



October 8, 2024

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

Re: Proposed Program Comment on Accessible, Climate-Resilient, Connected Communities

Dear Chair Bronin:

The American Cultural Resources Association (ACRA), the trade association for private firms that specialize in cultural resource management (CRM), appreciates this opportunity to comment on the Advisory Council on Historic Preservation's (Council) Proposed Program Comment on Accessible, Climate-Resilient, Connected Communities (Program Comment).

ACRA-member firms undertake many of the legally mandated CRM studies and investigations in the United States and employ thousands of CRM professionals, including archaeologists, architectural historians, ethnographers, historians, and an increasingly diverse group of other specialists. To help guide smart, sustainable economic development and safeguard important historic and cultural heritage assets, ACRA members apply specialized research skills within a framework of federal, state, local, and/or Tribal law and facilitate an open dialog where every stakeholder has a voice.

ACRA respectfully offers the following comments about the Program Comment.

Overview

The Section 106 process was enacted in the National Historic Preservation Act of 1966 and implemented through Council regulations at 36 CFR 800. It is an American success story, enabling the government and the private sector to build the infrastructure on which our society depends while ensuring that we do not compromise our historic and cultural heritage. More critically, the Section 106 process ensures that states, Tribes and the public have the ability to comment on undertakings.

For certain routine undertakings that may warrant an expedited process, the Council has worked with stakeholders to develop tools like memoranda of agreement (MOA), programmatic agreements (PA), program alternatives, and – where appropriate and when requested by federal agencies – program comments. ACRA believes such approaches, when carefully and thoughtfully developed, are consistent with the intent of the Section 106 process to balance the twin goals of development and heritage protection.

We are deeply concerned, however, that this proposed Program Comment is so broad and all-encompassing that it will undermine significant work conducted over decades by Council members, state and Tribal preservation officers, cultural resource management firms and professionals, and many others to strike an appropriate balance between those goals. ACRA also is concerned that the process by which this Program Comment is being developed has not allowed for the thoughtful consultation, review, and feedback that such a far-reaching document demands.

Worse, by proposing that the Program Comment will be in effect for two decades, and allowing it to be unilaterally extended by whomever holds the position of Chair, the Council could very well allow the Section 106 process to be further undermined by exempting broad categories of undertakings from review for virtually any policy goal.

ACRA fully supports the intended policy goals of this Program Comment, including construction of more affordable housing and the development of buildings and transportation systems that address the impacts of climate change. We also agree that these issues demand urgent attention from the federal government. However, the core mission of the Council is to balance worthy policy goals like these with the equally vital goal of avoiding irreparable harm to historic, archaeological, and traditional cultural places and properties. This Program Comment simply does not strike that balance.

ACRA's specific concerns with the Program Comment are summarized below.

- **It is Unprecedented for the Council to Issue a Program Comment on Its Own Initiative.**

Section 36 CFR 800.14 addresses program alternatives, including program comments. Although the Council may initiate a program comment (36 CFR 800.14(e)), the regulations' focus is on an agency requesting the Council to comment.¹ Program comments traditionally have been initiated by a single agency (not a group of agencies) asking the Council to approve alternate processes for compliance with Section 106. This proposed Program Comment would represent the first time in its history that the Council has issued such a comment without a request from an agency, and the first time that it has contemplated one that applies to all agencies.

Furthermore, 36 CFR 800.14(f) requires that “[w]hen an agency official proposes a program alternative [including program comments], the agency official shall ensure that development of the program alternative includes appropriate government-to-government consultation with affected Indian tribes and consultation with affected Native Hawaiian organizations.” There is no evidence that this requirement was followed in the development of this Program Comment.

Considering the unprecedented nature of this Program Comment – coupled with its expansive scope in terms of agencies covered and undertakings affected – it is particularly essential that the Council adhere to a careful and deliberative consultation process which provides stakeholders and the public ample time to consider and provide input on its potentially far-reaching impacts. It is not lost on ACRA that this Program Comment, if adopted, may become a template for expansive actions by future Council members whose commitment to protection of the nation's cultural heritage is not known.

¹ For example, 36 CFR 800.14(e)(1) requires the agency to “identify the category of undertakings, specify the likely effects on historic properties, specify the steps the agency official will take to ensure that the effects are taken into account, identify the time period for which the comment is requested and summarize any views submitted by the public;” 36 CFR 800.14(e)(2) requires agencies to “arrange for public participation appropriate to the subject matter and the scope of the category,” and so on.

- **The Justification for the Program Comment Does Not Adequately Explain the Need for It.**

The Program Comment states, under “D. Justification,” that it “enables federal agencies to focus on other undertakings with greater potential for adverse effects on historic properties, reducing taxpayer costs and facilitating project delivery. . . .”

