

**DRAFT PROGRAM COMMENT ON  
CERTAIN HOUSING, BUILDING, AND TRANSPORTATION ACTIVITIES**

This Program Comment was issued by the Advisory Council on Historic Preservation (ACHP) on [date of adoption], on its own initiative pursuant to 36 CFR § 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 CFR part 800 (Section 106), regarding the *effects* of certain *housing*-related, *building*-related, and *alternative transportation infrastructure*-related activities.

## I. INTRODUCTION

### A. Background

The National Historic Preservation Act calls for “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. The development of this Program Comment responds to this call and is driven by the need to harmonize policies and procedures for the preservation of our nation’s historic places with other efforts designed to produce and rehabilitate affordable, accessible, energy-efficient, and hazard-free housing; to reduce energy use and associated costs, improve resilience against natural hazards, and provide alternative transportation options — needs that have received high levels of attention from Congress, as well as state, local, and Tribal governments and private parties.

### B. Prior ACHP Action

The ACHP’s statutory duties under the National Historic Preservation Act include advising the President, Congress, and state and local governments on historic preservation policy issues and overseeing the Section 106 process. The ACHP has performed these statutory duties in the areas covered by this Program Comment.

In its advising capacity, the ACHP 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 and Historic Preservation 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 energy use and cost, resilience, and historic preservation through its Climate Change and Historic Preservation 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 alternative transportation projects.

In its oversight of the Section 106 process, the ACHP has issued or participated in a variety of 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

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The Program Comment is still too sweeping - covering disparate, non-related and non-intuitive categories of undertakings. The intent of Program Comments was to cover specific categories of undertakings, not a broad government-wide set activities. In short, there is no Program being commented upon. Also required, under the regs, is a specification of the likely effects on historic properties and steps the agency will take to ensure these effects are taken into account. This is not clearly present in this document. Moreover, the primary focus of this Program Comment is the identification of undertakings that are not subject to further review, or "exemptions" with no discussion at all about mitigation for adverse effects. It is an "exemption." Just because it is called Program Comment does not negate this fact. The ACHP has regulations in place governing the process for exemptions which it has failed to follow. Therefore, while improved, it is the improper vehicle.

has also recently been a signatory to several statewide programmatic agreements with HUD related to projects and programs subject to 24 CFR Parts 50 and 58.

With regard to building rehabilitation, 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 resilience-related undertakings.

With regard to transportation alternatives, 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, Indian Tribes, and state departments of transportation, covering a range of transportation-related activities.

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 offers an alternative approach for Section 106 review across the federal government for certain undertakings, equipping federal agencies to more effectively and efficiently preserve and protect our nation's historic resources while addressing other critical policy needs.

### **C. 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." Accordingly, it has been drafted to advance historic preservation goals including the reuse of historic materials and buildings and the upgrading of infrastructure in historic neighborhoods, and to harmonize them with the nation's pressing needs to expand access to housing, improve resilience, and offer transportation alternatives.

Every day, federal agencies meet these needs by proposing to carry out, permit, license, fund, assist, or approve undertakings that have the potential to affect historic properties, and when they do, they must comply with Section 106 of the National Historic Preservation Act. Recognizing the extent, and in some cases the increasing extent, of federal action in the housing, building, and transportation sectors, and the volume and repetitive nature of such action, the ACHP has issued this Program Comment to offer efficiencies in 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. This Program Comment also aims to leverage existing investments in existing buildings and other built infrastructure by facilitating reuse and thereby avoiding the need for new construction and for costly new construction materials.

Ultimately, this Program Comment aims to benefit the people who live in the housing, work in the buildings, and move using the transportation infrastructure projects being carried out, permitted,

licensed, funded, assisted, or approved by federal agencies by creating review efficiencies that deliver these projects more quickly and efficiently.

## 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 <sup>1</sup> at the ACHP's own initiative provides the ACHP a reasonable opportunity to comment regarding the covered *undertakings*.

### B. Effect on Other Applicable Laws

This Program Comment does not modify, preempt, or replace any other federal laws or regulations (including the federal rehabilitation tax credit), or any applicable state, local, or Tribal laws or regulations (including local historic preservation review or zoning ordinances, building codes, or permitting requirements).

### C. <sup>2</sup>Effect on Existing Agreements

1. Overall Effect A *federal agency* that already has an executed Section 106 memorandum of agreement (MOA) or programmatic agreement (PA) in effect that addresses covered *undertakings* must follow the terms of those MOAs or PAs to the extent those MOAs or PAs address the *undertakings* covered by this Program Comment. This Program Comment does not in any way supersede, replace, or change the terms of existing MOAs or PAs, or other program comments.

#### 2. Amendment or Termination of MOAs and PAs

*Federal agencies* may pursue amendments to existing 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*.

If a *federal agency* elects to amend or terminate an MOA or PA, and if the applicable amendment or termination provision of such MOA or PA does not require consultation with relevant *Indian Tribes* or *Native Hawaiian Organizations*, the ACHP strongly recommends that the *federal agency* meaningfully consult with relevant *Indian Tribes* and *Native Hawaiian Organizations* in considering any such amendment or termination.

If a *federal agency* elects to terminate an MOA or PA, and if the applicable termination provision of such MOA or PA does not require notice to the ACHP of such termination, the *federal agency* must provide written notice to the ACHP of such termination and provide notice of its intent to follow this Program Comment per Section III.A.2. of this Program Comment.

#### 3. Amendment of Existing Program Comments

*Federal agencies* may propose to the ACHP amendments to existing program comments following the amendment provisions in those program comments, and the ACHP may

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As a technical matter, it should be pointed out that the ACHP did not follow the procedures it recommends every other federal agency to follow in the development of a Program Comment, despite the overwhelming number of comments submitted asking it to do so. The Chair instead has stated that as those recommendations are not regulatory, so the ACHP is not required to do so - which in our view is poor form. We maintain that the ACHP stands to lose credibility and undermine its value when it refuses to follow its own advice for no reason other than the desire of the Chair.

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NCSHPO applauds this change that does not override existing agreements.

consider any amendments to incorporate, in whole or in part, the terms of this Program Comment.

#### **D. Application on Tribal Lands**

This Program Comment does not apply to *undertakings* located on *Tribal lands*, or to *undertakings* that may affect *historic properties* located on *Tribal lands*, unless the *Tribal Historic Preservation Officer (THPO)* 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 C to this Program Comment, and by submitting the completed authorization to the Executive Director of the ACHP. This Program Comment is applicable on the *Tribal lands* identified in such authorization on the date of receipt of the authorization by the Executive Director of the ACHP, who must ensure notice of such authorization is included on the website of the ACHP within 30 days of ACHP's receipt. The *THPO* 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 affect *historic properties* on the *Tribal lands* under the jurisdiction of the *Indian Tribe*.

#### **E. Activities Not Covered and Exceptions**

A *federal agency* must follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7 or 36 CFR § 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*.
2. The *undertaking* is not listed in the Appendices to this Program Comment.
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 found within the boundaries of a *National Historic Landmark* district.
  - c. Sites of religious and cultural significance to *Indian Tribes* and *Native Hawaiian Organizations*, including but not limited to Tribal identified sacred sites and sites identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*.

### III. ALTERNATIVE COMPLIANCE APPROACHES

#### A. Available Alternative Compliance Approaches and Federal Agency Use

##### 1. Available Alternative Compliance Approaches

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

<sup>1</sup> For *undertakings* set forth in Appendix A of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking*.

<sup>2</sup> For *undertakings* set forth in Appendix B of this Program Comment, a *federal agency* has no further Section 106 review requirements regarding the *undertaking* if the *federal agency* (i) satisfies the conditions, exclusions, or requirements prescribed in Appendix B, and (ii) documents, as part of its administrative record and for any reports required by Section X of this Program Comment, the manner in which it has satisfied such conditions, exclusions, or requirements.

