



SOCIETY FOR AMERICAN ARCHAEOLOGY

September 1, 2022

Ms. Jaime L. Loichinger
Assistant Director
Advisory Council on Historic Preservation (ACHP)
401 F Street NW, Suite 308
Washington, DC 20001

VIA EMAIL: program_alternatives@achp.gov

Dear Ms. Loichinger:

The Society for American Archaeology (SAA) thanks the ACHP for this opportunity to provide further comment on the revised draft Exemption from Historic Preservation Review for Electric Vehicle Supply Equipment (EVSE). We appreciate the changes that the Council made to the initial version of the proposed exemption, following the receipt of stakeholder comments, but feel that the document needs a great deal of further clarification before it is finalized.

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 5,500 members, the SAA represents professional and avocational archaeologists, archaeology students in colleges and universities, and archaeologists working at tribal agencies, museums, government agencies, and the private sector. The SAA has members throughout the United States, as well as in many nations around the world.

The installation of EVSE is an important priority, and Section 106 compliance for federal undertakings involving charging stations should be carried out as efficiently as possible. That compliance work, however, must still be meaningful. In short, there must be a balance between efficiency and effectiveness. The new draft contains a number of terms and provisions that remain too vague to be implemented. The following are some, but not all, of the issues our members identified:

- Part II—Exemption Concept and Criteria: “...*should a project consist of the installation of substantial new electrical infrastructure, the construction of a parking facility, or the usage of canopies or photovoltaic arrays, it would not be subject to the terms of this exemption.*” What would “substantial new electrical infrastructure” consist of, and who would decide that it is substantial? Would it include adding external fixtures to historic buildings, or include the visual effects of added overhead lines, including cumulative effects?

- Part II—Exemption Concept and Criteria: “...the EVSE will be restricted to existing footprints and levels of ground disturbance, and would use reversible, non-permanent techniques for installation, where appropriate.” What if the existing ground disturbance is part of the historical archaeological matrix and within a historic property? A far better alternative would be for the exemption to be limited to those ground-disturbing activities that take place within existing structural sections of pavement. Any project requiring disturbance beyond such boundaries should have an archaeological inspection to receive the exemption.
- Part IV—Response to Comments: “the exemption requires that ground disturbance be limited to the depth of previous construction and that the EVSE be minimally visible.” What previous construction, specifically? How is “minimally visible” determined, and by whom?
- Part IV—Response to Comments: “When planning EVSE projects, agencies are encouraged to discuss the projects with stakeholders, including Tribes and NHOs, to ensure that application of the exemption is appropriate.” Without the exemption, the agency would be required, and not just encouraged, to discuss the undertakings under Section 106 of the NHPA with the Tribes and NHOs. The requirement should be maintained.
- Part IV—Response to Comments: “Because the exemption limits the level of ground disturbance to previously disturbed soil, it is unlikely that discoveries would occur.” Unanticipated discoveries can occur in previously disturbed land. Previous disturbances, prior to full and proper implementation of the National Historic Preservation Act in the 1980s, often have the potential for human remains. Prior to the 1980s little work was done to identify or care for burial areas. At a minimum, the exemption should cite the 36 CFR § 800 regulations regarding post-review discoveries. Agency documents permitting a project to proceed often include a provision establishing a contact process in the event of a discovery. This is especially useful so that those unaware of archaeological law know that there is a legal responsibility. On federal properties, such an event could also involve ARPA considerations. Without such guidance, how would contractors hired to install the EVSE know of the legal requirements regarding the impacts on cultural resources?
- Part V—Text of Exemption 1(3): “...do not exceed previous levels of documented ground disturbance, or ground disturbance reasonably believed to have occurred.” How would this be recorded for any party to be able to understand the basis of this decision? Should the agency be providing at least the minimal level of information on these matters in whatever notice it is providing to facility developers, or should facility developers be required to indicate this information in their response to the agency on how they will proceed under the exemption?

Unfortunately, the original draft exemption contained a fundamental problem that was not resolved in the revised version: under the exemption, a person could be hired to install EVSE who has little or no background in Section 106, and who does not understand their legal responsibilities to historic properties impacted by the construction. If implemented, the range of vague and open-ended terms in the document will lead to adverse outcomes for historic resources. The question is one that the ACHP itself uses when it comes to Section 106 agreement documents upon which the agency comments. Given that this exemption is programmatic, and

technically similar to a nationwide Programmatic Agreement, if the ACHP wishes to proceed with this exemption it should follow the cold-reader standard that it applies to those agreements drawn up by other agencies, and (1) clarify the terms, (2) resolve open-ended provisions, (3) specify the responsible agency in each circumstance, and (4) include a periodic review to ensure that the exemption is working properly.

Given that EVSE technology is relatively new and, given the pace of technological development, will undoubtedly change over time, the SAA suggests that the ACHP revisit the exemption periodically, such as every five years, to ensure that the exemption comports with technological advances. If the uncertainties created by the technology and its applications are too great to satisfactorily resolve in an exemption, then the ACHP should adopt another course of action. This could include state-by-state Programmatic Agreements, or as the National Association of Tribal Historic Preservation Officers suggests, require all actions to be reviewed under the regular 36 CFR § 800 process.

We appreciate your time and consideration of these comments.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Sandweiss', with a horizontal line underneath.

Daniel H. Sandweiss, PhD, RPA
President, Society for American Archaeology