

**Comment Summary**  
**Proposed Program Comment on Accessible, Climate-Resilient and Connected Communities**  
**October 23, 2024**  
**Prepared by: ACHP staff**

The following summary is intended to provide a general overview of the comments that were received on the draft Program Comment (PC). They are organized by section, although the comments from Tribes have their own summary, given the government-to-government relationship between Tribes and the ACHP. Specific comments can be tracked in the comment matrix that was developed by staff.

Comments from Tribes:

In addition to verbal comments received, the ACHP received 7 letters from Tribes about the proposed Program Comment (PC). The ACHP did not receive comments from Native Hawaiian Organizations. Each letter stated the Tribe was opposed to the PC as written. Six Tribes requested additional consultation with the ACHP, which the agency is working to schedule individually with those Tribes. Several Tribes expressed concerns with the ACHP's development of the PC, flagging the need for the ACHP to meaningfully and systematically consult early in and throughout the process to ensure Tribal and NHO input is appropriately considered. Some requested additional consultation with all Tribes.

All letters from Tribes communicated their view that the PC, as written, is likely to result in harm, potentially significant harm, to sites of religious and cultural significance to Tribes and Native Hawaiian Organizations. Commenters stated this likelihood is due to the breadth of activities and agencies covered in the PC and its potential to allow federal agencies to predetermine that covered activities are not likely to affect sites of religious and Tribal significance on their own, bypassing Tribal consultation in the Section 106 process. Some commenters viewed this proposal as contrary to the ACHP's Policy Statement on Indigenous Knowledge and Historic Preservation and trust responsibility to Tribes, as certain undertakings will be entirely exempted from Section 106. Tribes expressed this is problematic because the Section 106 process as described in 36 CFR § 800.3 through 800.7 recognizes specific rights and roles for Tribes and Native Hawaiian Organizations that allow their expertise to be incorporated into the process.

Based on their prior experience in the Section 106 context, some Tribes cited concerns that undertakings in the Appendices deemed to have "no or minimal potential to adversely affect historic properties" do carry the potential to adversely affect properties. One Tribe commented that the potential for some of the actions listed in the Appendices to cause adverse effects is evidenced by language in the PC regarding mitigation. The Tribe pointed out that the inclusion of language about the potential need for mitigation in and of itself recognizes the potential for adverse effects. A few Tribes stressed they prefer tailored, agency and situation-specific agreements that reflect the unique circumstances of and communities invested in undertakings. Like other commenters, Tribes commented that the PC as written allows an agency to decide to use the PC instead of using previously negotiated agreements that are specific to various situations, programs, and undertakings. Unlike some other commenters flagging this issue (like SHPOs), Tribes are often not signatories to agreements they have consulted on and those agreements may not reflect their recommendations. Thus, updating the draft proposed Program Comment to allow signatories to agree to forego use of an existing agreement document to use the Program Comment without consultation with Tribes may not resolve Tribally-expressed concerns.

Generally, written comments submitted by Tribes expressed concerns about the inclusion of ground disturbance in activities described in the Appendices, citing concerns about potential harm, and asked that ground disturbing activities be removed from the Appendices. One letter from a Tribal leader asked that the Appendix related to transportation activities be removed. Additionally, this Tribal leader asked for removal of all references in the Appendices to activities that cause ground disturbance, regardless of

whether an agency determined there has been prior ground disturbance. Generally, comments received from Tribes flagged the need to reconsider references to previously disturbed ground and previously disturbed rights of way, as there should not be a general assumption that previously disturbed areas have a reduced likelihood of possessing or intersecting with sites of religious and cultural significance to Tribes or sacred sites. Tribes also flagged that while the PC attempts to use the standard Section 106 process for undertakings that would affect sites of religious and cultural significance to Tribes, it is unclear to Tribes how federal agencies would know if this could be the case without Tribal consultation. Additionally, Tribes were unclear about how they should navigate the burden of demonstrating to agencies proposing or deciding to use this PC that an undertaking could potentially affect sites of religious and cultural significance.