##### 2. Federal Agency Notice of Alternative Compliance Approaches

<sup>3</sup> Prior to using this Program Comment, a *federal agency* must provide a written notification to the ACHP, the National Conference of State Historic Preservation Officers, and the National Association of Tribal Historic Preservation Officers of its decision to use this Program Comment, including an identification of the geographic scope (national, state, or otherwise) in which it will use the Program Comment. The ACHP must make available on its website any such notices submitted by *federal agencies* to the ACHP pursuant to this Section.

##### 3. Request for ACHP Advisory Opinions

A *federal agency* may seek an advisory written opinion from the ACHP as to whether it may appropriately utilize this Program Comment for an *undertaking* by forwarding to the ACHP all documentation relevant to the *undertaking*, requesting the ACHP to provide within 30 *days* its written comments, and taking the ACHP's comments into account before making a decision as to whether to utilize this Program Comment for such an *undertaking*.

#### 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.

##### 1. Potential Effects on Properties of Traditional Religious and Cultural Significance to Indian Tribes and Native Hawaiian Organizations

It is important to recognize that while this Program Comment was drafted to limit *effects* on *historic properties*, including sites with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, covered *undertakings* could directly, indirectly, or cumulatively affect such properties.

##### 2. Consultation-Related Obligations

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Everything in Appendix A is exempted from 106. Again, this is an exemption.

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Number: 2      Author: hein      Subject: Comment on Text      Date: 12/11/2024 2:39:10 PM  
Everything in Appendix B is exempted if it satisfies certain conditions. Again, this is an exemption.

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Number: 3      Author: hein      Subject: Comment on Text      Date: 12/11/2024 2:40:02 PM  
If the Federal Agency opts to use this Program comment it should notify the affected SHPOs and THPOs - not just NCSHPO and NATHPO. There should also be some parameters - particularly if an agency wants to use this nationally. How exactly would this notification work for grant recipients, such as HUD responsible entities?



Prior to engaging in any *undertaking* for which this Program Comment requires a Type B Determination in accordance with Appendix B of this Program Comment, or for any *undertaking* for which the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering *historic properties* in which an *Indian Tribe* or *Native Hawaiian Organization* may have an interest, a *federal agency* must make a reasonable and good faith effort to identify any *Indian Tribes* or *Native Hawaiian Organizations* that might attach religious and cultural significance to *historic properties* in the *area of potential effects* and invite them to be consulting parties. 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 *federal agency* staff; historic maps; information gathered from previous consultations pursuant to Section 106 or Section 110 (subject to Section III.B.4. of this Program Comment); 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. Such *Indian Tribe* or *Native Hawaiian Organization* that requests in writing to be a consulting party shall be one.

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 but not limited to recognizing the special expertise of holders of Indigenous Knowledge. The *federal agency* must defer to the determination by an *Indian Tribe* or *Native Hawaiian Organization* that a certain individual or individuals has or have expertise (including but not limited to Indigenous Knowledge-based expertise) in identification, evaluation, assessment of *effect*, and treatment of *effects to historic properties* of religious and cultural significance to the *Indian Tribe* or to *Native Hawaiians*.

The *federal agency* must gather information to identify whether any *historic properties* of religious and cultural significance to such *Indian Tribes* or *Native Hawaiian Organizations* are included in such *area of potential effects* in accordance with the protocols in 36 CFR § 800.4(a)(4) and must use this information to assess whether the *undertaking* could result in an *effect* on any such *historic properties*.

### 3. Effect of a Finding of Potential Effect on Certain Properties

Should the *federal agency* determine through consultation with *Indian Tribes* or *Native Hawaiian Organizations* or otherwise that a proposed *undertaking* covered in this Program Comment could result in an *effect* on a *historic property* with traditional religious and cultural significance to an *Indian Tribe* or *Native Hawaiian Organization*, including but not limited to a Tribal identified sacred site or a site identified by Indigenous Knowledge of *Indian Tribes* or *Native Hawaiian Organizations*, the *federal agency* will not use this Program Comment and must instead follow the Section 106 review process under 36 CFR §§ 800.3 through 800.7, or 36 CFR § 800.8(c), or another applicable agreement or program alternative.

#### 4. Confidentiality-Related Obligations

Consistent with 36 CFR § 800.4(a)(4) and 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 laws, such as Section 304 of the National Historic Preservation Act, or by applicable State and local laws. *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, including when maintaining records of correspondence related to consultation under this Section. *Federal agencies* must also adhere to confidentiality requirements for other resources covered by Section 304 of the National Historic Preservation Act or other applicable State and local laws.

#### 5. Responsibilities for Consultation and Opportunities for Outreach

The *federal agency* retains ultimate responsibility for complying with government-to-government consultation requirements. However, an *Indian Tribe* may consent in writing to allow an entity delegated legal responsibility for compliance with Section 106 in accordance with federal law to assist with or lead consultation. Such consent may be rescinded in writing by the *Indian Tribe* at any time.

Nothing in this Program Comment shall be construed to preclude or discourage early outreach by project proponents, applicants, state or local government entities, or other non-federal entities to *Indian Tribes* or *Native Hawaiian Organizations* prior to the initiation of an *undertaking*.

### C. The Use of Qualified Professionals

Except where explicitly stated, *undertakings* covered by this Program Comment do not require the use of a *qualified professional*.<sup>1</sup> When the *federal agency* consults with a *qualified professional*, the type of *qualified professional* must be appropriate to the circumstances. As an example, determinations regarding architectural resources and structures must be made by a *qualified professional* meeting such professional standards for historic architecture or architectural history established by the Secretary of the Interior.

## 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 CFR 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

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This clarification is appreciated.

develop a memorandum of agreement or programmatic agreement to conclude the Section 106 review. 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 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 ability to enter into such an arrangement and pursuant to its statutory authorities and regulations. 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 or analysis to perform preliminary assessments of eligibility to the National Register or to make recommendations about eligibility to the *federal agency* and thereby inform the *federal agency's* determination of eligibility.
- D. Conduct research or analysis to assess the potential *effects* of the *undertaking* on *historic properties* and thereby inform the *federal agency's* determination of *effects*.
- E. Carry additional research or monitor ground disturbing activities.
- F. Curate artifacts or records recovered or made as part of *historic property* identification, or evaluation.
- 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, or minimize *effects* to *historic properties*.
- H. Monitor ground disturbing activities or *federal agency* treatment of unanticipated discoveries.

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.

## V. UNANTICIPATED DISCOVERIES

### A. Immediate Response Requirements

If previously unidentified *historic properties* or unanticipated *effects*, including but not limited to visual, audible, atmospheric, and cumulative *effects*, to *historic properties* are discovered during implementation of the *undertaking*, the *federal agency* must immediately halt all activity within 100 feet of the discovery or that could otherwise 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 CFR § 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 in accordance with the ACHP Policy Statement on Indigenous Knowledge and Historic Preservation. For sites involving burial sites, human remains, or funerary objects, the *federal agency* must follow these procedures and be guided by the ACHP Policy Statement on Burial Sites, Human Remains, and Funerary Objects.

#### **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 100 feet of the discovery must cease, the area must be secured, and the *federal agency's* authorized official, any known and potentially affiliated *Indian Tribe* or *Native Hawaiian Organization*, 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* will comply with state burial laws and with Section 3 of the Native American Graves, Protection and Repatriation Act and its implementing regulations, 43 CFR 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**

<sup>1</sup> 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 any consulting parties involved in the *undertaking* and any relevant *State Historic Preservation Officer (SHPO) or THPO*. Objecting parties may include but are not limited to *Indian Tribes, THPO(s), SHPO(s), 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 CFR § 800.4(c)(2) and Section V of this Program Comment, as appropriate.

Should resolution not be reached within 60 *days*, the *federal agency* must forward to the ACHP all documentation relevant to the objection, including the *federal agency's* proposed resolution if any, request the ACHP to provide within 30 *days* its written comments to resolve the dispute, and take the ACHP's comments into account before making a decision regarding its approach to complying with Section 106. The *federal agency* must notify the objecting party, any consulting parties previously notified of the dispute, and any relevant *THPO or SHPO* regarding its decision regarding 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 final decision in writing, 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 to identify patterns or common issues in the use of this Program Comment, 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*.

