



September 27, 2024

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

Dear Chair Bronin:

Over many decades, the National Conference of State Historic Preservation Officers (NCSHPO) has worked with the Advisory Council on Historic Preservation (ACHP) in the development of Section 106 program alternatives, as outlined in 36 CFR 800. As statutory members of the Council, we have consistently approached the development of these alternatives with an open and collaborative mind – always seeking to help find the right balance between historic preservation, federal agency needs, and the public benefit. While we may not have always agreed as to the ultimate approach taken, we could always count on our overall pursuit of the same goals, namely, a shared reverence for the spirit and purposes of the National Historic Preservation Act (NHPA) underscored by mutual professional respect.

In this vein, we want you to know that we have taken your Chair-proposed Program Comment on Accessible, Climate Resilient, Connected Communities, as seriously as we would any proposed program alternative. We have given it careful thought, subjected it to a great deal of analysis, and solicited the input of our Board and membership at large. We did so with a mind to help to produce something that could work – in a spirit of collaboration. To that end, we include for you our markup of the draft document in the way of a path forward in lieu of the draft Program Comment as currently proposed.

We trust that this markup will best address the ability to explain the detailed edits we think would be required not only to make the work more effectively, but also to comply with existing laws and regulations. Two key points worth highlighting, however, are:

1. **Transportation programs and related undertakings should be removed.** To keep the scope of the Program Comment reasonable and more focused, we think that transportation activities should be removed and, if necessary, considered in a separate document. More importantly, however, transportation projects are the most likely to be covered by a myriad of other existing agreements. They are likewise among the most likely undertakings to be publicly controversial, something ACHP's own guidance dictates are most usually not appropriate for the program comment approach.

Importantly, this Program Comment as currently conceptualized would in fact make the project delivery process more cumbersome and unnecessarily complex. The Chair-proposed Comment draft also raises a number of troubling legal and jurisdictional questions. Moreover, we have met with the Department of Transportation about their current preparation of a Prototype Programmatic Agreement that would address many of the items considered by this Program Comment while allowing these matters to be more responsibly integrated into existing

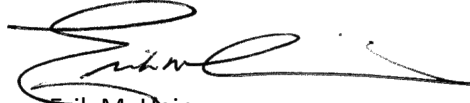
procedures. This Prototype Programmatic Agreement approach also has the support of the White House.

2. **The necessary level of consultation on some undertakings should be restored.** While we appreciate that there are a number of proposed undertakings for which little or no consultation may be appropriate because we would expect no adverse effect, several aspects of the proposed process set forth in the proposed Comment are problematic without necessary consultation otherwise required by Section 106.

The casual elimination of all consultation with not only SHPOs but moreover the public itself as an efficiency measure is in direct contravention with the clear purposes and requirements of the NHPA and, in our view, eliminates the opportunity to seek and implement creative, cost-effective, constituent-oriented solutions to complex preservation problems. We have attempted to bring some more balance to this aspect, and to restore consultation, in some cases, where it would lead to better preservation outcomes while still advancing project goals.

We look forward to continued discussion with the full Council about this proposal. As previously noted, we urge the Council the strongest terms possible to follow the best practices and procedures it recommends to other federal agencies who wish to pursue Program Comments. If the Council itself fails to adhere to its own guidance for initiation of Program Comments as it would require for a public agency, we believe that that fundamental credibility and mission of the ACHP would be significantly and unfortunately undermined.

Sincerely,

A handwritten signature in black ink, appearing to read 'Erik M. Hein', written over a horizontal line.

Erik M. Hein
Executive Director

Note: This Redline/Markup of the ACHP’s Proposed Program Comment is a work in progress by the National Conference of State Historic Preservation Officers, dated September 11, 2024, and is subject to change. It is offered for discussion and educational purposes.

DRAFT PROGRAM COMMENT ON

~~ACCESSIBLE, CLIMATE RESILIENT, AND CONNECTED COMMUNITIES~~ **Certain Housing-Related and Climate-Smart Building Related Undertakings**

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 C.F.R. § 800.14(e), and went into effect on that date. It provides all *federal agencies* with an alternative way to comply with their responsibilities under Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations, 36 C.F.R. part 800 (Section 106), regarding the *effects* of certain *housing-related, climate-smart building-related, and activities, climate-friendly transportation infrastructure related activities.*

I. INTRODUCTION

A. Background

The development of this Program Comment is driven by the need to harmonize policies and procedures for the preservation of our nation’s historic places with other national policy efforts designed to address the nation’s pressing needs to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce its energy use and greenhouse gas emissions, improve climate resilience, and to cut energy costs; and to decarbonize its transportation sector — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

~~Recognizing these needs~~ This Program Comment builds upon the principals identified in the ACHP’s, in 2023, the ACHP adopted its Housing and Historic Preservation Policy Statement (Housing Policy Statement) and its Climate Change and Historic Preservation Policy Statement (Climate Change Policy Statement), both adopted in 2023. These policy statements which commit the ACHP to “...to encourage both rehabilitation of historic housing (including historic public housing) and adaptation of historic buildings not originally built for housing, and to “... to define more clearly connections between climate change and historic properties, to articulate the policy principles the ACHP will integrate into the Section 106 process, and to guide public-serving institutions on how they may acknowledge, plan for, mitigate, and adapt to climate change impacts on historic properties.”

~~explore new opportunities to use program alternatives to enable federal agencies to advance historic preservation while meeting the nation’s housing and climate goals. These policy statements reflect increasing public awareness that historic preservation strategies — and historic properties themselves — can play an important role in addressing the three interrelated sectors covered in this Program Comment.~~

Following these policy statements, the ACHP developed this government-wide Program Comment to help harmonize the need for preservation of our historic resources with the need to accelerate the review of projects carried out, permitted, licensed, funded, assisted, or approved by federal agencies to rehabilitate existing housing or create new housing in existing buildings, and to maintain and update buildings and their immediate environs in response to climate concerns, ~~and to rehabilitate or develop new climate friendly transportation infrastructure.~~

Commented [EH1]: The Program Comment should be titled to cover the types of undertakings it applies to rather than desired community characteristics.

Commented [EH2]: Suggest reducing the scope to exclude transportation, to instead focus on only buildings. Transportation projects are most frequently covered through other programmatic means, have other inter-connected processes and procedures, and would be disrupted by the addition of this Program Comment as written. If this is deemed an integral component, would recommend a separate agreement document.

Commented [EH3]: As written, the aim of the Program Comment fails to prioritize the ACHP’s primary goal of promoting the preservation, enhancement, and sustainable use of our nation’s diverse historic resources. The Policy Statements this is built from aim to harmonize and further preservation. This document, as written, treats preservation as something to be simply set aside in favor of other policy goals. That is not an appropriate position, in our view, of the ACHP. We suggest a careful read to re-state the need to harmonize policy goals instead of making preservation simply-subordinate.

Commented [EH4]: This language comes directly from the Policy Statements for accuracy.

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B. Current Federal Agency Action

Every day, federal agencies propose to carry out, permit, license, fund, assist, or approve undertakings covered by this Program Comment, and when they do, they must comply with Section 106 of the National Historic Preservation Act. While the federal government’s role in supporting housing rehabilitation and production, ~~and~~ climate-smart buildings, ~~and climate friendly transportation~~ is difficult to quantify, an overview of current federal agency actions and investments offers insight into the scope and scale of undertakings covered by this Program Comment.

In the area of housing, federal agencies support housing for millions of Americans and preserve the viability and affordability, upgrade the energy efficiency, and enhance the climate resiliency of the nation’s housing stock. The Department of Housing and Urban Development (HUD), for example, supports ~~one+~~ million housing units across 190,000 public housing buildings, with HUD spending nearly \$9 billion annually in capital and operating funds on these units, over half of which were built before 1975. HUD also provides billions ~~of dollars~~ annually through the Community Development Block Grant and HOME Investments Partnership programs. In addition, the Department of Defense provides over one million units to Military Service members, including 846,000 units in military- owned barracks, while the Rural Housing Service of the Department of Agriculture provides loans to support affordable multifamily developments in rural areas and currently has over 400,000 units in its portfolio, including 17,000 units that support farm laborers. Thousands of projects are funded by other federal agencies working to ensure all Americans have safe, habitable, and affordable housing.

In the area of climate-smart buildings, federal agencies have long undertaken projects that seek to reduce energy cost burdens, cut climate pollution, and boost climate resilience of the nation’s building stock. The Inflation Reduction Act — the largest climate bill in history — and the Bipartisan Infrastructure Law have accelerated these efforts. The Environmental Protection Agency \$27 billion Greenhouse Gas Reduction Fund, for example, finances zero emissions building projects and clean technology deployment nationally, including in low-income and disadvantaged communities. The Climate Smart Buildings Initiative is catalyzing more than \$8 billion of private sector investments by 2030 to perform energy efficiency upgrades in federal buildings. The \$1 billion HUD Green and Resilient Retrofit Program invests in energy efficiency, electrification, clean energy generation, climate resilience, and low-embodied-carbon materials in HUD-assisted multifamily housing. And the Department of Energy Efficiency and Conservation Block Grant Program is assisting states, local governments, and Tribes in implementing strategies to reduce energy use, to reduce fossil fuel emissions, and to improve energy efficiency, including for residential and commercial buildings.

~~In the area of climate friendly transportation, the federal government’s project portfolio — from sidewalks and bike lanes, to bus shelters and light rail — spans multiple Department of Transportation operating administrations as well as other federal agencies, including those that might fund such projects (such as HUD and the Environmental Protection Agency) or build such projects (such as the Department of Agriculture and the Department of Interior). Through the Bipartisan Infrastructure Law and other recent actions, the federal government is currently making significant investments to reduce greenhouse gas emissions and bolster the resilience of America’s transportation infrastructure. This includes \$91 billion over five years for public transportation projects, including for transit accessibility, transit-oriented development, and expanded transit service. It also includes \$66 billion to improve the nation’s rail systems, representing the largest investment in passenger rail since the creation of Amtrak, and additional funding for pedestrian and bike infrastructure, recreational trails, Safe Routes to School, and more. Other funding includes billions \$7.5 billion over five years for electric vehicle charging infrastructure, \$8.7 billion over~~

~~five years for transportation infrastructure resilience, and \$2 billion to reduce the lifecycle emissions of transportation construction projects by investing in materials with lower levels of embodied carbon emissions compared to industry averages.~~

Many types of activities relating to these and other federal agency programs and investments require Section 106 review.

C. Prior ACHP Action

The ACHP’s statutory duties under the National Historic Preservation Act include advising the President and Congress, ~~and state and local governments~~ on historic preservation policy issues and overseeing the Section 106 ~~process~~.

In its advising capacity, ~~advised the President, Congress, and state and local governments on housing since at least 1995, when the ACHP – it~~ issued its first policy statement on affordable housing in 1995. It updated this policy statement in 2006, and again in 2023 ~~by broadening the scope to cover all housing~~. The Housing Policy Statement states that Section 106 reviews must “be grounded in a flexible yet consistent approach to ensure that housing can be developed expeditiously while still preserving the historic qualities of affected historic properties.” Also in 2023, the ACHP advised on climate change and historic preservation through its Climate Change Policy Statement. It urges action on building reuse and energy-and-emissions-saving retrofits of older and historic buildings (including enhanced electrification and increased energy efficiency standards). It also supports expediting Section 106 review of projects addressing climate change, including clean energy and climate-friendly transportation projects.

In its oversight of the Section 106 process, the ACHP has also issued or participated in other program alternatives to create tailored review processes for certain programs and undertakings relevant to this Program Comment. At the request of Department of Defense, for example, the ACHP has issued six program comments specifically related to housing, which cover housing developed under specific congressionally appropriated programs, housing constructed during specific eras, and housing designed and built with similar form, style, and materials. The ACHP has also recently been a signatory to several statewide programmatic agreements with HUD related to projects and programs subject to 24 C.F.R. Parts 50 and 58. Prior program comments addressing housing have reduced the operational and maintenance costs of historic housing, made homes more comfortable for occupants, and facilitated the preservation and reuse of existing buildings.

With regard to climate-smart buildings, ACHP has issued several program comments, along with an exemption for the General Services Administration’s routine operations and maintenance. The ACHP has also signed a Department of Energy Prototype Programmatic Agreement for weatherization activities and a Nationwide Programmatic Agreement Regarding Climate Resiliency and Sustainability Undertakings on Department of Homeland Security Owned Facilities, which cover a broad range of energy efficiency, water efficiency, and climate adaptation- related undertakings. ~~Prior program alternatives incorporating climate-smart building strategies have reduced the operational and maintenance costs of historic buildings, made such buildings more comfortable for occupants, and facilitated the preservation and reuse of historic buildings.~~

~~With regard to climate friendly transportation, the ACHP has issued two program comments specifically related to transportation projects, along with a government wide exemption for certain electric vehicle supply equipment. In addition, the ACHP has been a signatory to statewide programmatic agreements with the Federal Highway Administration, state historic preservation offices, and state departments of transportation, covering a range of transportation related activities. To the extent prior program alternatives have addressed climate friendly transportation projects, they have facilitated such projects while upholding historic preservation values.~~

Commented [EH5]: Deleted to support the relocation of transportation, if pursued, into a separate effort.

Commented [EH6]: According to the NHPA, the Council advises the President and Congress on matters of historic preservation, but regarding state and local governments, the ACHP’s role as stated is to advise on the “dissemination of information pertaining to those activities.” (historic preservation). It advises state and local governments specifically in drafting legislation relating to historic preservation, and it informs and educates as to the Council’s authorized activities - but it doesn’t advise them broadly on historic preservation policy issues. Its role with state and local governments, therefore is not the same as it is with the President, Congress and as otherwise specified for federal agencies.

