SOCIETY FOR AMERICAN ARCHAEOLOGY

September 20, 2024

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

Dear Chair Bronin:

The Society for American Archaeology (SAA) appreciates this opportunity to provide comments on the proposed Advisory Council on Historic Preservation's (ACHP) "Program Comment on Accessible, Climate Resilient, Connected Communities" (PC), pertaining to certain housing-related, climate-smart building-related, and climate-friendly transportation infrastructure–related activities. For the reasons stated below, the SAA vehemently opposes the draft PC as currently written and urges the ACHP to withdraw the document.

The SAA is an international organization that, since its founding in 1934, has been dedicated to research about and interpretation and protection of the archaeological heritage of the Americas. With more than 6,000 members, the SAA represents professional archaeologists in the private sector and the academy, avocational archaeologists, archaeology students in colleges and universities, and archaeologists working at tribal agencies, museums, and government agencies. The SAA has members throughout the United States, as well as in many nations around the world.

Background:

The National Historic Preservation Act of 1966 (NHPA) was intended and designed to be a collaborative process between states, tribes, local governments, and the federal government to preserve historic resources impacted by federal and federally sponsored undertakings. The NHPA ensures that each stakeholder's voice is heard, because it is through their involvement that American heritage that might be impacted by such undertakings are identified. This includes historic buildings, structures, and archaeological sites, as well as tribal places and objects of traditional religious and cultural importance. The process established by the statute and its regulations was

designed precisely to ensure that the identification, preservation, and protection of historic sites and resources did not rest entirely within the purview of a single governmental entity. Yet adoption of this draft PC would result in precisely that situation.

The PC in its current form violates the NHPA:

It is a basic tenet of administrative law that a government agency can only undertake actions that are within the power delegated to it by Congress (*Ass'n of Am., Physicians & Surgeons, Inc. v. United States FDA, 226 F. Supp. 2d 204 (D.C.D. 2002)*). After nearly a half century of deference to agencies on questions of the scope of their delegated authority and the interpretation and application of their regulations (*Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984)*), the United States Supreme Court (SCOTUS) recently rescinded much of that deference (*Loper Bright Enters. v. Raimondo, 144 S. Ct. 2444 (2024)*). In other words, the court has tacitly recognized that agencies have often acted outside of their delegated congressional jurisdiction and authority and that, consistent with the US Constitution, much of that activity must instead be undertaken by Congress.

The current PC exemplifies the extra-legislative activity with which SCOTUS was concerned in *Loper* for two reasons. First, while the ACHP has authority to "provide program comments at its own initiative" 36 CFR 800.14(e), that initiative and authority do not derive from Congress—the ACHP provided itself with the authority to issue program comments, which are controlling policy once adopted, without any such authorization or direction from Congress. Second, even if one accepts the ability of the ACHP to grant itself the ability to issue program comments, any such policies must remain within the congressionally delegated confines of the ACHP's authority pursuant to the statute. Unfortunately, the draft PC does exactly the opposite.

The ACHP is an advisory body expressly established to "advise," "encourage," and "inform" various federal, state, tribal, and local entities regarding the implementation of the NHPA (54 U.S.C. 304102). Critically, pursuant to and consistent with this statutory obligation, the ACHP has developed the Section 106 process that constitutes a framework for federal agencies to ensure compliance with their NHPA responsibilities. A cornerstone of the Section 106 process is the consultation with state, tribal, and local entities and other stakeholders regarding undertaking effects on historic properties. The draft PC contravenes the NHPA mandate to advise and inform State Historic Preservation Officers (SHPOs) and tribal representatives and eliminates the regulatorily mandated consultations in Section 106. In this regard, the draft PC creates several new categories of undertakings that the ACHP proposes to exempt from critical Section 106 review and consultation. As provided in the PC, NHPA-covered effects to properties that fall in the category of "climate-friendly," "climate-smart," and "housing rehabilitation and production" (as defined in the comments and to be interpreted by federal agencies) will

be effectively treated as categorical exclusions from the Section 106 process as the impacts relate to the consultation process. In other words, the draft PC, while not amending duly adopted federal regulations (i.e., Section 106), exempts entire swaths of federal undertakings from having to adhere to the statutorily and regulatorily mandated consultations with SHPOs and tribes, among others.