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Number: 1 Author: hein Subject: Comment on Text Date: 12/11/2024 2:41:58 PM

As previously noted.... since the primary purpose of this PC is the exemption of activities from further 106 at an agency's own direction, this dispute resolution provision is fairly meaningless as potentially interested parties would have no idea about the undertaking unless they had been previously notified. The notification provision prescribed is too broad - allowing an agency to provide a singular notification to a national entity for a national set of undertakings. How would anyone know a specific project is taking place that is covered by this PC and, therefore, not subject to the usual Section 106 process?

## VII. DURATION

This Program Comment will remain in effect from the date of adoption by the ACHP through December 31, 2034, 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 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 <sup>1</sup> *federal agencies* and other parties as it deems appropriate and as set forth below.

### A. Amendment by the Chair, ACHP

<sup>2</sup> The Chair of the ACHP, after notice to the rest of the ACHP membership and *federal agencies*, and after publication on the ACHP website of the Chair's written explanation (which shall take into account ACHP reports and *federal agency* reports required by this Program Comment and any comments received from *Indian Tribes*, *Native Hawaiian Organizations*, and others), may amend this Program Comment to extend its duration one time for 5 additional years. The ACHP must notify *federal agencies*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* and publish notice in the Federal Register regarding such amendment within 30 *days* after its issuance.

### B. 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. All Other 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.

## IX. WITHDRAWAL

If the ACHP determines that the consideration of *historic properties* <sup>3</sup> is not being carried out in a manner consistent with this Program Comment, the ACHP may withdraw this Program Comment. The Chair of the ACHP must then notify *federal agencies*, *SHPOs*, *THPOs*, *Indian Tribes*, and *Native Hawaiian Organizations* 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 CFR §§ 800.3 through 800.7, or 36 CFR § 800.8(c), or another applicable agreement or program alternative for individual *undertakings* covered by this Program Comment.

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Number: 1      Author: hein      Subject: Comment on Text      Date: 11/22/2024 10:27:45 AM  
federal agencies, SHPOs and THPOs should be specified with other parties as appropriate.

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Number: 2      Author: hein      Subject: Comment on Text      Date: 12/11/2024 2:43:25 PM  
If the Chair is being bestowed the authority to extend, they should also have the authority to terminate.

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Number: 3      Author: hein      Subject: Comment on Text      Date: 12/11/2024 2:44:37 PM  
This is too limiting as it only allows the withdraw if the Program Comment isn't being carried consistent with its own terms. As a sweeping new concept, there must be more latitude for its withdraw. In short, the ACHP should be able withdraw this Program Comment for a variety of reasons - including widespread adverse effects, unintended consequences, etc.. - not just because it isn't being carried out as written.



## X. REPORTS AND MEETINGS

### A. Federal Agency Reports

#### 1. Timing of Reports

The *federal agencies* that use this Program Comment must provide annual reports to the ACHP regarding the use of this Program Comment during the previous fiscal year reporting period, ending September 30 annually, to the ACHP, as provided in this Section. Annual reports are due on December 31 of each year, starting December 31, 2025.

#### 2. Delivery of Reports

For any reporting required by this Section, *federal agencies* whose legal responsibility to comply with Section 106 has been delegated in accordance with federal law but who maintain a reporting mechanism for some or all such entities must provide reports to the ACHP on behalf of those entities for which such data is available. <sup>1</sup> Other entities to whom legal responsibility for compliance with Section 106 has been delegated must directly submit reports to the ACHP in accordance with this Section, using their own reporting mechanisms. In any report required by this Section, the ACHP encourages *federal agencies* to also propose for ACHP's consideration amendments and refinements to this Program Comment based on their experience implementing it.

#### 3. Content of Reports

In any report required by this Section, each *federal agency* must:

- a. Identify the number of times the *federal agency* has utilized this Program Comment for *undertakings* covered by Section III.A.1.a.;
- b. For any *undertakings* covered by Section III.A.1.b., include: the address or, if no address is available, the location of the *undertaking*; information about the manner or extent to which the agency satisfied the conditions, exclusions, and requirements to proceed with such *undertakings*; the names and any institutional affiliations of any *qualified professionals*, *SHPOs*, or *THPOs* who contributed to written determinations required by this Program Comment; and a list of relevant *Indian Tribes* and *Native Hawaiian Organizations* with which consultation on such *undertaking* occurred;
- c. Identify any significant issues (including disputes) that may have arisen while implementing the Program Comment, and their resolution;
- d. Assess the overall effectiveness of the Program Comment;
- e. List any entities to which the *federal agency* has delegated legal responsibility for compliance with Section 106 in accordance with federal law and whose *undertakings* are included in the report.

#### 4. Template for Reports

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Number: 1 Author: hein Subject: Comment on Text Date: 12/6/2024 10:05:21 AM

The agreement as a whole is very unclear as to how it would work where delegated to a grantee? With so many HUD projects operating this way, the agreement should not be silent on this. This section is really the only place where delegation is discussed.

<sup>1</sup> Within three months of the adoption of this Program Comment, the ACHP must develop a template for *federal agencies* to collect information about any *undertakings* covered by Section III.A.1.b. The ACHP must also endeavor to create an online reporting and tracking system for undertakings covered by this Program Comment.

#### 5. Publication of Reports

The ACHP must make available on its website any annual reports submitted by *federal agencies* to the ACHP pursuant to this Section within 30 days of receipt.

### **B. Invitation to Provide Comment**

At any time, any *Indian Tribe, Native Hawaiian Organization, SHPO, THPO*, consulting party, or member of the public may submit written comments to the ACHP regarding the overall effectiveness of the Program Comment in meeting its intent and regarding suggestions for amendments and refinements to this Program Comment. The ACHP must provide and maintain instructions for submission of written comments on its website. The ACHP must consider such written comments when drafting any reports required by Section X.D. of this Program Comment.

### **C. Annual Meetings**

By March 31, 2026 and annually for the duration of this Program Comment, the ACHP must schedule an annual meeting and invite *federal agencies, Indian Tribes, SHPOs, THPOs, Native Hawaiian Organizations*, ACHP members, consulting parties, 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.

### **D. ACHP Reports and Recommendations for Amendments**

At any time, but at least once during the initial three-year period during which this Program Comment is being used, and every three years thereafter, ACHP staff must provide at an ACHP business meeting a written and oral summary of information received from *federal agency* reports, annual meetings, comments provided pursuant to Section X.B. of this Program Comment, or other sources about the utility of this Program Comment and make any recommendations for amendments. The ACHP must make such written summary of information and such recommendations available to the public through posting on the ACHP website within 30 days of such meeting.

## **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, remove, or encapsulate.

*Adverse effect*, as provided in 36 CFR § 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

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Number: 1 Author: hein Subject: Comment on Text Date: 12/4/2024 9:34:51 AM

This should be in place prior to adoption of the PC or the effective date of the PC should be dependent upon these templates. They are an integral safeguard to the terms of the PC. The template should also be created with input from SHPOs.

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.

*Alternative transportation infrastructure* means a *building* or structure used for pedestrian, bicycle, *micromobility vehicle*, and *transit* purposes.

*Area of potential effects*, as provided in 36 CFR § 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 is not physically separated from motor vehicle traffic and that has been designated by striping, signage, and pavement markings for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

*Bicycle locker* means a device or structure for storing personal or shared bicycles and *micromobility vehicles*, that may have a cover and enclosure to protect the bicycles and *micromobility vehicles* from weather or theft and is not intended for human occupancy.

*Bicycle parking* means a designated area to store a bicycle, whether personal or shared, including but not limited to *bicycle racks*, *bicycle lockers*, *bicycle shelters*, and dedicated docks and kiosks used in a shared system for bicycles or *micromobility vehicles*.