Commented [EH7]: The one piece missing in this section is an acknowledgment that some of these programs involve the delegation of 106 to grant recipients or pass-thru entities. We think the ACHP should carefully review and consider the impact of this Program Comment on those types of undertakings - or - perhaps limit this agreement to direct federal agency undertakings. It is unclear whether this would help or further complicate/frustrate the delegation processes, grant programs, etc.

Commented [EH8]: To make this assertion, we recommend the inclusion of some data points - that said, for this to be a good talking point for the ACHP, the actual preservation of resources should be included in the data.

^z DRAFT FOR PUBLIC COMMENT – DATED 8/8/2024

This Program Comment is guided in part by the mechanisms, provisions, and approaches in prior program alternatives that are most consistent with the ACHP’s recently adopted Housing Policy Statement and Climate Change Policy Statement. In expanding beyond the scope of these prior program alternatives, this Program Comment ~~creates~~ offers an alternative ~~a consistent and holistic~~ approach for Section 106 review across the federal government for certain undertakings, reducing complexity and equipping federal agencies to more effectively and efficiently preserve and protect our nation’s historic resources while addressing other critical policy ~~the nation’s~~ needs.

D. Justification

Many types of ~~activities-undertakings~~ relating to the programs identified in Section I.B. of this Program Comment, and other similar programs, require review under Section 106 of the National Historic Preservation Act. Recognizing the extent, and in some cases the increasing extent, of federal action in the housing ~~and~~ ~~building~~ ~~and transportation~~ sectors, and the volume and repetitive nature of such action, the ACHP has issued this Program Comment to clarify ~~preferred-alternative~~ approaches to reviewing these covered undertakings. In doing so, this Program Comment enables federal agencies to ~~focus on preservation and consultation for other undertakings with greater potential for adverse effects on historic properties,~~ ~~reducing taxpayer costs and facilitating project delivery~~ ~~while enabling the production and rehabilitation of housing, the preparation of buildings to be climate resilient, and the reduction of energy use and greenhouse gas emissions in the building and transportation sectors.~~

~~This Program Comment also aims to leverage the embodied carbon in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for construction materials that currently account for more than 15 percent of annual global greenhouse gas emissions, and in turn slowing down climate change and its impacts on our most cherished places.~~

E. Goals

This Program Comment aims to promote actions that, consistent with the National Historic Preservation Act, 54 U.S.C. § 300101(1), “foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”

More specifically, this Program Comment aims to achieve objectives laid out in ACHP policy statements, to advance historic preservation goals, and to ~~help satisfy~~ ~~harmonize them with~~ the nation’s pressing needs to expand access to housing ~~and to~~ facilitate climate-resilient and ~~zero~~ ~~lower~~ emissions buildings, ~~and promote climate friendly transportation.~~ ~~It does so in recognition of three critical facts: that the United States has an aging housing stock, with half of existing housing units built before 1979; that more than a third of greenhouse emissions comes from the building sector, and buildings use 75% of the electricity generated annually; and that transportation sector is the largest source of greenhouse gas emissions in the United States, responsible for about one-third of all emissions.~~

~~This Program Comment also aims to leverage the embodied carbon in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for construction materials that currently account for more than 15 percent of annual global greenhouse gas emissions, and in turn slowing down climate change and its impacts on our most cherished places.~~

~~Ultimately, this Program Comment aims to benefit the people who live in the housing, work in the buildings, and move using the climate friendly transportation infrastructure projects being carried out, permitted, licensed, funded, assisted, or approved by federal agencies.~~

Commented [EH9]: This is unintentionally negative -it should be reworded to suggest that it will leave agencies to focus resources for consultation and preservation on more complex projects with a potential to adversely impact historic properties.

Commented [EH10]: Repetitive - it is repeated in the goals section, where it is more appropriate.

Commented [EH11]: Although net-Zero is a laudable goal, substituting lower emissions offers a more reasonable objective.

Commented [EH12]: Given these are not goals, they would be better suited in the justification. This data, however should be accompanied by the full story - that percentage of the building sector that historic buildings represent.

Commented [EH13]: Again, not a goal statement, but a justification. Moved above.

Commented [EH14]: Recommend omitting this statement as it includes nothing about preservation, and seems unnecessary.

II. SCOPE

A. Overall Effect

This Program Comment provides an alternative way for *federal agencies* to comply with their Section 106 responsibility to take into account the *effects on historic properties* of their covered *undertakings*. The issuance of this Program Comment at the ACHP's own initiative, by default, provides serves as also provides the ACHP a our reasonable opportunity to comment regarding covered *undertakings*.

B. Effect on Other Applicable Laws

This Program Comment does not modify, preempt, or replace any other federal or Tribal laws, or any applicable and/or additional federal, state, local, or Tribal laws or regulations including local historic preservation review or zoning ordinances, building codes or permitting requirements.

C. Effect on Existing Agreements

A *federal agency* that already has a Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must either:

1. Follow this Program Comment, rather than such MOA or PA for a class of covered *undertakings* for the life of this Program Comment. Before making a decision to do so, the *federal agency* must first consult with the signatories of such MOA or PA and then provide them written notice of the decision seek their consent to apply this Program Comment to a class of covered *undertakings*; or
2. Continue to implement the existing MOA or PA regarding such covered *undertakings*, rather than this Program Comment.

Federal agencies may pursue amendments to such MOAs or PAs per their stipulations, to incorporate, in whole or in part, the terms of this Program Comment. *Federal agencies* may also consider terminating such MOA or PA and follow this Program Comment to satisfy their Section 106 responsibility for the covered *undertakings*.

A federal agency that already has a Section 106 program comment or program comments in effect for covered undertakings must follow the terms of those program comments to the extent those program comments address the undertakings covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of other program comments. *Federal agencies* may propose to the ACHP amendments to existing program comments following the amendment procedures in those program comments, to incorporate, in whole or in part, the terms of this Program Comment.

D. Effect on Tribal Lands

This Program Comment does not apply on *Tribal lands*, or to activities that may affect *historic properties* located on *Tribal lands*, unless the *Indian Tribe*, *Tribal historic preservation officer*, or a designated representative of the *Indian Tribe* has provided prior written notification to the Executive Director of the ACHP that the Tribe allows the use of the Program Comment on the Tribe's lands. *Indian Tribes* can agree to such use of the Program Comment by issuing an authorization for such use in a format substantially similar to the format contained in Appendix D to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on those *Tribal lands* on the date of receipt by the Executive Director of the ACHP, who must ensure notice on such authorization is included on the website of the ACHP. The *Indian Tribe*, *Tribal historic preservation officer*, or designated representative of the *Indian Tribe* may terminate the *Indian Tribe's* authorization to use this Program Comment by notifying the Executive Director of the ACHP in writing. Such a termination will be limited to the Program Comment's applicability to *undertakings* that would occur on or

Commented [EH15]: Given the unprecedented reach of this Program Comment, it could be easy for a grant recipient, for example, to misunderstand that while they may not be subject to Section 106, local preservation ordinances and review processes may apply. This should be stated here for clarity.

Commented [EH16]: An Agency should not be able, at their own discretion, decide which legally binding agreement to utilize without consent of the other signatories. If consent is not provided then, if the Agency really wants to proceed, they always have the option of terminating their agreement and following the Program Comment. This, at least, provides clarity as to which process will be followed and when. It also would serve to pressure signatories and the agency to work together - which is a good thing.

Commented [EH17]: Why is it that a Program Comment in effect must be followed, but another Program Alternative (even signed agreements) can be disregarded? This doesn't make sense.

affect *historic properties* on the *Tribal lands* under the jurisdiction of the *Indian Tribe*.

E. Standard Section 106 Review

A *federal agency* must follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7 or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative, if:

1. The *federal agency* elects, for any reason, not to utilize this Program Comment for an *undertaking* for which alternative compliance approaches are prescribed in Section III of this Program Comment.
2. ~~The *undertaking* or components of an *undertaking* that include activities not listed in the Appendices, meaning the *undertaking* would be subject to the Section 106 review process, but the *federal agency* could incorporate use of this Program Comment in its review of the entire *undertaking*.~~
3. The *undertaking* would occur on or have the potential to affect the following *historic properties*:
 - a. Any National Monument, National Historic Site, National Historic Trail, National Historical Park, National Military Park, National Battlefield, National Battlefield Park, or National Battlefield Site.
 - b. Any site, object, *building*, or structure individually designated as a *National Historic Landmark* or designated as a *contributing property* to a *National Historic Landmark* district, or found within the boundaries of a *National Historic Landmark* archaeological district.
 - c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*.

Commented [EH18]: We do have a concern about how an undertaking would be defined. Usually, an entire rehab, for example, is the undertaking and 106 pathways are built around that undertaking. What is being contemplated here, it seems, is a possibility that undertaking would be broken down into components where this Program Comment would apply to certain aspects of a larger undertaking, but another programmatic instrument would cover the rest. Project segmentation is not traditionally permitted in the 106 process. The consequences here are hard to calculate....

III. ALTERNATIVE COMPLIANCE APPROACHES

A. Available Alternative Compliance Approaches

This Program Comment authorizes alternative compliance approaches for covered *undertakings*, as follows:

1. For *undertakings* or components of *undertakings* ~~with no or minimal potential to adversely affect *historic properties*~~, as set forth in Appendix A-1, B-1, or C-1 of this Program Comment, a *federal agency* may proceed with the *undertaking* without conducting further review under Section 106.
2. For *undertakings* or components of *undertakings* for which the *federal agency* satisfies certain conditions, exclusions, or requirements, as set forth in Appendix A-2, B-2, or C-2 of this Program Comment, a *federal agency* may proceed with the *undertaking* if it satisfies the conditions, exclusions, or requirements prescribed in those Appendices, and it documents the manner in which it has satisfied such conditions, exclusions, or requirements.

Commented [EH19]: We are not comfortable characterizing the undertakings listed as having no or minimal potential to adversely affect historic properties. In some cases, the undertakings will indeed have an adverse effect as defined in 36 CFR 800.5, putting this at odds with the ACHP's own regulations.

B. Consultation with Indian Tribes and Native Hawaiian Organizations

The United States government has a unique legal and political relationship with *Indian Tribes* as set forth in the Constitution of the United States, treaties, statutes, court decisions, and Executive Orders. The United States recognizes the right of *Indian Tribes* to self-government. Tribes exercise inherent sovereign powers over their members and territories. The ACHP drafted this Program Comment with a commitment to strengthening the government-to-government relationship between the United States and *Indian Tribes*.

1. Potential Effects on Properties of Significance to Indian Tribes and Native Hawaiian Organizations

It is important to recognize that while this Program Comment was drafted to limit impacts on *historic properties*, such as sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, covered *undertakings* could directly or indirectly affect such properties.

2. Consultation-Related Obligations

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*, including Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, may occur, it must make a reasonable and good faith effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* and invite them to *consult* to assess whether use of the Program Comment for the subject *undertaking* is appropriate. The *federal agency's* consultation effort should be informed by and be conducted in accordance with the National Historic Preservation Act, the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects, including by recognizing the special expertise of holders of Indigenous Knowledge.

The *federal agency's* effort to identify potentially interested *Indian Tribes* and *Native Hawaiian Organizations* should be informed by, but not limited to the following: the knowledge and expertise of agency Tribal liaison staff, historic maps, information gathered from previous consultations pursuant to Section 106, databases of *Indian Tribes* and *Native Hawaiian Organizations* where accessible and appropriate, the Bureau of Indian Affairs Tribal Leader List, U.S. Department of the Interior Native Hawaiian Organization List, the National Park Service Tribal Historic Preservation Program contact database, National Association of Tribal Historic Preservation Officers, the U.S. Housing and Urban Development Tribal Directory Assistance Tool, *state historic preservation officer* databases, and other resources.

3. Effect of Finding of Potential Effect on Certain Properties

Should it be determined through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could potentially result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including a

Commented [EH20]: The whole process for determining an APE is unclear in this document since the undertakings are framed as not needing review.

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Commented [EH21]: What if the tribe disagrees?

Commented [EH22]: It should be acknowledged that off of tribal lands, where there is no THPO, some tribes do rely upon the SHPO for support.

Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* may not use this Program Comment and must instead follow the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative.

4. Confidentiality-Related Obligations

Consistent with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, *federal agencies* should consider information regarding *historic properties* with traditional religious and cultural significance to *Indian Tribes* or *Native Hawaiian Organizations*, Tribal identified sacred sites, and Indigenous Knowledge shared with the *federal agency* by *Indian Tribes* or *Native Hawaiian Organizations* as sensitive, unless otherwise indicated by the *Indian Tribe* or *Native Hawaiian Organization*. *Federal agencies* should clearly inform *Indian Tribes* and *Native Hawaiian Organizations* of any limitations on the agency's ability to keep sensitive information confidential. *Federal agencies* must keep sensitive information provided by *Indian Tribes* or *Native Hawaiian Organizations* confidential to the extent authorized by applicable federal, State and local laws, such as Section 304 of the National Historic Preservation Act. *Federal agencies* are encouraged to use best practices on confidentiality delineated in the 2023 Interagency Best Practices Guide for Federal Agencies Regarding Tribal and Native Hawaiian Sacred Sites when implementing this Program Comment.

Commented [EH23]: Note state and local laws on confidentiality exist.

C. ~~The Use of Consultation with Qualified Authorities and Use of Qualified Professionals~~

~~*Some Undertakings* covered by this Program Comment **do not** require the use of a *qualified authority*, and some do not, except where explicitly stated, or except where, in the reasonable When not required, nothing is meant to prevent the judgment of ~~the~~ a *federal agency* in consideration of various factors, that the use of a *qualified authority* is necessary to fulfill the intent of the National Historic Preservation Act or necessary or useful to inform the *federal agency's* decision-making.~~

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Commented [EH24]: Since some things do require a qualified authority, it isn't always a choice.