Agency policy has long been used to avoid the requirement of legislation by Congress and the notice and comment regulation adoption process required by the Administrative Procedures Act (APA). The draft PC is just that: agency policy. If the ACHP implements these comments, they will have the effect of becoming controlling agency policy, and the ACHP has no legal authority to implement policies that contradict statutory mandates. Congress was clear: the ACHP has the authority to "promulgate regulations as it considers necessary to govern the implementation of" the NHPA (54 U.S.C. 304108(a)). The ACHP has no further authority. The effect of the draft PC will be to create exemptions for federal agencies' compliance with the NHPA and Section 106. Congress contemplated such a scenario when it provided the ACHP with the authority to "promulgate regulations or guidelines, as appropriate, under which Federal programs or undertakings may be exempted from any or all of the requirements of this division when the exemption is determined to be consistent with the purposes of this division" (54 U.S.C. 304108(c)). The draft PC, however, not only is not a promulgated regulation but, if implemented, will provide federal agencies with an option to do end-runs around existing legal consultation mandates, an outcome clearly inconsistent with the purposes of the statute. In addition, because the draft PC does not have legal force as a law or regulation, its approval and implementation must follow 5 U.S. Code § 553 - Rule making in the APA. The process the ACHP is following for the document, however, does not follow the APA.

Thwarting SHPO and tribal involvement in the Section 106 process pushes those entities out of the statutory and regulatory mandate in every undertaking that might be classified as "climate-friendly," "climate-smart," and "housing rehabilitation and production." Such a development was clearly never contemplated or intended by Congress, is not supported by the black letter law of the NHPA and contravenes the ACHP's own existing regulations. Accordingly, if implemented, the draft PC is unconstitutional *ab initio*.

The exemptions for ground disturbance are unacceptable and will result in unnecessary damage to archaeological sites and delays of projects. Exemptions from ground disturbance must be determined by qualified archaeologists, not project managers or their delegates. Archaeologists understand the potential of buried sites and artifacts or interments. This is particularly true for archaeological sites located in urban areas, which are often built upon the locations of ancient habitation sites. The fact that the draft PC does not take this reality into account demonstrates that its draftees have neither expertise

in archaeological site identification nor understanding of ground disturbance methodology and site-transformation processes. The exemptions called for in the draft PC not only remove protections from unidentified archaeological sites but also increase the potential to cause projects to come to a halt once inadvertent discoveries are made, thus exacerbating costs to the taxpayer and delaying projects.

Additionally, in the context of our understanding of climate change impacts as adverse effects to archaeological and sacred cultural sites, the unsupported ACHP claim that the exemption of classes of ground disturbance will contribute to climate resiliency may exacerbate the loss of resources to climate mitigation measures.

The draft PC does not recognize that SHPOs have their own authority under 54 U.S. Code §302303 to review federal undertakings. As stated above, SHPOs have the statutory authority to conduct reviews of federal undertakings for the protection of affected historic properties. The draft PC essentially proscribes this authority by giving agencies the option of not having to carry out Section 106 reviews for large categories of undertakings, a proscription not permitted to the ACHP by the NHPA.

The draft PC would violate existing agreements. Programmatic Agreements (PAs) and Memoranda of Agreements (MOAs) require the signature of either a SHPO or the National Conference of State Historic Preservation Officers as the negotiated consent in mitigation of effects to historic properties by federal undertakings. These agreements are binding contracts between the states and federal agencies. Yet the draft PC would give federal agencies the ability to abrogate their contractual responsibilities when it comes to certain undertakings. Under the PC it is not even clear that other signatories to the MOAs or PAs would have an opportunity to comment on amendments or terminations. The ACHP should be fully aware of the benefits of these PAs. For example, in California the Federal Highway Administration has estimated that the existing PA has resulted in a reduction of more than 45 labor hours per undertaking, or tens of thousands of total hours saved per year. This in turn means millions of dollars in savings for the taxpayer. Existing state and national PAs have resulted in enormous time and cost saving benefits. There is no reason to change a process that is working, especially when the ACHP has not presented any data demonstrating the need for the draft PC.

