



August 2, 2022

Stacey M. Jensen
Deputy Federal Preservation Officer
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon,
Washington, DC 20310-0108

Re: Modernization of Army Civil Works Policy Priorities, COE-2022-0006

Dear Ms. Jensen:

The Coalition for American Heritage appreciates the opportunity to comment on the U.S. Army Corps of Engineers (“Corps”) Public Notice to Modernize the Army of Civil Works Policy Priorities. 87 Fed. Reg. 33756 (June 3, 2022). The comments below are focused on improving the Corps’ compliance with the National Historic Preservation Act (“NHPA”) and on strengthening tribal consultation.

The Coalition for American Heritage (“Coalition”) is an advocacy coalition that protects and advances our nation’s commitment to heritage preservation. Supported by the Society for Historical Archaeology and the American Anthropological Association, the Coalition collectively represents 350,000 cultural resource management professionals, academic archaeologists and anthropologists, and subject matter experts with an interest in NHPA implementation and tribal consultation. Many of our members serve as consultants to project applicants and facilitate compliance with the NHPA and the National Environmental Policy Act. Additionally, many of our members serve federal government agencies by helping ensure compliance with NHPA regulations.

The Corps should rescind 33 C.F.R. 325, Appendix C (“Appendix C”) and follow the Advisory Council on Historic Preservation (“ACHP”) regulations at 36 C.F.R. Part 800 to comply with the NHPA, rather than attempting to develop another program alternative. Additionally, the Coalition encourages the Corps to address broader issues with their Regulatory and tribal consultation programs as they consider new processes to meet the Corps’ responsibilities under Section 106 of the NHPA.

1. The Corps should rescind Appendix C.

Appendix C is unlawful and should be rescinded. The ACHP has never concurred with or approved Appendix C, and the ACHP is the sole federal agency authorized by statute to promulgate

implementing regulations for Section 106.¹ The historic preservation community has long recognized that Appendix C is inconsistent with ACHP regulations, and federal courts have agreed.²

Appendix C should be rescinded because the regulations are outdated and incomplete, and updating the regulations would not be feasible. Appendix C stokes uncertainty and conflict because it does not fully integrate all historic preservation guidance in a clear way, and because the regulations are confusingly applied inconsistently by the many Corps districts across the country.

Appendix C is unlawful as it is inconsistent with the NHPA and the ACHP regulations. For example, the Corps' definition limits what is considered an "undertaking" to the portion of the project that requires a Corps permit, restricting the Corps' review for the project in violation of the NHPA and ACHP regulations. The ACHP regulations define "undertaking" as "a project, activity, or program funded *in whole or in part* under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y) (emphasis added). The Appendix C definition, on the other hand, limits the definition of "undertaking" to "the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations[.]" 33 C.F.R. pt. 325, app. C 1(f).

Appendix C also restricts the scope of review in its definition of "permit area." The ACHP regulations define "area of potential effects" as "the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." 36 C.F.R. § 800.16(d). The Corps, by contrast, narrowly defines "permit area" as "those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures."

Appendix C also limits the definition of when an effect is adverse, contrary to the ACHP regulations. The ACHP regulations provide:

[a]n adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for

¹ 54 USC § 304108(a).

² See, e.g., *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1438 (C.D. Cal. 1985) (the Corps' narrow definition of "permit area" in its proposed regulations violated the NHPA and its regulations by not considering the effects on cultural resources within the affected area as defined by the ACHP).

the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.

36 C.F.R. § 800.5(a)(1). Appendix C, on the other hand, lists three situations in which an effect that would otherwise be adverse may be considered not adverse, including where the property is of value only for its research potential. 33 C.F.R. pt. 325 app. C 15(c). These limitations are plainly inconsistent with the NHPA and ACHP regulations.

Appendix C also limits consideration of indirect and cumulative effects in Corps regulatory review, resulting in adverse effects to historic properties that are not resolved.

Furthermore, Tribes were never consulted and are not mentioned in Appendix C, and Appendix C does not incorporate the 1992 amendments to the NHPA, which among other things expressly provided that “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.” 54 U.S.C. § 302706(a). The 1992 amendments also require agencies to consult with tribes that attach religious and cultural significance to historic properties. Traditional cultural properties are also excluded from discussion in Appendix C. As a result of these omissions and errors, consultations under Appendix C frequently do not meet the standard in the NHPA to make a “reasonable and good faith” effort to identify historic properties that might be affected.

2. Appendix C has resulted in the Corps failing to consider impacts to traditional cultural properties.

With relation to Corps tribal consultations, the lack of consideration of traditional cultural properties, inconsistent compliance with National Park Service Bulletin 38, and lack of clear guidance on tribal consultation requirements and protocols for funerary items and ancestral remains have caused repeated challenges associated with the identification, evaluation, assessment, and mitigation for tribal and traditional cultural sites. The language in Appendix C regarding confidential information, which is only protected from disclosure when there is a “substantial risk of harm, theft, or destruction,” has failed to allow tribes to protect sacred information and led tribes to be reluctant to disclose information on culturally sensitive sites. These factors have meant that the Corps has not met its responsibilities under the NHPA with respect to traditional cultural properties, causing harm to tribal communities and their cultural resources.