*Bicycle rack* means a rack for a personal or shared bicycle or *micromobility vehicle*.

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

*Bicycle shelter* means a canopy structure above a *bicycle rack* for a personal or shared bicycle or *micromobility vehicle* that provides partial weather protection of the rack and bicycles or *micromobility vehicles*.

*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 but not limited to mobile and manufactured homes and *alternative 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.

*Building safety system* means fire alarm, fire suppression, and security systems and equipment.

*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, 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 *alternative transportation infrastructure*.

*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.

*Economic feasibility* means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to estimated construction costs (including but not limited to the cost of *building* material and labor), estimated operational costs, material availability and life cycle, available budget, and the long-term sustainability of the *undertaking*.

*Effect*, as provided in 36 CFR §§ 800.5(a)(1) and 800.16(i), means a direct, indirect, reasonably foreseeable, or cumulative impact or 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 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 electric vehicle.

*EVSE criteria* means: (1) taking 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) using reversible, minimally invasive, non-permanent techniques to affix the infrastructure; (3) minimizing *ground disturbance* to the maximum extent possible, and ensure that it does not exceed previous levels of documented *ground disturbance*; (4) using the lowest profile equipment reasonably available that provides the necessary charging capacity; (5) placing the EVSE in a minimally visibly intrusive area; and (6) using colors complementary to surrounding environment, where possible.

*Federal agency* means an agency as defined by 5 U.S.C. § 551(1), and for Section 106 purposes the term *federal agency* includes state, local, or Tribal governments that have been delegated legal responsibility for compliance with Section 106 pursuant to federal statutory authority such as that under the provisions of the Housing and Community Development Act of 1974 at 42 U.S.C. § 5304(g).

*Flex post* means flexible bollards or delineators used to separate motor vehicle traffic from a *bicycle lane* or *protected bicycle lane* 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.

*Ground disturbance* means any activity that moves, compacts, alters, displaces, or penetrates the ground surface of any soils.

*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 but not limited to lead-based paint), asbestos, asbestos-containing material (including but not limited to 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 pavement using a polymer binder to restore or maintain pavement friction.

*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*, as provided in 36 CFR § 60.3(d), means a geographically definable area, urban or rural, possessing a significant concentration, linkage, or continuity of historic sites, *buildings*, structures, or objects united by past events or aesthetically by plan or physical development.

*Historic property*, as provided in 36 CFR § 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 significance to an *Indian Tribe* or *Native Hawaiian Organization* that meet the National Register of Historic Places criteria.

*Housing* means any *building* containing or proposed to contain 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 limited to *buildings* served by an elevator or elevators, “walk-up” *buildings*, rowhouses, semi-detached homes, mobile and manufactured homes, barracks, and freestanding homes.

<sup>1</sup>*Independent utility* means those aspects of a project, activity, or program without which the specifically approved project, activity, or program would not serve a rational need.

*Indian Tribe*, as provided in 36 CFR § 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 in composition, design, color, texture, size, dimension and other physical and visual properties.

*In-kind replacement* means *replacement* of *historic building materials* with *in-kind building materials* or *replacement* of other existing materials, elements, or equipment with new materials, elements, or equipment that are physically and visually similar in all possible respects.

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

*Maintenance* means activities required to maintain in an operational state, or to bring back to operating condition.

*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, including but not limited to 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, waste heat recovery devices (including but not limited to desuperheater water heaters, condensing heat exchangers, heat pump and water heating heat recovery systems, and other energy recovery equipment), adjustable speed drives, duct and pipe systems (including but not limited to return ducts, diffusers, registers, air filters, and thermostatic radiator controls), refrigeration lines, and building energy control systems.

*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 approximately 15 to 30 miles per hour.

*National Historic Landmark*, as provided in 36 CFR § 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 CFR § 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.

*Native Hawaiian Organization*, as provided in 36 CFR § 800.16(s)(1), means any organization which serves and represents the interests of *Native Hawaiians*; has as a primary and stated purpose



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Number: 1      Author: hein      Subject: Comment on Text      Date: 12/11/2024 2:53:39 PM

This definition needs work. A project with independent utility is a project that stands on its own and not in connection with or necessary for the completion of other projects. This definition states that it is of independent utility if without it a project would not be needed. This is backwards. This makes it a dependent utility, not independent.

the provision of services to *Native Hawaiians*; and has demonstrated expertise in aspects of historic preservation that are significant to *Native Hawaiians*.

*Non-significant façade* means any exterior façade of a *building* which does not contribute to the historic significance of the *building*.

*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 materials* that are 45 years or older, including but not limited to those comprised of pavers, cobblestones, Belgian blocks, bricks, or wood and those involving earthworks or roofs of structures entirely underground.

<sup>1</sup>*Previously disturbed ground* means soils 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, including *previously disturbed right-of-way*, and does not mean areas that have been shallowly disturbed (such as via plowing) and does not mean areas in which the previous disturbance occurred sufficiently long ago to allow for subsequent deposit of cultural resources that are now over 45 years old (such as historic urban deposits).

*Previously disturbed right-of-way* means areas 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 a historically significant property to remain, including but not limited to: the entire curb-to-curb roadway, existing sidewalks, existing drains, and parking areas, including but not limited to 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 determine the vertical and horizontal dimensions of the previously disturbed areas.

<sup>2</sup>*Primary space* means lobby, ceremonial room, ground-floor hallway (unless primarily used for utility purposes), and any other public space that contains a concentration of *character-defining features* of a *historic building* or *historic alternative transportation infrastructure*.

*Protected bicycle lane* means a bicycle or *micromobility vehicle* facility, whether one-way or two-way (such as a cycle track), that is physically separated from motor vehicle traffic, distinct from the sidewalk, and for the exclusive use by and increased safety of bicyclists or users of *micromobility vehicles*.

*Qualified professional* means a person who meets the relevant standards for the appropriate corresponding discipline outlined in the Secretary of the Interior's Professional Qualifications Standards, as amended and annotated.

*Rail infrastructure* means structures, *building*, land, and equipment that supports land lines, including but not limited to both the infrastructure that is in the rail *right-of-way* (such as ballast, ties, tracks, bridges, and tunnels) and the infrastructure that is adjacent to the *right-of-way* such as signs, signals, mileposts or switches.

*Recognized design manual* means one of the following transportation manuals: 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,

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Number: 1 Author: hein Subject: Comment on Text Date: 12/11/2024 2:45:42 PM

Who would make this determination? Without testing, you might be able to assess the horizontal breadth of disturbance but it is impossible to know the depth of the disturbance. The standard of "previously disturbed ground" is a well known mechanism for ignoring potential for subsurface deposits in developed areas.

Number: 2 Author: hein Subject: Comment on Text Date: 12/6/2024 10:07:47 AM

The National Register defines primary space as: Primary spaces are those that are essential in conveying the historic and architectural character of a building.. This should be incorporated into the definition for consistency.

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 and available *Indian Tribe*, state historic preservation office, Tribal historic preservation office, *Native Hawaiian Organization*, local preservation or planning office, and *federal agency* files, records, inventories, and databases, or other sources recommended by such parties, for information about whether *historic properties*, including but not limited to properties with traditional religious and cultural significance to one or more *Indian Tribes* or *Native Hawaiian Organizations*, are known to exist within an *area of potential effects*.

*Repair* means fix or mend obsolete, broken, damaged, or deteriorated features, elements, materials, and systems. *Replacement* means substitution of new material, element, or equipment for an existing material, element, or equipment, including *in-kind replacement* and including substitution requiring a change in composition, design, color, texture, size, dimension, location, or configuration in order to improve the function and condition of the material, element, or equipment or the broader system of which the material, element, or equipment is a part.

*Resilience* means the ability to prepare for threats and hazards, adapt to changing conditions, and withstand and recover rapidly from adverse conditions and disruptions.

*Right-of-way* means land developed or designated for the public passage of people using any mode of transportation, including *transit*.

*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 CFR § 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*.