When the *federal agency* ~~chooses to use~~ consults with a *qualified authority*, the type of *qualified authority* must be appropriate to the circumstances. For example, a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects* to *historic properties* of religious and cultural significance to the *Tribe* or to *Native Hawaiians*, respectively, should be consulted to inform the identification, *effects* determination, and other matters involving *historic properties* significant to that *Indian Tribe* or *Native Hawaiian Organization*. As another example, determinations regarding architectural resources and structures must be made by ~~a qualified professional~~ an individual meeting such professional standards for historic architecture or architectural history established by the Secretary of the Interior. An individual meeting the Secretary of Interior's standards for archaeology would similarly be used for determinations concerning archaeological resources.

D. Determinations of Eligibility

~~*Undertakings* covered by this Program Comment, 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.~~

Commented [EH25]: This isn't really accurate and, in our view, adds more confusion. The very applicability of 106 rests upon whether a historic property is present. Evaluating primary facades requires a knowledge whether or not the property is historic.

IV. ASSISTANCE TO CONSULTING PARTIES

This Program Comment does not require a *federal agency* to pay any consulting party for providing its views or comments in response to 36 C.F.R. part 800 responsibilities, including invitations to consult in a Section 106 review; to respond to the proposed *area of potential effects*, scope of identification efforts, eligibility findings, assessment of *effect*; or to consult to seek ways to resolve any *adverse effects* or to develop a memorandum of agreement or programmatic agreement to conclude the Section 106 review finding or determination. If, however, a *federal agency* asks an *Indian Tribe, Native Hawaiian Organization*, or any consulting party to do more than the activities listed in the preceding sentence in connection with this Program Comment, the *federal agency* or its applicant, grantee, or permittee, if applicable, ~~must~~ may enter into an appropriate arrangement to provide the *Indian Tribe, Native Hawaiian Organization*, or consulting party reasonable payment for such services, if and to the fullest extent the *federal agency* has the authority to enter into such an arrangement and pursuant to its policies and procedures, or where otherwise prohibited by other laws, regulations or statutes. Examples of services include requests to:

- A. Conduct an archaeological, ethnographic, or other inventory or field survey to identify *historic properties* that may be affected by the *undertaking*.
- B. Perform a *records check* on behalf of the *federal agency*.
- C. Conduct research and make preliminary assessments of National Register eligibility on behalf of a *federal agency*, as opposed to responding to determination of eligibility.
- D. Provide an assessment of the potential *effects* of the *undertaking* on *historic properties*, as opposed to responding to such an assessment.
- E. Carry out *mitigation measures*, including conducting additional research or monitoring ground disturbing activities as part of a mitigation plan.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, evaluation, or mitigation efforts.
- G. Design or develop a specific plan or specifications for an *undertaking* that would meet the Secretary of the Interior's Standards for Rehabilitation or otherwise avoid, minimize, or mitigate *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.
- I. Contribute substantially to any of the above activities carried out by a third party.

A request during consultation by an *Indian Tribe* or *Native Hawaiian Organization* to conduct such services itself does not preclude reasonable payment for services simply because the request was made during consultation. A *federal agency* or its applicant, grantee, or permittee, if applicable, must consider entering into an arrangement, in accordance with this Section, with any *Indian Tribe* or *Native Hawaiian Organization* making such a request.

Commented [EH26]: If this applies everywhere except tribal lands, and no qualified authority is necessary, and no determination of eligibility is required, what consultation would ever take place? As written the only consultation explicitly stated above seems to be whether or not the tribe agrees the Program Comment should be used - and only after the agency has already determined a historic property may exist. If an agency says there isn't one, can they proceed without even asking a tribe whether the program comment may be used?

Commented [EH27]: We realize the intent, but by saying "must," it prevents payment to entities potentially and appropriately authorized by a consulting party.

Commented [EH28]: The NPS HPF Manual, for example, prohibits certain payments for services of grant recipients.

V. UNANTICIPATED DISCOVERIES

A. Immediate Response Requirements

If previously unidentified *historic properties* or unanticipated *effects*, including visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of the *undertaking*, the *federal agency* must immediately halt all activity that could affect the discovery and institute interim measures to protect the discovery from looting, vandalism, weather, and other threats. The *federal agency* must then follow the procedures set forth in 36 C.F.R. § 800.13(b); for sites with potential religious and cultural significance to *Indian Tribes* or *Native Hawaiian* organizations, the *federal agency* must request, and incorporate, if provided, the special expertise of Tribes or *Native Hawaiian Organizations* and the information provided by designated holders of Indigenous Knowledge and must follow those procedures accordance with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation, and for sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow these procedures in accordance with the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. A *federal agency* that has *historic property* discovery procedures in existing management plans pertaining to *historic properties* should follow such existing procedures.

B. Response to the Discovery of Human Remains, Funerary Objects, Sacred Objects, or Items of Cultural Patrimony

The *federal agency* must ensure that in the event human remains, funerary objects, sacred objects, or items of cultural patrimony are discovered during implementation of an *undertaking*, all work within **an appropriate buffer zone, or a minimum of 50 feet (whichever is greater)** of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, local law enforcement, and coroner/medical examiner in accordance with any applicable state statute(s) must be immediately contacted. The *federal agency* must be guided by the principles within the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects. The *federal agency* must comply with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 C.F.R. part 10, in regard to any human remains, funerary objects, sacred objects, or items of cultural patrimony found on federal or Tribal land.

VI. DISPUTE RESOLUTION

Any person may file a dispute over the implementation of this Program Comment or its use for any particular *undertaking*, by filing a notice with the relevant *federal agency*, including the *federal agency's* federal preservation officer, with a copy to the consulting parties involved in the *undertaking* and any relevant *Tribal historic preservation officer* or *state historic preservation officer*. Objecting parties may include but are not limited to *Indian Tribes*, *Tribal historic preservation officers*, *state historic preservation officers*, *Native Hawaiian Organizations*, local governments, preservation organizations, owners of historic properties, and members of the public. The *federal agency* must consult with the objecting party to resolve the dispute for not more than 60 *days*. Any disputes over the evaluation of unanticipated discoveries must be resolved in accordance with the requirements of 36 C.F.R. § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 *days*, the *federal agency* ~~may~~ shall forward to the ACHP all documentation relevant to the objection, including the *federal agency's* proposed resolution if any, request

Commented [EH29]: It should be acknowledged that many undertakings proposed here would not require consultation - so it is unclear how a dispute would even surface.

the ACHP to provide within 30 *days* its advisory comments to resolve the dispute, and take the ACHP’s comments into account before finalizing its approach to complying with Section 106. The *federal agency* must notify the objecting party and any relevant *Tribal historic preservation officer* or *state historic preservation officer* regarding its approach to complying with Section 106 for an *undertaking* that is the subject of a dispute. ~~The federal agency’s decision regarding the resolution will be final.~~ Following the issuance of ~~its~~ ACHP’s final decision, the *federal agency* may authorize the action subject to dispute hereunder to proceed in accordance with the terms of that decision.

The ACHP must monitor such disputes, and from time to time, the Executive Director of the ACHP may issue advisory opinions about the use of this Program Comment to guide *federal agencies*.

VII. DURATION

This Program Comment will remain in effect from the date of adoption by the ACHP through December 31, ~~20442034~~, unless prior to that time the ACHP withdraws the Program Comment in accordance with Section IX of this Program Comment. On any date during the six-month period preceding the expiration date, the ~~ACHP Chair~~ Council may amend the Program Comment to extend its duration in accordance with Section VIII.A. of this Program Comment. If an *Indian Tribe* authorizes the use of this Program Comment on its *Tribal lands* in accordance with Section II.D. of this Program Comment, such authorization will be in effect from the date of the issuance of the authorization until the termination of such authorization by the *Indian Tribe* or the expiration or withdrawal of this Program Comment, whichever is earlier.

VIII. AMENDMENT

The ACHP may amend this Program Comment after consulting with *federal agencies*, *state and tribal historic preservation officers*, and other parties as it deems appropriate and as set forth below.

~~A. Amendment by the Chair, ACHP~~

~~The Chair of the ACHP, after notice to the rest of the ACHP membership and federal agencies may amend this Program Comment to extend its duration. The ACHP must notify federal agencies and publish notice in the Federal Register regarding such amendment within 30 days after its issuance.~~

~~B.A. Amendment by the Executive Director, ACHP~~

The Executive Director of the ACHP, after notice to the ACHP membership and other *federal agencies* may amend this Program Comment to adjust due dates and make corrections of grammatical and typographical errors. The ACHP must notify *federal agencies* and publish notice in the Federal Register regarding such amendments within 30 *days* after their issuance.

~~C.B. All Other Amendment by Council Amendments~~

Amendments to this Program Comment not covered by Sections VIII.A. or VIII.B. of this Program Comment will be subject to ACHP membership approval.

Commented [EH30]: The ACHP has final decision on compliance, not an agency. The agency can certainly proceed with their undertaking anyway, after the ACHP comments... but an agency should not have the final say on the compliance with an ACHP process.

Commented [EH31]: 20 years is too long... definitions alone will change drastically which will impact the scope of this PC. At very least it should expire but have a provision for the membership to vote to extend.

Commented [EH32]: We would also like to advocate for a 5 year probational term, perhaps with a provision that permits its automatic renewal for another 5 years if no objections raised by the Council.

Commented [EH33]: We do not support the extension of such a sweeping document by the Chair. This should require a vote of the Council.

IX. WITHDRAWAL

If the ACHP determines that the consideration of *historic properties* is not being carried out in a manner consistent with this Program Comment, the ACHP membership may vote to withdraw this Program Comment. The Chair of the ACHP must then notify *federal agencies, state and tribal historic preservation officers*, and publish notice in the Federal Register regarding withdrawal of the Program Comment within 30 days of the decision to withdraw. If this Program Comment is withdrawn, *federal agencies* must comply with the Section 106 review process under 36 C.F.R. §§ 800.3 through 800.7, or 36 C.F.R. § 800.8(c), or another applicable agreement or program alternative for individual *undertakings* covered by this Program Comment.

Commented [EH34]: Another reason why the section on Determinations should be removed - if you take away the need to identify historic properties, how would a failure of consideration even play out?

X. REPORTS AND MEETINGS

A. Federal Agency Annual Reports

The *federal agencies* that use this Program Comment must provide annual reports regarding the use of this Program Comment during the previous reporting period, ending June 30 annually, to the ACHP, as provided in this Section. Each agency's annual report must: provide examples of *undertakings* covered by Section III.A.1. of this Program Comment; provide *general locational and statistical* information about the manner or extent to which the agency *utilized the Program Comment*, satisfied the conditions, exclusions, and requirements to proceed with the *undertakings* covered by Section III.A.2.; identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; include an assessment of the overall effectiveness of the Program Comment in meeting its intent; and summarize professional assistance and compliance monitoring activities. Annual reports are due on September 30 of each year, starting September 30, 2025 and ending September 30, ~~2029~~2030. *The ACHP will make all federal agency reports publicly available.*

Commented [EH35]: For reports to be useful, they must include some locational information (state, county, etc.) and some quantifiable data about the volume and types of undertakings.

For the remaining duration of this Program Comment, the *federal agencies* that use this Program Comment must provide reports regarding the use of this Program Comment during the previous reporting period, ending June 30 triennially, to the ACHP, as provided in this Section. Each agency's triennial report must be submitted either as part of *federal agencies'* report to the ACHP pursuant to Executive Order (EO) 13287, "Preserve America," or, for *federal agencies* not otherwise required to submit such report to the ACHP, as a stand-alone triennial report. Each agency's triennial report must: identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, how those were addressed, and how they may be avoided in the future; and include an assessment of the overall effectiveness of the Program Comment in meeting its intent. Triennial reports are due on September 30 of every third year, starting September 30, 2032. *The ACHP will make all federal agency reports publicly available.*

In any report required by this Section, *or in response to such a report*, the ACHP encourages *federal agencies and/or state and tribal historic preservation officers* to also propose for ACHP consideration amendments and refinements to this Program Comment ~~based on their experience implementing it.~~

In any report required by this Section, a *federal agency* must include in its report the activities, if any, of entities to which it has delegated legal responsibility for compliance with Section 106 in accordance with federal law.

B. Annual Meetings

By January 31, 2026 and for four years thereafter, the ACHP must schedule an annual meeting and invite *federal agencies, Indian Tribes, state historic preservation officers, Tribal historic preservation officers, Native Hawaiian Organizations* and others it deems appropriate, to discuss implementation of the Program Comment. At the meeting, attendees will have an opportunity to provide their views on the overall effectiveness of the Program Comment in meeting its intent and purpose. Such views may inform decisions such as those regarding amendments to the Program Comment. Annual meetings may take place in-person, by phone, virtually using electronic meeting platforms, or any combination of such means.

Commented [EH36]: We suggest at least biannual after the four year term.

C. ACHP Reports

~~At any time, but at least once during the initial three-year period~~ Each year through 2030 during which this Program Comment is being used, and every three years thereafter, ACHP staff must make publicly available ~~provide~~ a written ~~or oral~~ summary of information received from *federal agency* reports, annual meetings, or other sources about the utility of this Program Comment and make any recommendations for amendments to the ACHP membership. The ACHP may ask for and the federal agencies must provide additional information upon request if their reports are deemed by ACHP staff to be insufficient for demonstrating usage of the Program Comment.

XI. DEFINITIONS

For purposes of this Program Comment, the following definitions apply, and beginning in Section II of this Program Comment, such words are *italicized* for convenience:

Abatement means acting or actions to eliminate, lessen, reduce, or remove.

