



WISCONSIN  
HISTORICAL  
SOCIETY

October 7, 2024

The Honorable Sarah Bronin  
Advisory Council on Historic Preservation  
401 F St. NW, Suite 308  
Washington DC 20001

Dear Chair Bronin and members of the Council:

Thank you for the opportunity to comment on the *Program Comment on Accessible, Climate-Resilient, Connected Communities*. As stated in the Goals of the *Program Comment*, it is our collective interest to advance historic preservation goals. These goals are not separate from addressing housing needs and working toward greater sustainability. We can advance historic preservation *and* address societal needs, as was the intent of the National Historic Preservation Act in 1966.

However, while many aspects of the proposed *Program Comment* are sensible provisions that eliminate the need for unnecessary reviews, there are several points that we would like the ACHP to consider moving forward. The provisions as proposed stand in direct opposition to Congressional intent by diminishing the role of SHPOs as set forth in the National Historic Preservation Act to protect resources within their states. Furthermore, the use of the *Program Comment* may undermine beneficial State/Agency and Tribal partnerships created through years of collaboration and relationship building, may increase conflict between the actions of Federal agencies and state statutes, and may lead to avoidable disturbance of archaeological/burial sites.

For over two decades, the Wisconsin SHPO has made significant investments to build a comprehensive cultural resources database and project tracking system so that we can provide the critical data needed for Section 106 reviews and to expedite consultation. Our state receives approximately 1600 federal projects for review annually and our average response time is 11 calendar days. Last year, we were able to resolve all projects with our federal partners, and through consultation reduced projects with adverse effects to only 41 projects out of 1600. These projects were mitigated through consultation with impacted communities and project partners.

**General Observations:**

The scope of the document is overly large and complex. The need for a lengthy flow chart exemplifies the complexity of the proposed rule changes and underscores the possibilities of misinterpretation. In addition, while most of the *Comment* addresses buildings, the transportation portion is not a good fit. Specifically, many states have worked with FHWA and our state Departments of Transportation to develop robust programmatic agreements that address the concerns and historic resources that are unique to each state. A one-size-fits-all approach is not

advisable where cultural resources are concerned. Our Wisconsin transportation Programmatic Agreement signed in 2023 with FHWA, WisDOT, FRA, USACE, and THPOs encompasses the particular interests of Tribes with a historical and cultural interest in Wisconsin, as communicated to us and our partners, and includes other federal agencies with roles in the transportation permitting process.

A concern throughout is that the effect of this *Program Comment* may be to hold private individuals and state and local governments to a higher preservation standard than the federal government in the treatment of potentially eligible buildings, and on impacts to archaeological and burial sites. In Wisconsin, like many other states, approximately 77% of the 157,000+ standing resources in our state inventory have not been evaluated for National Register eligibility. The *Program Comment* has the potential to have negative impacts on these unevaluated buildings because allowable projects could diminish a property's integrity and possibly render it not eligible for listing due to *Comment*-permitted alterations. If federal projects allow for non-reviewable replacement of historic features and materials, it makes the job of local historic preservation commissions and SHPOs more difficult and undermines the uniform application of the Secretary of the Interior's Standards. The *Program Comment* allows federal agencies to skirt the Standards as well as SHPO review and consultation, while requiring private property owners to comply under the federal tax credit program, local preservation ordinances, or state cultural resources laws. Section I.5.e. addresses the transfer, lease or sale out of federal ownership and the requirement for enforceable conditions to ensure the long-term preservation of the property. These conditions include provisions for review and for adherence to the Standards. This again may require the purchaser (often a unit of government or a private individual) to adhere to stricter historic preservation standards than the previous federal owner.

The removal or replacement of extant historic materials or features and the allowance of substitute materials should be subject to SHPO review. Some materials are better suited as alternative materials than others, while other substitutes offered as replacements by the building trades are inappropriate because they are not suitable for local conditions or cannot replicate the appearance, physical properties, or performance of original materials as documented by NPS in their Preservation Brief 16, *The Use of Substitute Materials on Historic Building Exteriors*.

