

# NCSHPO

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National Conference of State Historic Preservation Officers

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April 19, 2019

National Register of Historic Places  
National Park Service  
1849 C Street NW  
MS 7228  
Washington, DC 20240

RE: National Park Service (NPS) Regulation Identifier Number 1024-AE49

To Whom It May Concern:

Thank you for the opportunity to submit comments on the Proposed Rule governing the listing of properties on the National Register of Historic Places. The National Conference of State Historic Preservation Officers (NCSHPO) is a nonprofit organization whose members are the State government officials (State Historic Preservation Officers, or SHPOs) and their staff who carry out the national historic preservation program as delegates of the Secretary of the Interior pursuant to the National Historic Preservation Act of 1966, as amended (NHPA). NCSHPO serves as a communications vehicle between SHPOs, federal agencies and other organizations. It also educates the public and elected officials about the national historic preservation program, legislation, policies and regulations. There are also several references to our organization and extensive explanations of the roles and responsibilities of our members in the text of the NHPA.

As the entity representing a key constituency who will be substantially impacted by the changes proposed, we have several objections and concerns.

## **Implementation of 2016 Amendments to the National Historic Preservation Act**

The primary stated goal of the proposed revisions to the regulations is to "...implement the 2016 Amendments to the National Historic Preservation Act." NCSHPO and the National Trust for Historic Preservation were present for discussions informing the 2016 Amendments, and provided substantial feedback on various versions of the text prepared by its authors. We are familiar with its intent, the background behind its passage, and the language employed. Given this, we believe that the purpose of the Amendment has not only been misinterpreted, but that its authority and scope has been exceeded. The Amendment was designed specifically to require SHPO comments on nominations submitted to the Keeper by Federal Agencies. If comments are not forthcoming, it is then assumed the SHPO is not in favor of the nomination. Should the nomination proceed, the Keeper would then be forced to publish a

notice in the Federal Register outlining the reasons why. The whole idea was to provide clarity and more transparency to any nominations submitted by Federal Agencies.

What the Amendment did *not* do, was create a new exclusive process for the nomination of federally owned properties. This is an important distinction. There is nothing in the Amendment that suggests all federal properties may only be nominated by federal agencies. As common practice, many nominations of federal properties originate with and are pursued by SHPOs or citizens themselves. There is good reason for this. The impetus for the passage of the NHPA was the result of massive federal agency overreach in urban-renewal, transportation and other major projects that, in the 1950's and 1960's, decimated historic properties nationwide and included no opportunity for citizen input. We find it hard to believe that the language of an Amendment designed to actually increase input into federal decision-making would be interpreted to instead manufacture a way to strip that input away by giving federal agencies unilateral and exclusive rights to nominate or refuse to nominate historic properties. By way of context, Section 110 of the NHPA (54 U.S.C. § 306102) makes it very clear that federal agencies have *responsibilities* for the preservation of our historic places – not rights.

In addition to conflating nominations by federal agencies with the nominations of federal properties, the proposed rules veer even further off track by altering the process for Determinations of Eligibility (DOEs) – a completely different process not at all covered by the Amendment. DOEs, by design, are meant to be a way to get an early opinion from the Keeper of the National Register without having to complete a full nomination – which can take a great commitment of time and resources. DOEs are an integral part of the entire federal historic preservation program – enabling consultation on federal projects via Section 106 (54 U.S.C. § 306108) to proceed in a timely manner. Impacts to properties determined eligible can be duly considered early in the project planning process – providing clarity and saving time, effort and limited resources. Properties determined ineligible purposely do not require the preparation of a nomination, again saving time and money, and proposed projects can proceed through the regulatory process. Eliminating the ability to even seek an Eligibility Determination, unless a complete National Register Nomination is submitted by a federal agency, unnecessarily undermines the ability for a sensible reconciliation of project timelines with the need to protect our historic properties.

