their agency, and the SHPO

receives poor-quality, incomplete submittals, requiring the SHPO to conduct the research on behalf of the project proposer.

- *Section V. Unanticipated Discoveries.* Includes provisions for the discovery of “unidentified historic properties or unanticipated effects [...] to historic properties”, but by circumventing 36 CFR 800. 3 through 7, it is unclear how such properties or effects would or could be identified during implementation of the undertaking, and no mention of a qualified authority is included.
- *Section VI. Dispute Resolution.* Includes provision for a person (notably not an agency, tribe, SHPO, or organization) to file a dispute over implementation of the PC or its use on a particular undertaking but it is not apparent. Given the paucity of reporting requirements and the long lag time between project implementation and required reporting, how can transparency be expected for undertakings carried out under this PC which would allow for public awareness to file a dispute in a window during which the outcome may still result in adequate consideration of a historic property?
- *Section VIII. Amendment.* The lack of inclusion of SHPOs and tribes in the required consultation step to amend this PC is particularly problematic.
- *Section X.A. Reports and Meetings.* The reporting requirements (only requiring examples, and only during the first four years, no minimum information specified, with triennial reporting after that) is completely inadequate to allow for sufficient transparency and oversight (by ACHP, SHPOs and tribes, and the public) to ensure the PC is working as intended. At a minimum, justification should be provided for each undertaking to address how it complies with Section 106 of the NHPA.
- The term “rehabilitation” as defined in the PC differs from its use in the Secretary of the Interior’s Standards for the Treatment of Historic Properties; this should be made clear.
- *Appendix A-1.2a.* Precludes the identification of previously unidentified, eligible historic properties (e.g., “a building whose eligibility for inclusion in the National Register is not known”) and can result in removal of character-defining features of such a building. In addition, a building may be designed with more than one primary façade, or the current and historic primary façade may differ due to changes in orientation or access of circulation networks in association with the building. Without a qualified authority to identify these nuances, character-defining features, including doors, windows, roof features, chimneys, and siding, can and will be lost. Similarly, under 3(d), the PC allows for work on skylights, atriums, courtyards, or lightwells – all of which may be character-defining features - or installation of new ones, without requiring that such work meets the Secretary of the Interior’s Standards for the Treatment of Historic Properties. There are other examples throughout the appendices which can and will result in the inappropriate replacement or removal of character-defining features of historic properties. Efforts to exclude these in the PC, such as the caveat “not including replacement or removal of any element that is a character-defining feature of a historic property”, is insufficient since most of the available documentation on historic properties does not specify their character-defining features, and without the decision-making involvement of a qualified authority, it is unclear how such features will be identified, assessed, and protected.

The MN SHPO welcomes efforts to seek ways that focus our activities on protecting historic resources that are most threatened by development pressures, federal activities, natural disasters, and climate

changes. However, the draft PC compromises the State Historic Preservation Officer's responsibility to ensure that Minnesota's historic properties are taken into consideration at all levels of planning and development (NHPA Section 302303(b)).

Sincerely,



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Director and Deputy SHPO  
Minnesota State Historic Preservation Office

Cc: NCSHPO Executive Director Erik Hein  
MN Department of Administration Commissioner Tamar Gronvall, SHPO