The Determinations of Eligibility provision in the draft PC is a direct violation of the NHPA. Section 106 of Title 54 is explicit—the effects of an undertaking on historic properties must be considered by the federal agency, the SHPO, and Tribal Historic Preservation Officer (THPO). Again, that legal requirement cannot be waived in regulation or policy when such an exemption directly contradicts the purpose of the statute.

The section "Consultation with Indian Tribes and Native Hawaiian Organizations" is confusing. It does not appear to have any relationship with the remainder of the draft PC. It fails to specify how qualifications to carry out consultations with tribes will be determined or who will make those determinations. The PC does not specify exactly who are the "tribal liaison staff" nor does it define "tribal authority." Nor does the PC make clear how or even if these officials are supposed to consult with THPOs. In addition, in the 2017 report *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*, multiple tribes specifically pointed out how "tribal liaison staff" are not properly trained to handle tribal consultation. This further weakens this section's ability to succeed when it is well documented that "tribal liaison staff" are poorly trained to perform the tasks in their own job description.

The concept of a qualified authority versus a qualified professional is also very confusing. The draft does not adequately define "appropriate to the circumstances." It also does not make clear the difference between the "qualified authority" and "qualified professional."

Section III, Alternative Compliance Approaches, of the draft PC is unclear. The document does not specify who will determine minimal potential harm to adversely affect historic properties. PAs and MOAs are the current methods for making these decisions and are developed by qualified professionals. It also does not make clear under what standards, such as the Secretary of the Interior's Professional Qualifications Standards, these determinations will be made. This section should be removed from any future draft of the PC.

Section V. A. Immediate Response Requirements—This section is inadequate. It references 36 CFR § 800.13(b) but only in the context of sites with potential traditional religious and cultural importance to Indian Tribes or Native Hawaiian organizations (NHOs). Archaeological sites that have no potential religious and cultural significance to Tribes or NHOs are not mentioned. This is another example of how the draft PC provides insufficient protections for archaeological resources impacted by undertakings exempted by the policy.

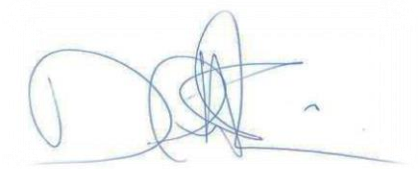
Section VIII—The amendment provision is an unbalanced approach. Under this language, the ACHP can unilaterally amend a comment. It must notify agencies but does not have to offer agencies a chance to comment. Further, other agencies can offer amendments, but only the ACHP has approval authority. The draft PC does not outline a process by which potential disagreements can be resolved. The draft is also unclear as to whether or not consultation will take place between the ACHP and the agencies.

Alternative approaches to the draft PC:

The SAA supports efforts to improve the Section 106 compliance process that are in accordance with the intent and language of the NHPA. There are actions that the ACHP can take to accelerate climate- and energy-related project delivery without undermining protections for historic properties and diminishing the participation of states, tribes, and localities. Some suggestions include (1) the ACHP could issue guidance to address cases in which a project's area of potential effect (APE) only partially covers an archaeological or other NRHP-eligible site or resource, a situation leading to many sites not being fully delineated; (2) tribes have outlined, including in the report *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions*, that there must be a standard for data associated with project reviews. The ACHP could establish minimum levels of data presented for a project in order to constitute a "reasonable good faith effort"; and 3) gaps in technology frequently slow down reviews. Security protocols between federal, state, and tribal government entities—not to mention other stakeholders—have led to file sharing systems that do not work on all networks. The ACHP could facilitate a discussion about how to share the data associated with the Section 106 review process, thus eliminating the delays associated with data sharing by the various consulting parties.

The SAA strongly urges the ACHP to withdraw the draft PC and engage with SHPOs, THPOs, archaeologists, and other stakeholders and experts to devise ways to improve Section 106 reviews for climate- and energy-related undertakings. Only by embarking on a multilateral approach to streamlining—as opposed to the unilateral (and illegal) method encapsulated in the draft PC—can the Council achieve its goal while still protecting our irreplaceable historic properties and ensuring that state, tribal, and local voices are heard.

Sincerely,



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