Adverse effect, as provided in 36 C.F.R. § 800.5(a)(1), means an action that may alter, directly or indirectly, any of the characteristics of a *historic property* that qualify the property for inclusion in the National Register of Historic Places in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association; and it includes reasonably foreseeable *effects* caused by the *undertaking* that may occur later in time, be farther removed in distance or be cumulative.

Area of potential effects, as provided in 36 C.F.R. § 800.16(d), means the geographic area or areas within which an *undertaking* may directly or indirectly cause alterations in the character or use of *historic properties*, if any such properties exist, and is influenced by the scale and nature of an *undertaking* and may be different for different kinds of *effects* caused by the *undertaking*.

~~*Bicycle lane* means a portion of a roadway that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists.~~

~~*Bicycle parking* means a designated area to store a bicycle, whether personal or shared, including bicycle racks and dedicated bicycle docks used in a shared system.~~

~~*Bicycle rack* means a rack for a personal or shared bicycle, e-bicycle, or scooter that is typically u-shaped.~~

~~*Bicycle rail* means a traffic control device that provides a protective barrier between motor vehicle travel lanes and protected bicycle lanes or cycle tracks.~~

~~*Bulb out* means feature that extends the line of the curb into the traveled way, reducing the width of the street, also known as curb extensions or bump outs.~~

Building means a constructed work created principally to shelter any form of human activity, including mobile and manufactured homes and *climate-friendly transportation facilities* that are *buildings*.

Building energy control system means a *mechanical system* enabling a *building* occupant to manage or monitor energy use and all components of such system, including but not limited to programmable thermostats, digital outdoor reset controls, occupancy sensors, Underwriters Laboratories listed energy management systems or *building* automation systems, demand response and virtual power plant technologies, smoke and carbon monoxide detectors, and related technologies.

Character-defining feature means an element of a *historic property* that demonstrates or includes the characteristics of a *historic property* that qualify the *historic property* for inclusion in the National Register of Historic Places, including elements that contribute to the *historic property*'s overall shape, materials, craftsmanship, decorative details, interior spaces and features, as well as the various aspects of its site an environment ~~style, design, and decorative details.~~

Clean energy technologies means *solar energy systems*, ~~wind energy systems~~, battery energy storage systems, geothermal systems, and microgrids serving a *building* or *buildings*, ~~or serving a climate friendly transportation facility.~~

Commented [EH37]: Geothermal systems can require a great deal of ground disturbance... So they don't really fit, unless more specifics/parameters or qualifiers are included.

~~*Climate friendly transportation infrastructure* means pedestrian, bicycle, micromobility vehicle, bus (including bus rapid transit), and rail infrastructure.~~

~~*Climate friendly transportation facility* means a building or structure used for bicycle parking, micromobility parking, a bus station, a bus rapid transit station, or a rail station.~~

Climate-smart building means a *building* that is energy efficient, electric, uses clean energy, and is resilient.

Climate resilience is defined as the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

Community solar system means a solar photovoltaic *installation* with up to 5 megawatts nameplate capacity and delivering at least 50% of the power generated from the system to *buildings* within the same utility territory as the facility.

Cool pavement means paving materials that reflect more solar energy, enhance water evaporation, or have been otherwise modified to remain cooler than conventional pavements.

Contributing property, as provided in National Register Bulletin 16A, "How to Complete the National Register Registration Form," means a *building*, structure, object, or site, as applicable, within the boundaries of a *historic district* that adds to the historic associations, historic architectural qualities, or archaeological values for which a property is significant because it was present during the period of significance, relates to the documented significance of the property, and possesses historic integrity or is capable of yielding important information about the period; or it independently meets the criteria for the National Register of Historic Places.

~~*Cycle track* means a bicycle facility that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use of bicyelists.~~

Day means calendar *day*, taking place from one midnight to the following midnight.

Economic feasibility means the viability, suitability, and practicality of a proposed *undertaking weighed against the potential impact to a historic property and* in light of a range of *other* considerations, including estimated construction costs (including the cost of *building material and labor*), *material availability and lifecycle*, estimated operational costs, available budget, and *timelines for compliance review processes to the extent they impact financial conditions for the undertaking* long-term sustainability of a project.

Effect, as provided in 36 C.F.R. §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative alteration to the characteristics of a *historic property* qualifying it for inclusion in or eligibility for the National Register of Historic Places.

Electrification means the *replacement* or conversion of an energy-consuming device or system from non-electric sources of energy to electricity; or the *replacement* or conversion of an inefficient electric appliance to an efficient electric appliance.

~~*Electric vehicle supply equipment or EVSE* means conductors, including the ungrounded, grounded, and equipment grounding conductors and the electric vehicle (EV) connectors, attachment plugs, and all other fittings, devices, power outlets, or apparatus installed specifically for the purpose of delivering energy from the premises wiring to the EV. There are three levels of EVSE: i. Level 1: Refers to a freestanding or wall-mounted charging structure that delivers a 110/120V charge, replenishing an EV battery at a rate of 4 to 6 miles of range per hour of charging time. Charging an EV at level 1 typically takes between 7 and 20 hours depending on the size of the vehicle's battery. ii. Level 2: Refers to a freestanding or wall-mounted charging structure that delivers a 208/240V charge, replenishing an EV battery at a rate of 10 to 20 miles of range per hour of charging time. Charging an EV at level 2 typically takes between 2 and 5 hours depending on the size of the vehicle's battery. iii. Level 3 (also known as Direct Current (DC) Fast Charging): Refers to a freestanding or wall-mounted structure capable of being networked that is designed to charge vehicles more quickly than level I or level II with an electrical output ranging between 40 kW-500 kW delivering 50-1000 volts of direct current to the EV battery. Converts AC power to DC within the charging station and delivers DC power directly to the battery. DC fast charging can typically replenish an EV battery at a rate of 50 to 200 miles of range per 30 minutes of charging time.~~

Emergency situation means any of the following *as defined by 36 CFR 800.12*: occurrence of a natural catastrophe, such as a hurricane, wildfire, flood, or excessive heat; declaration of emergency by the President, an *Indian Tribe*, governor, or a chief elected official of a territory or city; or recognition or report of a sudden, serious, and imminent threat to life, health, safety, or property.

~~*EVSE criteria* means (1) take place in existing parking facilities with no major electrical infrastructure modifications and are located as close to an existing electrical service panel as practicable; (2) use reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimize ground disturbance to the maximum extent possible, and ensure that it does not exceed previous levels of documented ground disturbance; (4) use the lowest profile equipment reasonably available that provides the necessary charging capacity; (5) place the EVSE in a minimally visibly intrusive area; and (6) use colors complementary to surrounding environment, where possible.~~

Federal agency means an agency as defined by 5 U.S.C. § 551(1), and includes state, local, or Tribal government officials who have been delegated legal responsibility for compliance with Section 106 in accordance with federal law.

Commented [EH38]: This is not an appropriate metric for economic feasibility. This suggests wide latitude for an agency to discount consultation as simply too expensive. This really goes against the heart of the ACHP's core values.

~~*Flex post means flexible bollards or delineators used to separate motor vehicle traffic from a bicycle lane, protected bicycle lane, or cycle track, and designed to withstand being hit or run over by motor vehicles.*~~

Green infrastructure means the range of measures that use plant or soil systems, *permeable ground surface materials*, stormwater harvest and reuse, or landscaping to store, infiltrate, and evapotranspire stormwater and reduce flows to sewer systems or to surface waters, including but not limited to rain gardens, bioswales, bioretention facilities, and other ecosystem services and nature-based solutions used to treat stormwater as close to the source as possible and improve resiliency.

Greenhouse gas means gas that traps heat in the atmosphere, including but not limited to carbon dioxide, methane, nitrous oxide, and fluorinated gases (such as hydrofluorocarbons).

Ground disturbance means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils that are not *previously disturbed ground*.

Ground surface material means any hard material typically used to cover soils for transportation purposes, including but not limited to asphalt, concrete, pavers, cobblestones, Belgian blocks, bricks, gravel surface or base, or wood.

Hazardous material means lead, lead-containing material (including lead-based paint), asbestos, asbestos-containing material (including floor tile, plaster, insulation, glazing putty, roofing material, and flashing material), radon, and other similar materials detrimental to human health and safety.

High friction surface treatment means application of very high-quality aggregate to the pavement using a polymer binder to restore or maintain pavement friction at existing or potentially high crash areas.

Historic building means a *building* included in, or eligible for inclusion in, the National Register of Historic Places, as an individually listed property or as a *contributing property* to a *historic district*.

Historic building material means *building* material used in the construction of a *historic building* and installed during the period of significance, and any pre-existing *in-kind replacement* of same.

Historic district means a geographically definable area that possesses a significant concentration of *historic buildings*, associated *buildings* and structures, *sites* and objects united historically by plan or physical development that are *historic properties*.

Historic property, as provided in 36 C.F.R. § 800.16(l), means any prehistoric or *historic district*, site, *building*, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. It includes artifacts, records, and remains that are related to and located within such properties, and it includes properties of traditional religious and cultural importance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

Housing means any *building* containing one or more dwelling units, including but not limited to multi-unit apartment *buildings*, single-family homes, administrative and employee dwelling units, and recreation residences, in a variety of *building* types and configurations, including but not

Commented [EH39]: There should be some limiting factors... bioretention facilities can involve a great deal of ground disturbance. "Other ecosystem services and nature-based solutions" are too broad. Perhaps size limits? Depth?

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limited to *buildings* served by an elevator or elevators, “walk-up” *buildings*, rowhouses, semi-detached homes, mobile and manufactured homes, and freestanding homes.

Indian Tribe, as provided in 36 C.F.R. § 800.16(m), means an Indian tribe, band, nation, or other organized group or community, including a native village, regional corporation, or village corporation, as those terms are defined in Section 3 of the Alaska Native Claims Settlement Act (43 U.S.C. § 1602), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

In-kind building materials means new *building materials* that are identical to *historic building materials* in all possible respects, including their composition, design, color, texture, and other physical and visual properties.

In-kind replacement means *replacement* of historic or existing *building materials* with *in-kind building materials*.

Installation means the action or process of placing or fixing something, including but not limited to materials, *mechanical systems* and components, appliances, and equipment, or of being installed, in a particular location.

Lowest profile equipment means EVSE that is the smallest height and width possible that meets the EV charging needs.

Maintenance and repair means activities required to maintain in an operational state, or to bring back to operating condition by *repair* or *replacement* of obsolete, broken, damaged, or deteriorated features, elements, materials, and systems.

Mechanical system means any heating, cooling, indoor air quality, ventilation, dehumidification, air conditioning, plumbing, or electrical system, and the individual elements and components of each system.

~~*Micromobility vehicle* means small, lightweight vehicles such as e-bicycles and scooters, which can be human-powered or electronic, privately owned or shared, and operate at low to moderate speeds of 15 to 30 miles per hour.~~

~~*Micromobility parking* means an area to store for *micromobility vehicles*, whether private vehicles or shared vehicles, including dedicated bicycle docks used in a shared system.~~

~~*Minimally visibly intrusive* means that the EVSE is partially visible but does not detract from the views from or to historic properties.~~

Mitigation measures means any existing, new, or updated materials or actions that serve to address, compensate for, or otherwise resolve *adverse effects* on *historic properties*, and may include research reports, historical documentation, recordation, and other materials and activities.

National Historic Landmark, as provided in 36 C.F.R. § 800.16(p), means a *historic property* that the Secretary of the Interior has designated a *National Historic Landmark*.

Native Hawaiian, as provided in 36 C.F.R. § 800.16(s)(2), means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

Commented [EH40]: The only place in the whole document this term is used is in reference to providing assistance to consulting parties. Since there is no consultation taking place, it is unclear how this would apply. Moreover, there does not appear to be any mitigation offered or stated anywhere for adverse effects.

Native Hawaiian Organization, as provided in 36 C.F.R. § 800.16(s)(1), means any organization which serves and represents the interests of *Native Hawaiians*; has as a primary and stated purpose the provision of services to *Native Hawaiians*; and has demonstrated expertise in aspects of historic preservation that are significant to *Native Hawaiians*.

~~*Parking facilities* mean buildings, structures, land, rights-of-way, facilities, or areas used for parking of motor vehicles.~~

Permeable ground surface materials means permeable pavement, permeable pavers, porous flexible pavement, or other material or system that provides a hard surface, while allowing water to flow through to the underlying soils instead of into the storm sewer.

Potentially historic ground surface materials means any *ground surface material* comprised of pavers, cobblestones, Belgian blocks, bricks, or wood that are 45 years or older.

Previously disturbed ground means soils as determined by a qualified authority not likely to possess intact and distinct soil horizons and have a reduced likelihood of possessing *historic properties* within their original depositional contexts in the area and to the depth to be excavated, and does not mean plowed soils or historic urban deposits, including *previously disturbed right-of-way*.

Previously disturbed right-of-way means areas as determined by a qualified authority where previous construction or other activities have physically altered soils within the three-dimensional *area of potential effects* to the point where there is likely no potential for an archaeologically significant property to remain, including but not limited to: the entire curb-to-curb roadway, existing sidewalks, existing drains, and parking areas, including the prepared substrate constructed to support the infrastructure down to undisturbed or intact soil or subsoil. As-built drawings and plans can be used to help determine the vertical and horizontal dimensions of the previously disturbed areas.

Primary façade means the exterior façade of a *building* which serves as the front or the major entry point of the *building*, provided that a determination of the *primary façade* is made in consultation with the relevant State Historic Preservation Officer, can depends ~~on~~ on a variety of factors, and one *building* may have more than one *primary façade* and or secondary facade.

