



August 2, 2022

Submitted via E-Mail and www.Regulations.gov

Hon. Michael L. Connor, Assistant Secretary of the Army (Civil Works)
Attn: Stacey M. Jensen
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108
usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil

**Re: National Association of Tribal Historic Preservation Officers' Recommendations on Modernizing the U.S. Army Corps of Engineers' Implementing Regulations for Section 106 of the National Historic Preservation Act
Docket ID No. COE-2022-0006**

Dear Assistant Secretary Connor:

The National Association of Tribal Historic Preservation Officers (“NATHPO”) is pleased to provide the following recommendations to the U.S. Department of the Army (“DOA”) and the U.S. Army Corps of Engineers (“USACE”) about how the USACE intends to modernize its compliance with Section 106 of the National Historic Preservation Act (“NHPA”)¹ in response to the DOA’s and the USACE’s June 3, 2022, Federal Register notice, *Notice of Virtual Public and Tribal Meetings Regarding the Modernization of Army Civil Works Policy Priorities; Establishment of a Public Docket; Request for Input* (the “Request for Input”).²

NATHPO is a national, non-profit membership organization founded in 1998, comprising tribal government officials, specifically Tribal Historic Preservation Officers (“THPOs”), who implement federal and Tribal preservation laws to protect culturally important places that perpetuate Native identity, resilience, and cultural endurance. Connections to cultural heritage sustain the health and vitality of Native peoples. NATHPO’s overarching purpose is to support the preservation, maintenance, and revitalization of the cultures and traditions of Native peoples of the United States. This is accomplished most importantly through the support of Tribal Historic Preservation Programs as acknowledged by the NPS.³ There are currently 209 THPOs. NATHPO is a voting member of the ACHP.⁴

¹ 54 U.S.C. § 306108.

² 87 Fed. Reg. 33,756 (June 3, 2022).

³ See 54 U.S.C. §§ 302701-302706.

⁴ *Id.* § 304101(a)(8).

The Request for Input solicits input on, *inter alia*, “potential rulemaking actions regarding the Corps’ implementing regulations for the National Historic Preservation Act[.]”⁵ Specifically, the Request for Input seeks

input on whether the Corps should rely on the NHPA regulations at 36 CFR 800 promulgated by the ACHP and rescind Appendix C, and if so, whether any clarifying guidance is needed on the scope of the area of potential effects for the Corps’ Regulatory Program, and whether development of a Program Alternative (36 CFR 800.14) would allow for clear and consistent implementation procedures, as well as improved Tribal consultation.⁶

The Request for Input specifically asks the public to consider four options developed for addressing Appendix C developed by the USACE and published in a 2004 advanced notice of proposed rulemaking (“ANPR”).⁷ Two of the options identified in the 2004 ANPR suggest that the USACE revoke Appendix C and use Part 800 for all permits or revoke Appendix C and use Part 800 for individual permits and a program alternative for general permits.⁸ The other two options suggest that the USACE revise Appendix C to be consistent with Part 800 or revoke Appendix C and develop new alternate procedures.⁹

NATHPO recommends that the USACE revoke 33 C.F.R. Part 325, Appendix C (“Appendix C”) through formal rulemaking and use 36 C.F.R. Part 800 (“Part 800”) to comply with Section 106 for all Regulatory Program undertakings. NATHPO further recommends that the USACE consider developing a nationwide programmatic agreement (“NPA”) with the Advisory Council on Historic Preservation (“ACHP”) to govern Section 106 compliance for its nationwide permit (“NWP”) program. If the USACE decides to pursue either revising Appendix C or developing new alternate procedures, NATHPO recommends that the USACE revoke Appendix C and develop entirely new alternate procedures. These recommendations are based on NATHPO’s, its staffs’, and its members’ experiences engaging in Section 106 reviews with the USACE, the virtual public and Tribal meetings held during July 2022, and our review of the relevant statutes, regulations, and case law.

