Allyson Brooks Ph.D., Director
State Historic Preservation Officer

September 24, 2024

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

Dear Chair Bronin:

Thank you for the opportunity to provide comments on the proposed ACHP Program Comment on Accessible, Climate Resilient, and Connected Communities pertaining to certain housing-related, climate-smart building-related and climate-friendly transportation infrastructure-related activities.

As the State Historic Preservation Officer of Washington, I ***agree*** with some of the basic principles involved in developing this comment, namely, the concept of streamlining for housing projects, climate projects and climate related transportation. We ***agree*** that our focus should be balancing project delivery with impacts to historic properties. However, our state has met most of these goals with our existing state programmatic agreements. These agreements have gone through our own state-focused consultation process with federal agencies, local governments and tribes. It is also important to note that our agency responds to 106 submittals within ***one business week***. There is no reason for these program comments to negate our existing streamlined agreements by instituting a national initiative that may not meet our local concerns, goals and objectives and that have been previously and successfully negotiated.

Based on the concern above, I respectively *object* to this agency wide Program Comment as currently proposed and many of the proposed exemptions. The pre-emptive elimination of the State Historic Preservation Officer's role in the Section 106 process detailed in this Program Comment is problematic. The legislative requirement in 54 USC 302301 that each Chief state elected official must appoint a state historic preservation officer demonstrates the paramount importance of including the state official's role in the historic preservation process.

Title 54 USC 304108 allows the Advisory Council on Historic Preservation to exempt undertakings through ***regulations***. Unless each federal agency adopting these proposed Program Comments goes through the Administrative Procedures Act, and publishes the exemptions in the federal register, they should only be considered guidelines.

Another reason for our objection is the Advisory Council on Historic Preservation has ***not*** provided us with data demonstrating that climate related projects are being delayed due to the Section 106 regulatory process. Instead, we can demonstrate that our 106 agreements have *effectively streamlined* the process to ensure timely project delivery. Aside from the regulatory havoc these program comments will create, and the lack of data to demonstrate any climate related project delays, this initiative seems to be an *intellectual exercise* rather than an initiative based on science and facts.

While we ***agree*** that streamlining is a laudable goal, this endeavor would be better served under programmatic agreements. The agreement process provides for tribal and public input, and state consent on streamlining initiatives specific to each state's regional ecological environments and public

interest. At minimum, the program comments should ***not*** override existing agreements that are functioning well and serving their purpose ***nor should the decision of using program comments vs existing agreements be left to the federal government alone***. The state and tribes **must** have a voice in whether existing agreements should remain, or the program comments should be implemented.

The challenge with making blanket exemptions at a national level is that they remove the specific analysis for the environmental and cultural conditions of each state. For example, in Appendix A-1 ciii there is an exemption for the removal of trees for housing. However, in the Pacific Northwest, we have over 1300 culturally Modified Trees, some of which in urban areas are registered as archaeological sites. An exemption for work on trees will inadvertently demolish culturally important trees to Washington State tribes. We recently found our agency in this exact situation where a significant culturally modified tree, important to an area tribe, was slated for removal for a housing project in Seattle. Appendix A-1 ciii needs to be adjusted to allow for the identification of culturally significant trees through consultation with the state and tribes.

While we appreciate efforts under Appendix C-1 for streamlining transportation projects to expedite project delivery, Washington State has already streamlined transportation undertakings through a successful statewide programmatic agreement. Our existing agreement, which was carefully negotiated with all of Washington's 29+ tribes, delineates exemptions, and ***maintains an average response time of three days.*** Appendix C-1 should be modified to allow existing programmatic agreements with FHWA and WSDOT to continue. There is no reason to negate a ***successful*** agreement that is working for our state and tribes. **The proposed program comments should NOT override any existing national or state programmatic agreements.**

It is also critical to acknowledge that programmatic agreements are contracts. If the Advisory Council terminates that contract for the program comment, then the entire list of transportation undertakings will need to be renegotiated under a new programmatic agreement and the process could take months to a year or more. Why create *regulatory chaos* when an existing agreement process is fully functioning? In this case, if ACHP is adamant about the proposed program comments in the transportation arena then there must be an independent, objective legal analysis focused on the impact of the program comments on existing programmatic agreements. An objective legal analysis should include reviewing the authority of federal agencies to unilaterally void existing contractual agreements.

In general:

1. State Historic Preservation Officers (SHPO) have their own authority under 54 U.S. Code §302303 to review federal undertakings. Section III, Alternative Compliance Approaches is unclear and should be removed. Who is determining minimal potential to adversely affect historic properties? Programmatic Agreements are the current method for making these decisions with qualified professionals. **Programmatic agreements and memorandum of agreements require the signature by either a SHPO or the National Conference of State Historic Preservation Officers as the negotiated consent to the streamlining initiatives. Existing agreements should remain in place.**

2. Consultation with Indian Tribes and Native Hawaiian Organizations: This section is confusing as it does not tie into the remainder of the program comments. Who is considered qualified to be conducting tribal consultation? Any project manager? Only a qualified cultural resource professional? Who are the tribal liaison staff being referred to? It is not clear whether this staff person is responsible for consulting with Tribal Historic Preservation Officers or whether they are just using internal agency information.

3. The Use of Qualified Authorities: The concept of a qualified authority vs. a qualified professional is very confusing. What does appropriate to the circumstances mean? How is that defined? What is the difference between the two?

4. Determinations of Eligibility: This seems to be a direct violation of the National Historic Preservation Act. Section 106/Title 54 is clear that the effects of an undertaking on historic properties must be considered by the federal agency, SHPO and THPO. That legal requirement cannot be waived in regulation. While there may be a legal opinion that ACHP does have this authority it seems open to a Loper Bright challenge.