Primary right-of-way means the street, driveway or corridor, open to the public for transportation purposes, from which a person may best view the *primary façade* of a *building* or, if the *primary façade* is not visible from the public *right-of-way*, the corridor nearest the façade(s) through which people enter the *building*.

Primary space means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other space that contains a *character-defining feature* of a *historic building* ~~or historic climate-friendly transportation facility identified in consultation with the relevant State Historic Preservation Officer.~~

~~*Protected bicycle lane* means a bicycle facility that is physically separated from motor vehicle traffic and is distinct from the sidewalk for the exclusive use by and increased safety of bicyclists.~~

Qualified authority means a ~~qualified professional~~ State or Tribal Historic Preservation Officer, or a person recognized by the relevant *Indian Tribe* or *Native Hawaiian Organization*, respectively, to have expertise (including Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects* to *historic properties* of religious and cultural significance to their *Indian Tribe* or to *Native Hawaiians*, respectively.

Qualified professional means a person who meets the relevant standards for the appropriate

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Commented [EH41]: None of this is accurate in terms of quantifying the potential for archeological or human remains. Parking lots, for example, frequently exist over existing archaeological and human remains as a means of protection. Further disturbance would need to be managed appropriately - so the assumption can't be that the presence of these types of features would mean there is likely no potential for the presence of these resources.

Commented [EH42]: These alone cannot be relied upon. Particularly older as-built plans can show an area of disturbance but may include no information about the presence of cultural resources.

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Commented [EH43]: The definition in the previous draft of "Primary view" included language noting it could include views of secondary sides, rear elevations, etc., which sounded more specific. "Depending on a variety of factors" is too broad - and since this PC eliminates consultation, who would make this call? There must be consultation to determine appropriate primary views.

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Commented [EH44]: We like the inclusive concept of Qualified Authority to allow for tribal and NHO involvement. However, qualified professionals, as defined below, are not "authorities" and should not be added here. The omission of SHPOs is concerning.

corresponding discipline outlined in the Secretary of the Interior’s Professional Qualifications Standards, as amended and annotated.

Recognized design manual means one of the following: Federal Highway Administration Manual on Uniform Traffic Control Devices, American Association of State Highway and Transportation Officials A Policy on Geometric Design of Highways and Streets, National Association of City Transportation Officials (NACTO) Urban Street Design Guide, NACTO Urban Bikeway Design Guide, NACTO *transit* Street Design Guide, NACTO Bike Share Station Siting Guide, or NACTO Urban Street Stormwater.

Records check means a search of relevant *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, and *federal agency* files, records, inventories, and databases, local preservation and/or planning office records, ~~or and~~ other sources recommended by such parties, for information about whether *historic properties*, including properties with traditional religious and cultural significance to one or more *Indian Tribes* or *Native Hawaiian Organizations*, are known to or may exist within an area of potential effects.

Reduce energy use or greenhouse gas emissions means to take an action that: lessens either the amount of energy used or *greenhouse gas* emitted to perform the same task or produce the same result; replaces an energy production source reliant on fossil fuels with a clean energy technology or upgrades a clean energy technology; or achieves *electrification*.

Rehabilitation means the act or process of making possible ~~an efficient~~ compatible use for a property through *repair*, alterations and additions while preserving those portions or features that convey its historical, cultural or architectural values.

Replacement means substitution of new element for an existing element, either in-kind or which may require a change in size, dimension, location, and configuration, in order to improve the function and condition of the element or the broader system of which the element is a part.

Secondary Façade means a façade that, in consultation with the appropriate *qualified authority* and other stakeholders, there is concurrence that they are appropriate for more liberal alteration.

Solar energy system means any addition, alteration, or improvement which is designed to utilize solar energy either of the active type based on mechanically forced energy transfer or of the passive type based on convective, conductive, or radiant energy transfer, or some combination of these types to reduce the energy requirements of that structure from other energy sources, including but not limited solar hot water equipment, *community solar systems*, and solar photovoltaic equipment and all components.

State historic preservation officer, as provided in 36 C.F.R. § 800.16(v), means the official appointed or designated pursuant to Section 101(b)(1) of the National Historic Preservation Act to administer the state historic preservation program or a representative designated to act for the *state historic preservation officer*.

Substitute building materials “building materials that have the potential to match the appearance, physical properties, and related attributes of historic materials well enough to make them alternatives for use in current preservation practice when historic materials require replacement.” ~~“from PB16 means modern, industry standard, natural, composite, and synthetic materials that simulate the appearance, physical properties, and related attributes of historic materials well enough to make them alternatives for use when historic building materials require replacement.”~~

Technical feasibility means the viability, suitability, and practicality of a proposed *undertaking* in

Commented [EH45]: Without this clause, you are setting up an expectation of a grant recipient proceeding with something allowed under the Program Comment but may be prohibited or process restricted by a local ordinance.

Commented [EH46]: There is a problem here if this PC is meant to apply to public grant recipients, for example. The presence of archaeological and other historic property data may be restricted... so a records check, depending upon how it is completed, may not reveal the necessary information.

Commented [EH47]: Again - nothing in the Program Comment about the establishment of an APE.

Commented [EH48]: The actual definition of rehabilitation as provided by the NPS should be used here to eliminate confusion.

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Commented [EH49]: This is the definition of Substitute Building Materials as defined by the NPS. What appears to be proposed here is what the Army has defined as Imitative Substitute Materials - which is a term of their own invention. If the intent is for the latter, that term should be used to avoid confusion and make the distinction that what is being permitted is a more liberal use of material.

light of a range of considerations, including health, safety, energy efficiency, climate resiliency, durability of materials, and sound professional judgment (including architectural, archaeological, or engineering judgment).

~~Transit means mass transportation by a conveyance (including a bus, railcar, locomotive, trolley car, or light rail vehicle) that provides regular and continuing general or special transportation to the public, but does not include school bus, charter, or sightseeing transportation.~~

~~Transit oriented development building means a building within one half mile of an existing or planned transit stop to be developed or redeveloped as part of a federal program or project to promote transit oriented development.~~

Tribal historic preservation officer, as provided in 36 C.F.R. § 800.16(w), means the Tribal official appointed by the *Indian Tribe's* chief governing authority or designated by a Tribal ordinance or preservation program who has assumed the responsibilities of the *state historic preservation officer* for purposes of Section 106 compliance on *Tribal lands* in accordance with Section 101(d)(2) of the National Historic Preservation Act.

Tribal lands, as provided in 36 C.F.R. § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

Undertaking, as provided in 36 C.F.R. § 800.16(y), means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a *federal agency*, including those carried out by or on behalf of a *federal agency*; those carried out with federal financial assistance; and those requiring a federal permit, license or approval.

Zero emissions building means a *building* that is highly energy efficient, does not emit *greenhouse gases* directly from energy use, and is powered solely by clean energy, as further defined in the National Definition of a Zero Emissions Building.

APPENDIX A-1: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

1. Site Work

The following activities do not require further Section 106 review when conducted in areas ~~adjacent to or~~ on the same lot as *housing*:

a. *Rehabilitation, replacement, installation,* and removal of any of the following *elements* less than 45 years old ~~or on or adjacent to a building 45 years old or newer~~, provided ~~there is concurrence of the State Historic Preservation Officer, Tribe or NHO that such activity exclusively affects previously disturbed ground ,or~~ creates no new *ground disturbance*, ~~or has a low likelihood of impacting historic properties as specified below:~~

i. ~~Repair and/or in-kind replacement of~~ ~~C~~concrete and asphalt ground surfaces such as streets, parking areas, driveways, and walkways, including ~~repaving, restriping, replacing~~ ~~Replacing~~ such surfaces with *permeable ground surface materials*, and reducing surface size, but not changing vertical alignment or expanding surface size, ~~provided previous surface is not a character-defining feature of a historic property.~~

ii. ~~Recreational~~ ~~P~~park, playground, and sports equipment such as platforms, guardrails, handrails, climbers, ramps, stairways, ladders, balance beams, fitness equipment, rings, rolls, un- mechanized merry-go-rounds, seesaws, slides, swings, benches, netting, basketball hoops, drinking fountains, and *ground surface materials*, but not *buildings*.

Commented [EH50]: Installation suggests putting something in that was not previously present. One could argue there was some previous ground disturbance, based on the definition provided, so the installation of a new paved parking lot, driveway, etc. could be undertaken with no consultation. This is, in some cases, problematic.

Commented [EH51]: In other words, the elements are less than 45 years old but they can be part of a resource that is a historic property. Throughout this section, however, there are attempts to qualify "unless a character-defining feature of a historic property." If a DOE isn't required, how would anyone even know this? Also, this would cover federally owned buildings as well as grant delegated projects, correct? So even more questionable - how would a grant recipient know?

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Commented [EH52]: Restriping isn't an undertaking, is it?

- iii. Fencing, but not *replacement* or removal of fencing that is a *character-defining feature* of a *historic property*.
 - iv. Wayfinding, address, and identification signage.
 - v. Lighting, such as *building-mounted* lighting and freestanding lighting in parking areas, along driveways or walkways, or in park and playground areas, and including relamping and rewiring, but not including *replacement* or removal of lighting that is a *character-defining feature* of a *historic property*.
 - vi. Water feature, such as decorative fountains, including replumbing, but not *replacement* or removal of a water feature that is a *character-defining feature* of a *historic property*.
 - vii. Curb, gutter, steps, ramp, and retaining wall, but not a retaining wall that is a *character-defining feature* of a *historic property*.
- b. *Maintenance, repair, and in-kind replacement* of any element listed in Section 1.a. of this Appendix.
- c. Any of the following landscaping, grounds, and water management activities:
- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.
 - ii. Planting of grass, shrubs, and other plants, and xeriscaping, provided there is no historic landscape present.
 - iii. ~~Replacement~~ of a tree in its existing location, provided it is not a character defining element of a historic landscape ~~and~~
 - iii-iv. ~~planting~~ of a new tree within 40 feet of the *building*, provided there is no historic landscape present.
 - iv-y. ~~Removal~~ of grass, shrubs, other plants, provided there is no historic landscape present; invasive species, dead plant and tree material, and diseased or hazardous trees.
 - v-vi. ~~Removal~~ of rocks and debris, but not rocks arranged in a rock wall or other feature that is a *character-defining feature* of a *historic property*.
 - vii. ~~Maintenance, repair, rehabilitation, replacement, and installation~~ of *green infrastructure* either in *previously disturbed ground*, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the *building*.
- d. *Maintenance, repair, rehabilitation, replacement, and removal* of the following elements serving *housing*, provided such activity exclusively affects *previously disturbed ground*, ~~or~~ creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:
- i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in auger holes, or other miscellaneous hardware.
 - ii. Below-ground utilities, including underground water, sewer, natural gas, electric, telecommunications, drainage improvements, septic systems, and leaching systems.
 - iii. Vault toilets.
- e. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter that do

Commented [EH53]: These aren't undertakings requiring review - do they need to be here?

Commented [EH54]: There needs to be a qualifier here about extent of ground disturbance both existing and required. Small trees may be fine... but the planting of larger ones should be tied to a knowledge there are no suspected archeology or human remains.

Commented [EH55]: The replacement of a sewer, septic and leaching system is pretty invasive - hard to limit ground disturbance. This should have some limits and may require some sort of check whether or not there is a potential for archaeological resources first.

~~not~~ impact ground surface materials 45 years or older or known historic properties.

f. Installation and removal of temporary construction-related structures, including scaffolding, barriers, screening, fences, protective walkways, signage, office trailers, and restrooms.

2. Work on the Building Exterior

The following activities do not require further Section 106 review when conducted on ~~or near~~ the exterior of housing:

a. Rehabilitation, replacement, and installation of the following elements: on a building less than 45 years old and not known after a records check to be a historic property or located in a national register listed or eligible, or locally designated historic district; on a building the appropriate qualified authority ~~federal agency or another federal agency~~ has determined to not be a listed or eligible historic property within the preceding ten five years; ~~or on the non-primary façade of a historic building or on the non-primary façade of a building whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the primary right of way~~;

- i. Doors, including insulated exterior doors and basement bulkhead doors.
- ii. Windows, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings or window louvers.
- iii. Canopies, awnings, and solar shades.
- iv. Roofing, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.
- v. Improvements that address the requirements of the Americans with Disabilities Act, such as ramps and railings.
- vi. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.
- vii. Solar energy systems.
- viii. Elevator systems.
- ix. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- x. Foundations and seismic and structural repairs, with ground disturbance limited to areas within 10 feet of the building previously disturbed ground.
- xi. Chimneys.
- xii. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.
- xiii. Siding.
- xiv. Energy and water metering devices.

b. Maintenance, repair, and in-kind replacement activities on any building, including:

- i. Maintenance, repair, and in-kind replacement of any element listed in Section 2.a. of this

Commented [EH56]: The other items are testing related... drilling a well is a final action and rather negates the ground-disturbance clause. Maybe, just maybe if it was within a certain distance of an existing well, or replacing an existing...

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Commented [EH57]: Many of these exterior modifications, as proposed, would allow replacement of potentially character defining features or installation of major elements, such as solar panels - simply because the status of the building is unknown, or if it is not visible from the primary right of way, or not on a primary façade. While in some cases this may be OK, this must be evaluated in consultation. So unless this is fleshed out further, this should be limited to newer buildings, etc.

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Commented [EH58]: Undertaking?

Commented [EH59]: Reference to NPS Bulletins on how to do this work would enhance this point.

