



COMMONWEALTH of VIRGINIA

Department of Historic Resources

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J. Paul Loether, Chief
National Park Service
National Register of Historic Places and National Historic Landmarks
1849 C Street, N. W
Washington, D. C. 20240

Re: Comments and Recommendations on Bulletin 38, *Guidelines for Evaluating and Registering Traditional Cultural Properties*

Dear Mr. Loether:

Thank you for the opportunity to provide comments and recommendations on National Register Bulletin 38 (Bulletin 38). The Department of Historic Resources (DHR) is pleased to support your efforts in updating this guidance.

To date, DHR has not received any nominations for traditional cultural properties (TCPs) in Virginia. The evaluation of TCPs in the 106 process, however, is something we have experienced and expect will continue to face. The National Park Service has specific guidance for the formal process of evaluating and nominating a TCP to the National Register. In practice, Section 106 may not find these guidelines feasible. It would be most helpful if the NPS would collaborate with the Advisory Council on Historic Preservation (ACHP) to develop clear step by step guidance on TCPs and the 106 process. A start has been made with the ACHP's *Native American Traditional Cultural Landscapes and the Section 106 Review Process: Questions and Answers* (July 2012). However, the response to question 5, **How can issues of confidentiality be addressed when traditional cultural landscapes may be affected by an undertaking?**, suggests that tribes may elect to provide information only to the federal agency and the National Park Service and/or the ACHP.

Such a course of action is contrary to the letter and spirit of the 106 process and the right of the states to participate in consultation on projects within their state boundaries. Withholding information from the SHPO seems counter-productive since it is acknowledged in regulation that the role of the SHPO includes advising and assisting federal agencies, local governments and organizations and individuals to take into consideration historic properties at all levels of planning and development. While withholding confidential locational information is reasonable

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in circumstances when disclosure might cause direct harm, guidance from the National Park Service and the ACHP should explicitly acknowledge that property owners have a role in the nomination process and in Section 106. The guidance should clearly express a commitment to an open and transparent National Register nomination and determination of eligibility processes with public participation and in a manner consistent with a respect for private property and relevant laws.

The issue of "continuity of use" is also of concern. Continuity of use must be documented and in practice is assumed to require continuous use for fifty years before the present. In states such as Virginia, which at present has no resident federally recognized tribes, this practice appears weighted against tribes who are no longer resident in our state but have ancestral lands in Virginia. Due to the passage of time, a tribe may be aware of the existence of a culturally important site but its exact location may no longer be known to them. This bias toward documentation would appear to drive the TCP for confirmation as an archaeological site. Further, a distinction between archaeological integrity (the ability to provide information important in history or prehistory) and integrity of feeling (which is more subjective and in the minds of the tribe) needs to be presented. If evaluated as an archaeological site, the TCP may not retain integrity, have a low artifact count or be confined to a plowzone containing artifacts of multiple periods, but yet in the opinion of the tribe still retain integrity of feeling and location as a TCP.

In general, despite the examples provided in the introduction, Bulletin 38 appears to place too much emphasis on Native American communities. It would be helpful to have further examples of TCPs associated with other groups and how the identification, evaluation, and nomination of those TCPs might proceed.

Please call me if you have any questions or if you would like to discuss our recommendations or comments further, at 804-482-6082.

Sincerely,



Kathleen S. Kilpatrick, Director
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State Historic Preservation Officer

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