5. The exemption for review of buildings 45 years and less for climate related activities means that buildings or structures that may become eligible for the National Register of Historic Places in the additional 5 years will be modified before a property owner can consider the use of tax credits as a cost savings for climate efficiency. The proposed program comment prevents a property owner from learning whether they can take advantage of the federal or state tax credit programs once the property reaches 50 years. If modifications to potentially eligible buildings result in loss of National Register status this could cost a property owner, the loss of thousands of dollars that could have been used for climate related rehabilitation. **States were given rights regarding the identification of historic properties and the right to have property owners learn of tax incentives. The right of the public to learn about potential tax incentives before funding climate related changes deserves to be honored and continued.**

6. The exemptions for ground disturbance must be determined by a *professional archaeologist* who understands the potential for buried soil surfaces and whether ground disturbance may have the potential for artifacts or human remains. If this is not properly analyzed, the exemption will cause a project to stop due to inadvertent discoveries. Stopping projects is exorbitantly expensive and time consuming. Time is better spent on properly analyzing the potential for archaeological material ahead of project initiation.

In the early 2000s, our state transportation agency moved forward on a large transportation project, known as the Graving Dock, claiming the area and archaeological materials were disturbed. This erroneous decision led to impacting over 300 intact tribal burials, and a 2000- year-old village site. This egregious impact caused the project to be terminated and cost the federal government and Washington State over $100 million. There is a misunderstanding from the Federal Advisory Council on Historic Preservation that many critical archeological discoveries have been located either within or just below ground disturbance. Due to beneficial environmental conditions most, urban areas have simply been built over indigenous villages and cultural places. The failure to use science and culture for archaeological identification methods will have detrimental results.

The idea that previous ground disturbance will not impact archaeological or cultural material, or that either is unimportant, is a misunderstanding of the science of archaeology from a soil development perspective. This generalization diminishes the value of cultural material that may be retrievable to groups that were marginalized and moved during the development of urban area. The best method of streamlining the Section 106 process is to fund technological initiatives such as expanded Geographic Information Systems projects. Sharing data through

technology streamlines Section 106 reviews, expedites responses and prevents harm to historic properties.

7. While the policy focus on zoning is laudable there are an estimated 365,000 Community/Homeowner Associations in the United States. HOAs are essentially private residential government, and all too often function as de facto covenants for land use. We strongly urge examining the impact of HOAs on land use restrictions. HOA covenants are often more damaging than traditional zoning as the latter allows legal variances which the former does not.

There is no data to support that there is a problem that requires solving through this proposal. In state Fiscal year 2024 our agency received 4,994 Section 106 submittals and the average response time was 3 days. Out of all the projects submitted 948 were considered No Historic Properties Affected, 317 were No Adverse Effect and only 32 we identified as having an Adverse Effect. Our agency also has 111 active programmatic agreements which assists with reducing the number of Adverse Effects. The data clearly demonstrates that the current streamlining processes are functioning as intended. The proposed program comments will actually harm our regulatory timelines as the ACHP override of programmatic agreements, that were carefully negotiated with all stakeholders and our tribal partners, will require either new agreements or amendments. The proposed changes will be particularly devastating to existing agreements with HUD and federal and state transportation agencies.

As a reminder, the National Historic Preservation Act of 1966 (NHPA) (a law proudly spearheaded by Washington State Senator Scoop Jackson) was designed to be a collaborative process between states, tribes, local governments and the federal government to preserve America's heritage. The NHPA gave each party a unique role that ensured a well-rounded perspective on our heritage. The voice of the state was paramount in identifying historic buildings, structures, sites, districts, and objects within their boundaries. In 1992, the responsibility of identifying places of religious and cultural significance was expanded to tribal governments., The Congressionally established process ensured that one governmental entity was not solely responsible for identifying, preserving and protecting places of importance to the tribes, the state, local communities and the nation. The importance of multiple voices cannot be understated; neither is the concept of a collaborative process that was a right given by Congress to the states and the tribes to voice historical significance from their localized perspective and to have a role in avoiding, minimizing, or mitigating effects to historic properties.

Program Comments are *not* in law but are a construction devised in federal rules. Regulations must exist within the framework of the law they seek to administer as established by Congress. The authority to write general regulations does not allow an agency to usurp power and authority given to the states and tribes by laws enacted by Congress. While the Chair of the ACHP has the right to develop *general rules* for Section 106, the concept of using a program comment is creating vast changes in how Section 106 functions in Title 54. If the ACHP wants to use the idea of a program comment for such a vast change to the Section 106 process, the Chair of the ACHP should write an amendment to the National Historic Preservation Act. The current program comment proposal seems open to a Loper Bright challenge. Even though the Advisory Council on Historic Preservation has general rule making authority regarding NHPA that does not make it legal or appropriate that they should abrogate the State's authority under Section 106 of the Act without state consent. This also holds true for the rights of the tribes under the Act.

In general, the Washington State Department of Archaeology and Historic Preservation does not waive its right to participate in the Section 106 process as written and passed by Congress without our consent. We are, however, more than willing to continue entertaining national programmatic agreements or state agreements that result in state **approval** of a ***streamlined process*** by all parties. These are very effective streamlining methods that are tailored to state conditions. This agreement process assures regional

accountability by all parties and is a process tailored to variations in the archaeological and built environment across the United States.

We look forward to working with the Chair of the Advisory Council on Historic Preservation to transform these comments into national or state programmatic agreements that allows the consent of the states, tribes and local communities that will result in an expedited Section 106 process.

Sincerely,

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Executive Director/State Historic Preservation Officer

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