Perhaps the most illogical of the proposed changes, again, not supported by either the language or intent of the Amendment, asserts that the Keeper would only be able to hear an appeal of a federal agency's refusal to either nominate a property, or to even seek a Determination of Eligibility, if the agency actually nominates it. This takes the misinterpretation of the Amendment to its ultimate conclusion –stripping away citizens' right to nominate a federal property, empowering federal agencies to refuse to nominate or to even seek a Determination of Eligibility, and then eliminating any possibility of appeal. This federal overreach is the very antithesis of the entire purpose of the NHPA.

It is clear that a lot of effort went into the proposed rule. In our view, that effort and much time were wasted based upon an incorrect reading and interpretation of the amendment. Since the Amendment only pertains to the nomination process that federal agencies must follow, only one section of the regulations appear to require revision: 36 CFR § 60.9.

In looking at the specific changes proposed to 36 CFR § 60.9, the language looks generally acceptable with one exception - the removal of the timetable for the listing of properties to the National Register. Under the current rules, the nomination is to be included in the National Register within 45 days of receipt – unless the Keeper disapproves or an appeal is filed. In our opinion, there is no reason to eliminate this provision – which as proposed would give the Keeper an infinite amount of time to render

a decision. Allowing a nomination to sit with no action for an indefinite period could put historic properties in jeopardy while they wait for a decision. Combined with the proposal to essentially eliminate eligibility determinations, a refusal of the Keeper to act could amount to de-facto rejection and destruction.

In the case of 36 CFR § 60.10 (Concurrent State and Federal Nominations), it is unclear whether any changes to the existing regulations are necessary. A major problem *does* exist, however, in the language proposed. First, 36 CFR § 60.10 (a) requires concurrent nominations to follow the procedural requirements of 36 CFR § 60.9, including a 45 day comment period for SHPOs. Given the existing language of Section 36 CFR § 60.10 (b) requiring SHPOs to follow the property owner notification and objection process, as well as the submission to State Review Boards pursuant to 36 CFR § 60.6, this proposed language creates a timetable that cannot be achieved. There is little way for the process outlined in 36 CFR § 60.6 to be concluded, and for SHPOs to submit comments in 45 days. First, even if notices are sent to all property owners, there must be time for them to respond. Second, State Review Board meetings, as public meetings, are subject to advance public notice and transparency requirements that frequently necessitate pre-set schedules that may or may not correspond with the time at hand.

Given that concurrent nominations require SHPOs and Federal Preservation Officers (FPOs) to cooperate, and particularly given that the resources could be privately owned, we question why any alteration to this section is necessary to meet the spirit of the Amendment. As such, we recommend the language remain as originally written.

### **Land Area**

Also included in 36 CFR § 60.10, and indeed more broadly present in nearly every section proposed for revision, is the introduction of a new means for calculating objections to the National Register process – land area. For several reasons, we strenuously object to this proposal.

First, it is unclear what problem this rule change is attempting to solve. Under current procedures, property owners are afforded the opportunity to object to National Register listings. If a majority of property owners object to a historic district listing, the district cannot be listed. Why this process would be changed to propose a new calculation affording proportional voting rights based upon the amount of land area owned is not only unnecessary, it runs counter to the fundamental one-person-one-vote principle that underpins our nation's entire approach to democratic governance. It essentially affords a more significant voice to those possessing more wealth in the form of land – a rather feudal concept, and one that has been introduced with no justification.

We also believe this proposed rule exceeds the authority of the NHPA as outlined in 54 USC § 302105. This provision states “...the *owner of the property, or a majority of the owners of the individual properties* within a district in the case of a historic district, shall be given the opportunity (including a reasonable period of time) to concur in, or object to, the nomination of the property for inclusion or designation.” (Emphasis supplied.) The principle is very clear – the law requires the consideration of objections based upon a vote by either the single owner, or a single vote for properties with multiple owners. There is nothing in the law that authorizes proportional voting based upon land area.

