



December 15, 2024

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

**RE: Proposed Program Comment on Certain Housing, Building and Transportation Activities**

Dear Chair Bronin:

We are writing to express our continued opposition to the proposed Program Comment on Certain Housing, Building and Transportation Activities as currently drafted. While our reasons are numerous, they fall generally into three categories: legal concerns, technical problems, and precedent. Despite these concerns, however, we still offer a potential path forward that does not present legal questions and the potential for litigation, and therefore one we believe should enjoy broad support.

Overall, we agree that there are some efficiencies that can be made in the Section 106 process relative to the provision of federally supported housing. But we believe that there is a better way to do it than via this Program Comment as written. We observe that the rapid race to conclude this agreement before the change in Presidential Administration coming on January 20, 2025, has created an arbitrary sense of urgency that will prevent the adoption of a workable, useful and responsible document. We therefore urge the Council to do the right thing as it would under regular order to allow for ample time for the adjudication of the comments submitted, and for the creation of a focused working group tasked with rewriting this draft into a more cohesive, defensible and usable document for Council consideration.

Attached are two documents that support our position. The first is a letter from our organization's legal counsel outlining very alarming legal issues with the program comment as currently drafted. The second is a markup of the existing document to better illustrate where technical and other problems exist.

**Concerning Legal Questions**

The ACHP's regulations at 36 CFR 800 articulate what program alternatives that it has made available to the standard Section 106 process. Program Comments, according to the ACHP's own regulations, are designed to allow the Council to "...comment on a category of undertakings in lieu of conducting individual reviews." While the Council also has given itself the authority to issue program comments at its own initiative, it has never done so. But the intent is clear in that program comments are meant to apply to a specific, nuanced niche category of undertakings – not a sweeping menu of various and disparate undertakings across the entire federal government. The proposed Program Comment does not, therefore, meet the definition or intent as provided for in the regulations.

Additionally, the Council's regulations stipulate that an agency official must identify the category of undertakings as well as specify the likely effects on historic properties and the steps the agency will take to ensure that the effects are taken into account. The Chair has not done so, placing the Council in an untenable position as to the viability of this Program Comment. Instead, the Chair's draft has simply prepared pathways whereby no Section 106 review will be required –creating a de facto exemption, which is another 106 alternative.

While the Council's regulations do allow for exemptions, they must meet certain criteria beyond those of a program comment. In addition to qualifying as undertakings, the potential effects of the undertakings must be foreseeable and likely minimal or not adverse. They also must be consistent with the purposes of the National Historic Preservation Act. Given the proposal outright exempts numerous projects from Section 106, it is clear, in our view, and in our legal counsel's opinion, that the purported draft program comment is in fact an exemption. **Therefore, this proposal, as offered, should move through the exemption process, not that for a Program Comment.** Importantly, exemptions require public participation far beyond what has been offered by the Chair, and perhaps even more strikingly, require publication in the Federal Register, which has not been done in this instance. To put it simply, the Chair's draft is on questionable legal ground, and subject to legal challenge and litigation.

Further discussion on this topic is attached via a letter from our legal counsel Andrea Ferster.

### **Technical Questions and Concerns**

As can be seen in the accompanying markup, numerous technical questions and concerns still exist in this proposed document. Some key issues include:

1. **Elimination of consultation with the public and States.** The primary efficiency sought in this agreement is still the elimination of consultation with SHPOs. While there is agreement that there are actions where this may be appropriate, this document also exempts undertakings that will cause adverse effects, per the ACHP's own regulations, and bestows enormous latitude and responsibility in the hands of all federal agencies. This approach is not only contrary to the intent and requirements of the National Historic Preservation Act, we think that the best decision making is informed – not made unilaterally by decisionmakers far removed from the locale and not made with an instrument designed limit knowledge, identification, assessment and treatments for historic properties.
2. **Pass-through entities.** The Program Comment is unclear how it would apply to pass-through entities or, in the case of HUD, "responsible entities." While they are responsible for some of the reporting requirements, it is unclear how the functional aspects of the undertaking/activity process would be completed.
3. **Template reports.** The Template Reports, which is the primary proposed mechanism for assuring the appropriate functioning of the Program Comment should be developed prior to adoption – not within three months. Stakeholders should have an opportunity to review and comment on the reporting template.