#### Comments on Approach:

##### *Use of a program comment*

Comments generally support the intent of the PC, commending the ACHP on its efforts to address housing needs and climate-related concerns. Several comments supported the efforts to streamline the Section 106 process, however, a majority of comments questioned whether a program comment was the appropriate tool for streamlining, given the breadth and scope of covered undertakings. Others cited the ACHP's guidance on program alternatives, noting that most effective program alternatives are focused on specific resource types, repetitive project or program types, and specific responsible agencies and professionals. Some comments raised concerns that by making the PC available to any federal agency, the PC does not account for the different missions and capacities of federal agencies. Other comments acknowledged that the justification for the PC are the ACHP's recent policy statements, rather than implementation challenges within Section 106. Some comments asked for data supporting its need, meaning additional data that reflects this approach would fulfill identified compliance and timing issues relating to Section 106 reviews for the covered undertakings. Some comments emphasized that the PC, as currently drafted, was difficult to understand and would potentially result in delays and confusion due to the large number of undertakings to be included and the level of detail and requirements to be met. Finally, others noted a preference for programmatic agreements (including nationwide and prototype), which can be specific to states/localities.

##### *Legality of a program comment*

Numerous comments were received regarding the legality of a program comment and whether it could supersede existing agreements. Rather than summarizing those comments further, members should review the memorandum provided by ACHP's General Counsel.

##### *Consultation*

Numerous comments requested additional consultation on the concept of a program comment, as well as a dialogue on the issues that were being encountered in Section 106 that the PC is meant to address. These comments urged the ACHP to revisit whether a program comment was needed, but acknowledged that if it continued to be pursued, a substantially revised draft was needed. Tribes in particular requested individual Government-to-Government consultation but noted that consultation more broadly needed to occur.

##### *Role of SHPO*

Comments highlighted that due to the PC's structure, SHPOs appear to have been removed from the PC's implementation, which keeps a statutory voice out of the process.

##### *Training*

Comments in this regard requested that the ACHP consider whether broader Section 106 training would achieve the PC's same goals. They also noted that if adopted, the PC would require the development of

extensive guidance and training. Several comments pointed to the need for flowcharts to assist with clarity, some comments provided example flowcharts.

#### *Format*

Many commenters noted the length of the draft PC and the complexity of the overall document, including definitions and cross references, as a potential concern for its implementation, should it be adopted. Comments requested that consideration be given to simplifying the document to ensure it could be correctly utilized, including by staff who don't have specialized preservation experience.

#### Comments on Section I (Introduction):

Overall comments on this section requested renaming the PC to reflect the undertakings it covers, rather than policy goals.

#### *Background*

Several comments on this section suggested reframing it to emphasize the ACHP's mission of promoting the preservation and sustainable use of historic properties, and how the PC promotes preservation as an outcome. Other comments on this section requested the removal of transportation-sector projects due to its coverage within existing programmatic agreements and the different types of effects those projects create compared to housing undertakings.

#### *Federal Agency Action*

Although minimal comments were received here, they noted that the section would benefit from revisions that focus on the importance of Section 106 as process to review the types of undertakings referenced in the previous section.

#### *Prior ACHP Action*

Comments on this section requested data to support assertions regarding the costs and preservation outcomes that have occurred as a result of past program alternatives. Others noted that while the ACHP can advise state and local governments, its primary responsibility is to advise at the federal level.

#### *Justification*

Numerous comments in this section stated that the justification for the PC was not strongly made, and that the section would benefit from more specificity on the Section 106 challenges it is trying to address. Others noted that the justification seemed to rely on a foundation that the process was flawed, and the section should be reworded to emphasize the process's successes and the potential for further preservation.

#### *Goals*

Some comments here supported the PC's broad goals for streamlining and efficiency, and many others supported the need for finding a way of making it easier to create needed housing. However, in acknowledging that creating housing and addressing climate change are important goals, comments emphasized that those goals should be balanced with historic preservation values. Comments on this section also noted the potential conflicts with the requirements of the federal rehabilitation tax credit standards. Several commenters supported the removal of regulatory barriers, while others observed that the PC appears to place non-historic preservation policy goals ahead of preservation values.