I. The USACE must revoke Appendix C through formal rulemaking and use Part 800 to comply with Section 106.

Appendix C suffers from two fundamental legal deficiencies that require the USACE to revoke it through formal rulemaking. First, Appendix C was never concurred in or approved by the ACHP when it was developed and adopted. Second, Appendix C is inconsistent and conflicts with Part 800 and the NHPA. As a starting point, it is critical to emphasize that the NHPA explicitly

⁵ 87 Fed. Reg. at 33,757.

⁶ *Id.* at 33,760.

⁷ *Id.* at 33,759-60 (citing 69 Fed. Reg. 57,662 (Spet. 27, 2004)).

⁸ 69 Fed. Reg. at 57,663.

⁹ *Id.*

delegates *exclusive* authority to the ACHP to “promulgate regulations at it considers necessary to government the implementation of [Section 106] of th[e] [NHPA] in its entirety.”¹⁰ These regulations are promulgated at Part 800. Accordingly, the USACE has no independent, inherent, or concurrent authority to promulgate its own regulations that purport to implement Section 106.¹¹ That said, like other federal agencies, the USACE may develop, adopt, and use its own “alternate procedures” to Part 800, pursuant to the prescribed process set forth in Part 800.¹² Appendix C is not a legally promulgated alternate procedure.

Appendix C was not lawfully promulgated. In 1990, when the USACE formally adopted Appendix C, Part 800 allowed federal agencies to develop, adopt, and use “counterpart regulations” to Part 800. In 1990, Part 800 required counterpart regulations to be “concurrent in by the [ACHP]” in order for federal agencies to use them in lieu of Part 800.¹³ When the USACE first began developing Appendix C in 1979, Part 800 similarly required counterpart regulations to be “approved by the Chairman” of the ACHP.¹⁴ The ACHP has never approved of or concurred in Appendix C.¹⁵ Accordingly, Appendix C was unlawfully promulgated and the USACE’s continued use of Appendix C is unlawful.

Appendix C is inconsistent and conflicts with Part 800 and the NHPA. Section 110 of the NHPA requires that any federal agency’s procedures for complying with Section 106 must be “consistent with the regulations promulgated by the [ACHP] pursuant to [54 U.S.C. §] 304108(a) and (b)[.]”¹⁶ While the 1979 and 1990 versions of Part 800 did not explicitly require counterpart regulations to be consistent with Part 800 and the NHPA, by requiring ACHP approval or concurrence, such consistency was implied.¹⁷ Moreover, the current version of Part 800 explicitly requires alternate procedures to be consistent with Part 800.¹⁸

Nearly every provision in Appendix C is inconsistent or conflicts with the corresponding provision in Part 800 of the NHPA. The attached memorandum details each of these inconsistencies. For the purposes of this recommendation, NATHPO will focus on three inconsistencies that fundamentally

¹⁰ 54 U.S.C. § 304108(a).

¹¹ *Am. Library Ass’n v. Fed. Comm’n Comm’n.*, 406 F.3d 689, 691 (D.C. Cir. 2005) (“It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.”).

¹² 36 C.F.R. § 800.14(a).

¹³ 36 C.F.R. § 800.15 (1990).

¹⁴ 36 C.F.R. § 800.11(a) (1979).

¹⁵ *See, e.g.*, Email from Frances Gilmore on behalf of Don Klima, Advisory Council on Historic Pres., to allstaff, Advisory Council on Historic Pres., *Status of Corps of Engineers’ Effort to Revise/Replace Appendix C* (Dec. 2, 2008) (“The ACHP has never approved Appendix C as a counterpart regulation for implementing Section 106.”); *Comm. to Save Cleveland’s Hulls v. U.S. Army Corps of Eng’rs*, 163 F. Supp. 2d 776, 792 (N.D. Ohio 2001) (“All parties agree that there is no record of the ACHP ever approving or concurring in the Corps’ regulations.”); Gov’t Accountability Office, *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects* 54 (Mar. 2019) [hereinafter GAO Report], available at <http://www.gao.gov/assets/gao-19-22.pdf> (“According to ACHP documents, the ACHP did not concur in the final rule, indicating it was inconsistent with ACHP regulations.”).