4. **Problematic definitions.** Some definitions are problematic and vague – such as “independent utility,” which seems to contradict itself and call into question how many undertakings actually would be covered. It is a term also added to the definition of “undertaking,” conflicting with the statutory definition – something that the ACHP has always been clear rejecting in agreement documents.
5. **Determination process.** The “Determination” process outlined in Appendix B is confusing and cumbersome and includes a measure requiring consultation to develop an Area of Potential Effects but then potentially no consultation on the identification of historic properties or on the assessment of effects.
6. **Does not meet spirit of program comment as alternative to 106.** The proposed document does not focus on streamlining for projects with no or minimal potential to adversely affect historic properties and instead includes undertakings with clear potential for adverse effects without any consultation or mitigation required. This approach does not meet the spirit of the National Historic Preservation Act or the ACHP’s own regulations.
7. **No public notification.** The Dispute Resolution section is not meaningful. Since no notification of SHPOs is required, and there will be no public notification, how would an interested party know whether an undertaking is covered by the Program Comment and whether or not to file a dispute?
8. **Not in alignment with Secretary’s Standards.** The provisions covering the exteriors of buildings still conflict with generally accepted protocols for reviewing projects relative to the Secretary’s Standards – the most common approach taken by local governments. Indeed, alterations not in keeping with the Secretary’s Standards are an example of an adverse effect per 36 CFR 800.5(2)(ii). This means there would be potentially two different and conflicting spheres of historic preservation review.
9. **Archaeological concerns.** “Previously-disturbed” ground exemptions are problematic without proper due diligence and consultation. Simply requiring a written determination by a person meeting the Professional Qualifications Standards does not guarantee any particular outcome if they are not required to consult.
10. **Inadequate identification efforts.** Historic Property Identification Efforts are inexplicably abbreviated. Since no consultation is required in some cases beyond a “records check,” by a person meeting Professional Qualification Standards, there is still no guarantee that even a phone call would take place with the SHPO – who are the official repositories of historic property data in their states.

## **Precedent**

While working to achieve overarching political policy goals is to be expected, the ACHP was established to *advise* the President and Congress on historic preservation matters in an informed and impartial manner. We are very concerned that the Council seems to instead be doing the opposite – increasingly taking advice and instruction from the President and Congress to help them achieve their own political policy goals. The precedent potentially set by this Program Comment, as written, is clear – that the Council can be pressured to use its tools to achieve political goals, even when they are in direct contravention of the intent of the National Historic Preservation Act, its own regulations and published

guidance, concerns from State and Tribal Historic Preservation Officers, and objections from professionals in the preservation field, and most importantly, the larger public. While it may seem acceptable, even laudable, if the policy goals are desired – we ask the Council to consider very carefully the implications should future policy goals be infinitely more fraught with political divergence and societal complexity.

### **Possible Path Forward**

Despite our concerns, as noted at the beginning of this letter, we believe there is a possible path forward. Simply put, instead of the overly broad and legally concerning program comment draft, a program alternative focused on the maintenance, repair and rehabilitation of housing interiors could enjoy strong support from agencies, State Historic Preservation Officers and preservationists alike. There would be numerous benefits to this approach:

1. It would tailor the scope of the PC to a more definable category of undertakings, more consistent with the regulatory intent of this program alternative. It would make it more manageable and easier to monitor.
2. Ground disturbance would be either eliminated or substantially reduced, alleviating numerous concerns about archaeology and reduce a number of tribal concerns.
3. Inconsistencies and policy conflicts relative to local building reviews would be reduced or eliminated.
4. Problems with determinations of eligibility and Areas of Potential Effect could be substantially reduced.
5. Objectives identified in the Housing Policy Statement would be furthered.
6. More latitude for expeditious interior rehabilitation would occur.

### **Conclusion**

While many concerning and disquieting issues still exist with the Chair's proposed Program Comment draft, we remain optimistic that a productive path forward, as outlined above, is still possible. We urge the Council to reconsider the approach it is taking to this effort, to consider the consequences, and to instead move towards a collaborative and welcome solution that could be useful and beneficial to everyone.

Respectfully,



Erik M. Hein  
Executive Director