#### Comments on Section II (Scope):

Most comments on this section asked how the PC would address the issue of delegation to applicants or permittees, or how the PC would be used by those agencies who often act as a pass-through.

### *Overall Effect*

Comments on this section noted the potential conflation with the section's use of "effect" and the regulation's definition of "effect." Other comments noted that because of the PC's breadth and scope, it would be impossible to track its use and ensure that effects to historic properties are avoided. Several comments observed that the PC appears to acknowledge that minimal adverse effects may occur as a result of the PC, with no further discussion of mitigation or resolution of adverse effects, which led to questions of inconsistency with the regulations. Some comments noted that the PC assumes adequate or appropriate identification efforts have already been completed, which may not always be the case. The potential for effects to archaeological sites and TCPs also noted in comments. Some comments also questioned the provision allowing for use of the PC for components of larger undertakings and noted potential concerns with a segmentation approach.

### *Effect on Other Applicable Laws*

Comments on this section acknowledged that the PC would likely conflict with local processes in addition to state laws that often require SHPO review. Another comment noted that absent similar streamlining efforts with laws such as NEPA, it would be unlikely that meaningful efficiencies would occur.

### *Effect on Existing Agreements*

Comments on this section consistently noted that it would be inappropriate for the PC to supersede existing agreements without consultation by the agency and the agreement of the signatories at a minimum. Questions regarding disputes were also raised, asking whether the PC's dispute resolution stipulation could be used if a signatory objected to the use of the PC. While the recent OGC memorandum noted that the PC could not unilaterally supersede any existing agreements and that agencies could pursue amendments to existing agreements to utilize the PC, as noted above, such a solution may not be sufficient for resolving issues raised by Tribe given that they are often not signatories to agreements they have consulted on.

### *Effect on Tribal Lands*

Comments on this section noted the need to strengthen language clarifying that program comments never apply on Tribal lands, and that the majority of properties of religious and cultural significance are located off Tribal lands as defined by the NHPA. Another comment noted the need to clarify where any Tribal authorizations would be posted.

### *Standard Section 106 Review*

Comments on this section noted that the piecemeal application of the PC to components of an undertaking could result in segmentation or an incomplete consideration of an undertaking's effects on historic properties. Similarly, questions were raised how an Area of Potential Effect would be delineated if components of an undertaking were reviewed under the PC and excluded from further review. Other comments noted that without consultation, an agency would not know if a property of religious and cultural significance could be affected by a covered undertaking, thereby raising questions as to whether the PC could be utilized. Other comments noted that while the exclusion of NHLs was useful, the PC did not account for those properties that could be considered NHLs, and whether undertakings reviewed under the PC would result in effects to them that would preclude their consideration for NHL status in the future.

### Comments on Section III (Alternative Compliance Approaches):

#### *Available Alternative Compliance Approaches*

This section raised comments regarding the elimination of consultation with the SHPO, Tribes, THPOs, consulting parties and the public. Comments emphasized consultation as the cornerstone of the Section

106 process, particularly for access to federal decision-making. Others noted the introduction of the idea of “minimal potential to affect historic properties,” which if kept in subsequent drafts, needs further clarification. Comments in this section also questioned how agencies would determine which appendix would be followed as the overlap between housing projects and energy efficiency goals often overlap. Some comments also asked how agencies would document their compliance with the PC’s various conditions, and how that documentation could or would be shared.

#### *Consultation with Indian Tribes and Native Hawaiian Organizations*

Commenters asked for further clarity on this particular section, as they perceived it to be limited to Tribal consultation on the use of the PC, rather than consulting on effects to properties of religious and cultural significance. Others noted that it could preclude meaningful consultation with Tribes. Some also questioned who would be considered a Tribal liaison, and how this section fit into the overall goals of the PC.

#### *Use of Qualified Authorities*

There were many comments on this section that asked whether this definition was needed, given its similarity to “qualified professional.” Comments also noted that the use of qualified professionals should be a requirement to use the PC. There was support for ensuring that the qualified professional have relevant and local knowledge, so that the PC could effectively be applied. Others questioned who would be considered a qualified authority, who was making decisions regarding who met that threshold, how “appropriate to the circumstances” would be determined, and what constituted “reasonable judgment.”