*Technical feasibility* means the viability, suitability, and practicality of a proposed *undertaking* in light of a range of considerations, including but not limited to health, safety, energy efficiency, *resilience*, durability of materials, and sound professional judgment (including but not limited to architectural, archaeological, or engineering judgment).

*Transit* means mass transportation by a conveyance (including but not limited to 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 shelter* means a canopy structure or other structure open to the elements on at least one side, which provides partial weather protection for users of *transit*, such as those provided at city bus stops or along rail platforms.

*Tribal Historic Preservation Officer*, as provided in 36 CFR § 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*

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Number: 1 Author: hein Subject: Comment on Text Date: 12/11/2024 4:56:50 PM

Assuming this is meant to be a separate definition item. That said, the definition is too broad - Replacement is one term. In-Kind replacement is another.

*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 CFR § 800.16(x), means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities.

*Undertaking*, as provided in 36 CFR § 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. <sup>1</sup>An *undertaking* must have <sup>2</sup>*independent utility*.

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Number: 1 Author: hein Subject: Comment on Text Date: 12/12/2024 10:46:02 AM

This is not in the statutory definition of undertaking and the definition provided for independent utility is flawed, instead seemingly describing what a project of "dependent utility." would be.

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Number: 2 Author: hein Subject: Comment on Text Date: 12/11/2024 7:56:30 PM

Some of the undertakings described in this document cannot possibly have independent utility - they are rather of "dependent utility," in other words they are undertakings tied to a larger project.

## APPENDIX A: ACTIVITIES NOT REQUIRING FURTHER REVIEW

### 1. Site Work

**1** The following activities do not require further Section 106 review:

a. *Maintenance or repair* of any of the following elements, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:

i. Concrete and asphalt ground surfaces such as streets, parking areas, driveways, alleys, ramps, sidewalks, and walkways, including repaving, restriping, replacing such surfaces with *permeable ground surface materials*, sealing (including *installation* of slurry seals, overlays, and seal coatings), filling, milling, grinding, grooving, and reducing surface size, but not changing vertical alignment or expanding surface size.

ii. 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, netting, basketball hoops, drinking fountains, and *ground surface materials*.

iii. Fencing.

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 landscape elements (such as planted beds), or in park and playground areas, and including but not limited to relamping and rewiring.

vi. Water features, such as decorative fountains, including but not limited to replumbing.

vii. Curbs, gutters, steps, ramps, and retaining walls.

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

ix. Below-ground utilities, including underground water, sewer, natural gas, electric, telecommunications, drainage improvements, septic systems, and leaching systems.

x. *Bulb outs*, crosswalks (including but not limited to raised crosswalks across roadways and raised intersections), traffic calming devices (including but not limited to speed humps and speed tables), or islands (including but not limited to pedestrian islands and corner islands to separate or protect bicycles).

xi. *High friction surface treatments*, *cool pavements*, *permeable ground surface materials*, and rumble strips.

xii. *Green infrastructure*, sprinkler heads, irrigation lines, and gray water systems.

xiii. Benches, tables, and freestanding planters.

xiv. Vault toilets.

b. Any of the following landscaping, grounds, and water management activities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*:



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Number: 1 Author: hein Subject: Comment on Text Date: 12/11/2024 2:56:37 PM

Generally, this section exempts maintenance and repair activities of **existing** materials and elements found on a building site/grounds or street scape. Many are minor, and many may not even be undertakings currently subject to review. As such, many would seem appropriate actions to cover in a program alternative, in certain circumstances.

- i. Fertilizing, pruning, trimming, mowing, deadheading, weeding, sheering, feeding, seeding, reseeding, mulching, aerating, and maintaining, as applicable, grass, shrubs, other plants, and trees.
  - ii. Planting of grass, shrubs, and other plants, and xeriscaping.
  - iii. *Replacement* of a tree in, or within 10 feet of, its existing location.
  - iv. Removal of grass, shrubs, brush, leaves, other plants, invasive species, dead plant and tree material, and diseased or hazardous trees.
  - v. Removal of rocks, litter, and debris, but not rocks arranged in a rock wall or other man-made feature.
  - vi. Removal of small conifers growing between mature trees.
  - vii. Removal of sediment, silt, and debris from man-made drainage facilities, including retention and detention basins, ponds, ditches, canals, and sumps.
- c. Test borings, soil sampling, well drilling, or perc tests less than eight inches in diameter
- d. *Installation* or removal of temporary construction-related structures, including but not limited to scaffolding, barriers, screening, sediment-capture devices, fences, protective walkways, signage, office trailers, cofferdams, and restrooms, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance* and that such activity does not damage any existing *building* or *structure*.
- e. Elevation of the ground surface within *previously disturbed right-of-way* by up to 18 inches to maintain, create, or connect *alternative transportation infrastructure*, or to facilitate boarding and disembarking at *transit* facilities, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*.
- f. Removal of a deteriorated or damaged mobile or manufactured home or other temporary *building* or structure, not including removal of foundations.


## 2. Work on a Building Exterior

The following activities do not require further Section 106 review when conducted on the exterior of a *building*:


- a. *Maintenance* or *repair* of any of the following elements:
  - i. Doors, including but not limited to insulated exterior doors and basement bulkhead doors.
  - ii. Windows, including but not limited to storm windows, glazing treatments, window jambs, window sills, solar screens, awnings, and window louvers.
  - iii. Siding.
- b. *Maintenance* or *repair* of any of the following elements, or *in-kind replacement* of any above-ground components of any of the following elements:
  - i. *Mechanical systems*.
  - ii. *Building safety systems*.

- iii. Canopies, awnings, and solar shades.
  - iv. Roofing, including but not limited to cladding and sheeting, flashing, gutters, soffits, downspouts, eaves, parapets, and reflective or energy efficient coating; fasteners and ties to attach roofing to structural elements; white roofs or cool roofs on flat roofs; and green, sod, or grass roofs on flat roofs.
  - v. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
  - vi. *Clean energy technologies*.
  - vii. Elevator systems.
  - viii. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
  - ix. Foundations and foundation vents.
  - x. Chimneys.
  - xi. Vents, including but not limited to continuous ridge vents covered with ridge shingles or boards, roof vents, bath and kitchen vents, soffit vents, or frieze board vents.
  - xii. Energy and water metering devices.
  - xiii. *Building-mounted utility infrastructure*, including but not limited to wires and anchors.
  - xiv. <sup>1</sup>~~Installation of~~ stanchions, fasteners, or tracks for flood shields.
- c. <sup>2</sup>*Replacement or installation of building-mounted solar energy systems* if such system is installed with methods that do not irreversibly damage *historic building materials*, sits close to the roof, and has a profile that matches the roof profiles (such as pitched or hip roofs) or if on a flat roof has a profile with a slope not to exceed 20%.
- d. Any of the following *maintenance* or *repair* activities:
- i. Caulking, weatherstripping, reglazing of windows, *installation* of door sweeps, and other air infiltration control measures on windows and doors.
  - ii. Repointing of mortar joints with mortar matching in composition, joint profile, color, hardness, and texture of existing mortar.
  - iii. 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 and not including sandblasting of masonry over 45 years old.
- e. Paint or stain on previously painted or previously stained exterior surfaces, provided that no historic decorative paint schemes or colors (such as graining, stenciling, marbling) will be covered and provided that for masonry over 45 years old, there will be no use of nontraditional or historically inappropriate masonry coatings, including painting of previously unpainted historic masonry, masonry consolidants, and waterproof or water-repellant coatings.

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 Number: 1 Author: hein Subject: Cross-Out Date: 11/22/2024 10:51:38 AM  
For consistency, "installation" does not belong here.

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 Number: 2 Author: hein Subject: Comment on Text Date: 11/26/2024 1:44:37 PM  
Not in favor of blanket installation of solar systems on front-facing gabled roofs without any review. Flat roofs, rear-facing angled roofs, etc. are fine. And in some cases front-facing may be fine - but review would enhance outcomes.

f. *Abatement of hazardous materials* where *effects* of the *abatement* are not visible on the *building* exterior, and the *abatement* either is limited to *previously disturbed ground* or creates no new *ground disturbance*.