Appendix.

ii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.

iii. Repointing of mortar joints with mortar ~~similar matching~~ in composition, joint profile, color, hardness, and texture of existing mortar.

iv. Removal of exterior paint or graffiti using non-destructive means, limited to hand scraping, low-pressure water wash of less than 500 psi, heat plates, hot air guns, and chemical paint removal.

c. *Maintenance, repair, rehabilitation, replacement, installation* and removal of any of the following elements ~~on or near a building~~, provided that such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from ~~the a primary right-of-way of either the subject building or an adjacent historic property~~;

i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.

ii. Below-ground utilities, including underground water, ~~sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems~~.

iii. Foundation vents, if painted or finished to match the existing foundation material.

iv. *Green infrastructure*.

v. Gray water systems.

d. Paint on previously painted exterior surfaces.

e. *Rehabilitation, replacement, and installation of clean energy technologies*, provided that:

i. Such technology is located either outside the boundaries of a *historic district*, ~~on a flat roof, or on the a non-primary secondary~~ *façade side* of *historic housing*, ~~or and~~ in a location not otherwise visible from the *primary right-of-way*; and is located on the same lot as or on an adjacent lot to that *housing*, ~~or in the case of a community solar system, in a lot within two blocks or two thousand feet (whichever is longer) of the housing served~~;

ii. Such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*;

iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted *solar energy system* may be visible from the *primary right-of-way* if it is ~~on a flat roof~~, installed with methods that do not irreversibly damage historic materials, ~~sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on and a flat roof has a profile with a slope not to exceed 20%~~.

f. *Maintenance, repair, or in-kind replacement of clean energy technologies*.

g. *Abatement of hazardous materials* where *effects* of the *abatement* are reversible or temporary or not visible from ~~the a primary right-of-way~~, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal or *replacement* of: ~~windows on the character-defining features on a primary~~

Commented [EH60]: Similar is too broad. Given the potential for serious masonry damage if the wrong mortar is selected, this needs to be more specific.

Commented [EH61]: “or near” needs to be further quantified.

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Commented [EH62]: We have to account for impacts to any adjacent historic properties.

Commented [EH63]: Installation of sewer, septic and leaching systems involves a great deal of ground disturbance... it is not really the same as replacing and repairing elements. May want to consider eliminating installation of new for some of these.

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Commented [EH64]: Community solar systems have too many variables that either need to be further fleshed out or omitted from this document.

façade of historic housing or housing ~~whose eligibility for inclusion in the National Register is not known~~; or ~~windows features~~ 45 years or older.

Commented [EH65]: Eligibility should guide decision-making.

3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of housing, and do not result in physical changes visible from ~~the a primary right-of-way~~ or a primary space:

a. *Maintenance, repair, rehabilitation, replacement, and installation, and abatement of hazardous materials*, that take place entirely within the interior of ~~the housing and: in an individual housing unit; in any interior location of housing~~ less than 45 years old and not known after a records check to be a historic property; on housing the state historic preservation officer, federal agency or another federal agency has determined to be not a historic property within the preceding ~~ten-five~~ years; or in any interior space within historic housing that ~~is not~~ has not been identified as a primary space and is devoid of character-defining features. Example activities covered by this Section 3.a. include: removal, alteration (including of width, height, and location), and construction of interior walls; alteration of floors and flooring (including of material, pattern, and texture); alteration of ceilings (including of material, lighting, and height); *installation of mechanical systems* and fire alarm, fire suppression, and security systems and equipment; insulation and air sealing; removal and *installation* of equipment and fixtures (including bathroom, kitchen, and lighting equipment and fixtures); *replacement* and refurbishment of elevator cabs, system-wide upgrades to elevator *mechanical systems, installation of building energy control systems*; and *installation* of code-required signage; removal, alteration, and construction of stairs (when not a character-defining feature); cosmetic improvements; and improvements to address the requirements of the Americans with Disabilities Act.

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Commented [EH66]: Generally, we are not in favor of listing examples unless they are similar enough to paint a clear picture. In this case, the examples amount to a potential gut-rehab. This section should include a list of potential activities, rather than general examples.

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b. *Rehabilitation, replacement and installation* of any of the following elements, in any location other than the locations identified in Section 3.a. of this Appendix, if such activity does not result

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Commented [EH67]: This is confusing.... 3a applies to housing in buildings less than 45 years old, on housing determined not a historic property, or on any historic property as long as not in a primary space. What does this section apply to.... ?

in physical changes visible from ~~the~~ a *primary right-of-way* and has no visual *effect* on the *primary spaces* of historic *housing*:

- i. *Mechanical systems*, including but not limited to heating, ventilating, and cooling components such as heat pumps, electric furnaces and boilers, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, ventilation systems, and refrigeration lines; and fire alarm, fire suppression, and security systems and equipment.
 - ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.
 - iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.
 - iv. Electronic ignition devices.
 - v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.
 - vi. Water conservation measures, such as low flow faucets, toilets, shower heads, urinals, and distribution device controls.
 - vii. Light fixtures, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
 - viii. *Building energy control systems*.
 - ix. EnergyStar (or similarly rated) appliances.
 - x. Battery energy storage systems.
 - xi. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, where such insulation can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.
 - xii. Spray foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch *historic building materials* and can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.
 - xiii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.
- c. *Maintenance, repair, and in-kind replacement* of any of the elements listed in Section 3.b., of any building element, including any existing improvement that addresses the requirements of the Americans with Disabilities Act, and any cosmetic or decorative features of the *housing*.
- d. *Maintenance, repair, in-kind replacement, and rehabilitation* of a skylight, atrium, courtyard, or lightwell; and *installation* of a new skylight, atrium, courtyard, or lightwell that will not be visible

Commented [EH68]: Undertakings?

Commented [EH69]: Should not include replacement of historic light fixtures that are character-defining.

Commented [EH70]: Undertakings?

Commented [EH71]: As written the intent of this section is confusing... are we talking about maintenance, repair and in-kind replacement of all of these elements? Or is the intent to waive review for installation of new ADA, cosmetic or decorative features?

from ~~the a~~ *primary right-of-way* and will not result in interior reconfigurations to *primary spaces* or removal of *historic building materials* in *primary spaces*.

e. *Abatement of hazardous materials* where *effects* of the *abatement* are reversible or temporary or not visible from ~~the a~~ *primary right-of-way*, the *abatement* either exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and the *abatement* does not involve the permanent removal or *replacement* of: ~~windows-character-defining features on the primary façade~~ of *historic housing* or *housing* whose eligibility for inclusion in the National Register is not known; or ~~windows-features~~ 45 years or older.

4. Emergency Work

The following activities related to the exterior or interior of any historic *housing* do not require further Section 106 review when such work relates to an *emergency situation* and takes place within 30 *days* of the occurrence of the *emergency situation* and otherwise complies with 36 C.F.R. § 800.12:

- a. Temporary stabilization that causes no permanent damage to historic *housing* or any other *historic property*, including *installation* of temporary bracing, shoring and tarps.
- b. *Emergency repair* of masonry, concrete, or *building façade* cracks or falling elements.
- c. *Emergency repair* of falling plaster or other elements that pose an immediate and imminent health and safety hazard.
- d. *Abatement of hazardous materials* required to address an *emergency situation*.
- e. *Replacement* and demolition of a deteriorated or damaged mobile or manufactured home.

5. Other Activities

The following activities do not require Section 106 review:

- a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of *housing*.
- b. Feasibility studies related to energy efficiency improvements, *electrification*, improvements incorporating *clean energy technologies*, and other topics relating to *building energy use*.
- c. Leasing, refinancing, acquisition, or purchase by the *federal agency of housing*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- d. Transfer, lease, or sale of a federal government-owned *housing* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such *housing* must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

~~e. Transfer, lease, or sale out of federal ownership or out of federal control of historic housing, provided there are adequate and legally enforceable restrictions or conditions (such as in a deed~~

Commented [EH72]: If it is covered by 800.12 do we need them in an agreement document?

Commented [EH73]: These aren't undertakings

Commented [EH74]: Just clarifying....Are we saying that leasing, refinancing, acquisition and purchase does not require 106 but the activities do - and then this Program Comment would apply?

Commented [EH75]: Transfer, sale or lease out of federal control should go through standard 106 consultation.

~~covenant) to ensure long term preservation of the property's historic significance in accordance with 36 C.F.R. § 800.5(a)(2)(vii).~~

~~f. Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment satisfying the EVSE criteria.~~

Commented [EH76]: There is already an EVSE exemption

APPENDIX A-2: HOUSING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

1. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to housing or on the same lot as housing, after the satisfaction of the identified conditions, exclusions, or requirements:

a. Replacement, installation, or removal of any of the following elements listed in Sections 1.a, 1.d or 1.e of Appendix A-1 which are either less than 45 years old and create new ground disturbance in previously undisturbed soils, or 45 years or older; if

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i. Appropriate a-qualified authority makes a written determination that such activity will have no adverse effects on any historic property; or

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a-ii. if the area of potential effects has been previously field surveyed (acceptable to current state or Tribal standards or within the past ten years) and, if applicable, has been subject to consultation with State and/or Tribal Historic Preservation Officers, -Indian Tribes and Native Hawaiian Organizations without such survey or consultation identifying any historic properties:

Commented [EH77]: Although present in definition, this seems to be the first mention of an APE. The document does not seem to include a procedure for determining the APE.

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i. Any of the elements listed in Sections 1.a. and 1.d. of Appendix A 1, including character-defining features of such elements;

Commented [EH78]: This document structure is confusing, the subject conditions, exclusions and requirements should be identified clearly as such... but it is also hard to determine exactly how this section contrasts with A-1....Is there an easier way to structure this?

ii. Test borings, soil sampling, well drilling, or pere tests more than eight inches in diameter, or that impact ground surface materials 45 years or older or known historic properties;

b. Planting of a new tree 40 feet or more from a building or replacement or installation of green infrastructure either in previously disturbed ground, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the building, if:

Commented [EH79]: This is odd - For this to apply, no historic properties would be present or there would be no adverse effect.... How would the removal of character-defining features not be an adverse effect? 36 CFR 800 is pretty clear.....

b-i. -aAppropriate qualified authority has made a written determination that such planting will have no adverse effects on any historic property.

Commented [EH80]: Included in 1.a - easier to understand

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2. Work on the Building Exterior

The following activities do not require further Section 106 review when conducted on, or in the case of clean energy technologies near (as further provided below), the exterior of housing, after the satisfaction of the identified conditions, exclusions, or requirements:

a. Rehabilitation, replacement, and installation of the following elements listed in Section 2.a. of Appendix A-1 on the exterior of: buildings 45 years or older if:

i. a-qualified authorityAppropriate qualified authority determines that the building is not a historic property; or

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a-ii. buildings 45 years or older determined by a qualified authority to be a historic propertyAppropriate qualified authority determines the building is a historic property and a y, if a qualified professional makes a written determination that such installation or replacement will have no or minimal adverse effects, pursuant to 36 CFR 800.5 , on any character-defining feature of a historic building and, once complete, verifies the work was completed as intended.;

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i. Any of the elements listed in Section 2.a. of Appendix A 1, including elements in

~~locations other than those identified in that Section.~~

Commented [EH81]: Moved to 2a for clarity.

b. Rehabilitation, replacement, or installation of any of the following elements listed in Section 2.c of Appendix A-1 ~~on~~, or in the case of clean energy technologies, when located or configured in a manner other than that identified in Section 2.e. of Appendix A-1 ~~near (as further provided below);~~ a building, which creates new ground disturbance on previously undisturbed ground, if:

~~b.i.~~ ~~a~~ Appropriate qualified authority makes a written determination that such activities will have no adverse effects on any historic property:

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~~b.ii.~~ ~~when located or configured in a manner other than that identified in Section 2.e. of Appendix A-1.~~

Commented [EH82]: Moved for clarity

c. Replacement of exterior historic building materials of historic housing with in-kind or substitute building materials after the federal agency, with the assistance of ~~a~~ the appropriate qualified authority, conducts the following selection procedure:

i. Characterize existing historic building materials in terms of condition, design, material properties, performance (including insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other hazardous materials;

ii. Next, determine, based on an evaluation of technical feasibility and economic feasibility, if historic building materials can be repaired or if they must be replaced;

iii. Next, if replacement is required, identify potential in-kind and substitute building materials and evaluate their technical feasibility and economic feasibility;

iv. Finally, based on such evaluation, select the most appropriate in-kind or substitute building material;

provided, however, that a federal agency may only utilize this selection procedure if such replacement or demolition does not create ground disturbance, creates ground disturbance exclusively on previously disturbed ground, or, in the opinion of a qualified authority, has no adverse effects on any historic property.

Commented [EH83]:

Commented [EH84R83]: Reference to the SOI Standards for Substitute Materials would enhance this section.

d. The abatement of hazardous materials, where such activity is irreversible or permanent or will be visible from the primary right-of-way, create new ground disturbance, or result in the permanent removal or replacement of: windows on the primary façade of a historic building or a building whose eligibility for inclusion in the National Register is not known; or windows 45 years or older, if the appropriate qualified authority makes a written determination that such activity will have no adverse effects on any historic property.

3. Work on the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of housing, after the satisfaction of the identified conditions, exclusions, and requirements:

a. In addition to those activities listed in Section 3 of Appendix A-1, maintenance, repair, rehabilitation, replacement, and installation, and the abatement of hazardous materials, where such activity results in physical changes to a historic building visible from the primary right-of-way or has a visual effect on the primary spaces of a historic building, ~~i~~:

~~a.i.~~ if a qualified authority makes a written determination that such activity has no adverse effects on any historic property.