Overall, there is insufficient consideration given to the potential impact of the *Program Comment* to archaeological sites, which may include sites of significance to Tribes, but also sites with Euro-American significance, as well as impacts to pre- and post-contact burial sites. While the *Program Comment* addresses impacts to previously disturbed areas, it may lead to work that has the potential to impact known and unknown archeological and burial sites. Just as many buildings are unevaluated, 96% of Wisconsin's 36,000+ identified archaeological sites are unevaluated—and large portions of Wisconsin have not been surveyed for the presence or absence of archaeological resources. Furthermore, Wisconsin's strict burial laws require reviews or permits within identified burial sites. Based on documented finds, these burial sites may be under existing roadways, under or adjacent to standing buildings, or within the right of way. In Wisconsin, buildings have been built within the boundaries of older Euro-American cemeteries as well as burial mounds. SHPO experience in helping partners identify and avoid known sites

and prevent potential disturbance to unreported sites in areas with high archaeological potential will be circumvented by the proposed changes, despite our proven track record of expediting projects while simultaneously protecting resources.

Appropriately, “Sites of religious or cultural significance to Indian Tribes and Native Hawaiian Organizations” are subject to standard 106 review. However, language in this section is unacceptably vague, and underrepresents the vital role played by THPOs outside of tribal lands. At least 19 Native American tribes, including several now living in other states, have a demonstrated historical and cultural interest in the land now known as Wisconsin. As defined in the document, “tribal lands” is all lands within the exterior boundaries of any Indian reservation. As an example, Wisconsin’s Ho-Chunk Nation has no reservation and only holds land in trust and fee simple. Historically, their territory covered 8.5 million acres by the Treaty of 1825, and they maintain an interest in this larger area.

By excluding SHPO from consultation, projects will inadvertently affect sites of religious or cultural significance. Together, SHPOs and THPOs assist in the identification of potential sites and SHPOs can help federal agencies identify the Tribes to consult. Overall, the *Program Comment’s* steps for the identification of relevant parties in consultation with Indian Tribes and Native Hawaiian Organizations discounts the state and regional Tribal relationships of THPOs and SHPOs. Our Wisconsin Archaeological Site Inventory stores important information related to sites, but only 0.04% of our sites currently have an identified Tribal affiliation. Tribal affiliation, when included, is only for post-contact sites. SHPOs and THPOs play a critical role in this important part of the consultation process, helping to ensure that the relevant Tribal interests are considered so that we can facilitate and coordinate reviews with our Tribal partners.

The statement on B. Effect on Other Applicable Laws should be strengthened, as this can easily be overlooked. Failure to obtain required state reviews or legal authorization may result in avoidable delays and significant costs. In Wisconsin, failure to obtain the necessary permits under our state’s burial law may lead to prosecution. SHPO staff ensure that these reviews and authorizations are obtained through the Section 106 project review.

Further clarification should be provided on when which type of Qualified Authority should be consulted. Some instances require a Qualified Professional or a Tribal authority, other situations may require both a Qualified Professional and an authority with Tribal expertise. Throughout the appendices, the *Comment* calls out a determination of a *qualified authority* without specifying which type of authority should participate.

The *Program Comment* notes that it “provides all Federal agencies with an alternative way to comply with their responsibilities,” and later stipulates (I.C.) that federal agencies may follow the *Program Comment* or continue to implement existing MOA or PAs. This provision allows solely the agency to choose which approach to use. It is also unclear at which federal level MOAs or PAs may be terminated. For example, could USDA terminate all agreements that exist within a Forest Service region in favor of the national scope *Program Comment*? SHPOs have worked in good faith for decades with federal agencies to develop these documents and successful partnerships. Again, these active MOAs and PAs address the particular needs of our

state, our Tribal partners, and our agencies, and their circumvention can only come at the expense of our cultural resources and established partnerships. The localized agreement documents that we have developed with federal agencies reflect how we work in the state and acknowledge the unique conditions within our state. They identify the factors that affect eligibility, as well as the character defining features that merit special consideration within our borders.

A 20-year duration for the agreement is much too long. This far exceeds other agreement documents and discourages adjustments or updates that reflect prevailing conditions or issues that arise. As we know well, a 20-year period will encompass new scholarship that will affect how we evaluate historic properties and new materials. New approaches to preservation will also need to be considered.