### 3. Work on a Building Interior

The following activities do not require further Section 106 review when conducted entirely in the interior of a *building*:

a. *Maintenance or repair* of any of the following elements:

- i. Walls, ceilings, and flooring.
- ii. Doors.
- iii. Light fixtures.
- iv. Elevator systems.
- v. Hardware, such as dead bolts, door hinges, latches and locks, window latches, locks and hinges and door peepholes.
- vi. Chimneys.
- vii. Skylights, atria, courtyards, or lightwells.

b. *Maintenance, repair, or in-kind replacement* of any of the following elements:

- i. *Mechanical systems*.
- ii. *Building safety systems*.
- iii. Light bulbs, ballasts, exit signs, HID fixtures, and lighting technologies such as dimmable ballasts, day lighting controls, and occupant-controlled dimming.
- iv. Battery energy storage systems.
- v. Thermal insulation, other than closed cell spray foam, in or around walls, floors, ceilings, attics, crawl spaces, *mechanical systems*, and foundations, where such insulation can be installed and removed without damaging exterior walls, and where such insulation will not cause condensation that could damage exterior walls – even if such insulation increases interior wall thickness.
- vi. Improvements, such as ramps and railings, that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.
- vii. Foundations and foundation vents.
- viii. Energy and water metering devices.

c. Maintenance, repair, replacement, or installation of household or kitchen appliances, where such appliances are Energy Star rated, or replace existing appliances with appliances with higher Energy Star ratings, or replace existing non-electric appliances with electric appliances.

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 Number: 1      Author: hein      Subject: Comment on Text      Date: 12/6/2024 10:01:15 AM

If it increases interior wall thickness, it is not a repair, maintenance or in-kind replacement. Rather, it is installation of new material.

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 Number: 2      Author: hein      Subject: Comment on Text      Date: 11/22/2024 11:05:48 AM

maintenance/repair OR replacement OR Installation of NEW appliances.

- d. Caulking, weather-stripping, and other air infiltration control measures in and around bypasses, penetrations, ducts, and *mechanical systems*.
- e. Painting or staining previously painted or previously stained interior surfaces, provided that no decorative paint schemes or colors (such as graining, stenciling, or marbling) will be painted or stained.
- f. *Abatement of hazardous materials* where *effects* of the *abatement* are only visible from within an individual *housing unit* or where *effects* are not visible from the *building interior*.

4. <sup>1</sup> Work Involving Transportation Fixtures and Equipment

<sup>2</sup> ~~The following activities do not require further Section 106 review, provided 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, replacement, or installation of the following elements:~~

- ~~i. Bicycle racks or dedicated docks or kiosks used in a shared system for bicycles or micromobility vehicles.~~
- ~~ii. Bicycle rails.~~
- ~~iii. Flex posts.~~
- ~~iv. Concrete or stone blocks affixed to the ground by their weight.~~
- ~~v. Marks on the ground surface for visibility and delineation, including but not limited to striping for bicycle lanes, thermoplastic striping and paint, painted sidewalk extensions, sidewalk stencils, marks for bicycle parking, and paint in zones of potential conflict between bicyclists and motor vehicle drivers.~~
- ~~vi. Detectable warnings on or before a curb, entry point, crosswalk, or accessible facility.~~

~~b. Maintenance or repair of any of the following elements, or in-kind replacement of any above-ground components of any of the following elements:~~


- ~~i. Signs, signals, traffic control devices, or signalization, including but not limited to any such elements that address the requirements of the Americans with Disabilities Act, Architectural Barriers Act Accessibility Standards, or Uniform Federal Accessibility Standards.~~
- ~~ii. Cameras, masts, wiring, and other equipment and fixtures used for automatic traffic enforcement, tolling, monitoring of motor vehicle traffic, or security purposes.~~
- ~~iii. Tracks, including but not limited to ballasts and ties.~~
- ~~iv. Clean energy technologies supporting alternative transportation infrastructure.~~
- ~~v. Signal bridges.~~
- ~~vi. Transformers, breakers, switches, and other electrical components.~~

~~e. Maintenance or repair of the following elements, or in-kind replacement of any above-ground components of the following elements:~~

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 Number: 1 Author: hein Subject: Comment on Text Date: 11/22/2024 11:07:48 AM

Once again, transportation activities and housing/energy efficiency measures are not related and should not be together in the same agreement document. It is simply poor, disorganized and random public policy for no justifiable reason.

 Number: 2 Author: hein Subject: Cross-Out Date: 11/22/2024 11:08:49 AM

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~~i. Bollards.~~

~~ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures.~~

~~iii. Transit shelters, bicycle lockers, or bicycle shelters.~~

~~5. Work on Bridges~~

~~The following activities related to bridges built as or incorporated into *alternative transportation infrastructure* do not require further Section 106 review:~~

~~a. Maintenance or repair of drains, joints, joint seals, concrete decks, parapet, rail, concrete, steel elements, bearings, retaining walls, and bridge machinery.~~

~~b. Cleaning and washing.~~

~~c. Conducting electrochemical extraction and cathodic protection.~~

~~d. Mitigating cracks, including but not limited to pin-and-hanger replacement and other retrofits.~~

~~e. Implementing countermeasures against scour.~~

6. Other Activities

The following activities lack any potential to cause *adverse effects* and therefore do not require further Section 106 review:

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

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* or by another entity receiving federal financial assistance (such as a state, Tribal, or local government, or joint venture, railroad commission, compact authority, port authority, transit agency or authority, private company, or other project sponsor), of: *buildings*, energy efficiency or *electrification* materials or equipment, *clean energy technologies*, railway *rights-of-way* for the *maintenance*, development, or expansion of rail-to-trail pathways or passenger rail service, and fleets of bicycles, *micromobility vehicles*, hybrid or electric vehicles, or electric locomotives, provided that any changes in use or access, or any physical actions related to such activities 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. Direct home mortgages or mortgage guarantees for homeowners.

e. Transfer, lease, or sale of a federal government-owned *building* or *alternative transportation infrastructure* from one *federal agency* to another *federal agency*, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.



~~1. A decision to limit motor vehicle access to, through, or on streets that remain available for walking, bicycling, micromobility vehicle, or transit uses, including but not limited to “play streets,” “school streets,” “safe route to school” streets, “open streets,” tolling, or congestion pricing, provided that any changes in use or access, or any physical actions related to such activities must separately undergo Section 106 review if and as required, and pursuant to the standard review process or to applicable agreements or program alternatives.~~

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

h. Treatment for pests, rodents, insects, and termites that does not visibly alter or obscure the structural, architectural, or decorative features of a *building*.



## APPENDIX B: ACTIVITIES NOT REQUIRING FURTHER REVIEW AFTER THE SATISFACTION OF CONDITIONS, EXCLUSIONS, OR REQUIREMENTS

### 1. Written Determinations

Certain *undertakings* listed in this Appendix B, <sup>1</sup> due to their nature and potential *effects*, require a written determination before the *federal agency* may proceed with the *undertaking*. <sup>2</sup> Applicable review processes and criteria for each type of determination are outlined below. After any such determination is made, the *federal agency* shall include the determination in its administrative record.

#### a. Type A Determination for Ground-Related Activities

A Type A Determination requires the *federal agency* to obtain a written determination that the *undertaking* is limited to *previously disturbed ground*, creates no new *ground disturbance*, or will have no *adverse effects* on any *historic property* from a *qualified professional* meeting the professional standards for archeology established by the Secretary of the Interior, the relevant *SHPO*, or the relevant *THPO*.