¹⁶ 54 U.S.C. § 306102(b)(5)(A).

¹⁷ *C.f.* GAO Report, *supra* note ____, at 53-54.

¹⁸ 36 C.F.R. § 800.14(a).

undermine the integrity of the USACE's Section 106 compliance: Appendix C's definition of "undertaking"; Appendix C's use of a "permit area": and Appendix C's lack of Tribal consultation.

The NHPA and Part 800 define undertaking as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval."¹⁹ In contrast, Appendix C defines undertaking as "the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 320-334."²⁰ Defining the undertaking is critical, because Section 106 requires federal agencies to "take into account the effect of *the undertaking* on any historic property."²¹ Under Part 800, the undertaking is the *entire* project, activity, or program, regardless of whether the federal permit is required for only a portion of it. Under Appendix C, the undertaking is limited only to the portion of the project, activity, or program that requires a USACE permit.

While a federal agency must consider the undertaking's effects, Part 800 confines the agency's obligations to identify historic properties, assess effects, and seek ways to resolve those effects to the "area of potential effects," or "APE."²² Part 800 defines "APE" as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist."²³ In contrast, Appendix C uses the term "permit area," which it defines as "those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures."²⁴

Appendix C's definition of undertaking and use of permit area allows the USACE to unlawfully limit the scope of its Section 106 reviews by excluding portions of undertakings that should be subject to Section 106 review and limiting the geographic area within which it identifies historic properties and assesses adverse effects. In so doing, the USACE violates the letter and spirit of Section 106.²⁵ On the ground, this means that the USACE permits projects without fully considering their impacts, often destroying historic properties that would have otherwise been

¹⁹ 36 CFR 800.16(y); 54 USC 300320.

²⁰ 33 CFR pt. 325, app. C 1(f).

²¹ 54 USC 306108 (emphasis added).

²² See 36 CFR 800.4(b),(c), 800.5(a), 800.6(a).

²³ 36 CFR 800.16(d).

²⁴ 33 CFR pt. 325, app. C 1(g)(1).

²⁵ Letter from Reid J. Nelson, Dir., Office of Fed. Agency Programs, Advisory Council on Historic Preservation, to Col. John W. Henderson, Dist. Eng'r, U.S. Army Corps of Eng'rs, *Dakota Access Pipeline Project 1* (May 6, 2016), available at <https://turtletalk.files.wordpress.com/2016/05/achpdakota-access-pipeline-con-06may16.pdf> ("We recognize that federal agencies may have limited jurisdiction over, or involvement in, an undertaking in some circumstances, limiting their ability to identify historic properties and to resolve adverse effects comprehensively throughout the APE for the entire undertaking. However, even in circumstances where such limitations exist, the federal agency remains responsible for taking into account the effects of the undertaking on historic properties.").

considered if the USACE used Part 800 or another federal agency was leading the Section 106 review.²⁶

Finally, Appendix C fails to require the USACE to engage in meaningful consultation with Indian Tribes, Native Hawaiian organizations, and Tribal Historic Preservation Officers (“THPOs”) throughout the Section 106 process. In 1992, Congress amended the NHPA to require federal agencies to consult with Indian Tribes and Native Hawaiian organizations during the Section 106 process when the undertaking has the potential to effect properties of religious or cultural significance to them.²⁷ Moreover, the 1992 amendments allowed Indian Tribes to establish Tribal Historic Preservation Programs and THPOs,²⁸ who can assume the role of State Historic Preservation Officers (“SHPOs”) in the Section 106 process for undertakings occurring on Tribal land or affecting properties of traditional religious and cultural importance.²⁹ Subsequent ACHP rulemaking codified this consultation obligation and the role of Indian Tribes, Native Hawaiian organizations, and THPOs throughout the Section 106 process.³⁰ Appendix C has not been updated since 1990. Accordingly, it does not require the USACE to consult with Indian Tribes throughout the Section 106 process in the same manner as Part 800, and it does not mention Native Hawaiian organizations and THPOs. Indeed, Appendix C’s section entitled “Consultation” does not mention Indian Tribes once.³¹