Per Stipulation X(A), federal agencies are required to provide an annual report regarding the use of the *Program Comment* only to the ACHP. Why would this report not be provided to SHPOs and THPOs as well? Per Stipulation X(B), ACHP will only meet with the SHPOs for the first four years to discuss the “implementation of the *Program Comment*.” Is there an assumption that any issues will be resolved within that time? SHPOs and THPOs regularly provide agencies with valuable feedback on concerns that arise and suggest improvements in the process, including ideas for additional streamlining. The current processes we have with our federal agency partners are a direct outcome of years of communication regarding what works best, and it is our intention to continue to improve those processes in years to come.

### **Comments on Appendix A-1, A-2, B-1**

#### **Site work:**

- Concrete and Asphalt Ground Surfaces: Exclusion of these projects from review denies protection to archaeological and burial sites immediately beneath the surface. We have seen multiple instances where significant sites, including ancestral burials, have survived immediately beneath asphalt and surface levels. SHPO review allows us to warn agencies of past finds in sensitive areas and to employ methods of rapid identification of near-surface resources in consultation with Tribal partners.
- Installation of other features, such as new lighting and retaining walls, has the potential to cause irreparable ground disturbance to archaeological and burial sites. Similarly, test borings could damage archaeological or burial sites. We ask that SHPOs be allowed to identify those instances through consultation and review and to assist agencies to avoid the delays, costs, and cultural trauma that result from inadvertent disturbance and destruction.
- Landscaping features may be part of a significant designed landscape.
- Areas within 10 feet of existing paved area or within 10 feet of a building may have known archaeological or burial sites.
- Many of these concerns may be alleviated through a consultation with SHPO, with the result that damage is avoided, partnerships and trust remain intact, and legal prosecution is forestalled.

### **Work on Building Exterior:**

- The exclusion of buildings that were determined to not be historic in the past ten years may remove from consideration those that were found to not meet eligibility criteria due solely to age. Allowing changes to buildings that have not been assessed has the potential to cause significant impacts to the integrity of unevaluated eligible buildings. Elements such as roofing, gutters, chimneys, windows, and siding may be character defining features. Consider a Tudor Revival building that has leaded glass, a slate roof, and decorative chimneys. The inappropriate replacement of these features may so diminish the integrity of the building as to render it no longer eligible.
- Maintenance or removal of below ground utilities within the boundaries of a recorded burial site would need to comply with Wisconsin state statutes related to burial site protection.
- Windows under 45 years of age may be character defining features of buildings that may meet criteria consideration G or be in buildings that are in potential historic districts that have periods of significance that end less than 50 years ago.
- Per the document, the replacement of materials may be allowed through an assessment of economic feasibility. As the definition is currently drafted, the “estimated operation costs and available budget” are included in project outcome determinations of “viability, suitability, and practicality of a proposed undertaking.” We already face numerous issues with applicants who use these reasons to not maintain historic facilities. The *Program Comment*, and this definition, will drastically reduce the ability to successfully offset adverse effects to historic properties and may encourage agencies to use the cost argument to avoid the upkeep of historic properties.

### **Work on Building Interior:**

- While the language clearly excludes work on primary spaces, the alteration of flooring, ceilings, or stairs may affect important character defining features. The term “cosmetic improvements” is not defined and is open to broad interpretation. These items, as well as the others listed in Section 3 are subject to review and approval for compliance with the Standards for individuals applying for federal rehabilitation tax credits. Furthermore, many of the allowable actions may be considered adverse effects in 36 CFR 800.5(a)(2).
- The same concerns noted above apply related to determinations that are 10 years old.
- It should be noted that some detailed actions, such as removal and installation of equipment and fixtures or the installation of building energy control systems are already addressed in many existing agency agreement documents and allow these improvements to proceed without SHPO review.

## APPENDIX C-1: Transportation related activities

- The placement of **shelters** should be reviewed to ensure minimized impacts to viewsheds and setting. A shelter could have a significant visual impact on a historic property. SHPOs are happy to work with transportation agencies to find more appropriate locations in the immediate area. Depending on the location, the preference is for a see-through shelter (no advertising) to allow for visibility of adjacent historic properties.
- Wisconsin Tribes have identified the installation of **rumble strips** (1.b.iv) as having a potential of adverse effect on adjacent ceremonial areas. **Bollards** have also met with community opposition.
- As noted above, we recommend the removal of this section.