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APPENDIX B-1: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW

1. Site Work

The following activities do not require further Section 106 review when they are conducted in areas adjacent to a building or on the same lot as a building, and when conducted primarily to reduce energy use or greenhouse gas emissions of the building or to enhance climate resilience of the building:

a. Rehabilitation, replacement, installation, and removal of any of the following elements less than 45 years old, provided such activity exclusively affects previously disturbed ground or creates no new ground disturbance, and not including replacement or removal of any element that is a character-defining feature of a historic property:

- i. Fencing.
- ii. Lighting, such as building-mounted lighting and freestanding lighting in parking areas, along driveways and walkways, in park and playground areas, and in other areas, and including relamping and rewiring.
- iii. Water feature, such as decorative fountains, including replumbing.
- iv. Curb, gutter, steps, ramp, and retaining wall.

b. Maintenance, repair, and in-kind replacement of any element listed in Section 1.a. of this Appendix.

c. Any of the following landscaping, grounds, and water management activities where the existing landscape or elements are not historic or a character defining feature of a historic property:

- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.
- ii. Planting of any of the following that are native, naturalized, drought-adapted, drought-resistant, drought-tolerant, water-wise, or xeric: grass, shrubs, and other plants; and xeriscaping.
- iv. Replacement of a tree in its existing location and planting of a new tree within 40 feet of the building.
- v. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.
- vi. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a character-defining feature of a historic property.
- vii. Maintenance, repair, rehabilitation, replacement, and installation of green infrastructure either in previously disturbed ground, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the building.
- viii. Removal of concrete or asphalt ground surfaces or replacement of such surfaces with permeable ground surface materials.
- ix. The following activities conducted to address fire threats within 200 feet of a building or auxiliary structure:

Commented [EH85]: What does adjacent mean?

Commented [EH86]: This is entirely too broad of a definition or category of undertakings. It seems odd that the first category of undertakings is housing (a property type), and the second category is a wide range of possible undertakings being completed to meet a policy goal (a program?) One is more specific (and in our view, better for a program alternative), and the other is more broad though the actions are similar. It makes for a tedious agreement document.

Commented [EH87]: So again - we have an element that itself may be less than 45 years old but is on a property that is more than 45 years old, and historic. The intent here should be clarified - are we talking about buildings, elements, or both?

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Commented [EH88]: Are these really undertakings that would be primarily to reduce energy use, greenhouse gas emissions or improve climate resilience? Fencing? Fountains? Maybe lighting if the type of lighting chosen were energy efficient....

Commented [EH89]: What about historic landscapes... or landscapes that themselves may be character-defining features?

Commented [EH90]: None of these are a real problem - but what do they have to do with energy reduction, emissions reduction or climate resilience? These are just general maintenance tasks. Are they even undertakings?

- a. Disposal of heavy accumulations of ground litter and debris.
- b. Removal of small conifers growing between mature trees, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*.
- d. *Maintenance, repair, rehabilitation, replacement* and removal of the following elements, provided such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the *primary right-of-way*:
 - i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.
 - ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.
 - iii. Vault toilets.
- e. Test borings, soil sampling, ~~well drilling~~, or perc tests less than eight inches in diameter that do not impact *ground surface materials* 45 years or older or known historic properties.
- f. *Installation* and removal of temporary construction-related structures, including scaffolding, barriers, screening, fences, protective walkways, signage, office trailers, and restrooms.

2. Work Related to the Building Exterior

The following activities do not require further Section 106 review when they are conducted on or near the exterior of a *building* and when they are conducted primarily to *reduce energy use or greenhouse gas emissions* of the *building*, or to enhance the *climate resilience* of the *building*:

- a. *Rehabilitation, replacement, and installation* of any of the following elements: on a *building* less than 45 years old and not known after a *records check* to be a *historic property* or located in a national register listed or eligible, or locally designated *historic district*; on a *building* ~~the an appropriate qualified authority federal agency or another federal agency~~ has determined to not be a *historic property* within the preceding ~~ten-five years~~; ~~or on the non-primary façade of a historic building or on the non-primary façade of a building whose eligibility for inclusion in the National Register is not known and in a location not otherwise visible from the primary right of way~~.
 - i. Doors, including insulated exterior doors.
 - ii. Windows, including storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
 - iii. Canopies, awnings, and solar shades.
 - iv. Roofing, including cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; white roofs or cool roofs; and green, sod, or grass roofs.
 - v. *Mechanical systems* and fire alarm, fire suppression, and security systems and equipment.
 - vi. *Solar energy systems*.

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Commented [EH91]: Again, we do not support the replacement of these components on historic buildings without any consultation.

Commented [EH92]: Isn't this covered under "e" below?

- vii. Elevator systems.
- viii. Chimneys.
- ix. Vents, such as continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, and frieze board vents.
- x. Siding.
- xi. Energy and water metering devices.

b. *Maintenance, repair, and in-kind replacement* of the following elements on, or in the case of *clean energy technologies* near (as further provided below), any *building*:

- i. Any element listed in Section 2.a. of this Appendix.
- ii. *Clean energy technologies*.
- iii. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.
- iv. Repointing of mortar joints with mortar similar-matching in composition, joint profile, color, hardness, and texture of existing mortar.

c. *Maintenance, repair, rehabilitation, replacement, installation, and removal* of any of the following elements on or near a building, provided that such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the-a primary right-of-way of either the subject building or an adjacent historic property:

- i. Above-ground utilities, including overhead wires, anchors, crossarms, transformers, monopole utility structures placed in augur holes, and other miscellaneous hardware.
- ii. Below-ground utilities, including underground water, sewer, electric, telecommunications, drainage improvements, septic systems, and leaching systems.
- iii. Foundation vents, if painted or finished to match the existing foundation material.
- iv. *Green infrastructure*.
- v. Gray water systems.

d. Paint on previously painted exterior surfaces.

e. *Rehabilitation, replacement, and installation of clean energy technologies*, provided that:

- i. Such technology is located either outside the boundaries of a *historic district*, on a flat roof, or on the non-primary a secondary facade side of a *historic building*, or in a location not otherwise visible from the-a primary right-of-way; and is located on the same lot as or on an adjacent lot to that *building or buildings*, or in the case of a community solar system, in a lot within two blocks or two thousand feet (whichever is longer) of the building or buildings served;
- ii. Such activity exclusively affects *previously disturbed ground* or creates no new *ground disturbance*, and further provided that such activity does not result in physical changes visible from the-a primary right-of-way;

Commented [EH93]: Near needs to be quantified

Commented [EH94]: We have to account for impacts to any adjacent historic properties.

Commented [EH95]: As previously noted, installing sewer, septic and leaching systems can produce a lot of ground disturbance. May want to consider eliminating installation of new.

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Commented [EH96]: The way this is worded as an “or,” a community solar system could be installed offsite within two blocks in a historic district. There should be some qualifiers added regarding location and visibility.

~~iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted solar energy system may be visible from the primary right-of-way if it is on a flat roof, installed with methods that do not irreversibly damage historic materials and has a profile with a slope not to exceed 20%.~~

~~iii. Notwithstanding Section 2.e.i. of this Appendix, a roof-mounted solar energy system may be visible from the primary right-of-way if it is installed with methods that do not irreversibly damage historic materials, sits close to the roof, and has a profile that matches the roof profiles (including pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.~~

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3. Work Related to the Building Interior

The following activities do not require further Section 106 review when they are conducted in the interior of a building and when they are conducted primarily to reduce energy use or greenhouse gas emissions of the building, or to enhance the climate resilience of the building:

- a. Maintenance, repair, rehabilitation, replacement, and installation of any of the following elements:
 - i. Thermal insulation, other than spray foam, in or around walls, floors, ceilings, attics, crawl spaces, ducts, water heater tanks, water heating pipes, refrigeration lines, and foundations, where such insulation can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.
 - ii. Spray foam, other than closed cell spray foam or extruded polystyrene, that does not directly touch historic building materials, and can be installed and removed without damaging exterior walls, even if such insulation increases interior wall thickness.
 - iii. Caulk, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and mechanical systems.
- b. Maintenance, repair, rehabilitation, replacement and installation of any of the following elements, if such activity does not result in physical changes visible from the primary right-of-way, and has no visual effect on the primary spaces of a historic building:
 - i. Mechanical systems, including but not limited to heating, ventilating, and cooling components such as furnaces, heat pumps, electric furnaces, vented space heaters, electric heat systems, electronic ignition devices, central air conditioners, window air conditioners, heat pumps, evaporative coolers, condensers, compressors, heat exchangers, air exchangers, and refrigeration lines.
 - ii. Waste heat recovery devices, including desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment.
 - iii. Adjustable speed drives such as fans on mechanical equipment including air handling units, cooling tower fans, and pumps.
 - iv. Electronic ignition devices.
 - v. Duct and pipe systems, including return ducts, diffusers, registers, air filters, and thermostatic radiator controls on steam and hot water heating systems.
 - vi. Water conservation measures, such as low flow faucets, toilets, shower heads, urinals,

Commented [EH97]: Undertaking?

and distribution device controls.

vii. Light fixtures, bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.

Commented [EH98]: Should not allow for replacement of historic light fixtures that are character-defining.

viii. *Building energy control systems.*

ix. EnergyStar (or similarly rated) appliances.

Commented [EH99]: Undertaking?

x. Battery energy storage systems.

4. Other Activities

The following activities do not require Section 106 review:

a. Energy audits, life cycle analyses, energy performance modeling, and retrocommissioning studies of *buildings*.

b. Feasibility studies related to energy efficiency improvements, *electrification*, improvements incorporating *clean energy technologies*, and other topics relating to *building* energy use.

Commented [EH100]: Not undertakings...

c. Leasing, refinancing, acquisition, or purchase by the *federal agency* of energy efficiency, *electrification*, and *clean energy technologies*, provided that any changes in use or any physical activities related to the *maintenance, repair, rehabilitation, replacement, or installation* of such technologies must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.

Commented [EH101]: Just clarifying....Are we saying that leasing, refinancing, acquisition and purchase does not require 106 but the activities do - and then this Program Comment would apply?

~~d. Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment satisfying the EVSE criteria.~~

APPENDIX B-2: CLIMATE-SMART BUILDING-RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

1. Site Work

The following activities do not require further Section 106 review when conducted in areas adjacent to a building or on the same lot as a building, and when conducted primarily to reduce energy use or greenhouse gas emissions of the building or to enhance climate resilience of the building, after the satisfaction of the identified conditions, exclusions, or requirements:

Commented [EH102]: Define adjacent

Commented [EH103]: As with the other section, this would read better if the elements were listed first in the text and then the conditions called out. Instead of the other way around.

a. Rehabilitation, replacement, installation, and removal of any element listed in Section 1.a of Appendix B-1, or in 1.d or Appendix B-1, of the following elements which are either less than 45 years old and create new ground disturbance in previously undisturbed soils, or 45 years or older, if:

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i. a qualified authority makes a written determination that such activity will have no adverse effects on any historic property; or

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ii. if the area of potential effects has been previously field surveyed (acceptable to current state or Tribal standards or within the past ten years) and, if applicable, has been subject to consultation with a State or Tribal Historic Preservation Officer, Indian Tribes and Native Hawaiian organizations without such survey or consultation identifying any historic properties

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~~i. Any element listed in Section 1.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section.~~

Commented [EH104]: It is entirely too confusing to attempt to waive limiting conditions in a section articulating conditions for approval.

~~ii. Any element listed in Section 1.d. of Appendix B-1, unrestricted by any limiting conditions found in such Section.~~

Commented [EH105]: Same as above

b. Planting of a new tree 40 feet or more from a building, or replacement or installation of green infrastructure either in previously disturbed ground, in areas within 10 feet of existing paved areas, or in areas within 10 feet of the building, if:

i. a qualified authority makes a written determination that such planting will have no adverse effects on any historic property.

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2. Work Related to the Building Exterior

The following activities do not require further Section 106 review when conducted on, or in the case of clean energy technologies near (as further provided below), the exterior of a building, and when conducted primarily to reduce energy use or greenhouse gas emissions of the building or to enhance climate resilience of the building, after the satisfaction of the identified conditions, exclusions, or requirements:

a. Rehabilitation, replacement, and installation of the following elements, any element listed in Section 2.a. of Appendix B-1 visible from the a primary facade or primary right-of-way and on the exterior of: buildings 45 years or older if:

i. an appropriate qualified professional authority determines that the building is not a historic property; or

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ii. buildings 45 years or older determined by an appropriate qualified professional authority to be a historic property, if a qualified professional makes and they make a written determination that such installation or replacement will have no or minimal adverse

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~~effects on any character-defining feature of a historic building; provided, however, that **an** the analysis of adverse effects, following 36 CFR 800.5 must consider technical feasibility and economic feasibility, including long-term operational costs and climate resilience of the building upon which elements are installed or replaced;~~

~~i.iii. Any element listed in Section 2.a. of Appendix B-1, unrestricted by any limiting conditions found in such Section.~~

~~b. Rehabilitation, replacement, or installation of any of the following elements listed in Section 2.c. of Appendix B-1 or clean energy technologies when located or configured in a manner other than identified in Section 2.c. of Appendix B-1 on or near a building, which create new ground disturbance on previously undisturbed ground if:~~

~~b.i. A qualified authority makes a written determination that such activities will have no adverse effects on any historic property, building, which create new ground disturbance on previously undisturbed ground, if a qualified authority makes a written determination that such activities will have no adverse effects on any historic property:~~

~~i. Any of the elements listed in Section 2.c. of Appendix B-1.~~

~~ii. Clean energy technologies, when located or configured in a manner other than that identified in Section 2.c. of Appendix B-1.~~

~~c. Replacement of historic building materials of historic housing with in-kind or substitute building materials to improve energy efficiency after the federal agency, with the assistance of a qualified professional authority as needed, conducts the following selection procedure:~~

- ~~i. Characterize existing historic building materials in terms of condition, design, material properties, performance, safety, and presence of hazards such as lead-based paint, asbestos, or other hazardous materials;~~
- ~~ii. Next, determine, based on an evaluation of technical feasibility and economic feasibility, if historic building materials can be repaired or if they must be replaced;~~
- ~~iii. Next, if replacement is required, identify potential in-kind and substitute building materials and evaluate their technical feasibility and economic feasibility;~~
- ~~iv. Finally, based on such evaluation, select the most appropriate in-kind or substitute building material;~~

~~provided, however, that a federal agency may only utilize this selection procedure if such replacement or demolition does not create ground disturbance, exclusively affects previously disturbed ground, or, in the opinion of a qualified authority, has no adverse effects on any historic property.~~

3. Work Related to the Building Interior

The following activities do not require further Section 106 review when conducted in the interior of a building, and when conducted primarily to reduce energy use or greenhouse gas emissions of the building or to enhance climate resilience of the building, after the satisfaction of the identified conditions, exclusions, or requirements:

a. In addition to those activities listed in Section 3 of Appendix B-1, maintenance, repair, rehabilitation, replacement, and installation, and the abatement of hazardous materials, where

Commented [EH106]: This is too general. Operational costs should already be considered as a part of the economic feasibility. Considering climate resilience... this entire suite of undertakings is supposedly already being considered as a part of climate resilience.... Repetitive. Though that term is problematic as it is substantively broad.