These legal deficiencies render Appendix C’s promulgation unlawful and the USACE’s continued use of Appendix C unlawful. Accordingly, NATHPO strongly recommends that the USACE revoke Appendix C through formal rulemaking and use Part 800 to comply with Section 106 for all Regulatory Program undertakings. NATHPO does not believe that the USACE needs to promulgate agency-specific guidance to help tailor the Section 106 process to the USACE’s unique permitting role. Based on NATHPO’s and our members’ experiences, the Section 106 process as established by Part 800 is flexible and adaptable to any unique circumstance that might arise from the USACE’s permitting processes. To the extent any guidance is necessary, that guidance should inform District and Division Commands of the substantive differences between Appendix C and Part 800 and ensure that Section 106 reviews are consistent with the established procedures in Part 800.

²⁶ U.S. Dep’t of Interior et al., *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions* 58 (Jan. 2017), available at <https://www.achp.gov/sites/default/files/reports/2018-06/ImprovingTribalConsultationandTribalInvolvementinFederalInfrastructureDecisionsJanuary2017.pdf> (“A number of Tribes expressed that both Federal agencies and private companies bear no consequences for allowing destruction of sacred sites, specifically noting that the Corps’ Appendix C has led to the destruction of sacred sites.”).

²⁷ 54 U.S.C. § 302706(b).

²⁸ *Id.* §§ 302701-302706.

²⁹ *See id.* § 302702; 36 C.F.R. § 800.2(c)(2)(i).

³⁰ *See generally* 36 C.F.R. §§ 800.2(c)(2)(ii)(A).

³¹ *See* 33 C.F.R. pt. 325, app. C, § 8.

II. The USACE may consider developing a nationwide programmatic agreement to govern Section 106 compliance for the nationwide permit program.

Notwithstanding NATHPO's recommendation that the USACE use Part 800 for all Regulatory Program undertakings, the NWP program presents a unique circumstance where Section 106 compliance may be best achieved through an NPA. Currently, the USACE does not engage in any level of Section 106 review at the program-level when issuing and reissuing NWPs. Instead, it has developed NWP General Condition 20 that purports to satisfy the USACE's Section 106 obligations for individual activities that are undertaken pursuant to an NWP. The USACE's failure to address Section 106 compliance and programmatic level and the procedures established by General Condition 20 are unlawful.

Under General Condition 20, the USACE will initiate Section 106 review for a specific project authorized under an NWP only if the project proponent submits a preconstruction notification to the USACE indicating that "the NWP activity might have the potential to cause effects to any historic property[.]"³² General Condition 20 further encourages applicants to consult with the SHPO or THPO to determine the presence of possible historic properties.³³

Upon receipt of a preconstruction notification, General Condition 20 requires the district engineer to "carry out appropriate identification efforts commensurate with potential impacts[.]"³⁴ Based on the preconstruction notification and this identification effort, the district engineer will determine whether the "activity has the potential to cause effects on historic properties."³⁵ If the district engineer determines there is a potential to cause effects, "[t]he district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c)" in making a no historic properties affected determination, a no adverse effects determination, or an adverse effects determination.³⁶

General Condition 20 flips the Section 106 process on its head. Part 800 prescribes how federal agencies determine whether Section 106 review is required: "The agency official shall determine whether the proposed Federal action is an undertaking as defined in [36 C.F.R.] § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties."³⁷ The Section 106 process is initiated if the undertaking has the *potential* to cause adverse effects to historic properties. This determination is made before the federal agency determines whether any historic properties will actually be affected.³⁸

Moreover, it is the obligation of the federal agency, not the applicant, to initiate the Section 106 process and engage in consultation with SHPOs and THPOs, not to mention Indian Tribes, Native

³² 86 Fed. Reg. at 2,870 (Gen. Condition 20(c)).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ 36 C.F.R. § 800.3(a).

³⁸ *See id.* §§ 800.4(b)-(c), 800.5(a).

Hawaiian organizations, and other consulting parties.³⁹ General Condition 20 abdicates the USACE’s responsibility to initiate the Section 106 process and engage in consultation to identify and evaluate historic properties. Finally, General Condition 20 simply requires the district engineer to consult with consulting parties if they determine Section 106 review is required. Presumably, the district engineer would follow the procedures set forth in Appendix C, but General Condition 20 does not provide specifics.⁴⁰ In any event, this is inconsistent with the procedures set forth in Part 800.⁴¹

Every activity that is undertaken pursuant to an NWP is an undertaking, as defined both by the NHPA and Part 800, thereby triggering Section 106 review.⁴² Since NWPs are issued at a national level and not for specific projects, the USACE has an obligation to address these activities’ potential effects to historic properties at a programmatic level.⁴³ An NPA may provide the USACE with the best option to address the NWP program’s programmatic effects on historic properties and establish a better process to address specific NWP-authorized activities’ effects.

Programmatic agreements “allow federal agencies to govern the implementation of a particular agency program . . . or multiple undertakings similar in nature[.]” Programmatic agreements may be appropriate “[w]hen effects on historic properties are similar and repetitive or are multi-State or regional in scope[.]”⁴⁴ Programmatic agreements must be developed in consultation with the ACHP, the appropriate SHPOs and THPOs, the National Conference of State Historic Preservation Officers (“NCSHPO”), and Indian Tribes and Native Hawaiian organizations,⁴⁵ and are effective only if the NPA is executed by the USACE, the ACHP, and the NCSHPO, and by the appropriate Indian Tribes if it applies to NWP-authorized activities on Tribal lands.⁴⁶

³⁹ See *id.* § 800.2(a) (“It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance[.]”).

⁴⁰ See *generally* Mem. from Lawrence A. Lang, Acting Chief, Operations, Directorate of Civil Works, U.S. Army Corps of Eng’rs, to All Major Subordinate Commands and Dist. Commands, U.S. Army Corps of Eng’rs, *Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR part 235 with the Revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800 dated 25 April 2005* (Jan. 31, 2007).

⁴¹ See 36 C.F.R. §§ 800.3-800.6.

⁴² See 36 C.F.R. § 800.16(y); 54 U.S.C. § 300320.

⁴³ *Cf. N. Plains Res. Council v. U.S. Army Corps of Eng’rs*, 454 F. Supp. 3d 985 (D. Mont. 2020) (USACE’s reissuance of NWP No. 20 and reliance on General Condition 18 to satisfy Endangered Species Act obligations was unlawful because the USACE was required to consider potential effects to listed species at a programmatic level through programmatic consultation with U.S. Fish & Wildlife Service).

⁴⁴ *Id.* § 800.14(b)(1)(i); see *Programmatic Agreements*, ADVISORY COUNCIL ON HISTORIC PRES., https://www.achp.gov/program_alternatives/pa (last visited July 18, 2022) (“A federal agency may also pursue a “program PA” [36 CFR § 800.14(b)(2)] when it wants to create a Section 106 process that differs from the standard review process for all undertakings under a particular program. A program that has undertakings with similar or repetitive effects on historic properties[.] . . . can avoid the need for individual reviews for each project.”).

⁴⁵ 36 C.F.R. § 800.14(b)(2)(i).

⁴⁶ *Id.* § 800.14(b)(2)(ii).

An NPA could establish procedures by which the USACE and project proponents comply with Section 106 for individual projects authorized under NWPs. This would satisfy the USACE's obligation to consider the programmatic effects of issuing and reissuing the NWPs, as well as project-specific effects. Unlike General Condition 20, the procedures established in an NPA would not be developed in a vacuum, and an NPA would provide a mechanism to ensure the USACE's compliance with this process.

III. The USACE should not revise Appendix C or develop new alternate procedures.

NATHPO recognizes that under Part 800, federal agencies, including the USACE, have the right to develop alternate procedures.⁴⁷ That said, NATHPO believes that Part 800 provides a flexible process that vitiates the need for the USACE to develop its own, Regulatory Program-specific alternate procedures. Notwithstanding the NWP program, NATHPO and its members have never seen a situation where the USACE's permitting process was incompatible with the standard Section 106 process set forth in Part 800. Nevertheless, should the USACE decide to pursue either revising Appendix C or developing new alternate procedures, NATHPO strongly recommends revoking Appendix C and developing new alternate procedures.

As discussed above, Appendix C suffers from serious legal deficiencies that render its continued use by the USACE unlawful. Appendix C is toxic. For more than forty years, the USACE has relied on some version of Appendix C to sideline Indian Tribes, THPOs, and Native Hawaiian organizations, and to minimize the consideration of historic resources in its permitting decisions. While revisions to Appendix C could fix its inconsistencies with Part 800, it would do nothing to repair the USACE's reputation with Indian Tribes, THPOs, Native Hawaiian organizations, SHPOs, and the rest of the preservation profession. Moreover, simply revising Appendix C would suggest that the USACE is not seriously committed to addressing these issues and that it did not listen to Indian Tribes, THPOs, SHPOs, and the public during this process. Accordingly, if the USACE is not inclined to use Part 800, NATHPO strongly recommends that it revoke Appendix C and develop entirely new alternate procedures.

Regardless of whether the USACE chooses either of these options, revisions to Appendix C or new alternate procedures must be developed in consultation with the ACHP, NCSHPO, the appropriate SHPOs and THPOs, and Indian Tribes,⁴⁸ and must be approved by the ACHP.⁴⁹ Revisions to Appendix C or new alternate procedures must also fix every single inconsistency and conflict between Appendix C and Part 800,⁵⁰ as detailed in these comments and the attached memorandum.

⁴⁷ See 36 C.F.R. § 800.14(a).

⁴⁸ *Id.* § 800.14(a)(1).

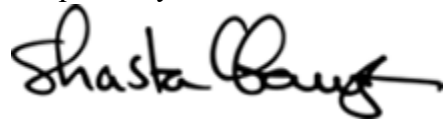
⁴⁹ *Id.* § 800.14(a)(2).

⁵⁰ *Id.* § 800.14(a), (a)(2); 54 U.S.C. § 306102(b)(5)(A).

IV. Conclusion

NATHPO is encouraged by the DOA's and USACE's stated commitment to address the USACE's compliance with Section 106 and its use Appendix C. NATHPO recognizes that addressing these issues will take time and we iterate our commitment to working in good faith with the DOA and the USACE to resolve these issues. These issues are of critical importance to NATHPO and our members, Indian Country, and the preservation community generally. Should you have any questions regarding these comments, please do not hesitate to contact us by email at: sgaughen@palatribe.com and valerie@nathpo.org; or our legal counsel, Wesley James Furlong, Native American Rights Fund, by email at: wfurlong@narf.org.

Respectfully,



Shasta C. Gaughen, Ph.D., Chairman of the Board
National Association of Tribal Historic Preservation Officers



Valerie J. Grussing, Ph.D., Executive Director
National Association of Tribal Historic Preservation Officers

c.c.

Hon. Jaime Pinkham, Principal Deputy Assistant Secretary of the Army (Civil Works)
United States Department of the Army

Lieutenant General Scott A. Spellmon, Commanding General and Chief of Engineers
United States Army Corps of Engineers

Hon. Jordan E. Tannenbaum, Vice Chairman
Advisory Council on Historic Preservation

Reid Nelson, Acting Executive Director
Advisory Council on Historic Preservation