#### b. Type B Determination for Ground-Related Activities

A Type B Determination <sup>3</sup> requires the *federal agency* to identify the *area of potential effects* in accordance with 36 CFR § 800.4 and either (a) (i) consult with *Indian Tribes* and *Native Hawaiian Organizations* in accordance with Section III.B. of this Program Comment and (ii) obtain a written determination that the activity will have no *adverse effects* on any *historic property* from either a *qualified professional* meeting the applicable professional standards established by the Secretary of the Interior or the relevant *SHPO*; or (b) conduct a field survey of the *area of potential effects* or obtain a field survey of such area completed within the past 10 years, where such survey is acceptable to current state or Tribal standards and, if applicable, has been subject to consultation with *Indian Tribes* and *Native Hawaiian Organizations*, without such survey or consultation identifying any *historic properties* in the *area of potential effects*.

In addition to explicit provisions in this Program Comment requiring a Type B Determination, if the *federal agency* knows, believes, or has been informed that there may be moderate or high likelihood of encountering subsurface *historic properties* or burial sites, human remains, funerary objects, sacred objects, or items of cultural patrimony, then a Type B Determination must be made before work can proceed pursuant this Program Comment.

#### c. Type C Determination of *Historic Building* Status

A Type C Determination applies to <sup>4</sup> *buildings* placed in service 45 or more years ago and requires the *federal agency* to either (a) make a written finding that such *building* has not been identified as a *historic building* within the preceding 10 years after a *records check* and a review of its own records or (b) obtain a written determination from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or the relevant *SHPO* that such building is not a *historic building*. If a *building* was placed in service fewer than 45 years ago, then a Type C Determination is not required.

#### d. <sup>5</sup> *Track D* Determination for Window, Door, and Siding *Replacements*

A Type D <sup>6</sup> Determination applies to *undertakings* involving the *replacement* of a window, door, or siding of a *historic building* or of a *building* that has not received a Type C determination. A Type D Determination requires that (a) a *qualified professional* meeting the professional standards for

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- Number: 1 Author: hein Subject: Comment on Text Date: 12/12/2024 12:41:38 PM  
Activities exempted provided the agency follows certain conditions - usually just by hiring someone or using staff meeting the SOI Professional Qualification Standards. The problem is there is no check and balance. An agency can hire/pay for someone meeting the standards, or utilize their own staff and heavily influence the outcome. This may be appropriate for agencies with proficiency in 106 and strong protocols - but since this is government wide, this is too subject to potential abuse and poses some Conflicts of Interest. The nature of these undertakings - usually material replacement, installation of new materials, etc., alterations... these are more intrusive than repair/maintenance activities. They are in some cases adverse effects, per the ACHP's own regulations. Sanctioning adverse effects with no consultation or discussion of mitigation, is not appropriate in many of these instances.
- 
- Number: 2 Author: hein Subject: Comment on Text Date: 12/6/2024 10:12:14 AM  
Eliminating actual DOE processes and substituting new ones sets a confusing government wide precedent giving the entire federal government unilateral discretion. While consultation is allowed, since it isn't required, it creates a government-wide parallel process that sets a dangerous new precedent for a sweeping set of potential undertakings.
- 
- Number: 3 Author: hein Subject: Comment on Text Date: 11/22/2024 2:14:08 PM  
Requires the agency to identify APE following standard regulations - which requires to identify historic properties in consultation with others, including in consultation with SHPOs and tribes - and then either consult with tribes and obtain written determination activity will have no adverse effects from a SOI qualified professional OR SHPO; or they conduct a survey. This is an odd arrangement - the agency would have to consult with SHPO on APE, but then could use a SOI qualified professional (but not the SHPO) to assess effects. Or after consulting on the APE, they complete a survey and then proceed without further consultation?
- 
- Number: 4 Author: hein Subject: Comment on Text Date: 11/22/2024 2:25:16 PM  
For buildings over 45 years old agency can perform a "records check" and determine on its own it is NOT a historic building. While the definition of "records check" in the document is fairly thorough, it is unclear whether the agency has to actually speak with the SHPO/THPO/NHO or whether they may only rely upon publicly available data. Perhaps definition of records check could be clarified?
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- Number: 5 Author: hein Subject: Comment on Text Date: 11/22/2024 2:22:12 PM  
Track or Type?
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- Number: 6 Author: hein Subject: Comment on Text Date: 11/22/2024 2:33:51 PM  
For buildings that failed Type C (meaning they are historic properties), an agency can have a SOI qualified individual make a determination that a replacement window, door or siding is an in-kind material OR that a substitute material is appropriate... AND if the agency determines that the replacement will reduce energy use. This potentially conflicts with the concept of using an in-kind material. In other words, it would only apply if in-kind material will reduce energy use. If a material is in-kind it may be hard to quantify an energy reduction. There are some requirements for considering life cycle and carbon.... but would this still incentivize replacement of these elements with substitutes in instances where the better choice might still be in-kind?

historic architecture or architectural history established by the Secretary of the Interior or the *SHPO* make a written determination that any *replacement* window, door, or siding is an *in-kind building material* or make a Type G Determination; and (b) the *federal agency* make a written determination that the *replacement* of a window or windows, door or doors, or siding as applicable, will reduce energy use of the *building*, after consideration of the lifespan and embodied energy of the existing element, the cost and carbon impact (including transportation-related impacts) of producing the *replacement* element, the *technical feasibility* of modifying the existing element to align it with current energy efficiency standards and codes, and the payback period of the *replacement* element.

e. Type E Determination for *Character-Defining Features* and *Non-Significant Facades*

A Type E Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type E Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *character-defining feature* of the *building* façade or that the *effects* of a proposed action will be limited to a *non-significant façade*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*. If a *building* was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type E Determination is not required.

f. Type F Determination for *Character-Defining Features* and *Primary Spaces*

A Type F Determination applies to *historic buildings* and *buildings* placed in service 45 or more years ago. A Type F Determination requires that the *federal agency* obtain a written determination that a proposed action will not affect a *primary space* at all, or will not affect a *character-defining feature* in a *primary space*, either from a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*. In making such a determination for a *building* placed in service 45 or more years ago but not deemed to be a *historic building*, the individual making the written determination must apply identical standards to such *building* as if it were a *historic building*, and all lobbies, ceremonial rooms, and ground-floor hallways (unless primarily used for utility purposes) shall automatically be deemed *primary spaces*. If a *building* was placed in service fewer than 45 years ago or a Type C Determination has been made, then a Type F Determination is not required.

g. Type G Determination for Substitute Building Material *Replacements*

A Type G Determination applies to *undertakings* involving the *replacement* of *historic building materials* with substitute building materials. A Type G Determination requires that the *federal agency* obtain a written determination from either a *qualified professional* meeting the professional standards for historic architecture or architectural history established by the Secretary of the Interior or from the relevant *SHPO*, that the substitute building material is appropriate based on the following factors: (a) the character of existing *historic building materials* in terms of condition, design, material properties, performance (including but not limited to insulation and air sealing value), safety, and presence of hazards such as lead-based paint, asbestos, or other *hazardous materials*; (b) the *technical feasibility* and *economic feasibility* of *repairing* or *replacing* the *historic building materials*; and (c) the suitability of available substitute building materials, with attention to composition, design, color, texture, size, dimension and other physical and visual properties.

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Number: 1 Author: hein Subject: Comment on Text Date: 11/22/2024 2:41:34 PM

An agency can have an SOI qualified individual determine that a proposed action won't affect a "primary space" or not affect a character-defining features of a "primary space." For buildings over 45 years deemed not historic, it is to be treated as it is anyway. HOWEVER....see next comment.

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Number: 2 Author: hein Subject: Comment on Text Date: 11/22/2024 2:41:15 PM

Why are lobbies, ceremonial rooms, ground-floor hallways deemed primary spaces in buildings 45 years or older that are not historic.... but for buildings that are, there is no similar provision?



h. *State Historic Preservation Officer Reviews*

The *State Historic Preservation Officer* shall have 30 days to review and respond to an adequately documented request by a *federal agency* for a determination pursuant to this Section. If the *State Historic Preservation Officer* requests additional, missing information in order to make its determination, the *State Historic Preservation Officer* shall have 30 days from receipt of the additional information to respond. If the *State Historic Preservation Officer* does not respond within 30 days of receipt of the request or the amended request, as applicable, then the determination shall be deemed to have been made.

