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October 9, 2024

The Honorable Sara Bronin, Chair
Advisory Council on Historic Preservation
401 F Street NW, Suite 308MT
Washington, DC 20001

Dear Chair Bronin,

Thank you for the opportunity to comment on the proposed Program Comment on Accessible, Climate Resilient, and Connected Communities (PC). The Montana State Historic Preservation Office (MTSHPO) consults in good faith with others under Section 106 of the National Historic Preservation Act of 1966 (NHPA). Last year, MTSHPO reviewed 527 undertakings, with an average response time of 15.7 days. Thanks to the 73 active Programmatic Agreements (PA) we have with 24 agencies, we eliminate 100s of reviews annually.

MTSHPO values streamlined consultation, especially as federal agencies fund a growing number of essential projects. Beyond streamlining that benefits MTSHPO and others, our *agreements* reflect MTSHPO-Agency consensus, clarify participant responsibilities, and are refined cyclically to function better for Montana. MTSHPO believes the proposed PC lacks the clear scope and explicit language of PAs we draft with agencies, Tribal Historic Preservation Offices, and Montana stakeholders. We believe the PC would be less likely than our own nuanced PAs to result in decisions that consider impacts to Montana's historic properties and the varied communities that value them.

The PC gives agencies the choice to apply the PC in place of existing program alternatives. The outright lack of federal cultural resources staff and the high turnover rates at agencies, combined with unprecedented federal funding and pressure to spend it, would command agencies to use a PC that MTSHPO believes would supersede the PC's regulatory framework and undermine Congress's intent under the NHPA. Underlying MTSHPO's concerns is that the precedent-setting, twenty-year, unilaterally extendable PC will normalize a lessened regard for resources.

Below are MTSHPO's specific comments on the PC's draft language. We look forward to working with the ACHP to streamline Section 106 review by developing program alternatives with clear and defensible language that recall the NHPA's intent. Thank you for your consideration.

Respectfully,

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cc: Erik Hein, Executive Director, National Conference of State Historic Preservation Officers (NCSHPO)

Enclosure

Montana SHPO's Comments on the ACHP's Proposed Program Comment on Accessible, Climate Resilient and Connected Communities

MAIN TEXT

II.C.1 The decision to abandon previously established PAs and MOAs to follow this PC should occur when all signatories of the existing agreement agree to do so not when discussions might happen and then the agency unilaterally decides to move forward with the PC. Additionally, per the language used in this section, agencies would be signing on for life with a determined class of undertakings. This contradicts II.E.1.

II.E.2 This definition allows segmentation of an undertaking, which is generally not how undertakings are currently reviewed. How can anyone truly evaluate the effects of a project when they are limited to looking at a single building elevation?

II.E.3.c How is this effective if, as is typically the case, sites of religious and cultural significance to Tribes and NHOs aren't formally registered and/or there's no file search requirement? Without consulting the THPO, how could federal agencies be aware of these resources?

III.A.2 Documents how and shares with whom?

III.B.2 How are federal agencies supposed to know if there are "historic properties of religious and cultural significance to Indian Tribes or Native Hawaiian Organizations" occurring within the project area? / File searches would likely be required. What if federal agencies perform file searches with the THPO, or with THPOs who have access to a SHPO's database? Are all THPOs staffed all the time to perform these and if so, are their databases as current as a SHPO's? What if a THPO is staffed to perform file searches at one point and that ability changes? If a THPO doesn't respond to a file search request, it does not mean the Tribe has no interest in an undertaking. While a SHPO can support or augment what THPOs can provide in file searches, SHPOs do not necessarily have information on all tribally significant places. There should be a process and contingencies described for THPO variability relative to file searches. The easiest process would be to require a File Search request with both THPOs and SHPO. / If an agency decides that there are no historic properties within the project area would any consultation with Tribes or NHOs occur at all?

III.C Any decision regarding the use of this PC and the potential effects on historic properties not significant to Tribes or NHOs should be required to be made by a qualified professional.

III.D There are no undertakings identified in the Appendices that would not require evaluation of a property of historic age. Any time the Appendices mention a character-defining feature or space or the primary façade, it indicates that an evaluation of eligibility is at least being made internally at the federal agency without consultation because those pieces of a building or site cannot be identified without one. / Eligibility determinations in addition to survey and recording previously unrecorded sites should be required.

V.B Needs to include reference to individual state burial laws as NAGPRA only applies on Federal lands. / A policy statement is not legislation – a federal agency is not required to be "guided" by the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects but rather they are required to comply with NAGPRA or other state burial laws when applicable, which is legislation.

VI How would SHPOs even know there is an issue if we're not seeing any documentation of specific projects taking place in our state?

VII This PC should at most last 10 years / A 20-year duration will establish this as normal and the next generation of preservationists will come of age with it in place. In 2044, few people will be knowledgeable of how it used to be and therefore will be less likely to oppose its indefinite continuation. Ending this would be a shock to agencies used to the quick and cheap route.

VIII Amendments should be consulted on with THPOs and SHPOs

VIII.A and B Neither the Chair nor the Executive Director of the ACHP should be allowed to unilaterally amend this PC – all amendments should go through the proper channels which includes a member vote and consultation with agencies, THPOs, and SHPOs.