Commented [EH107]: Again, this is confusing... Waiving limiting conditions in a section articulating limiting conditions is just deliberately confusing. Beyond that, this provision essentially lets an agency do anything to the exterior of a historic property without review as long as its in the name of energy efficiency and, in their own determination, has "minimal adverse effects". We suggest citing 36 CFR 800.5 as the process that should be followed to assess adverse effects. Also... is there a reason this provision, which is nearly identical, contains the technical and economic feasibility provision while the Housing provision does not? Inconsistent...

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Commented [EH109]: Is this meant to be here in this section?

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such activity results in physical changes to a historic *building* visible from the *primary right-of-way* or has a visual *effect* on the *primary spaces* of a historic *building*, if:

a.i. a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*.

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~~APPENDIX C 1: CLIMATE FRIENDLY TRANSPORTATION RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW~~

~~1. Work on Ground Surfaces~~

~~The following activities do not require further Section 106 review, provided they do not result in the demolition or removal of potentially historic ground surface materials, and they are located entirely within the previously disturbed right of way:~~

~~a. Maintenance, repair, rehabilitation, replacement, and installation of the following elements when used for or incorporated into pedestrian, bicycle, micromobility vehicle, or transit infrastructure:~~

~~i. Ground surface material, including installation of slurry seals, overlays, and seal coatings; sealing and repairing cracks; milling and re-paving; repair of potholes; and restoration after utility installation.~~

~~ii. Curb.~~

~~iii. Sidewalk.~~

~~iv. Bulb out.~~

~~v. Ramp.~~

~~vi. Crosswalk, including a raised crosswalk across a roadway and a raised intersection.~~

~~vii. Mark on the ground surface for visibility and delineation, including striping for bicycle lanes, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, bicycle parking, micromobility parking, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.~~

~~viii. Detectable warning on or before a curb, entry point, crosswalk, or accessible facility.~~

~~ix. Island, including a pedestrian island to reduce crossing distance or improve visibility, and a corner island to separate bicycles from motor vehicles or enable a protected bicycle queuing area or motor vehicle waiting zone.~~

~~b. Maintenance, repair, rehabilitation, replacement, and installation of the following ground surface materials and elements:~~

~~i. High friction surface treatment.~~

~~ii. Cool pavement.~~

~~iii. Permeable ground surface materials.~~

~~iv. Rumble strip.~~

~~vii. Traffic calming device, such as speed hump, speed table, raised crosswalk, and raised intersections.~~

~~e. Elevation of no more than 10 inches of the existing ground surface to maintain, create, or connect pathways for pedestrians, bicyclists, or micromobility vehicle users, or to facilitate boarding and disembarking at transit facilities.~~

Commented [EH110]: The rest of this document is either building or building-related. To maintain focus, we are not in favor of including transportation related activities. Many of these actions are already covered in existing processes that allow for more community engagement - which is appropriate. At minimum, if the sense is the ACHP must proceed with something, this should be a different document.

~~2. Work Involving Fixtures and Equipment~~

~~The following activities do not require further Section 106 review, provided they do not result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials*, they are located entirely within the *previously disturbed right of way*, and they follow the specifications of a *recognized design manual* (if and to the extent covered in any such manual):~~

~~a. Maintenance, repair, rehabilitation, replacement, and installation of the following elements when used for or incorporated into pedestrian, bicycle, *micromobility vehicle*, or transit infrastructure:~~

~~i. Bicycle rack.~~

~~ii. Micromobility parking corral.~~

~~iii. Bicycle rail or wheel stop no taller than 6 inches.~~

~~iv. Flex post no taller than 36 inches and no larger in circumference than 22 inches.~~

~~v. Bollard no taller than 48 inches and no larger in diameter than 12 inches.~~

~~vi. Concrete or stone block no taller than 24 inches and no wider than 6 inches, to protect bicycle parking or micromobility parking or to delineate a pedestrian pathway.~~

~~vii. Sign, signal, traffic control device, and signalization, including any such elements that address the requirements of the Americans with Disabilities Act.~~

~~viii. Ticket dispensing structure, fee collection structure, interpretive wayside exhibit structure, and single post metal or wooden sign 5 feet or less in height and 2 square feet or less in cross-section area, not including provisions for solar power.~~

~~ix. Camera, intelligent transportation systems, and other technological equipment limiting, removing, or identifying unauthorized traffic from pathways dedicated to walking, biking, micromobility vehicle use, or transit use.~~

~~x. Temporary construction fencing, but not grading, creating a soil borrow pit, or other significant excavation.~~

~~b. Maintenance, repair, rehabilitation, replacement, and installation of street furniture, including the following elements, provided that such activity does not result in the removal of historic street furniture:~~

~~i. Bench.~~

~~ii. Table.~~

~~iii. Freestanding planter.~~

~~iv. Street light.~~

~~v. Shelter for transit users with a combined dimension (length plus width plus height) less than 30 linear feet and with advertising space no greater than 24 square feet visible at any one time, and maintenance, repair, and in-kind replacement of any other such shelter.~~

~~e. Maintenance, repair, rehabilitation, and in-kind replacement of the following elements:~~

- ~~i. Catenary system.~~
- ~~ii. Tracks, including ballasts and ties.~~
- ~~iii. Camera, mast, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.~~

~~3. Work Relating to Vegetation and Landscapes~~

~~The following activities occurring within the same right of way or on the same lot as climate friendly transportation infrastructure do not require further Section 106 review, provided they do not result in the demolition or removal of potentially historic ground surface materials, and further provided that they exclusively affect previously disturbed ground or create no new ground disturbance:~~

~~a. Any of the following landscaping, grounds, and water management activities:~~

- ~~i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, and maintaining, as applicable, grass, shrubs, other plants, and trees.~~
- ~~ii. Planting of any of the following that are native, naturalized, drought adapted, drought-resistant, drought-tolerant, water wise, or xeric: grass, shrubs, and other plants; and xeriscaping.~~
- ~~iii. Replacement of a tree in its existing location and planting of a new tree on, along, or within a street that already has street trees.~~
- ~~iv. Removal of grass, shrubs, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.~~
- ~~v. Removal of rocks and debris, but not rocks arranged in a rock wall or other feature that is a character defining feature of a historic property.~~

~~b. Maintenance, repair, rehabilitation, replacement, or installation of green infrastructure or landscaping to delineate pedestrian pathways or bicycle lanes, provided such green infrastructure or landscaping follows the specifications of a recognized design manual (if and to the extent covered in any such manual).~~

~~4. Work on Bridges~~

~~The following activities related to a bridge built to serve pedestrian, bicycle, micromobility vehicle, or transit use do not require further Section 106 review, provided they do not result in the demolition or removal of potentially historic ground surface materials; further provided that they exclusively affect previously disturbed ground or create no new ground disturbance; and further provided that the bridge is: either less than 45 years old and not known after a records check to be a historic property, or has been determined by the federal agency or another federal agency to not be a historic property within the preceding ten years:~~

- ~~a. Maintenance, repair, rehabilitation, and in-kind replacement of drains, joints, joint seals, concrete decks, parapet, rail, concrete, steel elements, bearings, retaining walls, and bridge machinery.~~
- ~~b. Cleaning and washing.~~

- ~~e. Conducting electrochemical extraction and cathodic protection.~~
- ~~d. Mitigating cracks, including pin and hanger replacement and other retrofits.~~
- ~~e. Implementing countermeasures against scour.~~

5. Other Activities

The following activities do not require Section 106 review:

- a. Leasing, refinancing, acquisition, or purchase by the federal agency of:
 - ~~i. A railway right of way for the maintenance, development, or expansion of either rail-to-trail pathways or passenger rail service;~~
 - ~~ii. A transit-oriented development building; or~~
 - ~~iii. Fleets of bicycles, hybrid or electric vehicles, or electric locomotives,~~provided that any physical activities related to such properties must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.
- ~~b. Transfer, lease, or sale of a federal government-owned climate-friendly transportation facility or transit-oriented development building from one federal agency to another federal agency, provided that any changes in use or any physical activities related to the maintenance, repair, rehabilitation, replacement, or installation of such facility must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.~~
- ~~e. Transfer, lease, or sale out of federal ownership or out of federal control of a historic climate-friendly transportation facility or transit-oriented development building, provided there are adequate and legally enforceable restrictions or conditions (such as in a deed covenant) to ensure long-term preservation of the property's historic significance in accordance with 36 C.F.R. § 800.5(a)(2)(vii).~~
- ~~d. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, micromobility vehicle, or transit uses, including "play streets," "school streets," "safe route to school" streets, or "open streets," provided that any physical activities related to such decisions, including but not limited to the maintenance, repair, rehabilitation, replacement, or installation of streets for the purpose of limiting motor vehicle access, must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.~~
- ~~e. Maintenance, repair, rehabilitation, replacement, and installation of electric vehicle supply equipment satisfying the EVSE criteria.~~

~~APPENDIX C 2: CLIMATE FRIENDLY TRANSPORTATION RELATED ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS~~

~~The following activities do not require further Section 106 review after the satisfaction of the identified conditions, exclusions, or requirements:~~

~~1. Work on Ground Surfaces~~

~~The following activities do not require further Section 106 review, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:~~

- ~~a. Elevation of the existing ground surface by more than 10 inches, or that will result in the demolition or removal of *potentially historic ground surface materials*: to maintain, create, or connect pathways for pedestrians, bicyclists, or *micromobility vehicle* users, or to facilitate boarding and disembarking at *transit* facilities.~~

~~2. Work Involving Fixtures and Equipment~~

~~The following activities do not require further Section 106 review, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:~~

- ~~a. Any activities listed in Section 2.a. of Appendix C-1 that will result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials*, or create new *ground disturbance* in previously undisturbed soils, or result in the removal of historic street furniture.~~
- ~~b. *Rehabilitation, replacement, and installation* of a shelter for *transit* users with a combined dimension (length plus width plus height) 30 linear feet or more, or with advertising space more than 24 square feet visible at any one time.~~
- ~~c. *Installation* of the following new elements that will result in the demolition or removal of *potentially historic ground surface materials* or *historic building materials* or that create new *ground disturbance* in previously undisturbed soils:
 - ~~i. Catenary system.~~
 - ~~ii. Tracks, including ballasts and ties.~~
 - ~~iii. Camera, mast, wiring, and other equipment and fixtures used for automatic traffic enforcement, to monitor motor vehicle traffic, or for security purposes.~~~~

~~3. Work Relating to Vegetation and Landscapes~~

~~The following activities do not require further Section 106 review, even if they create new *ground disturbance* in previously undisturbed soils, if a *qualified authority* makes a written determination that such activity will have no *adverse effects* on any *historic property*:~~

- ~~a. Planting of a new tree on, along, or within a street that has not previously had street trees, or in other locations where such planting is intended to improve the experience for pedestrians, bicyclists, *micromobility vehicle* users, or *transit* users.~~
- ~~b. *Maintenance, repair, rehabilitation, replacement, or installation* of *green infrastructure* and landscaping related to pedestrian pathway or *bicycle lane* delineation that will result in the~~

~~demolition or removal of potentially historic ground surface materials or will create new ground disturbance.~~

~~4. Work on Bridges~~

~~The following activities do not require further Section 106 review, even if they create new ground disturbance in previously undisturbed soils, if a qualified authority makes a written determination that such activity will have no adverse effects on any historic property:~~

~~a. Activities listed in Section 4 of Appendix C-1 and conducted on historic bridges.~~

~~b. Rehabilitation, replacement, or installation of a bridge built to serve pedestrian, bicycle, micromobility vehicle, or transit use.~~

APPENDIX D: FORMAT FOR AUTHORIZATION BY AN INDIAN TRIBE FOR USE OF THIS PROGRAM COMMENT ON ITS TRIBAL LANDS

On behalf of [NAME OF INDIAN TRIBE] and as a duly authorized representative of such Tribe, I authorize federal agencies to utilize the Program Comment on Housing on the Tribal Lands of the [NAME OF INDIAN TRIBE]. This authorization is in effect until the withdrawal or termination of the Program Comment or on the date of receipt by the Executive Director of the Advisory Council on Historic Preservation that [NAME OF INDIAN TRIBE] has rescinded its authorization, which it may do at any time.

For further information, please contact: [Tribal Contact; Name and Contact Information].

Signed by:

[Signature]

Name:

Title:

Date:

Acknowledged and accepted by the ACHP:

[Signature – leave blank]

Name:

Title:

Date: