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

Dear Ms. Bronin:

This letter is written on behalf of the National Conference of State Historic Preservation Officers (“NCSHPO”) to express concerns about the lawfulness the proposed revised “Program Comment” dated November 15, 2024 (hereinafter referred to as “Revised Draft Program Comment”), which was recently circulated to the members of the Advisory Council on Historic Preservation (“ACHP”) and members of the public for comment. The Revised Draft Program Comment would effectively exempt numerous undertakings from any obligation to comply with the procedures set forth in Section 106 of the National Historic Preservation Act (“NHPA”), 54 U.S.C. § 306108 and 36 C.F.R. Part 800.

NCSHPO is providing a detailed substantive critique of the Revised Draft Program Comment simultaneously with this letter. The focus of this letter, however, is on overarching legal issues regarding whether the Revised Draft Program Comment can lawfully be used for the purpose of enacting exemptions and new rules of broad applicability without following the procedures for notice and comment rulemaking, as required by the Administrative Procedure Act (“APA”), the NHPA, and the ACHP’s own regulations.

- I. The Program Comment Violates the NHPA and Its Implementing Regulations by Proposing Numerous Exemptions from Section 106 Without following the Statutory and Regulatory Requirements for Developing Exemptions.
 - A. The Undertakings in Appendix A Are Exemptions from Section 106.

Section 214 of the NHPA confers on the ACHP specific authority to exempt categories of actions or undertakings from Section 106. 54 U.S.C. § 304108(c). Under this authority, the ACHP has developed various “Program alternatives” to “implement section 106 and substitute them for all or part of” the Section 106 regulations. 36 C.F.R. § 800.14(a). These alternative procedures include “program comments” and “exemptions for a program or category of undertakings.” *Id.* §§ 800.14(c), 800.14(e).

The Section 106 regulations make clear that program comments differ from exemptions in that program comments establish alternative procedures for agency Section 106 compliance, not exemptions from any further Section 106 review. Unlike exemptions, a program comment must “specify the steps the agency official will take to ensure that the effects are taken into account.” *Id.* § 800.14(e)(1). By contrast, where a category of undertakings is exempted from Section 106 review, no further consultation or “review under the provisions of subpart B” (i.e. the normal Section 106 process) is required. *Id.* § 800.14(c)(1).

The vast majority of the categories of undertakings identified in Appendix A of the Revised Draft Program Comment meet this regulatory definition of exemption. They do not constitute a program alternative because they do not “specify the steps the agency official will take to ensure that the effects are taken into account.” *Id.* § 800.14(e)(1). Rather, the Revised Draft Program Comment clearly states that undertakings identified in Appendix A “do not require further Section 106 review.” Revised Draft Program Comment, at 20. Accordingly, they are exemptions and not alternative procedures, and the ACHP must comply with the procedures and criteria set forth in its regulations and in the statute for developing exemptions, which differ from the procedures for developing program comments.

B. The ACHP Has Not Followed the Statutory and Regulatory Procedures for Developing Exemptions from Section 106.

While the vast majority of the undertakings listed in Appendix A of the Revised Draft Program Comment are clearly exemptions, the process and criteria set forth in the NHPA and the regulations governing the adoption of exemptions was not followed.

1. The Process For Adoption of Exemptions Has Not Been Followed.

The process for adopting exemptions is distinctly different than the process for adopting program comments. Most notably, “[t]he proponent of the exemption shall publish notice of any approved exemption in the Federal Register.” 36 C.F.R. § 800.14(c)(8). Here, however, the ACHP followed the process for program comments initiated by the ACHP itself, which merely requires that the ACHP “notify and consider the views of SHPOs/THPOs on the proposed program comment,” as well as “Indian tribes and Native Hawaiian organizations.” *Id.* § 800.14(e)(3) and (4). With respect to the exemptions contained in the Revised Program Comment, the ACHP must comply with the procedures for exemptions set out in 36 C.F.R. § 800.14(c), including publication of the approved exemption in the Federal Register.¹ The prior notice and comment opportunity from many years ago when 36 C.F.R. § 800.14(c) was adopted is insufficient to satisfy this requirement that notice of the approved exemption be published in

¹ For example, when the ACHP proposed and adopted an exemption in 2022 for the installation of electric vehicle supply equipment, the draft of the proposed exemption was published in the Federal Register, 87 Fed. Reg. 26,771-73 (May 5, 2022), and the final exemption was published as well. *Id.* at 66,201-04 (Nov. 2, 2022).

the Federal Register, since, as discussed below, the exemptions in the Revised Draft Program Comment do not satisfy the criteria for exemptions set forth in the regulations.

Moreover, the NHPA establishes statutory procedures governing the adoption of exemptions. Section 214 of the NHPA also requires “the concurrence of the Secretary [of the Interior]” in order for ACHP to adopt an exemption. 54 U.S.C. § 304108(c). While the Secretary of the Interior concurred when the ACHP adopted 36 C.F.R. § 800.14(c)(1), the proposed program comment is effectively a new exemption with different criteria and breadth. Therefore, the Secretary of the Interior must concur in the exemptions prior to their adoption by the ACHP. The Secretary of the Interior has not concurred in the exemptions; to the contrary, the Secretary has made comments on draft program comment that were highly critical, and most recently, has requested specific revisions

2. The Exemptions in the Revised Program Comment Do Not Comply with the Statutory and Regulatory Criteria Governing the Adoption of Exemptions.

Section 214 of the NHPA also requires that the ACHP must determine the exemption “to be consistent with the purposes of this division, taking into consideration the magnitude of the exempted undertaking or program and the likelihood of impairment of historic property.” 54 U.S.C. § 304108(c). The Section 106 regulations likewise provide that all exemptions from Section 106 must satisfy specified criteria, which includes that “(ii) The potential effects of the undertakings within the program or category upon historic properties are foreseeable and likely to be minimal or not adverse; and (iii) Exemption of the program or category is consistent with the purposes of the [NHPA].” 36 C.F.R. § 800.14(c)(1).

However, there are no specific findings in the Revised Draft Program Comment that all of the undertakings identified in Appendix A satisfy the statutory and regulatory criteria or procedures for exemptions. With respect to the vast majority of the listed categories of undertakings, the Revised Draft Proposed Program Comment does not include a determination that the effects are likely to be “minimal or not adverse,” as required by the regulations. *Id.* Only one group of “other activities” listed in Appendix A is found to “lack any potential to cause *adverse effects*.” Revised Draft Program Comment, at 25-26 (Appendix A, ¶ 6) (emphasis in original).

To the contrary, the Revised Draft Program Comment makes clear that the objective of the program comment is to provide “efficiencies” in reviewing voluminous and “repetitive” undertakings in the housing, building, and transportation sectors, and to create “review efficiencies that deliver these projects more quickly and efficiently.” *Id.* at 2. In lieu of any specific finding that the exempted undertakings would have minimal or no adverse effect, the Revised Draft Program Comment finds only that the exemptions would allow federal agencies to “focus on preservation and consultation for other undertakings with greater potential for adverse effects on historic properties.” While the benefit of “efficiencies” in carrying out certain

Section 106 reviews could potentially justify the adoption of *alternative procedures* for these undertakings, these objectives are insufficient to satisfy the statutory and regulatory criteria governing the adoption of exemptions.

Section 214 of the NHPA also requires that the ACHP determine the exemption “to be consistent with the purposes” of the NHPA. 54 U.S.C. § 304108(c). The Revised Draft Program Comment includes a single reference to one of the purposes of the NHPA -- “us[ing] measures ... to 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.’ 54 U.S.C. § 300101.” Revised Draft Program Comment, at 1. The lack of any finding relating to the actual preservation purposes of the NHPA reflects the fact that the proposed program comment is not predicated on any finding that the listed categories of undertakings are likely to have minimal or no adverse effects.

The fact that the proposed exemptions may include undertakings that have the potential to adversely affect historic properties has been pointed out by a number of commenters. For example, HUD commented on the prior draft that the exemption for actions that create no new ground disturbance in *Appendix A-2* (now A-1) has the potential to adversely affect historic properties “without a professional’s guidance and judgement to assist.” Yet this exemption continues to apply without any requirement that the determination be made by a qualified professional. Revised Draft Program Comment, at 20 (*Appendix A-1*).

Likewise, the Revised Draft Program Comment empowers agencies to make unilateral determinations that replacement of exterior features identified in *Appendix A* are “in-kind” and therefore require no further Section 106 review. The lack of any consultation in applying these exemptions may lead to inappropriate replacements and alterations that adversely affect historic properties, which consultation with the SHPO could have avoided. The potential for excluding undertakings with adverse effects is all the greater in this context since the Revised Draft Program Comment does not require the use of qualified professionals when applying the exclusions identified in *Appendix A*, nor does it require the application of the exemption to be documented in the administrative record. Accordingly, the *de facto* exemptions identified in *Appendix A* do not satisfy the statutory criteria or regulatory procedures required for the adoption of exemptions.