ACRA agrees that the policy goals enumerated in the Program Comment are both worthy and necessary for the public good. However, the Program Comment’s assertion that such undertakings have a lower potential for adverse effects on historic properties than other undertakings lacks evidence. By what metrics does the Council demonstrate that the undertakings described in the Program Comment – as worthy as they may be – have less potential for harm to our nation’s cultural and historical heritage?

This fundamental question is particularly important since this Program Comment represents the first time that the Council is issuing such a comment without an agency request – and furthermore, is proposing to allow this Program Comment to apply to all federal agencies.

- **The Program Comment Will Give Agencies Unchecked Power to Make Decisions.**

ACRA is concerned that the Program Comment would leave considerable decision-making authority in the hands of federal agencies with no guardrails to ensure they consult with states, Tribes, and the public.

For example, the Program Comment states that agencies can choose to use the Program Comment, even if they already have a Section 106 MOA or PA in effect which addresses covered undertakings. While the Program Comment states that agencies must first consult with the MOA or PA signatories, the nature of such consultation is not defined. ACRA is concerned that this will allow agencies to abandon existing MOAs and PAs with only token signatory consultation, and without providing any recourse for stakeholders, especially the public, to weigh in.

Another example is in the requirement that a federal agency must follow the Section 106 process under 36 CFR 800 if the undertaking “would occur on or have the potential to affect” certain historic properties. This would include treatment of National Historic Landmarks (NHLs). The Program Comment is silent on properties that are potential NHLs. Again, the agency would appear to have complete authority to make such a determination without any stakeholder consultation.

- **The Program Comment Will Undermine Public Consultation.**

State, Tribal and public consultation is the linchpin on which the Section 106 review process rests; it is precisely through the task of engaging with public stakeholders that agencies and others build the necessary support which enables an undertaking to progress without controversy and court-case delay.

While certain undertakings, due to their limited scope and size, do not require extensive consultation, ACRA is concerned that the Program Comment would allow agencies to bypass public consultation that Section 106 requires even for undertakings where such engagement may be

necessary. Furthermore, the Program Comment would leave it to the agencies themselves to determine when and whether public consultation is even needed.

- **The Program Comment Would Allow Agencies to Act on Undertakings Without Use of Qualified Professionals.**

ACRA is deeply concerned that the Program Comment would enable agencies to make decisions without the use of qualified professionals. “C. The Use of Qualified Authorities” states that:

“Undertakings covered by this Program Comment do not require the use of a qualified authority except where explicitly stated, or except where, in the reasonable judgment of the federal agency, in consideration of various factors, the use of a qualified authority is necessary to fulfill the intent of the [NHPA] or necessary or useful to inform the federal agency’s decision making.”

This Program Comment effectively gives agencies carte blanche to make decisions on whether specific undertakings affect historic properties without consulting qualified authorities and provides no guardrails – beyond the vague qualifier of an agency’s “reasonable judgement” in “consideration of various factors” – to ensure agencies use qualified professionals where appropriate and necessary for the protection of cultural resources. As for “qualified professionals,” the only mention of them is in reference to historic architecture; there is no mention of their use with respect to archaeological or Tribal resources.

With respect to archaeological resources, the Program Comment apparently does not take into consideration that archaeological sites may extend below disturbed ground. In numerous places, the Program Comment requires a “qualified authority” to determine whether an area has been disturbed. However, the Program Comment fails to specify that the “qualified authority” must have the requisite knowledge and experience to determine whether a disturbed area has a potential for archaeological remains. Moreover, ACRA members are well aware that not all agency personnel who would be making these decisions meet the Secretary of the Interior (SOI) professional qualification standards.

- **The Program Comment Will Introduce More Confusion and Conflict into the Section 106 Process.**

CRM firms routinely report that one of the biggest challenges to the effective execution of Section 106 reviews is inconsistency of regulatory implementation among federal agencies, and between state and federal agencies. At times, even different regional offices of the same agency use dissimilar and conflicting procedures in implementing Section 106. This lack of consistency causes unneeded delays in the process, undermining the public’s trust in Section 106.

ACRA is concerned that the introduction of this Program Comment will make a complex interagency environment even worse by adding an untested process (one that, as noted above, was not requested by any agency) with vague definitions of covered undertakings. This is compounded by the fact that many projects must comply with federal, state, Tribal, and/or local preservation ordinances. Federal agencies, States, Tribes, and others have worked hard to align the federal 106

process with state and local requirements; ACRA believes that introducing a broad Program Comment like this will lead to confusion and difficulty in aligning compliance measures.

To make matters worse, a federal agency would be allowed to “incorporate use of this Program Comment in its review of [an] entire undertaking” in situations where components of the undertaking “include activities not listed.”

In essence, the Program Comment allows for a “choose your own adventure” approach to Section 106 review, whereby agencies could arbitrarily exempt certain activities in an undertaking from review while requiring it for others. ACRA is deeply concerned that this approach will inevitably lead to confusion, delays, and inconsistent and incomplete reviews of undertakings with potential historic and cultural resource significance.