#### *Determinations of Eligibility*

Comments in this section asked how agencies would be able to reasonable determine that there is minimal potential to affect a property without understanding whether a property was eligible for the NRHP. Questions were also raised regarding the identification of unknown historic properties and whether the reliance on existing data would be sufficient for identifying properties of significance to underrepresented communities. Comments in this section observed that determinations of eligibility were not required, but activities in the appendices were limited to primary facades and primary rights-of-way. The comments asked who would be making those determinations. Other comments noted that the activities in part 1 of each appendix would likely result in no effect or no adverse effect to historic properties, assuming such properties were present, but the activities in part 2 needed some level of consultation to consider a property’s eligibility.

#### Comments on Section IV (Assistance to Consulting Parties):

Comments questioned the relevancy of this section within the PC given that the compliance approaches established by this PC largely eliminate consultation. Further, commenters questioned the applicability of stipulations related to mitigation within a compliance approach designed to avoid adverse effects.

#### Comments on Section V (Unanticipated Discoveries):

##### *Immediate Response Requirements*

Commentors noted that the alternative compliance approaches established by this PC increase the likelihood of unanticipated discoveries due to the lack of adequate consultation, lack of adequate identification, and over reliance on assumptions regarding previously disturbed soils. Further, this section and the PC in general do not take into account this increased risk to all types of historic properties including those of religious and cultural significance.

##### *Response to the Discovery of Human Remains, Funerary Objects, Sacred Objects, or Items of Cultural Patrimony*

Commentors recommended reference back to 36 CFR section 800.13 and stronger reference to state and local laws related to burials given that NAGPRA applies only on federal and Tribal lands and the ACHP cannot compel agencies to follow the ACHP Burial Policy. Further, it was strongly expressed that the 50 feet perimeter is an arbitrary number and does not necessarily provide adequate protection.

#### Comments on VI (Dispute Resolution):

Comments focused on the challenge of filing a dispute regarding the implementation of the PC when there is no requirement for an agency to either notify consulting parties of the agency's decision to utilize the PC or to provide a comprehensive report of the agency's application of the PC. Further, commentors noted that an agency should be required to forward unresolved disputes to the ACHP for its advisory opinion.

#### Comments on VII (Duration):

Commentors consider the duration too long and made recommendations primarily ranging from five to ten years as an appropriate duration.

#### Comments VIII (Amendments):

Commentors expressed concern regarding execution of amendments to this PC without appropriate consultation due in large part to its far-reach. Commentors recommend requiring consultation for amendments and defining the term 'other parties' used in this section.

#### Comments on IX (Withdrawal):

Comments on the Withdrawal provision noted the need for SHPOs and Tribes to be aware of the PC's withdrawal. Sole use of the Federal Register would likely not be sufficient for formal notification to all consulting parties.

#### Comments on X (Reports and Meetings):

##### *Federal Agency Annual Reports*

Comments in this area requested metrics and data rather than examples, so that the ACHP could then meaningfully analyze the PC's usage. Additionally, by using examples, agencies may create an incomplete picture of successes compared to challenges. Other comments shared concerns with the lack of reporting after five years, creating questions of transparency and accountability. Reports should be shared with SHPOs and THPOs in addition to the ACHP. Report due dates should track the federal fiscal cycle, with a due date after the fiscal year closes.

##### *Annual Meetings*

Comments mentioned that the public should also be afforded a meeting. If agencies are not fully tracking use of the PC, feedback from the listed parties may be low because they do not have sufficient data to work from. ACHP members and preservation organizations should also be invited to participate in the annual meetings, which should occur for the duration of the PC.

##### *ACHP Reports*

Comments reflected a preference for written, rather than oral, presentations, so as to ensure durability. The reports should be provided to the membership annually.