### Recent Examples of Successful Consultation:

Below are some examples of Wisconsin projects where consultation with SHPO avoided project delays and adverse effects to resources. In these examples, we identified solutions and assisted the agency in avoiding adverse effects.

#### Silver Maple Solar Project

The project involved the installation of a solar field surrounding a church and community center in Oshkosh Township, Winnebago County. The qualified professional determined the historic property to be eligible under criterion A for its associations with the Welsh community and possibly under criterion C. The integrity of the feeling and setting of the rural church would have been affected by the installation of solar panels on three sides of the property. The project as proposed faced opposition. The SHPO consulted with the developer, state agencies, and the local community and developed a mitigation plan that included screening to lessen the visual impact while allowing the solar field to move forward within 30 days from initiation of consultation.

#### Vista Sands Solar Electric Generation Facility

A cluster of archaeological sites with exceptional integrity were encountered intact during the Phase I archaeological survey for this project in Portage County and research indicated that additional sites were located nearby. The SHPO concurred with the archaeological consultants that the density of sites in the area likely indicated the presence of a larger and significant Native American village complex. The qualified professional determined, and the SHPO concurred, that the area was eligible for the National Register under Criterion D. The SHPO developed a working plan of an area to be excluded from development with the understanding that the boundaries could be altered based on additional archaeological survey. A stipulation was added that interested parties should meet to discuss options and potential mitigation should any work proceed in the marked area.

#### Bus Rapid Transit in Milwaukee

Bus Rapid Transit is a federally funded initiative through the Federal Transit Administration which provides enhanced transit services to major metropolitan areas with stations strategically

placed to reduce trip time and improve traffic safety. The first BRT program in Wisconsin came in for SHPO review in 2017. Through consultation, we were able to assist project leads with relocating proposed stations to avoid Native and early Euro-American unmarked cemeteries and from obstructing the view of National Register listed resources such as Marquette University's iconic Johnston Hall.

### **Burials in Disturbed Areas**

Wisconsin SHPO staff have reviewed numerous projects in La Crosse, Onalaska, Trempealeau, Neenah, Prairie du Chien, Oshkosh, Calumetville, Milwaukee, Sauk City, and other municipalities where burial and other features have been found just below the road surface, along sidewalks, directly underneath buildings, and adjacent to hand-dug basements. These archaeological features, which reflect cultural sites as wide-ranging as Oneota cemeteries, post-contact Indigenous villages, and historic forts, are often located in heavily developed and so-called "disturbed" urban settings. Some sites were known prior to investigation, and consultation with SHPO resulted in their rapid identification and mitigation. Others were unknown, and SHPO responded rapidly as a consulting party to ensure respectful treatment and project success. Besides intact deposits and burials found just beneath the asphalt or concrete at many sites, human remains are found scattered back into utility trenches along with the backfill. Moreover, we have entire communities such as La Crosse, Onalaska, Trempealeau, and Sauk City, where large swaths of land are known to contain burials sites due to the long history of occupation at these locations. There are many other locations throughout Wisconsin where the exemptions proposed by ACHP are not allowable under Wisconsin statutes. We would not consider categorically exempting such undertakings in a statewide PA.

In conclusion, we at the Wisconsin SHPO look forward to working with the Advisory Council and our federal agency partners to incorporate the goals of the *Program Comment* into new or amended programmatic agreements. As SHPO staff and preservation professionals, we take the responsibilities in 36 CFR 800.2 seriously. It is our goal in all consultation to reflect the interests of the State and its citizens in the preservation of Wisconsin's cultural heritage. We advise and assist Federal agencies in carrying out their section 106 responsibilities and cooperating with such agencies, local governments, organizations, and individuals to ensure that historic properties are taken into consideration at all levels of planning and development. We request to continue to be active participants in the consultation process as partners in our shared goal of protection of our cultural heritage.

Sincerely,



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State Historic Preservation Officer - Wisconsin

cc: Erik Hein, NCSHPO