- **The Program Comment Effectively Removes S/THPOs from the Review Process.**

The Section 106 process as outlined in statute and regulation ensures that state and Tribal historic preservation officers (S/THPOs) play an important role in both the evaluation of the effects of federal undertakings on historic properties under their jurisdiction, and in identifying alternatives and mitigation strategies. S/THPOs best understand the cultural and historic significance of properties in their respective jurisdictions and therefore are best positioned to engage with local stakeholders.

By offering all federal agencies, for a wide range of undertakings, the chance to bypass the Section 106 process and regulations, the Program Comment will severely limit the ability of S/THPOs to comment on and be engaged in individual undertakings in their states and on Tribal lands. This not only inhibits local consultation on a wide variety of undertakings; it contradicts S/THPO legal responsibilities under the NHPA.

- **The Program Comment Leaves Unclear Who Determines Whether Effects to a Historic Property Are Adverse.**

The Program Comment authorizes federal agencies to use alternative compliance approaches “for undertakings [defined in Appendixes A-1, B-1 or C-1] with no or minimal potential to adversely affect historic properties,” without further review under Section 106.

However, the Program Comment does not specify who determines whether there is the potential to adversely affect historic properties. The implication is that this, too, is a determination that federal agencies can make under the Program Comment without consultation with stakeholders, experts or the public.

In a similar vein, the Program Comment requires, under “V. Unanticipated Discoveries,” that an agency must halt all activity and follow the 800 regulations “[i]f previously unidentified historic properties or unanticipated effects . . . to historic properties are discovered during implementation of the undertaking.” Again, it appears that the determination of what constitutes an unanticipated discovery would be solely under the purview of the agency, and there does not appear to be any mechanism to provide disclosure of such a discovery to the public and others. ACRA is deeply

concerned that an agency could theoretically identify an unanticipated discovery and choose to continue work without any provision for public input or agreement.

- **The Program Comment Fails to Ensure Transparency.**

The Program Comment requires federal agencies to “provide annual reports regarding the use of this Program Comment during the previous reporting period, ending June 30 annually, to the ACHP.” The report must provide “examples of undertakings covered by Section III.A.2” and other information. Under the Program Comment, after 2029 agencies must provide reports only once every three years. These reporting provisions present a number of concerns.

First, there is no requirement for agencies to report on their use of the Program Comment until after the fact, in some cases a full 12 months after the decision to use the Program Comment. After 2029, agencies would not need to report on their use of the Program Comment for up to three years. This would, in essence, allow agencies to utilize the Program Comment without giving the public the opportunity to know about its use until long after the undertaking has been completed – and, potentially, historic properties irrevocably damaged or destroyed.

Second, the wording of the provisions suggests that agencies need only provide examples of use of the Program Comment for undertakings covered by Section III.A.2, as opposed to all uses of the Program Comment.

These provisions become all the more troubling when considering the provision on “Dispute Resolution (Section VI),” which allows any person to “file a dispute over the implementation of this Program Comment or its use for any particular undertaking.” Without timely notification by agencies of their use of the Program Comment, how will members of the public even know that it has been used?

- **The Program Comment Does Not Require Mitigation for Adverse Effects.**

A core component of the Section 106 process is the identification of alternatives and modifications to the undertaking that, as expressed in the regulations at 36 CFR 800.6, “could avoid, minimize, or mitigate adverse effects on historic properties.” This process recognizes there are instances where adverse effects to historic properties and assets are unavoidable, yet an obligation remains to find ways to mitigate such damage. The Program Comment would enable federal agencies to elude any responsibility to identify alternatives or mitigation measures to undertakings allowed under it.

- **The Program Comment’s Duration and Extension Process Give Too Much Power to Future Chairs and Make It Difficult, if Not Impossible, to Institute Potential Reforms.**

The Program Comment is proposed to remain in effect for two decades. Although Section IX provides that the Council *may* terminate the Program Comment prior to 2044 and that the Council *may* amend the Comment, there is no requirement that the Council review the effectiveness or worthiness of the Comment during its lifespan and make requisite changes.

In addition, ACRA is concerned about the fact that the ability to extend the duration of the Program Comment beyond 2044 lies solely with the Chair and not the full Council. This provision puts too much power in the hands of future Chairs whose positions on the importance of preservation cannot possibly be known.

Conclusion

ACRA and its members are committed to maintaining and strengthening the Section 106 process so that infrastructure undertakings move forward with proper consideration for their impacts on all types of cultural resources, as well as with the active consultation with all affected parties.

For the reasons stated above, we are deeply concerned that the Program Comment moves federal preservation policy in the wrong direction. ARCA respectfully urges the Council to withdraw this Program Comment.

ACRA offers its assistance in working with the Council and other stakeholders to develop tools which help federal agencies deliver undertakings in a timely manner while striking the right balance between progress and heritage protection.

ACRA appreciates this opportunity to comment on the proposed Program Comment.

Sincerely,



Amanda Stratton
Executive Director