### Comments on Section XI (Definitions):

Comments in this section fit into one of three categories: standardization, where the PC has a conflicting definition with other guidance or regulations; definition, to include additional detail or provide suggested revisions; or additions, for definitions that should be added. Because of the volume of comments in this section, members briefly review the received comments in the matrix. Members will note that some comments disagreed with how terms such as qualified authority or previously disturbed soil were defined.

### General Comments on the Appendices:

Comments that were not specific to one appendix were captured in this comment section, which consists of five sections: general, building interior, building exterior, site work and other.

#### *General*

Comments here noted concern regarding the use of the extra-regulatory phrase “minimal adverse effect” and the lack of any mitigation discussion. Comments were also raised regarding the potential for effects to character-defining features within buildings. Several comments raised questions regarding the clarity and/or the organization of excluded activities, because it is hard to follow which conditions must be met. Others questioned how an agency would differentiate between a climate-resiliency undertaking and any other undertaking. Some comments noted the need for consultation with SHPOs and THPOs to be able to make such a determination regarding the use of an excluded activity, as well as potential conflicts with other existing program alternatives and Section 106 agreements. Most other comments related to a property’s eligibility, with people raising questions regarding the 45-year age of a building as the cutoff date and whether these modifications may render the property ineligible for historic tax credits in the future. The extent of ground disturbance as a general concept in the appendices was also noted, with questions regarding the need for an archaeologist and the use of previously disturbed soil as a threshold.

#### *Building Interior*

Comments generally had support for allowing some interior modifications to occur, given the exclusion of primary space, which had questions regarding its definition.

#### *Building Exterior*

Comments in this section related to effects to character-defining features because of the emphasis on primary facades; there were concerns that focus could result in adverse effects to character-defining features that may be considered non-primary under the PC’s terms. Other comments in this section related to climate-resiliency and energy efficiency, with questions regarding solar panels matching rooflines and window replacements meeting energy efficiency standards.

#### *Site Work*

Comments on this section noted that landscaping can be a significant feature of a historic property, records checks may be too narrow to constitute an adequate level of identification effort, and the assumption of minimal ground disturbance for activities related to transportation surfaces may be inaccurate, as they may require heavy equipment.

#### *Other*

Suggestions here included removing “other activities” from each appendix as they appeared to not be undertakings or already determined to have no adverse effects on historic properties under the regulations. On the issue of transfer/sale/lease of property out of federal ownership, comments requested more detail on legally enforceable provisions or the removal of this activity so that could undergo the standard Section 106 review.

## Comments on Appendix A

### *General*

Comments requested that the activities listed have no potential to cause effects to historic properties even if historic properties are present and require minimal value judgments to apply. Comments pointed to the challenge of conducting the balancing tests required to apply the provisions of this appendix, especially without input from consulting parties. Other comments supported the allowance for certain activities without triggering Section 106. Comments requested clarification on the phrase “minimal adverse effects,” raising concerns that without clear parameters and consultation the term could be misapplied or abused and may result in disputes over the PC’s applicability.

### *Site Work*

Comments requested clarification on the meaning of “adjacent to” for when an activity is “conducted in areas adjacent to or on the same lot as housing.” Comments were concerned with potential effects to historic districts and landscapes or to the setting of other historic resources. Numerous comments raised concerns with the potential for activities to affect archaeological resources and who is qualified to determine an activity exclusively affects previously disturbed ground. Comments also questioned how character-defining features could be identified when no determination of eligibility is required. Some comments noted that tree removal or replacement could adversely affect significant archaeological sites, others highlighted the possibility of culturally significant or modified trees. Other comments pointed out that roads, sidewalks, curbs, and steps may also be character-defining features.

### *Building Exterior*

Comments were concerned with the potential for activities to adversely affect the character-defining features of historic buildings—doors, windows, roofing, chimneys, siding. Particular concern was repeated for the potential impact of distinguishing between the primary facade and secondary elevations. Comments opposed the idea of segmenting buildings, asserting that the entire building should be considered. Comments continued to emphasize the potential for ground disturbing activities to effect archaeological resources. Comments questioned why SHPOs or CLGs were not included in eligibility determinations. One comment asserted that housing should not be considered separately from energy-efficiency and should include requirements for demonstrated superior energy-efficiency for replacement materials. Some comments also pointed out potential conflicts with other state and local reviews, as well as historic tax credit requirements.