II. The Administrative Procedure Act Requires Formal Notice and Comment Rulemaking for the Exemptions Proposed in Appendix A.

As the Department of the Interior recognized in its comments, the use of a “program comment” to exempt “vast numbers of resources and programs” across multiple agencies appears to be a “contrived workaround” to avoid the three-step notice-and-comment process when formulating, amending, or repealing an administrative rule required by the Administrative Procedure Act, 5 U.S.C. §§ 553, 551(5). The need for public notice and comment

was dismissed by ACHP staff on the grounds that the Section 106 regulations authorizing the use of program alternatives already went through the standard notice and comment rulemaking process twenty-five years ago. The ACHP should revisit this conclusion. As noted above, while nominally called a “program comment,” the proposal is in effect a set of exemptions, and represents a substantial departure from the existing regulatory regime for the adoption of exemptions. Therefore, the prior notice and comment opportunity from many years ago is insufficient to satisfy the notice and comment requirements of the APA.

The APA does include several exceptions from the requirements of formal notice-and-comment rulemaking for “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice.” *Id.* § 553(b)(A). However, those exceptions “must be narrowly construed.” *Texas v. United States*, 809 F.3d 134, 171 (5th Cir. 2015), *as revised* (Nov. 25, 2015) (citations omitted). None of these exceptions are applicable here.

To the contrary, the exemptions proposed by the Revised Draft Program Comment contain all the hallmarks of a substantive rather than an interpretative rule or policy statement. Simply put, “[s]ubstantive rules are ones treated as binding by the agency, while true policy statements are not.” *Pub. Citizen, Inc. v. U.S. Nuclear Regul. Comm’n*, 940 F.2d 679, 682 (D.C. Cir. 1991). Here, the ACHP is bound by the exemptions that it has created; it has left itself no discretion to individually comment on an undertaking where the agency chooses to apply the exemption in the program comment. The dispute resolution mechanism in the draft does not render the exemptions any less binding than a Memorandum of Agreement or Program Agreement, which are likewise binding on the agency notwithstanding the existence of similar dispute resolution clauses.

Further, “[l]egislative rules ... grant rights, impose obligations, or produce other significant effects on private interests. They also narrowly constrict the discretion of agency officials by largely determining the issue addressed.” *Avoyelles Sportsmen’s League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983). Here, the exemptions developed in Appendix A will have broad applicability to all federal agencies and will affect all future undertakings that come within their purview. They will therefore have a significant effect on private interests – namely, the private individuals and entities who own and/or seek to protect historic properties from adverse effects. *See United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union v. Fed. Highway Admin.*, 151 F. Supp. 3d 76, 91 (D.D.C. 2015) (holding that an FHWA memorandum creating a new regulatory exemption from the “Buy America” requirements for steel products was a substantive, not interpretative, rule because it “adopt[s] a new position inconsistent with ... existing regulations.”)

Nor can the Revised Draft Program Comment be considered an “interpretive rule.” The new exemptions proposed by Appendix A do not derive or flow fairly from the substance of the Section 106 regulation authorizing the ACHP to develop exemptions, 36 C.F.R. § 800.14(c)(1). As noted above, the Revised Draft Program Comment does not comport with the procedures

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established by the Section 106 regulations for exemptions, nor does it provide any assurances that the exemptions would involve minimal or no adverse effects. The exemptions are inconsistent with Section 106 regulations governing exemptions. To comport with the requirements of the APA and the ACHP's own regulations, the public must be provided with notice and an opportunity to comment on exemptions proposed by the Revised Draft Program Comment through publication in the Federal Register.

Accordingly, we urge the ACHP to provide for publication of the Revised Draft Program Comment in the Federal Register. NCSHPO would appreciate your formal response to the legal issues and concerns raised here.

Sincerely,

A handwritten signature in black ink, appearing to read 'A. Ferster', with a large, sweeping flourish at the end.

Andrea C. Ferster
Counsel for NCSHPO

CC

Javier Marques, General Counsel, ACHP

Reid Nelson, Executive Director, ACHP

Caroline Henry, Federal Preservation Officer, Department of the Interior