There are also numerous logistical problems with the land area proposal. For one, land records are not universally reliable and readily accessible nationwide. Likewise, assigning a singular unit of measure

(acres, square feet, etc.) using any number of different or disagreeing source records (such as an ancient survey plat versus acreage set out in a deed versus a new survey measurement), or lack thereof, is highly problematic. Without a reliable, consistent and fair system in place to make these determinations, decisions are vulnerable to legal challenges and would pit more advantaged neighbors against those with fewer resources. It also imposes additional technical and administrative requirements that SHPOs may be unable to meet.

This proposal would encounter even more ambiguity should a proposed historic district include federally owned properties. Would a potential historic district, for example, containing a post office and a federal courthouse suddenly be jeopardized because of federal agency objections? Or, because they are federally controlled, would they not even be permitted to be nominated as a part of a district – unless following the federally-controlled and sourced concurrent nominations process outlined in 36 CFR § 60.10? Generally, historic districts are listed because they contain many “contributing” buildings that collectively are important, but whose individual buildings may not be eligible themselves. Preventing other property owners in a historic district from accessing incentives, such as the Federal Rehabilitation Tax Credit, because some properties are federally owned, or because the size of a few lots of land combined may be larger than the rest is a terrible precedent and one counter to the purpose and spirit of the NHPA and other preservation incentives set forth in federal law.

To potentially make matters even worse, while the proposal on the one hand seeks to make the owner objection process more complicated, an additional question was raised on the other hand as to whether requiring notarized statements provided an unnecessary barrier. To this, we have to say that we know of no legal mechanism simpler than requiring a property owner to register their objection via a notarized letter. The notary is the least burdensome method for certifying identity that we know of. It is readily accessible and, in many places, low-cost or even free. We really do not see how one could consider complex land-area calculations as reasonable, while questioning whether a notarized letter is too burdensome.

### **Lack of Consultation**

In the notice of the proposed rule, it is duly noted that the Secretary is required, per the NHPA (in 54 USC § 302103), to consult with “national historical and archaeological associations,” on the promulgation of regulations for nominations, appeals, determinations of eligibility, and several other functions. Unfortunately, the requisite consultation did not occur in the development of these rules. Rather, the NPS opted to publish the proposal in the Federal Register with a promise to “consult” after publication. Since publication, the only “consultation,” has been in the form of soliciting questions, many of which go unanswered, and listening to comments. All substantive engagement is met with an instruction by NPS representatives, who admit they do not possess technical expertise in the subject, to submit written comments. This simply does not meet an acceptable definition of “consultation.”

It should also be noted that the NPS has determined, in its own analysis, that these proposed changes would have no impact upon tribes and thus make tribal consultation unnecessary. Unfortunately, this analysis purposely ignores the fact that a huge number of historic resources of importance to tribes are ultimately found on federally-controlled property. Therefore, any changes to the nomination process by federal agencies or on federal property deserves consultation with tribes.

## Conclusion

While we support the need to alter the rules to comply with the Amendment to the NHPA passed in 2016, we believe that as written, the proposed rules are based upon a fundamental misinterpretation of the text, and stretch well and unlawfully beyond its scope. The proposals are poorly conceived and would cause damaging effects on the national historic preservation program for which there is no justification. Indeed, if there are problems that the NPS is eager to solve, it would be a worthwhile endeavor to identify them, and to work collaboratively on solutions with a broad range of stakeholders.

NCSHPO, as always, stands ready to participate in meaningful consultation. As such, we respectfully ask that you narrow the scope of this rulemaking to comply with the language and meaning of the Amendment, and engage in consultation, as is required under the NHPA. Proposing alterations to the process for identifying and protecting the historic places that tell the stories of the American people, in our view, deserves nothing less.

Sincerely,

A handwritten signature in blue ink, appearing to read "Erik M. Hein". The signature is stylized and fluid.

Erik M. Hein  
Executive Director