### *Building Interior*

Comments emphasized the need for qualified authorities/professionals to make determinations of eligibility, especially regarding character-defining features. Comments demonstrated more comfort with activities not occurring in primary spaces. Other comments noted that character-defining features can be found in non-primary spaces. Comments raised concerns with how character-defining features could be identified and highlighted that certain activities could put significant historic interiors at risk without clear parameters to avoid loss or damage. Some comments noted that separating character-defining features from other interior elements is problematic. One comment suggested splitting out historic and non-historic interior modifications, emphasizing the need for clear parameters to avoid loss or damage to historic fabric in primary spaces. Comments again questioned why SHPOs or CLGs were not included in eligibility determinations. Comments also pointed out potential conflicts with other state and local reviews, as well as historic tax credit requirements.



## Comments on Appendix B

### *General*

Comments questioned the applicability of the listed activities to climate resiliency and energy efficiency. Other comments highlighted the overlap between Appendix A and Appendix B by noting that their comments apply to both appendices. Some comments expressed concern with treating all “buildings” the same, rather than as separate categories. Comments raised concerns about the potential subjectivity of federal agencies, pointing to the perceived lack of clarity about who qualifies as a qualified authority/professional and the absence of SHPO/THPO and local involvement in eligibility determinations. Comments also highlighted a need for comprehensive understanding of environmental impacts of buildings and prioritization of materials with low or no embodied carbon. One comment asserted that exemptions in Appendix B should apply to interventions where an energy audit, building systems evaluation, or similar study has indicated that the proposed activities will meaningfully reduce energy use or greenhouse gas emissions or enhance climate resilience. Comments also requested clarification on the phrase “minimal adverse effects,” raising concerns that without clear parameters and consultation the term could be misapplied or abused and may result in disputes over the PC’s applicability.

### *Site Work*

Many of the same concerns raised in the comments to Appendix A were repeated in Appendix B. These included, comments concerned about the potential for activities to affect archaeological resources and the need for further clarification on the expertise and objectivity of qualified authorities/professionals, comments concerned about impacts to historic districts and landscapes, and comments concerned about adverse effects to character-defining features of unevaluated historic properties.

### *Building Exterior*

Comments again raised concerns about the potential for activities to affect archaeological resources and the need for further clarification on the expertise and objectivity of qualified authorities/professionals. Comments underlined the potential for adverse effects to character-defining features of historic properties—focusing on historic windows, doors, roofs, and siding. Particular concern was raised regarding the distinction between primary facades and secondary elevations. Comments raised questions about the 45-year requirement for buildings—some comments were concerned about potentially significant buildings under 45 years of age, other comments were concerned that 45 years was too restrictive to achieve the policy goals. Several comments celebrated the inclusion of solar energy systems, echoing assertions that in most circumstances solar panels are reversible and do not harm the historic fabric. Other comments emphasized the potential adverse effects of solar panels to historic buildings and archaeological resources without additional conditions.

### *Building Interior*

Comments in this section were fewer compared to others, but noted that some activities that would not require further review may conflict with standards used in state and local tax credit programs. Comments on insulation were also shared, asking for additional specificity to ensure appropriate insulation is used.

## Comments on Appendix C

Multiple comments on this appendix requested that it be removed from the PC. Comments raised concerns with overbroad scope of the PC, the controversial nature of the activities covered in this appendix, the increased risk of inadvertent discoveries and adverse effects to archaeological resources, the lack of clarity about who qualifies as a qualified authority/professional, and the existence of other tailored Programmatic Agreements and Memoranda of Agreement that already cover the listed activities. Comments were also concerned about potential effects to historic districts and landscapes, as well as to

individual historic properties such as bridges, roads, sidewalks, and curbs. Comments in support of the inclusion of the appendix pointed to the provisions for public transportation (rail and bus transport) and requested that those provisions be further expanded.