2. Site Work

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

1. Replacement of any element listed in Appendix A, Section 1.a., after a Type A Determination has been made.

2. Removal of any element listed in Appendix A, Section 1.a., after a Type B Determination has been made.

3. Installation of any element on the same lot as a *building* or within an existing *right-of-way* and listed in Appendix A, Section 1.a., after a Type B Determination has been made.

d. Planting a tree (other than replacing a tree per Appendix A, Section 1.b.iii.), after a Type A Determination has been made.

e. Test borings, soil sampling, well drilling, or perc tests more than eight inches in diameter, after a Type B Determination has been made.

f. Any of the activities listed in Appendix A, Sections 1.d., 1.e. or 1.f. that have the potential for new *ground disturbance*, after a Type B Determination has been made.

g. Removal of oil tanks, septic tanks, or hazardous materials, provided such activity is limited to *previously disturbed ground* or creates no new *ground disturbance*, after a Type B Determination has been made.

3. Work on a Building Exterior

The following activities do not require further Section 106 review, when conducted on the exterior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

4. Replacement or installation of any of the elements listed in Appendix A, Section 2.a., after a Type C Determination has been made.

5. Replacement or installation of any of the elements listed in Appendix A, Section 2.a., if a Type C Determination cannot be made or is inconclusive, after a Type D Determination has been made.

6. Replacement or installation of any of the elements (whether above-ground or below-ground) listed in Appendix A, Section 2.b., if a Type E Determination has been made.

d. Abatement of hazardous materials where effects of the abatement may be visible from the *building* exterior, if a Type E Determination has been made.

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- Number: 1 Author: hein Subject: Comment on Text Date: 12/12/2024 12:52:43 PM  
This allows for the **replacement** of streets, sidewalks, retaining walls, fences, lighting, fountains, gutters, utilities, signage, etc. provided an agency decides via a SOI qualified individual that there is no new ground disturbance and no adverse effects. We are not comfortable with agency staff or consultants making their own adverse effect determinations without any consultation on the replacement - given the definition offered for replacement, in this document is so broad and inconsistent with SOI Standards. With the more permissive definition of replacement offered in this document leading to work not in keeping with the standards, per the ACHP's own regulations, an adverse effect determination is required. But this document suggests by meeting the definition of replacement contained here, a no adverse effect determination would be possible. This is a conflict.
- 
- Number: 2 Author: hein Subject: Comment on Text Date: 12/12/2024 12:59:34 PM  
This allows the agency to **remove** streets, walkways, playgrounds, fences, signage, lighting, retaining walls, etc. if their staff or consultant determines, after consultation on APE, there is no new ground disturbance or no adverse effect. Again uncomfortable with the removal of elements simply because an agency or their consultant says there is no adverse effect, without any consultation.
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- Number: 3 Author: hein Subject: Comment on Text Date: 12/12/2024 1:00:43 PM  
This allows for the **installation** of new streets, sidewalks, retaining walls, fences, lighting, fountains, gutters, utilities, signage, etc. if the agency staff or consultant determines, after consultation on APE, there is no new ground disturbance or no adverse effect. Uncomfortable with the installation of new elements because an agency or their consultant says there is no adverse effect, without any consultation.
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- Number: 4 Author: hein Subject: Comment on Text Date: 11/22/2024 3:31:43 PM  
agency can replace or install doors, windows, siding if its staff or consultant determines it isn't a historic property.
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- Number: 5 Author: hein Subject: Comment on Text Date: 12/12/2024 1:05:54 PM  
This allow an agency to replace elements if it can't determine whether a building is historic or not if their staff or consultant determines it uses in-kind or substitute materials AND it determines it would reduce energy usage. What metric/who determines the energy reduction? What happens if the best choice does not result in a reduction? Is there to be a preference towards selections that have more energy efficiency but may not be the best material choice? All because no consultation is required to determine if a building is a historic property or not? This is not responsible.
- 
- Number: 6 Author: hein Subject: Comment on Text Date: 12/12/2024 1:07:20 PM  
This allows replacement or installation of new HVAC, canopies, roofs, ADA, elevators, foundations AND SOLAR if agency staff or consultant determine it won't impact a character defining feature or facade or will be limited to insignificant facade. Note that replacement or installation of solar is additionally covered in A, Section 2.c. So there is confusing redundancy and perhaps inconsistency with A Section 2.b.vi. since solar is included in the definition of "clean energy technologies." We are not comfortable with agencies determining the significance of facades without any consultation.

e. *Abatement of hazardous materials* where *effects* of the *abatement* have the potential for new *ground disturbance*, after a Type B Determination has been made.

#### 4. Work on a Building Interior

The following activities do not require further Section 106 review, when conducted entirely in the interior of a *building*, after the satisfaction of the following conditions, exclusions, or requirements:

<sup>1</sup> a. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., after a Type C Determination has been made.

<sup>2</sup> b. *Replacement or installation* of any of the elements listed in Appendix A, Section 3.a. or Section 3.b., if a Type C determination cannot be made or is inconclusive, after a Type F Determination has been made.

c. *Abatement of hazardous materials* where *effects* of the *abatement* may be visible from the *building* interior (other than from the interior of an individual housing unit), after a Type F Determination has been made.

#### ~~3. Work Involving Transportation Fixtures and Equipment~~

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

~~a. *Replacement* of any of the elements (whether above ground or below ground) listed in Appendix A, Section 4.b. after a Type B Determination has been made.~~

~~b. *Installation* of signs, signals, traffic control devices, or signalization supporting *alternative transportation infrastructure*, or *installation* of any of the elements (whether above ground or below ground) listed in Appendix A, Section 4.b.ii., after a Type B Determination has been made.~~

~~c. *Installation* of *clean energy technologies* supporting *alternative transportation infrastructure*, after a Type B Determination has been made.~~

~~d. *Installation* of any of the following elements after a Type A Determination has been made:~~

~~i. Bollards no taller than 48 inches and no larger in diameter than 12 inches.~~

~~ii. Ticket dispensing structures, fee collection structures, or interpretive wayside exhibit structures, 6 feet or less in height and 3 square feet or less in horizontal cross-section area, in addition to height or cross-section needed to incorporate solar power into such structures.~~

~~iii. *Transit shelters, bicycle lockers, or bicycle shelters* 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.~~

#### ~~6. Work on Bridges~~

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

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Number: 1 Author: hein Subject: Comment on Text Date: 12/12/2024 1:12:27 PM

Agency staff or consultant can replace or install walls, doors, lights, HVAC, insulation, ADA, foundations, etc. if they can't find record of it being a historic building. This is why relying just on records checks is not the best way to determine if a building is historic or not. Actually talking to a SHPO is a responsible step. With some qualifiers here, there is interest in reducing reviews and giving more latitude in interior spaces - but more than a records check and delegating the identification of "character-defining" or "primary" spaces alone to an agency should be necessary. Clearer pathways and guardrails, if thoughtfully employed, could provide some real efficiencies and take unnecessary reviews off the table. NCSHPO supports continuing the conversation on these.

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Number: 2 Author: hein Subject: Comment on Text Date: 12/12/2024 1:14:32 PM

This provides the same things as above if they can't determine if it is historic or not if their staff or consultant thinks it won't impact a primary space. Again, if we can settle the historic property question and define the process for identifying primary and character-defining features and spaces, there is great interest in reducing reviews of various interior rehabilitation elements.

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Number: 3 Author: hein Subject: Cross-Out Date: 11/22/2024 3:51:40 PM

Again, we believe transportation does not belong in a vehicle primarily covering buildings.

~~a. Replacement or installation of a bridge built to serve pedestrian, bicycle, micromobility vehicle, or transit use, after a Type B Determination has been made.~~



**APPENDIX C: 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: