



**NATIONAL ASSOCIATION
OF TRIBAL HISTORIC
PRESERVATION OFFICERS**

MEMORANDUM

To: Michael L. Connor, Assistant Secretary of the Army (Civil Works)
U.S. Department of the Army

From: Wesley James Furlong, Native American Rights Fund
On behalf of
National Association of Tribal Historic Preservation Officers

Subject: The unlawful promulgation and use of 33 C.F.R. Part 325, Appendix C, by the U.S. Army Corps of Engineers to comply with Section 106 of the National Historic Preservation Act

Date: August 2, 2022

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INTRODUCTION

This memorandum was prepared in response to the U.S. Department of the Army’s (“DOA”) and the U.S. Army Corps of Engineers’ (“USACE”) June 6, 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”).¹ In this Request for Input, the DOA and the USACE solicited the public’s input on “potential rulemaking actions regarding the Corps’ implementing regulations for the National Historic Preservation Act[.]”² The purpose of this memorandum is to examine the legal deficiencies in the USACE’s development, adoption, and use of 33 C.F.R. Part 325, Appendix C (“Appendix C”) to purportedly comply with Section 106 of the National historic Preservation Act (“NHPA”).³ This analysis serves as the basis for the National Association of Tribal Historic Preservation Officers’ (“NATHPO”) recommendations, in response to the Request for Input, to revoke Appendix C and use 36 C.F.R. Part 800 (“Part 800”) to comply with Section 106 for all Regulatory Program undertakings.

¹ 87 Fed. Reg. 33,756 (June 3, 2022).

² *Id.* at 33,757.

³ 54 U.S.C. § 306108.

First, this memorandum provides a background on the NHPA, Section 106, and Section 106 alternate procedures. Second, it examines the development, adoption, and use of Appendix C, the USACE's subsequent interim guidance and memoranda on Appendix C's continued use, and previous efforts to revise Appendix C. Finally, this memorandum analyses Appendix C's legal deficiencies, including its unlawful promulgation and its inconsistencies and conflicts with Part 800 and the NHPA.

DISCUSSION

I. National Historic Preservation Act

Enacted in 1966, the NHPA seeks “to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations.”⁴ In passing the NHPA, Congress found and declared “that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people.”⁵ The NHPA is therefore “designed to encourage preservation of sites and structures of historic, architectural, or cultural significance.”⁶ To achieve this productive harmony and to encourage preservation of historic properties, Congress enacted Section 106 of the NHPA.

A. Section 106 of the NHPA

In its entirety, Section 106 provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking.⁷

Congress has called Section 106 “[o]ne of the most important provisions of the National Historic Preservation Act—the responsibilities of Federal agencies for the protection of historic resources[.]”⁸ Section 106 does not mandate the preservation of historic properties;⁹ rather, it is “a

⁴ *Id.* § 300101(1).

⁵ Pub. L. No. 89-665, § (b), 80 Stat. 915 (1966).

⁶ *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) (quoting *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093-94 (9th Cir. 2005)) (internal quotation marks omitted).

⁷ 54 U.S.C. § 306108.

⁸ S. Rep. No. 102-336, at 12 (1992).

⁹ *See Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 225 (5th Cir. 2006) (quoting *Bus. & Residents Alliance of E. Harlem v. Jackson*, 430 F.3d 584, 591 (1st Cir. 2005)) (“It does not itself require a particular outcome, but rather ensures that the relevant federal agency will, before approving funds or granting a license to the undertaking at issue, consider the potential impact of that undertaking on surrounding historic places.”).

‘stop, look, and listen’ provision that requires each federal agency to consider the effects of its programs[.]”¹⁰

The NHPA also established the Advisory Council on Historic Preservation (“ACHP”),¹¹ which Congress delegated exclusive authority to promulgate regulations implementing Section 106.¹² These regulations are codified as Part 800, of which Subpart B¹³ establishes a four-step process for complying with Section 106.¹⁴ Every federal agency must follow this process and comply with these regulations.¹⁵

Step one, “Initiation,” requires federal agencies to “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.”¹⁶ At this step, federal agencies must also identify consulting parties and invite them to participate in the Section 106 process.¹⁷ Step two, “Identification and Evaluation,” requires federal agencies to: (1) define the undertaking’s “area of potential effects”;¹⁸ (2) “take steps necessary to identify historic properties within the area of potential effects”;¹⁹ and (3) “apply the National Register [of Historic Places (“National Register”)] criteria (36 CFR part 63 [sic]) to properties that have not been previously evaluated for National Register eligibility.”²⁰ Step three, “Assessment,” requires federal agencies to “apply the adverse effect criteria to historic properties within the area of potential effects.”²¹ Step four, “Resolution,” requires federal agencies to “develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”²² The Section 106 process will be examined in greater detail in Section III.B, *infra*, of this memorandum where it undertakes a section-by-section analysis of Appendix C.

¹⁰ *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 814 (9th Cir. 1999) (quoting *Apache Survival Coal. v. United States*, 21 F.3d 895, 906 (9th Cir. 1994)).

¹¹ 54 U.S.C. § 304101.

¹² *Id.* § 304108(a).

¹³ See 36 C.F.R. §§ 800.3-800.13.

¹⁴ *Concerned Citizens Coal. v. Fed. Highway Admin.*, 330 F. Supp. 2d 787, 798 (W.D. La. 2004) (“These regulations provide for a four-step review process.”); *An Introduction to Section 106*, ADVISORY COUNCIL ON HISTORIC PRES., <https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106> (last visited July 25, 2022).

¹⁵ See *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 607 (9th Cir. 2010) (citing *Pit River Tribe*, 469 F.3d at 787; *Muckleshoot Indian Tribe*, 177 F.3d at 805) (“We have previously determined that federal agencies must comply with these regulations.”).

¹⁶ *Id.* § 800.3(a).

¹⁷ *Id.* § 800.3(c)-(f).

¹⁸ *Id.* § 800.4(a)(1).

¹⁹ *Id.* § 800.4(b).

²⁰ *Id.* § 800.4(c)(1). The National Register criteria are codified at 36 C.F.R. § 60.4, not 36 C.F.R. Part 63. The process by which the Keeper of the National Register determines properties eligible for inclusion on the National Register is codified at 36 C.F.R. Part 63.

²¹ *Id.* § 800.5(a).

²² *Id.* § 800.6(a).

In 1992, Congress amended the NHPA.²³ These amendments fundamentally altered the Section 106 process by ensuring that Indian tribes, Native Hawaiian organizations, and Tribal Historic Preservation Officers (“THPO”) had a statutorily codified role in the process. Two amendments in particular are relevant to this memorandum. First is the statutory obligation for federal agencies to consult with Indian tribes and Native Hawaiian organizations in the Section 106 process.

(a) In general.--Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

(b) Consultation.--In carrying out its responsibilities under section 306108 of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a).²⁴

Second is the NHPA’s establishment of Tribal Historic Preservation Programs and authority for THPO to assume the role of State Historic Preservation Officers (“SHPO”) in the Section 106 process for undertakings that occur on tribal land.²⁵

Following these amendments, the ACHP fundamentally revised Part 800. In 1994, the ACHP published a notice of proposed rulemaking.²⁶ In 1996, the ACHP published updated proposed revisions to Part 800.²⁷ In 1999, the ACHP published its final revisions to Part 800 implementing the 1992 NHPA amendments.²⁸ These final regulations were quickly challenged but largely upheld by the federal courts in 2003.²⁹ Following the resolution of litigation, the ACHP initiated a final rulemaking process³⁰ and published *final* revisions to Part 800 in 2004, consistent with the courts’ opinions.³¹ Since 2004, Part 800 had not been updated; this is the version in effect today.

B. Section 106 Alternate Procedures

In addition to the “Section 106 process” set forth in Subpart B, Part 800 allows for the development, adoption, and use of “Federal agency program alternatives.”³² Program alternatives allow federal agencies to “tailor the Section 106 review process for a group of undertakings or an

²³ See Pub. L. No. 102-575, 106 Stat. 4600 (1992).

²⁴ 54 U.S.C. § 302706(a)-(b).

²⁵ *Id.* § 302702.

²⁶ 59 Fed. Reg. 50,396 (Oct. 3, 1994).

²⁷ 61 Fed. Reg. 48,580 (Sept. 13, 1996).

²⁸ 64 Fed. Reg. 27,044 (May 18, 1999).

²⁹ See *Nat’l Mining Ass’n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003), *rev’g in part sub nom. Nat’l Mining Ass’n v. Slater*, 167 F. Supp. 2d 265 (D.D.C. 2001).

³⁰ 68 Fed. Reg. 55,354 (Sept. 25, 2003).

³¹ 69 Fed. Reg. 40,544 (July 6, 2004).

³² 36 C.F.R. § 800.14.

entire program that may affect historic properties.”³³ One type of program alternative are “alternate procedures.”³⁴ “Alternate procedures are a program alternative that allows federal agencies to streamline the Section 106 process by tailoring the process to the agency’s programs and decision-making process.”³⁵ Alternate procedures “substitute in whole or in part for the ACHP’s Section 106 regulations under Subpart B.”³⁶ Part 800 has contained provisions allowing federal agencies to develop, adopt, and use alternate procedures, or counterpart regulations as they were first called, since 1979.³⁷

In 1979, the ACHP revised Part 800 and included a new provision that “authorize[d] counterpart regulations permitting agencies to develop regulations which, if approved by the Chairman, may be used to meet certain requirements of these regulations.”³⁸ The new counterpart regulation provision provided: “Individual Federal agencies may[] . . . choose to adopt counterpart regulations related to their specific programs and authorities to assist in meeting their responsibilities under Section 106[.]”³⁹ Counterpart regulations had to be developed in consultation with and approved by the ACHP: “Responsibilities of individual Federal agencies pursuant to § 800.4 may be met by counterpart regulations *jointly drafted* by the agency and the Executive Director and *approved* by the Chairman.”⁴⁰ Federal agencies were also required to publish notice of the proposed counterpart regulations in the Federal Register for public review and comment.⁴¹

The ACHP updated the counterpart regulation provisions in 1986.⁴² The update provision was substantially simplified. In its entirety, the updated provision provided: “*In consultation* with the

³³ *Program Alternatives*, ADVISORY COUNCIL ON HISTORIC PRES., https://www.achp.gov/program_alternatives (last visited July 19, 2022).

³⁴ 36 C.F.R. § 800.14(a).

³⁵ *Alternate Procedures*, ADVISORY COUNCIL ON HISTORIC PRES., [ACHP, *Alternate Procedures*] http://www.achp.gov/program_alternatives/alternate_procedures (last visited July 19, 2022).

³⁶ *Id.*

³⁷ For the purposes of the memorandum, the terms “alternate procedures” and “counterpart regulations” are interchangeable and functionally identical. Counterpart regulations substitute for all or part of Subpart B of Part 800, must be promulgated through formal notice and comment rulemaking under the Administrative Procedures Act, and are formally codified in the Code of Federal Regulations (“CFR”). *Id.* Alternate procedures also substitute for all or part of Subpart B of Part 800 but are not promulgated through formal notice and comment rule making and are not codified in the CFR; instead, they are adopted as agency guidance or procedure. *Id.* Prior to 1999, Part 800 only allowed agencies to adopt and use counterpart regulations, meaning they could only be adopted through notice and comment rulemaking and had to be codified in the CFR. *Accord* 36 C.F.R. § 800.11 (1979); 36 C.F.R. § 800.15 (1986). In 1999, the ACHP updated Part 800, allowing federal agencies to develop, adopt, and use alternate procedures, which may “include formal Agency regulations” (*i.e.*, counterpart regulations), as well as “departmental or Agency procedures that do not go through the formal rulemaking process.” 64 Fed. Reg. at 27,068. This change was meant to make the process less “arduous” by not requiring federal agencies to engage in formal notice and comment rulemaking. *Alternate Procedures Questions and Answers*, ADVISORY COUNCIL ON HISTORIC PRES., <https://www.achp.gov/digital-library-section-106-landing/alternate-procedures-questions-and-answers> (last visited July 25, 2022).

³⁸ 44 Fed. Reg. 6,068, 6,068-69 (Jan. 30, 1979).

³⁹ 36 C.F.R. § 800.11 (1979).

⁴⁰ *Id.* § 800.11(a) (1979) (emphasis added). The Executive Director is “the Executive Director of the Advisory Council on Historic Preservation . . . or a designee[.]” *Id.* § 800.2(l) (1979). The Chairman is “the Chairman of the Advisory Council on Historic Preservation or a member designated to act for the Chairman.” *Id.* § 800.2(k) (1979).

⁴¹ *Id.* § 800.11(a) (1979).

⁴² *See* 51 Fed. Reg. 31,115 (Sept. 2, 1986).

Council, agencies may develop counterpart regulations to carry out the section 106 process. When *concurred in* by the Council, such counterpart regulations shall stand in place of these regulations for the purposes of the agency’s compliance with section 106.”⁴³ Despite simplifying the original provision, the new version still required counterpart regulations to be developed in consultation with and approved by the ACHP.

The ACHP again updated the counterpart regulation provision in 1999.⁴⁴ The updated provisions provide for the development, adoption, and use of alternate procedures, as opposed to counterpart regulations. The 1999 provisions are the regulations currently in effect and codified at 36 C.F.R. § 800.14(a). The current regulations provide: “An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council’s regulations[.]”⁴⁵

Alternate procedures must be developed in “consult[ation] with the Council, the National Conference of State Historic Preservation Officers [(“NCSHPO”)], or individual SHPOs/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations[.]”⁴⁶ The federal agency must also publish notice of the proposed alternate procedures in the Federal Register for public review and comment.⁴⁷ Finally, the federal agency cannot adopt and use the proposed alternate procedures unless and until the ACHP has approved them: “The agency official shall submit the alternate procedures to the Council for a 60-day review. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures.”⁴⁸

The counterpart regulation or alternat procedure provisions have been updated multiple times since 1979. Nevertheless, a common thread has persisted in each version. Each version has required that counterpart regulations or alternate procedures be developed in consultation with and approved by the ACHP before they can be used by the federal agency.

II. Development, Adoption, and Use of Appendix C

A. Development of Appendix C

Following the ACHP’s finalization of updates to Part 800 in 1979, the USACE began developing its own counterpart regulations for its Regulatory Program. In April 1980, the USACE published a first draft of the proposed counterpart regulations as an appendix—Appendix C—to 33 C.F.R. Part 325, its regulations governing how it processes DOA permit applications.⁴⁹ According to USACE at the time, “These proposed regulations would establish the procedures to be followed

⁴³ 36 C.F.R. § 800.15 (1986) (emphasis added).

⁴⁴ See 64 Fed. Reg. at 27051-52.

⁴⁵ 36 C.F.R. § 800.14(a).

⁴⁶ *Id.* § 800.14(a)(1).

⁴⁷ *Id.*

⁴⁸ *Id.* § 800.14(a)(2).

⁴⁹ 45 Fed. Reg. 22,112 (Apr. 3, 1980).

by the U.S. Army Corps of Engineers in its regulatory program in order to comply with the National Historic Preservation Act[.]”⁵⁰

According to the USACE’s Federal Register notice, “These regulations have been jointly drafted with the Advisory Council on Historic Preservation as counterpart regulations pursuant to 36 CFR 800.11.”⁵¹ The notice acknowledged that counterpart regulations must be “approved by the Chairman of the Advisory Council.”⁵² Additionally, the notice stated that the USACE would “follow the procedures set forth in these regulations on an interim basis.”⁵³

In May 1984, the USACE published a revised version of Appendix C.⁵⁴ The revisions were the “result of the maturing Federal program for historic preservation and an October 1983[] opinion from the Office of Legal Counsel in the Department of Justice[]” that made the original version of Appendix C “no longer appropriate.”⁵⁵

From 1980 until 1990, when the USACE formally adopted Appendix C, the USACE used the 1980 draft version of Appendix C to fulfill its Section 106 obligations “on an interim basis.”⁵⁶ During this time, at least one federal court held that the USACE’s use of the 1980 draft Appendix C on an interim basis was unlawful. *Colorado Indian Tribes v. Marsh* concerned the USACE’s permitting of the placement of riprap along banks of the Colorado River next to a proposed residential and commercial development.⁵⁷ The plaintiffs alleged, *inter alia*, that in issuing the permit, the USACE violated Section 106 because the procedures set forth in the 1980 draft Appendix C were inconsistent with Part 800 and therefore could not be relied upon by the USACE for Section 106 compliance.⁵⁸ The United States District Court for the Central District of California agreed.⁵⁹

The court noted that Appendix C “ha[d] never been finally adopted and incorporated into the Code of Federal Regulations.”⁶⁰ The court emphasized that “federal agencies can choose to adopt counterpart regulations related to [their] own specific programs and authorities,” but they “must be approved by the chairperson of the Advisory Council[.]”⁶¹ The court found the ACHP’s approval “a fact which is lacking with respect to the proposed regulation upon which the Corps relied.”⁶² The court nevertheless noted that “[i]f the responsibilities under the adopted regulations

⁵⁰ *Id.* at 22,112.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ 49 Fed. Reg. 19,036 (May 4, 1984).

⁵⁵ *Id.* at 19,037.

⁵⁶ 55 Fed. Reg. 27,000, 27,000 (June 29, 1990) (“On April 3, 1980, we published a proposed appendix c, which was approved by the Advisory Council on Historic Preservation for use on an interim basis. We have been operating under that appendix since that time.”).

⁵⁷ *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1427-28 (C.D. Cal. 1985).

⁵⁸ *See id.* at 1434-38.

⁵⁹ *Id.* at 1438 (“The Corps’ action in accordance with and in reliance on the proposed regulations violated [the] NHPA and its regulations.”).

⁶⁰ *Id.* at 1436.

⁶¹ *Id.* at 1437 (citing 36 C.F.R. § 800.11 (1985)) (internal citation omitted).

⁶² *Id.*

were commensurate with the responsibilities under [the] NHPA and its regulations,” it might not be unlawful for the USACE to follow the 1980 draft Appendix C.⁶³ The court concluded that the 1980 draft Appendix C was not “commensurate” with Part 800.

Particularly relevant to the case was that the 1980 draft Appendix C “distinguishes between different types of [historic] property and affixes responsibilities to each.”⁶⁴ Specifically, for “properties listed in or determined eligible or inclusion in the National Register,” the USACE would consider the direct and indirect reasonably foreseeable effects on such properties[.]”⁶⁵ The USCAE defined this as the “affected area.”⁶⁶ “For properties which *may* qualify for inclusion,” the USACE limited its Section 106 review to only those properties within “the water of uplands directly affected by” the undertaking.⁶⁷ The court noted that this “distinction between properties and differing scopes of responsibility is at odds with [the] NHPA and its regulations.”⁶⁸

In particular, the court pointed out that Section 106 requires federal agencies to “take into account the effect of the undertaking on any district, site, building, structure, or object that is *included in or eligible* for inclusion in the National Register.”⁶⁹ The court further pointed to Part 800’s definition of “eligible property” which “makes no distinction between determined eligibility and property that may qualify[.]”⁷⁰ The court concluded that “[t]he Corps’ action in accordance with and in reliance on the proposed regulations violated [the] NHPA and its regulations.”⁷¹

In June 1990, the USACE published the final version of Appendix C.⁷² The final version reflected changes made in response to public comments and the ACHP’s 1986 rulemaking updating Part 800.⁷³ The Federal Register notice reemphasized that Appendix C “only addresses the procedures to be followed by the Corps in implementing its regulatory program.”⁷⁴

B. Interim Guidance for Appendix C

Since 1990, the USACE has never updated, modified, or revised Appendix C, despite the 1992 amendments to the NHPA and the ACHP’s subsequent revisions to Part 800. Instead, the USACE has published a series of interim guidance and memoranda on the continued applicability and legality of Appendix C.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* (emphasis in original).

⁶⁸ *Id.*

⁶⁹ *Id.* (quoting 16 U.S.C. § 470f (re-codified as amended at 54 U.S.C. § 306108)) (emphasis in original).

⁷⁰ *Id.* (citing 36 C.F.R. § 800.2(f) (1985)).

⁷¹ *Id.* at 1438.

⁷² 55 Fed. Reg. at 27,000.

⁷³ *Id.* (discussing 51 Fed. Reg. at 31,115).

⁷⁴ *Id.*; see 33 C.F.R. pt. 325, app. C, § 2 (“This appendix establishes the procedures to be followed by the U.S. Army Corps of Engineers (Corps) to fulfill the regulatory requirements set forth in the National Historic Preservation Act (NHPA)[] . . . as they relate to the regulatory program of the Corps of Engineers (33 CFR parts 320-334).”).

In March 2002, the USACE published a “request for comment” in the Federal Register, recognizing the need to address Appendix C following the 1992 NHPA amendments and the ACHP’s updates to Part 800.⁷⁵ As part of this process, the request for comment “solicit[ed] public views on [the] 36 CFR part 800 regulation as it relates to the Corps Regulatory Program and Appendix C.”⁷⁶ The result of this review would be “additional guidance, modifications to Appendix C, programmatic agreements, or other products.”⁷⁷ Until then, the notice stated that the USACE “intends to issue interim guidance to address the use of Appendix C and the new 36 CFR part 800 regulations[.]”⁷⁸

In June 2002, the USACE issued its first set of interim guidance.⁷⁹ The guidance largely catalogued the ACHP’s changes to Part 800 following the 1992 NHPA amendments and counseled individual Division and District commands that “Appendix C shall continue to be used, since there are no substantive differences between Appendix C and the new ACHP regulations[.]”⁸⁰ The memorandum accompanying the 2002 Interim Guidance noted that “[t]he ACHP does not endorse this guidance nor does it agree with Appendix C.”⁸¹

In September 2004, the USACE published an advance notice of proposed rulemaking in the Federal Register to “solicit[] comments on how [its] permit application process procedures should be revised as a result of the 1992 amendments to the National Historic Preservation Act and the Advisory Council on Historic Preservation’s revised regulations on protection of historic properties.”⁸² Based on the comments received on its 2002 request for comment, the USACE “identified several options for updating [its] permitting application process to address the 1992 amendments to the NHPA and the revised 36 CFR part 800.”⁸³ The USACE identified four options:

⁷⁵ 67 Fed. Reg. 10,822, 10,822 (Mar. 8, 2002) (“Since the principle law and the ACHP implementing regulations have been changed, the Corps of Engineers has determined that it is necessary to address these changes.”).

⁷⁶ *Id.*

⁷⁷ *Id.* A programmatic agreement is another type of Part 800 program alternative that “govern[s] the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings.” 36 C.F.R. § 800.14(b). This is done “through negotiation of an agreement between the [federal] agency, appropriate SHPO(s) /THPO(s) [sic], and the ACHP.” *Programmatic Agreements*, ADVISORY COUNCIL ON HISTORIC PRES., https://www.achp.gov/program_alternatives/pa (last visited July 19, 2022).

⁷⁸ 67 Fed. Reg. at 10,822.

⁷⁹ U.S. Army Corps of Eng’rs, *Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the New Advisory Council on Historic Preservation Regulations at 36 CFR Part 800* (June 24, 2002) [hereinafter 2002 Interim Guidance].

⁸⁰ *Id.* at 2, § 3.

⁸¹ Mem. from Karen Durham-Aguilera, Acting Chief, Operations Div., Directorate of Civil Works, U.S. Army Corps of Eng’rs, to Commanders, Major Subordinate Commands, and District Commands, U.S. Army Corp’s of Eng’rs, *Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the New Advisory Council on Historic Preservation Regulations at 36 CFR Part 800*, at 1, § 3 (June 24, 2002) [hereinafter 2002 Memorandum].

⁸² 69 Fed. Reg. 57,662, 57,662 (Sept. 27, 2004).

⁸³ *Id.* at 57,663.

- Revise Appendix C to incorporate the current requirements and procedures at 36 CFR part 800.
- Revoke Appendix C and use 36 CFR part 800, subpart B when reviewing individual permit applications, and utilize Federal agency program alternatives at 36 CFR 800.14^[84] for general permits.
- Revoke Appendix C and use 36 CFR part 800, subpart B for all individual permits and general permits.
- Revoke Appendix C and develop non-regulation alternate procedures in accordance with 36 CFR 800.14.⁸⁵

The USACE “request[ed] comments on the appropriateness and feasibility of these options[,]” “invit[ed] suggestions for other options that we have not identified[,]” and sought “recommendations for the preferred option that would be pursued through the Administrative Procedures Act process to revise Regulatory Program procedures for the protection of historic properties.”⁸⁶

In April 2005, the USACE issued updated interim guidance on Appendix C.⁸⁷ The accompanying memorandum stated that its purpose was “to provide interim guidance concerning the consideration of historic properties during the Corps permit process, until the new permit process procedures are finalized and become effective[,]”⁸⁸ in reference to the public process initiated in 2002.⁸⁹ The 2005 Interim Guidance responded to the ACHP’s updates to Part 800 and superseded the 2002 Interim Guidance.⁹⁰ The accompanying memorandum noted that “comments received in response to the [2004 advance notice of proposed rulemaking] will be used to determine how we will revise our permit processing procedures.”⁹¹ No revisions to Appendix C were ever implemented.

In January 2007, the USACE published a memorandum clarifying that the 2005 Interim Guidance and Appendix C “appl[y] to all [DOA] requests for authorization/verification, including individual

⁸⁴ Besides alternate procedures and programmatic agreements, there are three other Part 800 program alternatives: exempted categories, 36 C.F.R. § 800.14(c); program comments, *id.* § 800.14(d); and standard treatments. *Id.* § 800.14(e).

⁸⁵ 69 Fed. Reg. at 57,663.

⁸⁶ *Id.*

⁸⁷ U.S. Army Corps of Eng’rs, *Interim Guidance for Implementing Appendix C of 33 CFR part 325 with the revised Advisory Council on Historic Preservation Regulations at 36 CFR part 800* (Apr. 25, 2005) [hereinafter 2005 Interim Guidance].

⁸⁸ Mem. from Michael B. White, Chief, Operations, Directorate of Civil Works, U.S. Army Corps of Eng’rs, to All Major Subordinate Commands, District Commands, U.S. Army Corps of Eng’rs, *Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation Regulations at 36 CFR Part 800*, at 1, § 4 (Apr. 25, 2005) [hereinafter 2005 Memorandum].

⁸⁹ See 67 Fed. Reg. at 10,822; 69 Fed. Reg. at 57,662.

⁹⁰ 2005 Mem., *supra* note 88, at 1, §§ 2, 4.

⁹¹ *Id.* at 1, § 3.

permits (standard permits and letters of permission) and all regional general permits and nationwide permits.”⁹²

In 2009, the USACE published another memorandum intended “[t]o provide clear guidance with respect to the applicability and implementation of 33 CFR 325, Appendix C[.]”⁹³ The 2009 Memorandum capped off an unsuccessful, multi-year effort by the USACE and the ACHP to revise or replace Appendix C.⁹⁴ The 2009 Memorandum noted that “the Corps suspended its efforts to revise” Appendix C when it “and the Council were unable to reach consensus on several fundamental policy issues.”⁹⁵ According to a statement from the Office of the Assistant Secretary of the Army for Civil Works (“ASA-CW”) accompanying the 2009 Memorandum, the ACHP and the USACE reached an impasse over three discrete issues: “1) how to define ‘undertaking’; 2) what is the proper regulatory scope of analysis; and, 3) whether and how to consider indirect effects of undertakings focused on [waters of the United States].”⁹⁶

The 2009 Memorandum specifically responds to, what the USACE characterized as, “a mass email” “disseminated” by the ACHP that “improperly characterizes the status of Appendix C, implying that Appendix C is not a valid process for complying with the Corps’ responsibilities under Section 106 of the National Historic Preservation Act.”⁹⁷ The ACHP email discusses the failed efforts of the ACHP and the USACE between 2006 and 2008 to resolve the “legal and policy issues related to Appendix C.”⁹⁸ The email recounts that the USACE “failed to resolve [the ACHP’s] fundamental legal and policy difference, notably the definition of undertaking, the designation of areas of potential effects, the scope of analysis for identification of historic properties and assessment of effects, and the nature of consultation.”⁹⁹ The email provides one of the firmest positions from the ACHP regarding the validity of Appendix C:

The ACHP has never approved Appendix C as a counterpart regulation for implementing Section 106. . . .

⁹² 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 District Commands, U.S. Army Corps of Eng’rs, *Clarification of Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800 dated 25 April 2005*, at 1, § 2 (Jan. 31, 2007) [hereinafter 2007 Memorandum].

⁹³ Mem. from James R. Hannon, Acting Chief, Operations, Directorate of Civil Works, U.S. Army Corps of Eng’r, to Regulatory Chiefs, U.S. Army Corps of Eng’rs, *Headquarters Regulatory Community of Practice on the Continued Use and Applicability of 33 CFR 325, Appendix C 1, § 1* (Jan. 6, 2009) [hereinafter 2009 Memorandum].

⁹⁴ See 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> (“From 2001 to 2008, Regulatory Program officials worked with ACHP officials[] . . . to revise or replace the Corps procedures but did not reach agreement on how to resolve several inconsistencies.” (footnote omitted)).

⁹⁵ 2009 Mem., *supra* note 93, at 1, § 2(b).

⁹⁶ Statement from Office of Assistant Sec’y of Army for Civil Works, *Statement Regarding the Applicability of Appendix C for Historic Properties* 1 (Dec. 10, 2008) [hereinafter Statement from OASA-CW].

⁹⁷ 2009 Mem., *supra* note 93, at 1, § 2(c).

⁹⁸ 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).

⁹⁹ *Id.*

Meanwhile, the ACHP reiterates to Section 106 stakeholders that the Corps' Appendix C is not approved as an alternative procedure for Section 106 compliance. Accordingly, all Section 106 reviews for Corps permits need to follow the process set forth by 36 CFR Part 800 or tailored procedures approved pursuant to 36 CFR § 800.14. Only when the Corps has complied with 36 CFR Part 800 can it evidence that the Section 106 historic preservation reviews for Section 404 and Section 10 permits have been satisfactorily completed.¹⁰⁰

The 2009 Memorandum asserts that the UASCE did not need to secure the ACHP's approval to adopt and use Appendix C because Appendix C "was not established as a 'counterpart regulation[.]'"¹⁰¹ Instead, the 2009 Memorandum contends that "[t]he Corps' Appendix C regulations were promulgated as stand alone [sic] regulations establishing the process by which the Corps fulfills the requirements of the National Historic Preservation Act."¹⁰² The 2009 Memorandum claims that "Appendix C has been effectively implemented for nearly two decades[.]"¹⁰³ Finally, the 2009 Memorandum affirms that the 2005 Interim Guidance remains in effect and that "the Corps should continue to follow the procedures found at 33 CFR 325, Appendix C unless otherwise directed by this office."¹⁰⁴

C. Attempts to Revise Appendix C

Progress to address Appendix C stalled for the next seven years until Congress passed the Water Infrastructure Improvements for the Nation Act ("WIINA") in 2016.¹⁰⁵ Section 1120 of the WIINA directed the Secretary of the Army to submit to Congress

a report that describes the results of a review by the Secretary of existing priorities, regulations, and guidance related to consultation with Indian tribes on water resources development projects or other activities that require the approval of, or the issuance of a permit by, the Secretary that may have in impact on tribal cultural and natural resources.¹⁰⁶

In response, the DOA, along with the Department of the Interior ("DOI") and the Department of Justice ("DOJ"), held seven tribal consultations and a single listening session with Tribes in

¹⁰⁰ *Id.*

¹⁰¹ 2009 Mem., *supra* note 93, at 1, § 2(c); *contra* 45 Fed. Reg. at 22,112 ("These regulations have been jointly drafted with the Advisory Council on Historic Preservation as counterpart regulations pursuant to 36 CFR 800.11." (emphasis added)).

¹⁰² 2009 Mem., *supra* note 93, at 1, § 2(c).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 2, § 3.

¹⁰⁵ Pub. L. No. 114-322, 130 Stat. 1628 (2016).

¹⁰⁶ *Id.* § 1120(a)(3), 130 Stat. at 1643.

October and November 2016, and solicited written comments.¹⁰⁷ The DOA, the DOI, and the DOJ sought tribal input on two broad issues:

1) *Promoting Meaningful Government-to-Government Engagement within the Existing Framework.* How can Federal agencies better ensure meaningful Tribal input into infrastructure-related reviews and decisions to protect Tribal lands, resources, and treaty rights within the existing framework?

2) *Identifying Any Necessary Changes to the Existing Framework.* Where and when does the current framework present barriers to meaningful consultation? What changes to the current framework would promote these goals?¹⁰⁸

In January 2017, the DOA, the DOI, and the DOJ published their report. Their report extensively documented Tribes' concerns with and objections to the USACE's use of Appendix C to fulfill its Section 106 obligations.

According to Tribes, the Corps' use of Appendix C has been at the heart of many consultation problems, for a number of reasons. A primary concern noted was that Appendix C has not been revised to reflect the 1992 amendments to the NHPA that make Tribal consultation mandatory. . . . Furthermore, the Tribes notes that Appendix C was never approved by the ACHP, which has repeatedly expressed its view that Appendix C is not in compliance with Section 106, and that using Appendix C does not fulfill the Corps' responsibilities under Section 106. . . . Several Tribes also noted that the Corps' 2005 and 2007 "interim guidance" regarding compliance with the NHPA is insufficient.

Numerous Tribes commented that the NHPA (and Section 106) is more expansive and comprehensive than Appendix C in the identification and consideration of historic properties, including those significant to Tribes. Additional problems with Appendix C that Tribes notes were that it results in disputed findings, uses a narrow definition of "undertaking" and of Area of Potential Effects, results in lack of input from Tribes, does not protect confidential information and does not address unanticipated discoveries, as required in Section 106.¹⁰⁹

¹⁰⁷ U.S. Dep't of Interior et al., *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions* 4 (Jan. 2017), available at <https://www.achp.gov/sites/default/files/reports/2018-06/ImprovingTribalConsultationandTribalInvolvementinFederalInfrastructureDecisionsJanuary2017.pdf>.

¹⁰⁸ *Id.* (emphasis in original).

¹⁰⁹ *Id.* at 54; see also *id.* at 58 ("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."); *id.* at 65 ("These Tribes argued that the Corps implemented Appendix C without congressional authorization or the required approval from the Advisory Council on Historic Preservation, and that Appendix C ignores or contradicts [the] ACHP's regulations implementing the NHPA.").

The report also repeatedly documented Tribes' calls for the USACE to revoke or revise Appendix C.¹¹⁰ The report concluded with a commitment by the DOA to address the concerns raised by Tribes about Appendix C.

The Army Corps of Engineers will update its Appendix C (33 C.F.R. 325) in 2017 in response to extensive Tribal comments calling for Appendix C's rescission or revision. (See "Federal Consultation with Tribes Regarding Infrastructure Decision-Making," transcript taken November 17, 2016, Rapid City, South Dakota, p. 34, lines 7-10, statement of Assistant Secretary of the Army Civil Works Jo- Ellen Darcy, committing to "improve" Appendix C).

No work was undertaken to "improve" or "update" Appendix C. The USACE continues to use Appendix C and the 2005 Interim Guidance to fulfill its Section 106 responsibilities.¹¹¹

In 2019, the Government accountability Office ("GAO") released a report documenting the federal government's overall failure to meaningfully consult with Tribes about infrastructure projects.¹¹² The report provided a detailed examination of the USACE's adoption and use of Appendix C, which will be discussed in greater detail in Section III.A, *supra*.¹¹³ The GAO concluded "that legislative action may be needed to resolve" "[t]he long-standing nature of the differences between the Corps procedures and the ACHP's regulations, as well as the agencies' inability to resolve these differences over almost two decades[.]"¹¹⁴

In July 2021, the ACHP sent a letter to the Acting ASA-CW offering its "assistance in addresses the challenges that other Corps policies and regulations may pose to [its nation-to-nation relationships with Indian tribes], specifically Appendix C[.]"¹¹⁵ The letter was unsparing in its assessment of Appendix C:

In our decades of experience consulting with the Corps, states, Indian tribes, and others about projects that require Department of the Army permits from the Corps, it is evident that Appendix C does not provide adequate consideration of the effects of these undertakings on historic properties not is it consistent with the regulations that implement Section 106 The differences between the Section 106 regulations and Appendix C are fundamental, create confusion among consulting parties, compliance Section 106 reviews, and lead at times to extensive litigation.¹¹⁶

¹¹⁰ See *id.* at 14 ("The Corps should revise or repeal its Appendix C[.]"); *id.* at 54 ("In numerous meetings and letters, Tribes called for repeal of Appendix C, noting that the Corps' application of Appendix C does not fulfill the agency's responsibilities under the NHPA and is not in compliance with Section 106.")

¹¹¹ See 86 Fed. Reg. 2,744, 2,851 (Mar. 15, 2021) ("The Corps continues to use Appendix C and the 2005 and 2007 interim guidance to comply with Section 106 of the NHPA.")

¹¹² See GAO Report, *supra* note 94.

¹¹³ *Id.* at 51-55.

¹¹⁴ *Id.* at 55

¹¹⁵ Letter from Reid L. Nelson, Acting Exec. Dir., Advisory Council on Historic Pres., to Jaime A. Pinkham, Acting Assistant Sec'y of Army (Civil Works) 1 (July 30, 2021).

¹¹⁶ *Id.*

The ACHP's conclusion is blunt: "Appendix C is fundamentally inconsistent with the government-wide Section 106 regulations and its use jeopardizes the Corps' ability to fully meet its legal obligations under Section 106. Unfortunately, these challenges can also undermine the important relationships the Corps has with Indian tribes, states, and others."¹¹⁷ The ACHP rejected the GOA's suggestion that a legislative fix is necessary, suggesting instead that the tools already exist to solve this issue.¹¹⁸ The letter noted that "[a] commitment to address the inconsistencies between Appendix C and the Section 106 regulations would also serve as an opportunity to strengthen relationships with federally recognized tribes and other stakeholders with an interest in preserving our nation's diverse history."¹¹⁹ The letter concluded by urging the USACE accept the ACHP's offer to work "on a solution to these systemic issues[.]"¹²⁰

In December 2021, the USACE published a notice in the Fall 2021 Unified Agenda for Regulatory and Deregulatory Actions of its intent to revise Appendix C through formal rulemaking. The agenda item specifically states: "The Corps would propose to revise its regulations to conform to the ACHP 800 regulations."¹²¹ It further notes that since Appendix C was adopted, the NHPA has been amended and Part 800 has been revised.¹²²

On June 3, 2022, the DOA and the USACE published a Federal Register notice soliciting public comments on how the USACE could "modernize" its Regulatory Program.¹²³ The DOA and the USACE solicited the public's input on, *inter alia*, "potential rulemaking actions regarding the Corps' implementing regulations for the National Historic Preservation Act[.]"¹²⁴ Recognizing the "longstanding disagreement between the Corps and the ACHP regarding" Appendix C, and that its use of Appendix C "can result in inconsistency and confusion," the DOA and the USACE sought "input on the best approach to modernizing Appendix C[.]"¹²⁵ Specifically, the DOA and the USACE sought

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.¹²⁶

¹¹⁷ *Id.* at 2.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Procedures for the Protection of Historic Properties, RIN: 0710-AB46*, OFFICE OF INFO. & REGULATORY AFFAIRS, <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0710-AB46> (last visited July 25, 2022).

¹²² *Id.*

¹²³ *See* 87 Fed. Reg. at 33,756.

¹²⁴ *Id.* at 33,757.

¹²⁵ *Id.* at 33,759.

¹²⁶ *Id.* at 33,760.

The DOA and the USACE specifically asked the public to consider the four options set forth in the 2004 advance notice of proposed rulemaking.¹²⁷ During June and July 2022, the USACE held eleven virtual public and tribal listening sessions, including two specifically on Appendix C.¹²⁸

III. Appendix C is an Unlawful Counterpart Regulation

Appendix C suffers from two fundamental legal deficiencies that render its adoption and continued use unlawful. First, Appendix C was not lawfully promulgated because it was never approved or concurred in by the ACHP. Second, Appendix C is inconsistent and conflicts with Part 800 and the NHPA.

A. Appendix C was not Lawfully Promulgated

Despite using a version of Appendix C for forty-two years, the USACE has conspicuously been unable to provide any documentation that the ACHP approved of or concurred in Appendix C's adoption and use. The USACE has not been able to provide such documentation because it does not exist; the ACHP has never condoned the adoption or use of Appendix C. The lack of ACHP approval of or concurrence in Appendix C makes its adoption and use unlawful.

In 1980, when the USACE published its first draft of Appendix C, Part 800 established a process by which federal agencies could to develop and adopt counterpart regulations, provided that they were “*approved by the Chairman[]*” of the ACHP.¹²⁹ Likewise, when the USACE formally adopted Appendix C in 1990, Part 800 allowed federal agencies to develop and adopt counterpart regulations, provided that they were “*concurred in by the Council[.]*”¹³⁰ Whether Appendix C was adopted pursuant to the regulations in place when the USACE initiated its development of Appendix C or the regulations in place when it formally adopted Appendix C, valid, lawful counterpart regulations needed to be “approved by” or “concurred in by” the ACHP. As the ACHP stated in its 2008 email regarding Appendix C: “The ACHP has never approved Appendix C as a counterpart regulation for implementing Section 106.”¹³¹ This fact has been widely documented by other federal agencies,¹³² the federal courts,¹³³ and commentators.¹³⁴ Indeed, the USACE itself has admitted that the ACHP has never approved of or concurred in Appendix C.

¹²⁷ *Id.* at 33,759-60 (discussing 69 Fed. Reg. at 57,663).

¹²⁸ *See id.* at 33,763.

¹²⁹ 36 C.F.R. § 800.11(a) (1980) (emphasis added).

¹³⁰ 36 C.F.R. § 800.15 (1990) (emphasis added).

¹³¹ Email from Gilmore, *supra* note 98.

¹³² *See, e.g.*, GAO Report, *supra* note 94, at 51-55.

¹³³ *See, e.g., Comm. to Save Cleveland's Hulleys 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.”); *c.f. Marsh*, 605 F. Supp. at 1437 (“[T]he counterpart must be approved by the chairperson of the Advisory Council, a fact which is lacking with respect to the proposed regulation upon which the Corps relied.” (internal citation omitted)).

¹³⁴ *See, e.g., Melissa Lorentz, Engineering Exceptions to Historic Preservation Law: Why the Army Corps of Engineers’ Section 106 Regulations are Invalid*, 40 WM. MITCHELL L. REV. 1580, 1582 (2014) (“[T]he Corps has not obtained ACHP approval.” (footnote omitted)).

Whether the ACHP had approved of or concurred in Appendix C was a central issue in *Committee to Save Cleveland's Hulleys v. U.S. Army Corps of Engineers*.¹³⁵ In *Cleveland's Hulleys*, historic preservation organizations challenged the USACE's compliance with Section 106 when it authorized a dredging project that ultimately damaged historic properties.¹³⁶ The USACE determined that the undertaking would have no effect on historic properties, ended the Section 106 process, and authorized the project.¹³⁷ Under the version of Part 800 in place at the time, the lead federal agency's finding of no effect did not end the Section 106 process. Upon making such a finding, the federal agency was required to notify the relevant SHPO of the finding and allow the SHPO fifteen days to concur in or object to the finding.¹³⁸ If the SHPO concurred in the finding, then the Section 106 process was over.¹³⁹ If the SHPO objected, additional consultation was required.¹⁴⁰

The USACE largely did not dispute that it did not provide the SHPO notice. Instead, it argued that it was not required to comply with Part 800 because its own regulations, Appendix C, governed its Section 106 compliance.

The Corps contends that the Court is *not* compelled to conclude that it violated the NHPA merely because the Court finds that the Corps failed to comply with the ACHP regulations set forth at 36 CFR § 800.1 *et seq.* The Corps argues that those regulations do not govern its permitting process. Because the Corps has adopted regulations governing its own authority and obligations, including those under the NHPA, the Corps contends it is against these regulations which its action should be judged.¹⁴¹

The USACE contended that it complied with Appendix C and therefore did not violate the NHPA.¹⁴² The court disagreed.

The court noted that the USACE was correct that it was allowed to adopt and use its own counterpart regulations but emphasized “that such regulations [must] be ‘consistent’ with those issued by the ACHP,” and must be “adopted in consultation with *and are approved by* the ACHP.”¹⁴³ It was these two critical points that the court found Appendix C lacking. Critically, the court highlighted that “[a]ll parties agree that there is no record of the ACHP ever approving or concurring in the Corps’ regulations.”¹⁴⁴ This included the USACE. Moreover, the court found

¹³⁵ *Cleveland's Hulleys*, 163 F. Supp. 2d at 792.

¹³⁶ *Id.* at 786.

¹³⁷ *Id.* at 790.

¹³⁸ *Id.* at 789 (discussing 36 C.F.R. § 800.5(b) (1999)).

¹³⁹ *Id.* (discussing 36 C.F.R. § 800.5(b) (1999)).

¹⁴⁰ *Id.* (discussing 36 C.F.R. § 800.5(b) (1999)). This process is largely unchanged in the current Part 800 regulations, although SHPOs, THPOs, and the ACHP have thirty days to object and notice must also be provided to Indian tribes and Native Hawaiian organizations. *See* 36 C.F.R. § 800.4(d)(1).

¹⁴¹ *Cleveland's Hulleys*, 163 F. Supp. 2d at 791 (emphasis in original).

¹⁴² *Id.*

¹⁴³ *Id.* (citations omitted, emphasis in original).

¹⁴⁴ *Id.* at 792 (emphasis added).

that “the Corp’s procedures are inconsistent with, and indeed, in derogation of those ACHP regulations.”¹⁴⁵ Finally, the court concluded that “the Corps cannot rely on its own regulations to determine compliance with the NHPA in the circumstances at issue in this case[.]”¹⁴⁶

More recently, the GAO extensively documented the lack of ACHP approval of or concurrence in Appendix C in its 2019 report on tribal consultation for infrastructure projects.¹⁴⁷ The GOA dedicated an entire chapter of its report to Appendix C, extensively detailing its development, adoption, and inconsistencies with Part 800 and the NHPA.¹⁴⁸ The GAO reported that in 1981, the Chairman of the ACHP did approve an early version of Appendix C.¹⁴⁹ The ACHP’s “approval” of the 1981 version of Appendix C should not be given too much weight. As the GAO reported, at the USACE never published that version in the Federal Register, and both the ACHP and the USACE were unable provide a copy of the 1981 version of Appendix C purportedly approved of by the ACHP.¹⁵⁰ Moreover, this is not the version that was adopted in 1990.

The GOA reported that in 1984, the USACE submitted an updated version of Appendix C to the ACHP, which refused to approve it, stating that it needed to be put out for public comment.¹⁵¹ The USACE eventually published this version in the Federal Register.¹⁵² The GAO reported that the USACE continued to work with the ACHP on Appendix C through the end of the 1980s, providing the ACHP revised versions of Appendix C in 1986 and 1987.¹⁵³ The GAO reported that the ACHP repeatedly informed the USACE that these versions were inconsistent with the NHPA and Part 800.¹⁵⁴

According to the GAO report, in 1988, the USACE provided the OMB a final version of Appendix C to be published in the Federal Register.¹⁵⁵ The OMB consulted with the ACHP, which provided revisions in 1988 and 1989.¹⁵⁶ Nevertheless, the GAO reported that the OMB and the ACHP were unable “to resolve some of the issues with the regulation to the satisfaction of all parties.”¹⁵⁷ The GAO documented that “[a]ccording to ACHP documents, the ACHP did not concur in the final rule, indicating that it was inconsistent with ACHP regulations.”¹⁵⁸ For whatever reason, the OMB approved the publication of this version of Appendix C in the Federal Register.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*; see also *Sayler Park Vill. Council v. U.S. Army Corps of Eng’rs*, No. C-1-02-832, 2002 WL 32191511, at *7 (S.D. Ohio Dec. 30, 2002) (“Defendants also contend that the Corps did not violate the NHPA because it complied with its own regulations and interpreted in its interim guidance. This argument fails.”).

¹⁴⁷ GAO Report, *supra* note 94, at 51-55.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 53.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See 49 Fed. Reg. at 19,036.

¹⁵³ GAO Report, *supra* note 94, at 53.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 54.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

Even the USACE has, at least tacitly, recognized that the ACHP has never approved of or concurred in Appendix C. For example, in its 2002 Memorandum, the USACE stated that “[t]he ACHP does not endorse this guidance nor does it agree with Appendix C.”¹⁵⁹ And in a statement accompanying the 2009 Memorandum, the ASA-CW stated, “The Corps acknowledges that Appendix C has not been approved as an alternate procedure pursuant to regulations adopted after [sic] Appendix C was promulgated[.]”¹⁶⁰

The USACE has never provided documentation that purports to show the ACHP’s approval of or concurrence in Appendix C. Perhaps recognizing that it cannot in good faith assert that the ACHP has approved of or concurred in Appendix C, the USACE has asserted that it did not need to obtain the ACHP’s approval or concurrence to adopt and use Appendix C. This assertion has taken two forms: first, that neither Part 800 nor the NHPA require the USACE to obtain the ACHP’s approval or concurrence; and second, that Appendix C is not a counterpart regulation, but a standalone regulation promulgated pursuant to the USACE’s inherent rulemaking authority. Neither of these assertions hold water.

In a 2017 report on its nationwide permit (“NWP”) program, the USACE extensively discussed its continued use of Appendix C.¹⁶¹ The report responded to public comments on the NWP program, including one comment that “stated that 33 CFR part 325, Appendix C is not approved by the Advisory Council on Historic Preservation (ACHP) as a program alternative, as required by 36 CFR 800.14.”¹⁶² In response, the report states:

The ACHP’s regulations at 36 CFR 800.14(a) states [sic] that an “agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council’s regulations pursuant to section 110(a)(2)(E)[¹⁶³] of the [NHPA].” Both 36 CFR 800.14(a) and NHPA section 110(a)(2)(E) state that a federal agency’s program alternative has to be “consistent” with the ACHP’s regulations. Neither of those provisions state that those program alternatives have to be “approved” by the ACHP.¹⁶⁴

¹⁵⁹ 2002 Mem., *supra* note 81, at 1, § 3; *see also Cleveland’s Hulets*, 163 F. Supp. 2d at 792 (“*All parties agree that there is no record of the ACHP ever approving or concurring in the Corps’ regulations.*” (emphasis added)).

¹⁶⁰ Statement from OASA-CW, *supra* note 96, at 1-2. This statement’s admission that Appendix C was not approved under the alternate procedure regulations adopted by the ACHP *after* Appendix C’s promulgation is irrelevant. Appendix C was adopted in 1990. 55 Fed. Reg. at 27,000. The ACHP did not update its alternate procedure regulations until 1999, 64 Fed. Reg. at 27,044, when it promulgated the current provisions. *See* 36 C.F.R. § 800.14(a). This statement implies that Appendix C *was* approved under the version of Part 800 in place in 1990. As discussed in Section III.A, *supra*, that is false.

¹⁶¹ *See generally* Office of Assistant Sec’y of the Army (Civil Works) & Office of Gen. Counsel, *Review of 12 Nationwide Permits Pursuant to Executive Order 12783* (Sept. 25, 2017) [hereinafter OASA(CW)/OGC Report], available at <https://usace.contentdm.oclc.org/utils/getfile/collection/p16021coll7/id/10241>; *see also* 82 Fed. Reg. 1,860, 1,959 (Jan. 6, 2017) (“Both 36 CFR 800.14(a) and NHPA Section 110(a)(2)(E) state that a federal agency’s program alternative has to be ‘consistent’ with the ACHP’s regulations. Neither of those provisions state that those program alternatives have to be ‘approved’ by the ACHP.”).

¹⁶² *Id.* at 110.

¹⁶³ *See* 54 U.S.C. § 306102(b)(5)(A).

¹⁶⁴ OASA(CW)/OGC Report, *supra* note 161, at 111.

There are three fundamental issues with the USACE's assertion. First, the USACE is incorrect that 36 C.F.R. § 800.14(a) does not require ACHP approval of program alternatives. While the provision does not use the word "approval" or "approve," its meaning is unambiguous. In relevant part, the provision states: "The agency official shall submit the proposed alternate procedures to the Council for a 60-day review period. If the Counsel finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures."¹⁶⁵ Section 800.14(a)(2) unambiguously requires the ACHP's approval before alternate procedures can be adopted and used. Moreover, the ACHP interprets Section 800.14(a) as requiring ACHP approval: "[Alternate] Procedures, approved by the ACHP and adopted by the agency, substitute in whole or in part for the ACHP's Section 106 regulations under Subpart B."¹⁶⁶

The NHPA unambiguously delegates exclusive Section 106 rulemaking authority to the ACHP: "The Council may promulgate regulations as it considered necessary to govern the implementation of Section 306108 of this title in its entirety."¹⁶⁷ Federal courts have unanimously recognized the ACHP's exclusive rulemaking authority in this arena.¹⁶⁸ Accordingly, the ACHP's interpretations of its own regulations are afforded substantial deference.¹⁶⁹ More to the point, the USACE's interpretations of Part 800 and the NHPA are afforded no deference.¹⁷⁰ Where the ACHP's and the USACE's interpretations differ or conflict, the ACHP's interpretations must prevail.¹⁷¹ Thus,

¹⁶⁵ 36 C.F.R. § 800.14(a)(2) (emphasis added).

¹⁶⁶ ACHP, *Alternate Procedures*, *supra* note 35.

¹⁶⁷ 54 U.S.C. § 304108(a).

¹⁶⁸ See, e.g., *Te-Moak Tribe*, 608 F.3d at 607 (quoting 16 U.S.C. § 470s (re-codified as amended at 54 U.S.C. § 306108(a))) ("The NHPA explicitly delegates authority to the Advisory Council on Historic Preservation 'to promulgate such rules and regulations as it deems necessary to govern the implementation' of section 106."); *CTIA-Wireless Ass'n v. Fed. Commc'ns Comm'n*, 466 F.3d 105, 116 (D.C. Cir. 2006) ("Congress has entrusted one agency with interpreting and administering section 106 of the NHPA: the Council. . . . Congress has authorized the Council to administer the provision at issue here: section 106."); *McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1287 (D.C. Cir. 1992) ("[T]he Advisory Council's regulations implementing the NHPA[are] promulgated under authority granted by Congress[.]" (citation omitted)); *Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161, 166 (1st Cir. 2003) ("Fortunately, the NHPA delegates authority to the Advisory Council on Historic Preservation (the 'Council') to promulgate regulations interpreting and implementing § 106." (citation omitted)); *Nat'l Trust for Historic Pres. in U.S. v. U.S. Army Corps of Eng'rs*, 552 F. Supp. 784, 790 (S.D. Ohio 1982) ("Further, Congress authorized the Advisory Council to promulgate regulations as necessary to govern the implementation of Section 106.").

¹⁶⁹ See *McMillan Park*, 968 F.2d at 1288 ("[W]e nevertheless believe the Advisory Council regulations command substantial judicial deference."); *CTIA-Wireless*, 466 F.3d at 117 ("Given that we must defer under *Andrus v. Sierra Club*, 442 U.S. 347 (1979),] and *McMillan Park* to the Council's reasonable interpretation of the meaning of section 106, we cannot see how it was arbitrary and capricious . . . for the FCC to choose to do so as well." (emphasis in original, internal citation omitted)).

¹⁷⁰ See *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1088 (D.C. Cir. 2019) (quoting *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1368 (D.C. Cir. 1999) ("[W]e 'owe no deference to the Corps' interpretation of a statute it does not administer." (brackets omitted from original)); *United Keetowah Band of Cherokee Indians in Okla. v. Fed. Commc'ns Comm'n*, 933 F.3d 728, 738 (D.C. Cir. 2019) ("We owe no deference to the FCC's interpretations of the NHPA.").

¹⁷¹ See *Sayler Park*, 2002 WL 32191511, at *7 ("Consequently, the Corps Interim Guidance is inconsistent with the ACHP Interim Guidance and irrelevant." (footnote omitted)); see also *Semonite*, 916 F.3d at 1088-89 (rejecting the USACE's interpretation of the NHPA for the ACHP's and the National Park Service's interpretation, and remanding to the USACE to use the "proper definition[]").

the USACE's interpretation that Section 800.14(a) does not require ACHP approval is irrelevant and incorrect.

Second, the USACE's reference to Section 800.14(a) of the current version of Part 800 is irrelevant. As discussed in Section I.B, *supra*, the current alternate procedure provisions in the Part 800 regulations were not adopted by the ACHP until 1999.¹⁷² The USACE adopted Appendix C in 1990.¹⁷³ At that time, Part 800 explicitly required counterpart regulations to be “*concurred in by the Council[.]*”¹⁷⁴ Moreover, the version of Part 800 in place when the USACE began developing Appendix C in 1979 required counterpart regulations to be “*approved by the Chairman[.]*” of the ACHP.¹⁷⁵ Even assuming arguendo that the current version of Part 800 does not require ACHP approval, Appendix C was developed and adopted under two versions of Part 800 that explicitly required the ACHP's approval.

Third, the USACE's reliance on Section 110(a)(2)(E) of the NHPA is misplaced. Section 110(a)(2)(E) merely requires federal agencies' procedures for complying with Section 106 to be “consistent with the regulations promulgated by the Council pursuant to section 304108(a) and (b) of this title[.]”¹⁷⁶ This provision was included in the NHPA in 1992.¹⁷⁷ The ACHP's subsequent rulemaking implementing the 1992 NHPA amendments produced the current alternate procedure regulations, which explicitly require the ACHP's approval for the adoption and use of alternate procedures.¹⁷⁸

In its 2009 Memorandum, the USACE asserts that “Appendix C was not established as a ‘counterpart regulations,’ and, as such, did not require approval of the Council.”¹⁷⁹ Instead, the 2009 Memorandum claims that “[t]he Corps’ Appendix C regulations were properly promulgated as stand alone [sic] regulations establishing the process by which the Corps fulfills the requirements of the National Historic Preservation Act.”¹⁸⁰ This assertion is legally false and belied by the USACE's own characterizations of Appendix C.

The USACE does not possess inherent or statutory authority to promulgate “stand alone [sic]” regulations that purport to implement Section 106 or prescribe the procedures by which the USACE complies with Section 106. “It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress.”¹⁸¹ Accordingly, when it comes to the promulgation of regulations, the USACE, like all other federal agencies, “literally

¹⁷² See 64 Fed. Reg. at 27,044.

¹⁷³ See 55 Fed. Reg. at 27,000.

¹⁷⁴ 36 C.F.R. § 800.15 (1990) (emphasis added).

¹⁷⁵ 36 C.F.R. § 800.11(a) (1979) (emphasis added).

¹⁷⁶ 54 U.S.C. § 306102(b)(5)(A).

¹⁷⁷ See Pub. L. No. 102-575, § 4012(2), 106 Stat. at 4760.

¹⁷⁸ See 64 Fed. Reg. at 27051-52; 36 C.F.R. § 800.14(a). The ACHP continues to interpret 36 C.F.R. § 800.14(a) as requiring ACHP approval. See ACHP, *Alternate Procedures*, *supra* note 35.

¹⁷⁹ 2009 Mem., *supra* note 93, at 1, § 2(c).

¹⁸⁰ *Id.*

¹⁸¹ *Am. Library Ass'n v. Fed. Commc'ns Comm'n.*, 406 F.3d 689, 691 (D.C. Cir. 2005).

has not power to act[] . . . unless and until congress confers power upon it.”¹⁸² Here, Congress has conferred Section 106 rulemaking power on the ACHP, not the USACE.¹⁸³

The USACE does not cite any statute that purports to provide it with the authority to promulgate “stand alone [sic]” regulations that implement Section 106.¹⁸⁴ Nor can it, as the NHPA explicitly delegates this authority to the ACHP, and the ACHP alone. Instead, the USACE presumably relies on its inherent rulemaking authority to promulgate regulations that prescribe how it carries out its obligations under other statutes, such as the Clean Water Act (“CWA”) and the Rivers and Harbors Act (“RHA”).¹⁸⁵ Any implied authority the USACE may perceive it has to promulgate regulations setting forth the procedures by which it complies with Section 106 while fulfilling its obligations under the CWA and RHA is superseded by Congress’s express and unambiguous delegation of rulemaking authority to the ACHP.¹⁸⁶ The USACE’s authority to promulgate Section 106 implementing “regulations is limited to the scope of authority Congress has delegated to it.”¹⁸⁷ Here, congress has delegated to the USACE no such authority.

Moreover, the USACE’s characterization that Appendix C is not a counterpart regulation but, instead, a “stand alone [sic]” regulation is belied by the USACE’s own characterization of Appendix C elsewhere. For example, when developing Appendix C, the USACE explicitly stated that Appendix C was a counterpart regulation: “These regulations have been drafted . . . as counterpart regulations pursuant to 36 CFR 800.11.”¹⁸⁸ More recently, the USACE has affirmed its own understanding that Appendix C is a counterpart regulation. In its 2017 report on the NWP program, the USACE called Appendix C “an acceptable ‘Federal Agency Program Alternative’ under 36 CFR 800.14, and shall substitute for all of Subpart B of said regulation, and is fully consistent with the ACHP’s regulations.”¹⁸⁹ And in 2021, in its Federal Register notice reissuing and modifying its NWPs, the USACE stated that “Appendix C remains in effect as a counterpart regulations to 36 CFR part 800[.]”¹⁹⁰

The ACHP has never approved of or concurred in Appendix C. Therefore, it was not lawfully promulgated. Moreover, the UASCE’s arguments that Appendix C is not a counterpart regulation or that it did not need ACHP approval or concurrence are meritless.

¹⁸² *La. Pub. Serv. Comm’n v. Fed. Commc’ns Comm’n*, 476 U.S. 355, 375 (1986).

¹⁸³ See *supra* notes 167-71 and accompanying text.

¹⁸⁴ *Accord* 2009 Mem., *supra* note 93, at 1, § 2(c); GAO Report, *supra* note 94, at 52 (“In response to our questions, Corps attorneys told us that the Corps had authority to issue its own regulations implementing section 106 but did not cite a specific statute.”).

¹⁸⁵ See GAO Report, *supra* note 94, at 52 n.93 (“[USACE attorneys] also stated that the Supreme Court has long recognized that agencies have implied authority to issue legislative regulations to formulate policy and make rules to fill any gaps in a law left implicitly or explicitly by Congress.”).

¹⁸⁶ See *N.Y. Stock Exch. LLC v. Secs. & Exch. Comm’n*, 962 F.3d 541, 546 (D.C. Cir. 2020) (quoting *Col. River Indian Tribes v. Nat’l Indian Gaming Comm’n*, 466 F.3d 134, 139 (D.C. Cir. 2006)) (“The controlling principle here is that ‘an agency’s general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority.’” (brackets omitted)).

¹⁸⁷ *Am. Library*, 406 F.3d at 691 (citing *Michigan v. Env’tl. Prot. Agency*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)).

¹⁸⁸ 44 Fed. Reg. at 22,112 (citing 36 C.F.R. § 800.11 (1980)).

¹⁸⁹ OASA(CW)/OGC Report, *supra* note 161, at 5.

¹⁹⁰ 86 Fed. Reg. at 2,826.

B. Appendix C is Inconsistent and Conflicts with Part 800 and the NHPA

In addition to being unlawfully promulgated, Appendix C is unlawful because it is inconsistent and conflicts with the Section 106 process set forth in the ACHP's Part 800 regulations and the NHPA itself. As discussed previously, Section 110 of the NHPA requires that federal agencies' "procedures for compliance with section 306108 of this title[] . . . are consistent with regulations promulgated by the Council pursuant to section 304108(a) and (b) of this title[.]"¹⁹¹ Moreover, the Part 800 regulations require alternate procedures to be "consistent with the Council's regulations[.]"¹⁹² Most of Appendix C's provisions are inconsistent or conflict with Part 800's and the NHPA's corresponding provisions. These inconsistencies and conflicts have been widely documented by federal agencies including the GAO¹⁹³ and the ACHP,¹⁹⁴ federal courts,¹⁹⁵ and commentators.¹⁹⁶

1. Section 1. Definitions.

Appendix C, Section 1(a) and 1(b). Section 1(a) defines "designated historic property" as:

¹⁹¹ 54 U.S.C. § 306102(b)(5)(A).

¹⁹² 36 C.F.R. § 800.14(a); *id.* § 800.14(a)(2) ("If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures."). While earlier 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, consistency was implied. *Accord* 36 C.F.R. § 800.11 (1979); 36 C.F.R. § 800.15 (1986). Assuming *arguendo* that Part 800 did not require Appendix C to be consistent with Part 800 when it was developed and adopted, Appendix C must nevertheless be consistent with Part 800 today. Congress's 1992 amendments to the NHPA required agency-specific Section 106 procedures to be consistent with Part 800. *See* Pub. L. No. 102-575, § 4012(2), 106 Stat. at 4760 (codified as amended at 54 U.S.C. § 306102(b)(5)(A)). Accordingly, since 1992, just two years after its adoption, the USACE has had an affirmative, statutory obligation to revise Appendix C to be consistent with Part 800. *See Slater*, 167 F. Supp. 2d at 282 ("[S]ection 110 mandates that federal agencies must ensure that their procedures for compliance with section 106 are consistent with the regulations issued by the Council pursuant to [54 U.S.C. § 304108]." (citation omitted)).

¹⁹³ *See* GAO Report, *supra* note 94, at 52 ("ACHP documents we reviewed identified several inconsistencies between the Corps procedures and ACHP regulations, including that the Corps procedures (1) define the geographic area to be analyzed narrowly, (2) improperly assigned the Corps' analytical responsibilities to third parties, and (3) limited opportunities for consultation with tribes and others.").

¹⁹⁴ *See, e.g.,* Letter from Nelson, *supra* note 115, at 1-2 ("The differences between the Section 106 regulations and Appendix C are fundamental[.] . . . Appendix C is fundamentally inconsistent with the government-wide Section 106 regulations[.]"); Advisory Council on Historic Pres., *Improving Tribal Consultation in Infrastructure Projects* 13-14 (May 24, 2017), *available at* <https://www.achp.gov/sites/default/files/2019-08/ImprovingTribalConsultationinInfrastructureProjects5-24-17-2.pdf> ("These regulations are inconsistent with the government-wide Section 106 regulations issued by the ACHP in key areas, including the establishment of areas of potential effects, consultation with Indian tribes, and the resolution of adverse effects.").

¹⁹⁵ *See e.g., Cleveland's Hullets*, 163 F. Supp. 2d at 792 ("The Court has found, moreover, that[] . . . the Corps procedures are inconsistent with, and indeed, in derogation of those ACHP regulations."); *c.f. Saylor Park*, 2002 WL 32191511, at *7 ("Consequently, the Corps Interim Guidance is inconsistent with the ACHP Interim Guidance and irrelevant." (footnote omitted)); *Marsh*, 605 F. Supp. at 1437 ("[Appendix C's] distinction between properties and differing scopes of responsibility is at odds with [the] NHPA and its regulations."); *Sisseton-Wahpeton Oyate of Lake Travers Reservation v. U.S. Army Corps of Eng'rs*, No. 3:11-CV-03026-RAL, 2016 WL 5478428, at *5 (D.S.D. Sept. 29, 2016) ("The Corps and the Advisory Council disagree about whether the Corps' regulations comply with the NHPA in several areas.").

¹⁹⁶ *See, e.g., Lorentz, supra* note 134, at 1592-1603.

“Designated historic property” is a historic property listed in the National Register of Historic Places (National Register) or which has been determined eligible for listing in the National Register pursuant to 36 CFR Part 63. A historic property that, in both the opinion of the SHPO and the district engineer, appears to meet the criteria for inclusion in the National Register will be treated as a “designated historic property.”¹⁹⁷

Section 1(b) defines “historic property” as: “‘Historic property’ is a property which has historical importance to any person or group. This term includes the types of districts, sites, buildings, structures or objects eligible for inclusion, but not necessarily listed, on the National Register.”¹⁹⁸

The NHPA defines “historic property” as: “[T]he term ‘historic property’ means any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the district, site, building, structure, or object.”¹⁹⁹ Additionally, the NHPA clarifies that “[p]roperty of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.”²⁰⁰

Accordingly, Part 800 defines “historic property” as:

(1) *Historic Property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

(2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.²⁰¹

Appendix C’s use of designated historic property conflicts with Part 800 and the NHPA. Section 106 requires federal agencies to “take into account the effect of the undertaking on any *historic property*.”²⁰² Historic property is a statutorily defined term. Appendix C appears to distinguish between historic properties that are formally listed or determined eligible for inclusion on the National Register and properties that have not previously been evaluated for National Register

¹⁹⁷ 33 C.F.R. pt. 325, app. C, § 1(a).

¹⁹⁸ *Id.* § 1(b).

¹⁹⁹ 54 U.S.C. § 300308.

²⁰⁰ *Id.* § 302706(a).

²⁰¹ 36 C.F.R. § 800.16(1)(1)-(2) (emphasis in original).

²⁰² 54 U.S.C. § 306108 (emphasis added).

eligibility but nevertheless meet the criteria. This is inconsistent with Part 800, which treats all three types of historic properties the same in the Section 106 process.²⁰³ Additionally, Appendix C fails to acknowledge properties of traditional religious and cultural importance to Indian tribes and Native Hawaiian organizations.

Appendix C, Section 1(e). Section 1(e) defines “effect” as: “An ‘effect’ on a ‘designated historic property’ occurs when the undertaking may alter the characteristics of the property that qualified the property for inclusion in the National Register. Consideration of effects on ‘designated historic properties’ includes indirect effects of the undertaking.”²⁰⁴ Additionally, the 2005 Interim Guidance states: “An indirect effect is also caused by the undertaking, but occurs later in time or is or is farther removed in distance, and is still reasonably foreseeable. Examples of indirect effects include visual and noise impacts resulting from the undertaking[.]”²⁰⁵

Part 800 defines “effect” as: “Effect means alternation to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.”²⁰⁶ Part 800 clarifies that an undertaking may cause direct or indirect effects, as well as “reasonably foreseeable effects . . . that may occur later in time, be farther removed in distance or be cumulative.”²⁰⁷ Appendix C does not require the USACE to consider cumulative effects, and improperly characterizes reasonably foreseeable, later occurring, and farther removed effects as indirect. This is inconsistent with Part 800.

The 2005 Interim Guidance’s examples of indirect effects—specifically, visual and auditory effects—conflict with the ACHP’s and federal courts’ interpretations of what direct and indirect mean in the NHPA. In *National Parks Conservation Association v. Semonite*, the USACE determined that the construction of a transmission line would only indirectly affect a historic property because it would cause only “visual impacts on the historic resource”²⁰⁸ and would “not ‘physically’ intrude on the [historic property].”²⁰⁹ The United States Court of Appeals for District of Columbia Circuit rejected this interpretation, agreeing with the ACHP and the National Park Service (“NPS”) that direct “refer[s] to causation and not physicality.”²¹⁰ While *Semonite* dealt with NHPA Section 110(f) reviews,²¹¹ the ACHP has interpreted the holding as “clarify[ing] how

²⁰³ 36 C.F.R. §§ 800.4(c)(1), 800.16(l).

²⁰⁴ 33 C.F.R. pt. 325, app. C, § 1(e).

²⁰⁵ 2005 Interim Guidance, *supra* note 87, at 4, § 6(i).

²⁰⁶ 36 C.F.R. § 800.16(i) (emphasis removed).

²⁰⁷ *Id.* § 800.5(a)(1).

²⁰⁸ *Semonite*, 916 F.3d at 1087.

²⁰⁹ *Id.* at 1088.

²¹⁰ *Id.* (citations omitted); *accord id.* (quoting *Quarterman*, 181 F.3d at 1368) (“We ‘own no deference to the [USACE]’s interpretation of a statute it does not administer.”); *Saylor Park*, 2002 WL 32191551, at *7 (holding that the USACE’s interpretations of Section 106 that are inconsistent with the ACHP’s interpretations are “irrelevant”).

²¹¹ Section 110(f) provides: “Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible federal agency shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark.” 54 U.S.C. § 306107. Federal agencies generally rely on the Section 106 process comply with Section 110(f). *See Presidio Historical Ass’n v. Presidio Trust*, 811 F.3d 1154, 1169 (9th Cir. 2016) (“Section 110(f) cannot be read in a vacuum. It builds on the general consultation process set out in Section 106[.]”).

effects in the Section 106 process may be defined as direct and indirect.”²¹² In its post-*Semonite* guidance, the ACHP noted that this clarification “will change the approach to defining effects based on physicality and recognize instances where direct effects may be visual, auditory, or atmospheric.”²¹³

Appendix C, Section 1(f). Section 1(f) defines “undertaking” as: “The term ‘undertaking’ as used in this Appendix means the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 325-335.”²¹⁴ The 2005 Interim Guidance clarifies that “[t]he scope of the undertaking is also dependent upon the amount of federal control and responsibility for a particular project.”²¹⁵

Part 800 and the NHPA define “undertaking” as: “Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction over 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.”²¹⁶

Section 106 requires federal agencies to “take into account the effects of *the undertaking* on any historic property.”²¹⁷ Under Part 800, a federal agency is required to take into account the effects of the *entire* undertaking, irrespective of whether only a portion of the undertaking falls under the agency’s jurisdiction (*i.e.*, is implemented by or on behalf of the agency or occurs on property managed or controlled by the agency), is funded by the agency, or is permitted by the agency. The ACHP has clarified that Part 800 “define[s] the undertaking as *the entire project*, portions of which may require federal authorization or assistance.”²¹⁸ In contrast, Appendix C defines the undertaking as only the portion of the project, activity, or program that requires a permit from the USACE. This directly conflicts with Part 800 and the NHPA and serves to constrain the scope of the USACE’s Section 106 reviews.

Appendix C, Section 1(g). Section 1(g) defines “permit area” as:

The term “permit area” as used in this Appendix means those areas comprising the waters of the United States that will be directly affected by the proposed work and uplands directly affected as a result of authorizing the work or structures. The

²¹² Mem. from ACHP Office of Gen. Counsel, to ACHP Staff, *Recent Court Decision Regarding the Meaning of “Direct” in Sections 106 and 110(f) of the National Historic Preservation Act 1* (June 7, 2019) [hereinafter ACHP OGC Memorandum].

²¹³ *Id.* at 3.

²¹⁴ 33 C.F.R. pt. 325, app. C, § 1(f).

²¹⁵ 2005 Interim Guidance, *supra* note 87, at 2-3, § 6(c).

²¹⁶ 36 C.F.R. § 800.16(y); 54 U.S.C. § 300320(1)-(3).

²¹⁷ 54 U.S.C. § 306108 (emphasis added).

²¹⁸ 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) [hereinafter ACHP DAPL Letter], available at <https://turtletalk.files.wordpress.com/2016/05/achpdakota-access-pipeline-con-06may16.pdf> (emphasis added).

following three tests must all be satisfied for an activity outside the waters of the United States to be included within the “permit area”:

(i) Such activity would not occur but for the authorization of the work of structure within the waters of the United States;

(ii) Such activity must be integrally related to the work or structures to be authorized within waters of the United States. Or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program, and

(iii) Such activity must be directly associated (first order impact) with the work or structures to be authorized.²¹⁹

Additionally, the 2005 Interim Guidance states: “The district engineer remains responsible for making the final determination regarding the boundaries of the permit area. The district engineer can, in unusual or complex projects, seek the views of the SHPO/THPO before making a final determination.”²²⁰

Parr 800 does not recognize the concept of “permit area.” Instead, Part 800 defines the “area of potential effects” (“APE”) as:

Area of potential effects means 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. The area of potential effects is influenced by the scale and nature of the undertaking and may be different for different kinds of effects caused by the undertaking.²²¹

Appendix C’s permit area conflicts with Part 800 in three predominant ways. First, the permit area limits the scope of the USACE’s Section 106 reviews to only those areas of the project, activity, or program that require a permit from the USACE, mirroring Appendix C’s definition of undertaking.²²² This limitation directly conflicts with Part 800’s definition of area of potential effects. The area of potential effects encompasses the area that the *entire* undertaking may affect, even portions that are outside the jurisdiction or control of the lead federal agency. The area of potential effects—the geographic area within which the federal agency is responsible for identifying historic properties, assessing potential effects, and resolving adverse effects—is not limited to only, or by, those parts of the undertaking under the jurisdiction or control of the federal agency. According to the ACHP:

²¹⁹ 33 C.F.R. pt. 325, app. C, § 1(g).

²²⁰ 2005 Interim Guidance, *supra* note 87, at 3, § 6(d).

²²¹ 36 C.F.R. § 800.16(d).

²²² *See* 2005 Interim Guidance, *supra* note 87, at 3, § 6(d) (“The limits of the permit area are constrained by the extent of Federal control and responsibility over a particular project (i.e., the undertaking).”).

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.²²³

Part 800 defines the area of potential effect only by the undertaking's potential effects, without consideration of the purported limits of the lead federal agency's jurisdiction or control over the undertaking. Second, the permit area is defined by considering only the potential *direct* effects of the undertaking, whereas the area of potential effects is defined by considering the *direct and indirect* effects of the undertaking. Third, Part 800 requires federal agencies to define the area of potential effects for every undertaking "[i]n consultation with the SHPO/THPO[.]"²²⁴ whereas Appendix C requires such consultation for only "unusual or complex projects[.]"²²⁵ Appendix C's use of a permit area, in conjunction with its definition of undertaking, limit to scope of the USACE's Section 106 reviews and conflict with Part 800 and the NHPA.

2. Section 3. Initial Review.

Appendix C, Section 3(a). Section 3(a) requires the USACE to conduct an initial review of "district files and records, the latest published version(s) of the National Register, lists of properties determined eligible, and other appropriate sources of information to determine if there are any designated historic properties which may be affected by the proposed undertaking."²²⁶ Appendix C further requires the USACE to "consult with other appropriate sources of information for knowledge of undesignated historic properties which may be affected by the proposed undertaking."²²⁷ This initial review informs the need for and level of further investigations to identify historic properties that are potentially affected by the undertaking.²²⁸

Part 800 outlines specific and detailed steps federal agencies must take to determine the scope of their efforts to identify historic properties:

- (2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;

²²³ ACHP DAPL Letter, *supra* note 218, at 1.

²²⁴ 36 C.F.R. § 800.4(a)(1).

²²⁵ 2005 Interim Guidance, *supra* note 87, at 3, § 6(d).

²²⁶ 33 C.F.R. pt. 325, app. C, § 3(a).

²²⁷ *Id.*

²²⁸ *Id.* § 5(a), (c).

(3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues related to the undertaking's potential effects on historic properties; and

(4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to [36 C.F.R.] § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that and Indian tribe or Native Hawaiian organization may be reluctant to divulge information regarding the location, nature, and activities associated with such sites. The agency should address concerns raised about confidentiality pursuant to [36 C.F.R.] § 800.11(c).²²⁹

Appendix C does not require the USACE to approach consulting parties, including SHPOs and THPOs, Indian tribes and Native Hawaiian organizations, and other individuals and organizations about the existence of and concerns for historic properties potentially located within the permit area. Consultation is the most important part of the Section 106 process: “The goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.”²³⁰ Appendix C initiates the USACE’s reviews by minimizing the role of consultation in the Section 106 process.

3. Section 4. Public Notice.

Appendix C, Section 4(a). In relevant part, Section 4(a) provides: “[T]he district engineer’s current knowledge of the presence or absence of historic properties and the effects of the undertakings upon these properties will be included in the public notice.”²³¹ While not elaborated on further in Appendix C, the USACE’s regulations elsewhere require a public notice to be issued within fifteen days of receipt of an application for a DOA permit.²³² This public notice solicits “comments and information necessary to evaluate the probably impact on the public interest.”²³³ Appendix C does not contain and other provisions regarding public notice in the USACE’s Section 106 process.

Part 800 provides detailed procedure for involving the public throughout the Section 106 process.²³⁴ For instance, Part 800 requires federal agencies to “seek and consider the views of the

²²⁹ 36 C.F.R. § 800.4(a)(2)-(4).

²³⁰ *Id.* § 800.1(a).

²³¹ 33 C.F.R. pt. 325, app. C, § 4(a).

²³² 33 C.F.R. § 325.2(a)(2).

²³³ *Id.* § 325.3(a).

²³⁴ See 36 C.F.R. § 800.2(d)(1) (“The views of the public are essential to inform Federal decisionmaking in the section 106 process.”); *Winnemem Wintu Tribe v. U.S. Dep’t of Interior*, No. 2:09-cv-01072-FCD EFB, 2009 WL 10693214, at *7 (E.D. Cal. Sept. 15, 2009) (“NHPA’s regulations also require federal agencies to provide interested members of the public reasonable opportunity to participate in the section [106] process.” (citations omitted)).

public in a matter that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, . . . and the relationship of the Federal involvement to the undertaking.”²³⁵ The requirement to involve the public is codified throughout the Section 106 process.

When initiating the Section 106 process, the federal agency is required to “plan for involving the public” by “identify[ing] the appropriate points for seeking public input and for notifying the public of proposed actions.”²³⁶ When identifying and evaluating historic properties, if the federal agency determines that no historic properties will be affected, it must “make th[at] determination available for public inspection prior to approving the undertaking.”²³⁷ In applying the adverse effects criteria, federal agencies must “consider the views concerning effects which have been provided by . . . the public.”²³⁸ In resolving adverse effects, federal agencies must “provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking.”²³⁹ Federal agencies may fulfill these public notice obligations through other statutes’ public involvement procedures, they must nevertheless provide the public with notice of, and the opportunity to comment on, the undertaking, historic properties, potential effects, and measures to resolve adverse effects.²⁴⁰ Appendix C’s limited public notice requirement is inconsistent with the requirements of Part 800.

4. Section 5. Investigations.

Appendix C, Section 5(b). Section 5(b) provides:

When the scope and type of work proposed by the applicant or the evidence presented leads the district engineer to conclude that the chance of disturbance by the undertaking to any potentially eligible historic property is too remote to justify further investigation, he shall so advise the reporting party and the SHPO.²⁴¹

Part 800 provides detailed procedures for how a federal agency makes a determination of no historic properties affected.²⁴² First, the federal agency must provide the SHPO or THPO documentation of its determination that the undertaking will not affect any historic properties or that there are not historic properties within the area of potential effects.²⁴³ The federal agency must also provide notice of this determination to all consulting parties, including Indian tribes, Native Hawaiian organizations, and the public.²⁴⁴

²³⁵ 36 C.F.R. § 800.2(d)(1).

²³⁶ *Id.* § 800.3(e).

²³⁷ *Id.* § 800.4(d)(1).

²³⁸ *Id.* § 800.5(a).

²³⁹ *Id.* § 800.6(a)(4).

²⁴⁰ *Id.* § 800.2(d)(3).

²⁴¹ 33 C.F.R. pt. 325, app. C, § 5(b).

²⁴² *See* 36 C.F.R. § 800.4(d).

²⁴³ *Id.* § 800.4(d)(1).

²⁴⁴ *Id.*

Second, the SHPO or THPO and the ACHP have thirty days to review this determination.²⁴⁵ If they do not object within that timeline, the federal agency's Section 106 obligations are fulfilled.²⁴⁶ If the SHPO or THPO objects, the federal agency must either engage in additional consultation with the SHPO or THPO or request that the ACHP review its determination.²⁴⁷ If the ACHP's views are requested, it has thirty-days to provide an opinion regarding the determination.²⁴⁸

If the ACHP provides an opinion or it objects to the determination, the federal agency is required to take the ACHP's opinion into consideration in making a final decision about whether to affirm the finding.²⁴⁹ The head of the federal agency is also required to provide the ACHP and all consulting parties with "a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion[.]"²⁵⁰ Appendix C does not contain these provisions.

Appendix C, Section 5(f). Section 5(f) provides:

The Corps of Engineers' responsibilities to seek eligibility determinations for potentially eligible historic properties is limited to resources located within water of the U. S. [sic] that are directly affected by the undertaking. The Corps responsibilities to identify potentially eligible historic properties is limited to resources located within the permit area that are directly affected by related upland activities. The Corps is not responsible for identifying or assessing potentially eligible historic properties outside the permit area, but will consider the effects of undertakings on any known historic properties that may occur outside the permit area.²⁵¹

The 2005 Interim Guidance further states that the USACE "cannot require permit applicants to do cultural resource surveys outside the permit area as it has been defined during the Section 106 process."²⁵²

As discussed in Section III.B.1, *supra*, Appendix C's use of permit area, combined with its definition of undertaking, unlawfully restrict the scope of the USACE's Section 106 review to only those portions of projects, activities, or programs that require a USACE permit. Here, Section 5(f) further restricts the scope of review by limiting the USACE's efforts to evaluate the National

²⁴⁵ *Id.* § 800.4(d)(1)(i), (iii).

²⁴⁶ *Id.*

²⁴⁷ *Id.* § 800.4(d)(1)(ii).

²⁴⁸ *Id.* § 800.4(d)(1)(iv)(A).

²⁴⁹ *Id.* § 800.4(d)(1)(iv)(C).

²⁵⁰ *Id.*

²⁵¹ 33 C.F.R. pt. 325, app. C, § 5(f).

²⁵² 2005 Interim Guidance, *supra* note 87, at 3, § 6(f).

Register eligibility of historic properties to only those within waters of the United States.²⁵³ Part 800 requires federal agencies, including the USACE, to “take into account the effects of *the undertaking* on any historic property[.]”²⁵⁴ and clarifies that “the undertaking” is any “project, activity, or program . . . requiring a Federal permit, license, or approval[.]”²⁵⁵ A federal agency’s Section 106 review, including the identification and the National Register-eligibility evaluation of historic properties, extends to “the *entire* project,” not just the components subject to that agency’s permitting authority.²⁵⁶

Furthermore, Appendix C’s limitation of the USACE’s identification effort only to those properties “directly affected” by the undertaking conflicts with Part 800. First, Part 800 requires federal agencies to assess the undertaking’s potential direct and indirect effects, including “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.”²⁵⁷ Second, Part 800 requires federal agencies to identify historic properties within the area of potential effect *before* assessing the undertaking’s potential effects.²⁵⁸ Appendix C flips the Section 106 process, limiting the USACE’s identification efforts to only those historic properties that will be affected by the undertaking.

Finally, Appendix C’s provisions regarding the consideration of effects “on known historic properties that may occur outside the permit area[.]” conflict with Part 800 and the NHPA and is internally inconsistent with the purpose of defining a permit area.²⁵⁹ Part 800 requires federal agencies to identify historic properties within the area of potential effects. Part 800 clarifies that historic properties include not only those listed on the National Register, but also those that meet the National Register criteria, include ones that have not previously been evaluated for National Register eligibility.²⁶⁰ “Known historic properties” is not a term defined Appendix C²⁶¹ and implies that the USACE’s identification efforts outside the permit area are limited to only historic

²⁵³ Section 5(f) is also internally inconsistent. In its first sentence, Section 5(f) states that the USACE will only determine the National Register eligibility of potential historic properties located within waters of the United States. 33 C.F.R. pt. 325, app. C, § 5(f). Yet, in the very next sentence, Section 5(f) states that the USACE will determine the National Register eligibility of potential historic properties within the permit area. *Id.* Waters of the United States and permit area are not necessarily coterminous, as the permit “compris[es] 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.” *Id.* § 1(g)(1) (emphasis added).

²⁵⁴ 54 U.S.C. § 306108 (emphasis added).

²⁵⁵ *Id.* § 300320(3); 36 C.F.R. § 800.16(y).

²⁵⁶ ACHP DAPL Letter, *supra* note 218, at 1 (emphasis added)

²⁵⁷ 36 C.F.R. § 800.5(a)(1). Moreover, the USACE’s interpretation of indirect effect conflicts with the ACHP’s and the D.C. Circuit Court’s interpretations. *See* ACHP OGC Mem., *supra* note 212; *Semonite*, 916 F.3d at 1088-89.

²⁵⁸ *Accord* 36 C.F.R. § 800.4(d)(2) (“If the agency official finds that there are historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties[] . . . [and] invite their views on the effects and assess adverse effects, if any[.]”); *id.* § 800.5(a) (“[T]he agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects.”).

²⁵⁹ *See* 2005 Interim Guidance, *supra* note 87, at 3, § 6(d) (“The limits of the permit area are constrained by the extent of Federal control and responsibility over a particular project (i.e., the undertaking).”).

²⁶⁰ *See* 36 C.F.R. §§ 800.4(c)(1), 800.16(l).

²⁶¹ *See* 33 C.F.R. pt. 325, app. C, § 1(a)-(b).

properties that are listed on the National Register or have previously been formally determined eligible for listing. This would be inconsistent with Part 800.²⁶²

5. Section 6. Eligibility Determinations

Appendix C, Section 6(a) and 6(b). Section 6(a) establishes a process for determining the National Register eligibility of “historic properties within waters of the U. S. [sic] that will be directly affected by the undertaking[.]”²⁶³ Section 6(b) established a process for determining the National Register eligibility of a “historic property outside of waters of the U. S. [sic] that will be directly affected by the undertaking[.]”²⁶⁴

Part 800 does not permit federal agencies to utilize different procedures for determining the National Register eligibility of historic properties based on their location. The area of potential effects defines the geographic area within which federal agencies must identify and evaluate the National Register eligibility of historic properties.²⁶⁵ The scope of the federal agency’s permitting jurisdiction is irrelevant in determining the area of potential effects and in evaluating the National Register eligibility of historic properties.

Additionally, a federal agency must identify historic properties within the area of potential effects *before* it assesses whether the undertaking will affect those properties.²⁶⁶ It would be impossible to determine first whether and undertaking will affect any specific historic property within the area of potential effects without having first identified the historic properties within the area of potential effects. Under both Part 800 and Appendix C, a property is adversely affected when the undertaking alters the characteristics of a historic property that make it eligible for inclusion in the National Register by diminishing its integrity of location, design, setting, materials, workmanship, feeling, or association.²⁶⁷ A federal agency cannot determine how and undertaking diminishes a property’s integrity before first determining the type or types of integrity it retains and the National Register criteria it meets.²⁶⁸

Finally, adverse effects are not limited to only direct effect. Part 800 requires federal agencies to assess the direct and indirect effects of an undertaking, as well as the “reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.”²⁶⁹ Appendix C only considers direct and indirect effects, and as discussed in Section III.B.1, *supra*, the UASCE’s interpretation of indirect is inconsistent with the ACHP’s interpretation.

²⁶² See 36 C.F.R. §§ 800.4(c)(1), 800.14(1).

²⁶³ 33 C.F.R. pt. 325, app. C, § 6(a).

²⁶⁴ *Id.* § 6(b).

²⁶⁵ 36 C.F.R. § 800.4(b).

²⁶⁶ *Accord id.* § 800.4(b)-(c); *id.* § 800.5(a).

²⁶⁷ *Id.* § 800.5(a)(1); 33 C.F.R. pt. 325, app. C, § 15(b).

²⁶⁸ 36 C.F.R. § 800.4(c)(2) (citing 36 C.F.R. § 60.4); 33 C.F.R. pt. 325, app. C, § 1(d) (citing 36 C.F.R. § 60.4).

²⁶⁹ 36 C.F.R. § 800.4(a)(1).

Appendix C, Section 6(b)(3) and 6(c). Section 6(b) provides:

For a historic property outside of waters of the U. S. [sic] that will be directly affected by the undertaking the district engineer will, for the purposes of this Appendix and compliance with the NHPA:

(1) treat the historic property as a ‘designated historic property,’ if both the SHPO and the district engineer agree that it is eligible for inclusion in the National Register; or

(2) treat the historic property as not eligible, if both the SHPO and the district engineer agree that it is not eligible for inclusion in the National Register: [sic] or

(3) treat the historic property as not eligible unless the Keeper of the National Register determines it is eligible for or lists it on the National Register. (See paragraph 6.c below.)²⁷⁰

Section 6(c) provides:

If the district engineer and the SHPO do not agree pursuant to paragraph 6.b.(I) [sic] and the SHPO notifies the district engineer that it is nominating a potentially eligible historic property for the National Register that may be affected by the undertaking, the district engineer will wait a reasonable period of time for that determination to be made before concluding his action on the permit. Such a reasonable period of time would normally be 30 days for the SHPO to nominate the historic property plus 45 days for the Keeper of the National Register to make such determination. The district engineer will encourage the applicant to cooperate with the SHPO in obtaining the information necessary to nominate the historic property.²⁷¹

Part 800 provides:

If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary [of the Interior (the “Secretary”)] so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and

²⁷⁰ 33 C.F.R. pt. 325, app. C, § 6(b)(1)-(3).

²⁷¹ *Id.* § 6(c).

cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.²⁷²

Section 6(b)(3) does not allow the ACHP or the Secretary to require the USACE to obtain a determination of eligibility from the Keeper. Section 6(c)'s requirement that the SHPO (without mention of THPOs, Indian Tribes, or Native Hawaiian organizations) *nominate* the property to the National Register conflicts with Part 800, which requires only that the federal agency obtain a *determination of eligibility* from the Keeper.²⁷³ Historic properties do not need to be listed on the National Register to be considered in the Section 106 process.²⁷⁴ Section 6(b)(3) and 6(c) is also internally inconsistent with Section 6(a)(3), which is generally consistent with Part 800.

Notwithstanding the conflict in requiring the property to be listed on the National Register, the process established in Section 6(c) is unworkable. First, Section 6(c) suggests that thirty days is a reasonable time for a SHPO to nominate a property to the National Register. This is wildly inconsistent with the National Register regulations, which set forth a highly detailed and lengthy process SHPOs must follow to nominate properties to the National Register.²⁷⁵ This process requires SHPOs to present the nomination to their State Review Board,²⁷⁶ provide thirty- to seventy-five-days' notice of this action,²⁷⁷ and allow land owners the opportunity to comment on and, possibly, object to, the nomination.²⁷⁸ The State Review Board must consider the property and make a recommendation about its eligibility and whether it should be listed.²⁷⁹ Then the SHPO must make its own recommendation and forward, or not, the nomination to the Keeper.²⁸⁰ If the SHPO and the State Review Board cannot agree, the regulations provide processes for resolving that disagreement.²⁸¹ Under no circumstances could a SHPO nominate a property to the National Register in thirty days. Appendix C also fails to account for historic properties located on federal lands. Under the National Register regulations, Federal Preservation Officers ("FPO") are responsible for nominating such properties to the National Register.²⁸²

Second, Section 6(c) fails to account for THPOs, Indian tribes, and Native Hawaiian organizations. If a THPO has assumed the role of the SHPO, the USACE must resolve its disagreement on the eligibility of a historic property with the THPO.²⁸³ The National Register regulations do not provide a process for Indian tribes, Native Hawaiian organizations, and THPOs to directly nominate property to the National Register. Instead, they are limited to submitting a "request for nomination" to the appropriate SHPO, who in turn nominates the property to the National

²⁷² 36 C.F.R. § 800.4(c)(2).

²⁷³ *Id.*

²⁷⁴ *Id.* § 800.16(1).

²⁷⁵ *See id.* § 60.6.

²⁷⁶ *Id.* § 60.6(j).

²⁷⁷ *Id.* § 60.6(c)-(d).

²⁷⁸ *Id.* § 60.6(g).

²⁷⁹ *Id.* § 60.6(j).

²⁸⁰ *Id.* § 60.6(k).

²⁸¹ *Id.* § 60.6(l).

²⁸² *See id.* § 60.9.

²⁸³ *Id.* § 800.4(c)(2).

Register.²⁸⁴ SHPOs have sixty days to respond to a request for nomination.²⁸⁵ If the SHPO determines that the property is adequately documented and appears to meet the National Register criteria, it must then present the nomination to the State Review Board, following the same procedures outlined above.²⁸⁶

6. Section 7. Assessing Effects.

Appendix C, Section 7(a). Section 7(a) provides: “During the public notice comment period or within 30 days after the determination or discovery of a designated historic property the district engineer will coordinate with the SHPO and determine if there is an effect and if so, assess the effect.”²⁸⁷

Part 800 provides:

In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria or adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.²⁸⁸

Appendix C does not require the USACE to consult with the SHPO, only coordinate, a term not defined in Appendix C.²⁸⁹ Moreover, Appendix C does not require the USACE to coordinate, much less consult, with THPOs, Indian tribes, and Native Hawaiian organizations, and it does not require the consideration of the public’s views on effects.

Appendix C, Section 7(b). Section 7(b) provides: “If the SHPO concurs with the district engineer’s determination of no effect or fails to respond within 15 days of the district engineer’s notice to the SHPO or a no effect determination, then the district engineer may proceed with the final action.”²⁹⁰

²⁸⁴ See *id.* § 60.11. If the property is located on federal lands, a request for nomination must be submitted to the appropriate FPO. See *id.* § 60.11(a), (g); 54 U.S.C. § 302104(c).

²⁸⁵ 36 C.F.R. § 60.11(a).

²⁸⁶ *Id.* § 60.11(c).

²⁸⁷ 33 C.F.R. pt. 325, app. C, § 7(a).

²⁸⁸ 36 C.F.R. § 800.5(a).

²⁸⁹ *Accord id.* § 800.16(f) (“Consultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process.” (emphasis removed)); U.S. Army Corps of Eng’rs, *Tribal Consultation Policy 2*, § 3(a) (Oct. 4, 2012) (“Consultation: Open, timely, meaningful, collaborative and effective deliberative communication process that requires trust, respect and shared responsibility. To the extent practicable and permitted by law, consultation works toward mutual consensus and begins at the earliest planning stages[.]”).

²⁹⁰ 33 C.F.R. pt. 325, app. C, § 7(b).

Part 800 establishes detailed procedures by which SHPOs, THPOs, and the ACHP can object to a finding of no effect. First, the federal agencies must provide documentation to the SHPO or THPO of its finding of no adverse effects.²⁹¹ The federal agency must also provide notice of this determination to all consulting parties, including Indian tribes and Native Hawaiian organizations, and the public.²⁹²

Second, the SHPO or THPO and the ACHP have thirty days to review this determination.²⁹³ If they do not object within those thirty days, the federal agency's Section 106 obligations are fulfilled.²⁹⁴ If the SHPO or THPO objects, the federal agency must either engage in additional consultation with the SHPO or THPO or request that the ACHP review its determination.²⁹⁵

Third, if the ACHP receives such a request, it has thirty days to review the finding and provide an opinion to the federal agency.²⁹⁶ If the ACHP provides an opinion, the head of the federal agency is required to respond to the opinion and provide the ACHP, as well as all consulting parties, with "a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion[.]"²⁹⁷ The federal agency may then either reverse its initial finding and move on to the next step in the Section 106 process, and affirm its initial findings, fulfilling its Section 106 responsibilities.²⁹⁸ If the ACHP does not respond to the federal agency's request within thirty days, the federal agency's Section 106 responsibilities are fulfilled.²⁹⁹ Appendix C, Section 7(b) contains none of these provisions and halves the time SHPOs (and no other consulting party) have to respond.³⁰⁰

Appendix C, Section 7(c). Section 7(c) provides: "If the district engineer, based on his coordination with the SHPO (see paragraph 7.a.), determines that an effect is no adverse, the district engineer will notify the ACHP and request the comments of the ACHP."³⁰¹ If the ACHP does not object or respond to the notice within thirty days, the USACE will proceed with its finding of no adverse effects.³⁰² If the ACHP timely objects, it may provide recommended conditions that

²⁹¹ 36 C.F.R. § 800.4(d)(1).

²⁹² *Id.*

²⁹³ *Id.* § 800.4(d)(1)(i), (iii).

²⁹⁴ *Id.*

²⁹⁵ *Id.* § 800.4(d)(1)(ii).

²⁹⁶ *Id.* § 800.4(d)(1)(iv)(A).

²⁹⁷ *Id.* § 800.4(d)(1)(iv)(C).

²⁹⁸ *Id.*

²⁹⁹ *Id.* § 800.4(d)(1)(iv)(A).

³⁰⁰ The 2005 Interim Guidance modifies these procedures to be generally consistent with Part 800. *Compare* 2005 Interim Guidance, *supra* note 87, at 4-6, § 6(j), (j)(2), (k)(1), (k)(3), *with* 36 C.F.R. § 800.4(d)(1). The procedures in the 2005 Interim Guidance are nevertheless inconsistent with Part 800 insofar as they do not require the USACE to provide the SHPO or THPO and other consulting parties with copies of any request to seek the ACHP's views and the district engineer's rationale for how they considered the ACHP's views. *Compare* 2005 Interim Guidance, *supra* note 87, at 4-5, § 6(j)(2), § 6(k)(3), *with* 36 C.F.R. § 800.4(d)(1)(ii), (iv)(C). It is unclear whether the USACE is legally required to adhere to guidance that imposes procedures that conflict with the procedures set forth in Appendix C.

³⁰¹ 33 C.F.R. pt. 3325, app. C, § 7(c).

³⁰² *Id.*

would resolve adverse effects.³⁰³ If the USACE accepts those conditions, it may proceed with its finding of no adverse effects.³⁰⁴ If it rejects the conditions, it will treat the effects and adverse.³⁰⁵

Part 800 establishes detailed procedures under which any consulting party can object to a finding of no adverse effect, not just the ACHP. First, the federal agency must provide the SHPO or the THPO, Indian tribes and Native Hawaiian organizations, the ACHP, and all other consulting parties thirty days to review the finding.³⁰⁶ Indian tribes and Native Hawaiian organizations may request that the ACHP object to a finding of no adverse effect.³⁰⁷ In making a finding of no adverse effect for a property of traditional religious and cultural significance to an Indian tribe or Native Hawaiian organization, the federal agency should seek the concurrence of the Indian tribe or Native Hawaiian organization.³⁰⁸ Second, if a consulting party objects within those thirty days, the federal agency must consult with the objecting party or request the ACHP to review the finding.³⁰⁹

Third, if the ACHP objects to the finding or its views are requested by the federal agency, the federal agency must “take into account the Council’s opinion in reaching a final decision on the finding.”³¹⁰ The ACHP has fifteen days to provide its views if requested by the federal agency.³¹¹ Additionally, the federal agency must provide the ACHP, the SHPO or THPO, and all consulting parties with “a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council’s opinion[.]”³¹² Section 7(c) is inconsistent with Part 800 as it only allows the ACHP to object to a finding of no adverse effect.³¹³

Appendix C, Section 7(d). Section 7(d) provides: “If an adverse effect on designated historic properties is found, the district engineer will notify the ACHP and coordinate with the SHPO to seek ways to avoid or reduce effects on designated historic properties. Either the district engineer or the SHPO may request the ACHP to participate.”³¹⁴

Part 800 provides: “The agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ 36 C.F.R. § 800.5(c)(2)(i)-s(ii).

³⁰⁷ *Id.* § 800.5(c)(2)(iii).

³⁰⁸ *Id.* § 800.5(c)(2)(iii).

³⁰⁹ *Id.* § 800.5(c)(2)(i).

³¹⁰ *Id.* § 800.5(c)(3)(ii)(A).

³¹¹ *Id.* § 800.5(c)(3)(i).

³¹² *Id.* § 800.5(c)(3)(ii)(B).

³¹³ The 2005 Interim Guidance modifies these procedures to be generally consistent with Part 800. *Compare* 2005 Interim Guidance, *supra* note 87, at 5-6, § 6(j), (j)(3), (k)(2)-(3), *with* 36 C.F.R. § 800.5(c)(2). The procedures in the 2005 Interim Guidance are nevertheless inconsistent with Part 800 insofar as they do not require the USACE to provide the SHPO or THPO and other consulting parties with copies of any request to seek the ACHP’s views and the district engineer’s rationale for how they considered the ACHP’s views. *Compare* 2005 Interim Guidance, *supra* note 87, at 4-5, § 6(j)(3), § 6(k)(3), *with* 36 C.F.R. § 800.5(c)(2)(i), (3)(ii)(B). It is unclear whether the USACE is legally required to adhere to guidance that imposes procedures that conflict with the procedures set forth in Appendix C.

³¹⁴ 33 C.F.R. pt. 325, app. C, § 7(d).

alternatives of modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties.”³¹⁵ Appendix C requires only that the USACE coordinate, not consult, with the SHPO, and not the THPO, Indian tribes and Native Hawaiian organizations, and other consulting parties. Appendix C also does not require the USACE to develop and consider alternatives and modifications to the undertaking or mitigation of adverse effects. Additionally, Part 800 allows the SHPO or THPO, Indian tribes and Native Hawaiian organizations, or any other consulting party to request the ACHP’s involvement in the consultations to resolve adverse effects.³¹⁶

7. Section 8. Consultation.

Appendix C, Section 8. Section 8 provides: “At any time during permit processing, the district engineer may consult with the involved parties to discuss and consider possible alternatives or measures to avoid or minimize the adverse effects of a proposed activity.”³¹⁷

In 1992, the NHPA was specifically amended to require federal agencies to consult with Indian tribes and Native Hawaiian organizations in the Section 106 process.³¹⁸ The ACHP’s subsequent rulemaking codified this requirement throughout Part 800. Specifically, Part 800 provides:

Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.³¹⁹

Moreover, consultation is a mandatory part of the Section 106 process. Part 800 requires federal agencies to consult with SHPOs and THPOs,³²⁰ Indian tribes and Native Hawaiian organizations,³²¹ local governments,³²² applicants,³²³ and other consulting parties,³²⁴ at each step of the Section 106 process.³²⁵ As Part 800 makes clear, “The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interested in the effects of the undertaking on historic properties, commencing at the early stages of the project.”³²⁶

³¹⁵ 36 C.F.R. § 800.6(a).

³¹⁶ *Id.* § 800.6(a)(ii).

³¹⁷ 33 C.F.R. pt. 325, app. C, § 8.

³¹⁸ 54 U.S.C. § 302706(b).

³¹⁹ 36 C.F.R. § 800.2(c)(2)(ii).

³²⁰ *Id.* § 800.2(c)(1), (2)(i)(A).

³²¹ *Id.* § 800.2(c)(2).

³²² *Id.* § 800.2(c)(3).

³²³ *Id.* § 800.2(c)(4).

³²⁴ *Id.* § 800.2(c)(5).

³²⁵ *See, e.g., id.* §§ 800.4(a)-(d), 800.5(a)-(b), 800.6(a)-(b).

³²⁶ *Id.* § 800.1(a).

Appendix C generally, and Section 8 specifically, entirely fails to address the 1992 amendments and the USACE’s statutory obligation to consult with Indian tribes and Native Hawaiian organizations in the Section 106 process, as well as recognize the role of THPOs. To be sure, the 2005 Interim Guidance recognizes that the USACE must consult with Indian tribes and Native Hawaiian organizations.³²⁷ But this *guidance* is not codified in the CFR as part of Appendix C. Moreover, the guidance fails to acknowledge that the USACE is statutorily mandated to consult with Indian tribes and Native Hawaiian organizations, instead stating only that “[t]he ACHP regulations contain provisions requiring consultation[.]”³²⁸ Appendix C’s assertion that consultation is discretionary in the Section 106 process—“the district engineer *may* consult with the involved parties”³²⁹—conflicts with Part 800’s explicit mandate that the Section 106 process is conducted in consultation with consulting parties.

8. Section 9. ACHP Review and Comment.

Appendix C, Section 9. Section 9 provides the procedures the USACE will follow if the ACHP (1) “determines that coordination with the AHPO is unproductive;” (2) “the ACHP[] . . . request additional information in order to provide its comments;” or (3) “the ACHP objects to any agreed resolution of impacts on designated historic properties.”³³⁰ Section 9(a) requires the USACE to provide certain documentation to the ACHP, the applicant, the SHPO, Indian tribes, and certified local governments.³³¹ Section 9(a) provides: “The district engineer will not delay his decision but will consider any comments these parties may wish to provide.”³³² Additionally, Section 9(b) provides: “The district engineer will provide the ACHP 60 days from the date of the district engineer’s letter forwarding the information in paragraph 9.a., to provide its comments. If the ACHP does not comment by the end of this comment period, the district engineer will complete processing of the permit application.”³³³

The Section 106 process must be completed before a federal agency takes a final action or makes a final decision—*i.e.*, issues or denies a permit, authorizes or undertakes an activity, or provides funding.³³⁴ If consultation has been terminated, or if the ACHP objects to the proposed measures to resolve adverse effects, the Section 106 process has not concluded and the USACE cannot simply proceed to making a final permit decision. In either situation, the USACE must demonstrate that it has taken the ACHP’s comments into consideration.

³²⁷ 2005 Interim Guidance, *supra* note 87, at 1, § 2.

³²⁸ *Id.*

³²⁹ 33 C.F.R. pt. 325, app. C, § 8 (emphasis added).

³³⁰ *Id.* § 9(a).

³³¹ *Id.* § 9(a)(1)-(4).

³³² *Id.* § 9(a).

³³³ *Id.* § 9(b).

³³⁴ 36 C.F.R. § 800.1(c) (quoting 54 U.S.C. § 306108) (“The agency official must complete the section 106 process ‘prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.’”).

When consultation has been terminated, Part 800 provides the ACHP an opportunity to formally comment on the undertaking and the federal agency's Section 106 process.³³⁵ Upon the termination of consultation, the ACHP has forty-five days to provide the federal agency with its comments.³³⁶ The federal agency "shall take into account the Council's comments in reaching a final decision on the undertaking[.]"³³⁷ and provide the ACHP with "a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments . . . *prior to* approval of the undertaking[.]"³³⁸ This summary must also be provided to all consulting parties,³³⁹ and the public.³⁴⁰ The termination of consultation, alone, does not end the Section 106 process.

Moreover, Part 800 requires federal agencies to develop and consider alternatives and modifications to the undertaking that would avoid, minimize, or mitigate adverse effects to historic properties.³⁴¹ When the ACHP is involved in a Section 106 review, the federal agency, the SHPO or the THPO, and the ACHP must "agree on how the adverse effects will be resolved[.]"³⁴² If these parties cannot agree on how to resolve the adverse effects, any party may terminate consultation.³⁴³ As explained above, termination does not immediately end the Section 106 process.³⁴⁴

Appendix C does not provide a process consistent with the process set forth at 36 C.F.R. § 800.7 for the termination of consultation and ACHP review. Moreover, Appendix C does not require the USACE to take into consideration the ACHP's comments when consultation has been terminated and provide the ACHP with a summary of how its comments were considered.

9. Section 11. Historic Properties Discovered During Construction.

Appendix C, Section 11. Section 11 provides:

After the permit has been issued, if the district engineer finds or is notified that the permit area contains a previously unknown potentially eligible historic property which he reasonably expects will be affected by the undertaking, he shall immediately inform the Department of the Interior Departmental Consulting Archeologist and the regional office of the NPS of the current knowledge of the potentially eligible historic property and the expected effects, if any, of the undertaking on that property. The district engineer will seek voluntary avoidance of construction activities that could affect the historic property pending a recommendation from the National Park Service pursuant to the Archeological and

³³⁵ *Id.* § 800.7(c).

³³⁶ *Id.* § 800.7(c)(1).

³³⁷ *Id.* § 800.7(c)(4).

³³⁸ *Id.* § 800.7(c)(4)(i) (emphasis added).

³³⁹ *Id.* § 800.7(c)(4)(ii).

³⁴⁰ *Id.* § 800.7(c)(4)(iii).

³⁴¹ *Id.* § 800.6(a).

³⁴² *Id.* § 800.6(b)(2).

³⁴³ *Id.* § 800.7(a).

³⁴⁴ *See id.* § 800.7(c).

Historic Preservation Act of 1974. Based on the circumstances of the discovery, equity to all parties, and considerations of the public interest, the district engineer may modify, suspend or revoke a permit in accordance with 33 CFR 325.7.³⁴⁵

Part 800 establishes detailed procedures for when “historic properties are discovered *or unanticipated effects on historic properties are found* after the agency official has completed the Section 106 process[.]”³⁴⁶ Upon the discovery of a new property or unanticipated effect, Part 800 requires the federal agency to “make reasonable efforts to avoid, minimize or mitigate adverse effect to such property[.]”³⁴⁷ Additionally, if the undertaking has not been approved or funded, or construction has not commenced, the federal agency must consult to resolve any adverse effects pursuant to 36 C.F.R. § 800.6.³⁴⁸ If the federal agency, the SHPO or THPO, or any Indian tribe or Native Hawaiian organization agree, the federal agency may comply with procedures set forth in the Archaeological and Historic Preservation Act³⁴⁹ instead of Part 800.³⁵⁰

If construction has commenced, the agency official has forty-eight hours to inform the SHPO or THPO, Indian tribes and Native Hawaiian organizations, and the ACHP of the discovery and what actions “the agency official can take to resolve adverse effects.”³⁵¹ This notice must include the federal agency’s assessment of the property’s National Register eligibility, and the proposed actions to resolve any adverse effects.³⁵² The SHPO or THPO and Indian tribes or Native Hawaiian organizations have forty-eight hours to respond. The federal agency must take into account their recommendations and provide them with a report of the actions taken.³⁵³ Appendix C contains none of these provisions and only applies to discoveries of new properties, not unanticipated adverse effects.

10. Section 12. Regional General Permits.

Appendix C, Section 12. Section 12 provides:

In developing general permits, the district engineer will seek the views of the SHPO and, [sic] the ACHP and other organizations and/or individuals with expertise or interest in historic properties. Where designated historic properties are reasonably likely to be affected, general permits shall be conditioned to protect such properties or to limit the applicability of the permit area.³⁵⁴

³⁴⁵ 33 C.F.R. pt. 325, app. C, § 11.

³⁴⁶ 36 C.F.R. § 800.13(b) (emphasis added).

³⁴⁷ *Id.*

³⁴⁸ *Id.* § 800.13(b)(1).

³⁴⁹ 54 U.S.C. §§ 312501-312508; 43 C.F.R. pt. 7.

³⁵⁰ 36 C.F.R. § 800.13(b)(2).

³⁵¹ *Id.* § 800.13(b)(3).

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ 33 C.F.R. pt. 325, app. C, § 12.

In effect, Section 12 establishes an entirely different process for complying with Section 106 than established by either Appendix C or Part 800. As explained in Section III.A, *supra*, the USACE lacks any authority to promulgate regulations that purport to implement Section 106.³⁵⁵ Accordingly, Section 12's codification of a different process for complying with Section 106 is unlawful. Moreover, the process set forth in Section 12 is inconsistent with Part 800's four-step process.³⁵⁶ Projects, activities, and programs that are constructed subject to a regional general permit are undertakings that require Section 106 review.

11. Section 13. National General Permits.

Appendix C, Section 13. Like Section 12, Section 13 establishes a separate Section 106 review process from Appendix C for the issuance of NWPs.³⁵⁷ The USACE has codified its Section 106 review for NWPs as NWP General Condition 20.³⁵⁸ The process set forth in General Condition 20 is inconsistent with Part 800.

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[.]”³⁵⁹ General Condition 20 further encourages applicants to consult with the SHPO or THPO to determine the presence of possible historic properties.³⁶⁰

Upon receipt of a preconstruction notification, General Condition 20 requires the district engineer to “carry out appropriate identification efforts commensurate with potential impacts[.]”³⁶¹ 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.”³⁶² 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.³⁶³

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.”³⁶⁴

³⁵⁵ See 54 U.S.C. § 304108(a).

³⁵⁶ See 36 C.F.R. §§ 800.3-800.6.

³⁵⁷ 33 C.F.R. pt. 325, app. C, § 13(a)-(b).

³⁵⁸ 86 Fed. Reg. at 2,869-70 (Gen. Condition 20).

³⁵⁹ *Id.* at 2,870 (Gen. Condition 20(c)).

³⁶⁰ *Id.*

³⁶¹ *Id.*

³⁶² *Id.*

³⁶³ *Id.*

³⁶⁴ 36 C.F.R. § 800.3(a).

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.³⁶⁵

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 Hawaiian organizations, and other consulting parties.³⁶⁶ 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.³⁶⁷ In any event, this is inconsistent with the procedures set forth in Part 800.³⁶⁸

Finally, since NWP's 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.³⁶⁹ Relying on General Condition 20 to satisfy the USACE's Section 106 obligations for the entire NWP program is insufficient and unlawful.

12. Section 14. Emergency Procedures.

Appendix C, Section 14. Section 14 provides:

In an emergency situation the district engineer will make every reasonable effort to receive comments from the SHPO and the ACHP, when the proposed undertaking can reasonably be expected to affect a potentially eligible or designated historic property and will comply with the provisions of this Appendix to the extent time and the emergency situation allows.³⁷⁰

Part 800 establishes the procedures by which federal agencies may comply with Section 106 in emergency situations.³⁷¹ Pursuant to Part 800, federal agencies must

³⁶⁵ *Accord id.* §§ 800.4(b)-(c), 800.5(a).

³⁶⁶ *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[.]”).

³⁶⁷ *But see* 2007 Mem., *supra* note 92.

³⁶⁸ *See* 36 C.F.R. §§ 800.3-800.6.

³⁶⁹ *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. 12 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).

³⁷⁰ 33 C.F.R. pt. 325, app. C, § 14.

³⁷¹ 36 C.F.R. § 800.12. Part 800 allows federal agencies to develop alternate procedures for emergency situations, so long as they are approved by the ACHP. *Id.* § 800.12(a). Section 14 is not such an alternate procedure because Appendix C has never been approved by the ACHP and it was not developed pursuant to this provision of Part 800.

[n]otify[] the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.³⁷²

Appendix C does not require the USACE to notify the ACHP, SHPOs or THPOs, or Indian tribes or Native Hawaiian organizations, nor does it require the USACE to provide them with an opportunity to comment on the undertaking and potential effects.

Moreover, what the USACE considers an emergency is likely inconsistent with what constitutes an emergency under Part 800. The USACE's regulations define an emergency as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship[.]"³⁷³ Part 800 defines an emergency as "a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property[.]"³⁷⁴ An immediate, unforeseen, and significant economic hardship is likely not an emergency under Part 800.

13. Section 15. Criteria of Effect and Adverse Effect.

Appendix C, Section 15(c). Section 15(c) provides examples of effects from undertakings that would otherwise be adverse unless specific conditions are met:

(1) When the designated historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;

(2) When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected designated historic properties through conformance with the Secretary's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings", [sic] or

³⁷² *Id.* § 800.12(b)(2).

³⁷³ 33 C.F.R. § 325.2(e)(4).

³⁷⁴ 36 C.F.R. § 800.12(b).

(3) When the undertaking is limited to the transfer, lease, or sale of a designated historic property, and adequate restrictions or conditions are included to ensure preservation of the property's important historic features.³⁷⁵

The first and third examples are inconsistent with Part 800. In both cases, the examples describe mitigation measures used to resolve adverse effects. While mitigation measures may be used to resolve adverse effects, their use necessarily means that there was, and continues to be, an adverse effect to the historic property.³⁷⁶ Mitigation in the Section 106 process does not, and is not intended to, avoid or limit the severity of an adverse effect. Mitigation seeks to accommodate for the values and significance lost by the adverse effect while recognizing that the effect itself cannot be avoided or minimized.

CONCLUSION

Since 1980, the USACE has utilized some version of Appendix C to purportedly comply with Section 106. The USACE's use of Appendix C is unlawful. Appendix C was not lawfully promulgated because the ACHP never approved of or concurred in its adoption and use. Moreover, nearly every provision of Appendix C conflicts or is inconsistent with the corresponding provisions in Part 800 and the NHPA. As is stated in NATHPO's recommendations in response to the DOA's and the USACE's Request for Input, Appendix C must be revoked through formal rulemaking and the USACE must rely on Part 800 to comply with Section 106 for all Regulatory Program undertakings.

³⁷⁵ 33 C.F.R. pt. 325, app. C, § 15(a)(1)-(3).

³⁷⁶ 36 C.F.R. § 800.6(a).