IX It is unlikely that the ACHP will be able to keep track of every project falling under this PC happening in every state, so it is unclear how the ACHP would ever make that determination / Furthermore, because SHPOs and THPOs are cut out of the annual reporting, they would not have any idea as to if agencies are using this PC correctly.

X.A Federal Agency Annual Reports should be made available to SHPOs and THPOs and should be required annually for the life of the PC

X.B Unsure as to what discussions will occur at these meetings if SHPOs and THPOs are not receiving any information as to the projects taking place in their state.

X.C The ACHP report should be provided annually for the first 5 years of the PC, minimum and be required to be written only.

XI The definition for “Economic Feasibility” is concerning in that it gives agencies the option to claim it is not economically feasible to do consultation – the impacts that this text could have on Section 106 consultation outside of this PC need to be considered / The definition of “Green Infrastructure” needs to be further refined / The definition of “Previously Disturbed Ground” and “Previously Disturbed Right-of-Way” should include a requirement for an SOI qualified person or SHPO to make those calls of not being concerned due to previous disturbance / The definitions for both “Qualified Authority” and “Qualified Professional” need to be clearer and how they relate to each other needs to be addressed / The definition of “Substitute Building Materials” should be based on the NPS definition and include reference to Preservation Brief 16

APPENDICE COMMENTS

If character-defining features are going to be referenced, then an evaluation of eligibility needs to be occurring – how is one to know if something is a character-defining feature if they have no clue if the property in question is significant?

These appendices also allow for many unilateral decisions to be made by agencies without consultation – considering high turnover of cultural resource staff at federal agencies and the systemic lack of training on Section 106 processes for said staff, would this end well?

A-1.1.a More information needs to be provided on how this is mean to be interpreted – element needs to be defined (are we talking about the material itself, the feature, etc.?)

A-1.1.c Consideration needs to be given to how these activities would impact a cultural/historic landscape (these can be stand along or contributing to a historic property) – many of these could be adverse effects

A-1.1.c.vi Being within 10 feet of a building does not mean there is less of a chance for archaeology exist – in fact it can be the opposite in some cases

A-1.1.d.ii There is too much ground disturbance for these activities to be exempted

A-1.2.a Regarding buildings that “the federal agency or another federal agency has determined to not be a historic property within the preceding ten years,” undertakings should only be allowed if they received concurrence from a

SHPO or THPO / buildings should not be segmented like this as it takes out the consideration of cumulative effects but also character-defining features are not limited to the “primary façade” – buildings are not listed on the NR or eligible for the NR just for their front façade, so why are we evaluating projects that way / exemptions should not apply to buildings that have previously been determined to be a historic property nor should they apply to buildings that have not been evaluated as to if they are a historic property or not

A-1.2.a.iv How many projects are likely to occur where the roof is not affecting a “primary façade” and would not be seen from the “primary right-of-way”?

A-1.2.a.v How many projects are likely to occur where ADA improvements are not affecting a “primary façade”?

A-1.2.a.x Being within 10 feet of a building does not mean there is less of a chance for archaeology exist – in fact it can be the opposite in some cases

A-1.2.a.xi Chimneys – regardless of if they are on the “primary façade” can be extremely important contributing features to a historic property – this should be removed as an exemption

A-1.2.b.iii Should reference applicable NPS Bulletins

A-1.2.b.iv Should reference applicable NPS Bulletins

A-1.2.c There is too much ground disturbance for these activities to be exempted

A-1.2.d Previously painted surfaces does not mean that the surface was painted historically – change previously to historically

A-1.2.e.iii This activity could have too great of an adverse effect to be exempted

A-1.3 What interior space would then even be visible from the “primary right-of-way” at all?

A-1.3.a Primary spaces are dependent on building type and there can be character-defining features not in “primary spaces”

A-1.5.e Transfer, sale or lease out of federal control should be removed as an exemption

A-2 The use of “qualified authority” and “qualified professional” are both specified in different instances, but it is confusing as to why that is based on the definitions within this document / Only activities that would result in No Historic Properties Affected should be considered for exemptions – if an activity has the potential to be a No Adverse Effect determination then it should be consulted on fully

A-2.1.a It should be specified that previous survey needs to cover 100% of the APE to count for this / not surveying for unrecorded resources will not only greatly inhibit historic property identification but it disproportionately will affect properties that would be coming of age now and as the 50-year mark moves forward

A-2.2.a There is no such determination as a “minimal adverse effect” it either is an adverse effect or it is not

B-1 This appendix is similar to Appendix A-1, please refer to those comments for the applicable activities restated in this appendix

B-1.1.c.ix.a and b If these activities require the use of heavy machinery they should not be exempted

B-1.3.a.i and ii If this is going to allow an increase in thickness of walls there should be parameters

B-2 This appendix is extremely similar to Appendix A-2, please refer to those comments for the applicable activities restated in this appendix

C-1 and C-2 These appendices should be entirely removed from this PC as it does not relate to the other two building focused appendices / these appendices also do not account for historic downtowns that were designed specifically for automobile use rather than public transportation

C-1.2.b.v This activity should not be exempt in Historic Districts

C-1.3 These activities need to be considered in the context of cultural/historic landscapes (stand alone or could be contributing to a historic property or Historic District)