3. The Corps should follow 36 C.F.R. Part 800 rather than developing a new program alternative.

The Corps should rescind Appendix C for the reasons described above and because the regulations at 36 C.F.R Part 800 are sufficiently flexible to coordinate Section 106 on a variety of project types and styles. It is critical that, as the Corps reconsiders its Appendix C regulations, the Corps does not repeat the errors of the Appendix C regulations by attempting to promulgate another program alternative that wrongly limits Corps responsibilities under the NHPA. If streamlining is needed, programmatic agreements or similar methods to approach classes of uniform, low-impact projects could be considered.

4. The Corps must implement other improvements to ensure that the Regulatory division meets their responsibilities under the National Historic Preservation Act.

Merely rescinding Appendix C, while an important step, will not address all the inadequacies in the Corps' compliance with the NHPA. While situations vary widely across the country, there are other factors that the Corps should consider when examining how to modernize its regulatory program.

The Corps should evaluate its staffing levels and staffing expertise and ensure that each District has sufficient resources to carry out its Section 106 responsibilities. In some Districts, Corps archaeologists are only present in the Planning or Civil Works departments, and they do not participate regularly in the assessment of No Effect and No Adverse Effect determinations. All Regulatory departments should all have staff who meet the Secretary of Interior standards in archaeology, architectural history, or ethnographic resources, and should have sufficient budgets to consult with additional Corps specialists in these areas if complex projects arise. The Corps should also ensure that its Regulatory staff receives clear training and guidance regarding how they should determine when ethnographic or traditional cultural sites inventories are needed to fully assess a project's effects. Additionally, Districts must ensure that each department has adequate staff and budget to review permits and conduct Section 106 consultations. During the height of the Covid pandemic, some Districts have issued alerts regarding increased workload and reduced staffing levels, or have taken over 90 days to provide responsive documents to FOIA requests on Section 106 consultation issues. Insufficient staffing can contribute to challenges resolving concerns over historic properties.

Furthermore, the Corps should ensure that its Regulatory processes are resolving effects through processes clearly endorsed within the ACHP regulations at 36 C.F.R. Part 800. For example, permit conditions should not be allowed to resolve adverse effects under Section 106 without a Programmatic Agreement or Memorandum of Agreement that clearly lays out mitigation procedures. The Corps should furthermore ensure that treatment plans and other mitigation elements are finalized before agreement documents are signed.

Finally, to ensure that public consultation is meaningful and robust, the Corps should evaluate its criteria for Public Notices, and should ensure that Corps Districts include common language descriptions of adverse effects in Public Notices in cases where the Corps has already made an Adverse Effect determination.

5. The Corps' tribal consultation policy should be revised.

The Coalition supports a reexamination of the Corps' tribal consultation policy as suggested in the Federal Register Notice, in consultation with Indian tribes. Overall, tribal consultation should be robustly and consistently undertaken. The Corps should look to tribes, the Advisory Council on Historic Preservation, the National Association for Tribal Historic Preservation Officers, and to the Corps Tribal Nations Technical Center of Expertise to develop protocols for transparent and meaningful consultation processes. The Corps must consider tribal input when deciding which historic properties surveys should be required and when ethnographic studies should be required to determine a project's potential impacts on traditional cultural properties. The Corps should not

put a substantial burden on tribes to prove that cultural sites are present, without offering the compensation that any other cultural resources contractor would receive.

The Coalition additionally supports the Corps' suggestion that it revise its tribal consultation policy to require a written response from the Corps to discuss what tribal feedback was received and how the Corps considered/addressed it. Finally, the Corps should incorporate additional feedback on their tribal consultation process from the General Accountability Office Report *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects*, which provides a series of recommendations for the Corps to improve its tribal consultation.

6. The Corps does not take sufficient responsibility for excavated collections.

The Corps wrongfully limits responsibility for excavated collections to collections excavated from land owned by the Corps in fee simple.³ This definition excludes the Corps from properly curating collections, especially those excavated by Corps staff directly as part of Civil Works projects if the project obtained an easement rather than purchasing the land and continuing to own the land outright. This language has in at least some cases (such as the Richmond Floodwall collection) resulted in situations where archaeological sites were not properly recorded, no report was written, and the collections are conserved at the SHPO at the SHPO's expense. There are likely additional situations in which this language regarding curatorial responsibility has resulted in orphaned collections. The Corps' limitation of its curatorial responsibility in this manner is contrary to 36 C.F.R. Part 79. Those regulatory requirements are applicable to any collections "that are the result of a prehistoric or historic resource survey, excavation or other study conducted in connection with a Federal action, assistance, license, or permit. Such collections include those that are owned by the United States and for which a Federal agency has practical management authority, either directly or indirectly, as a result of that ownership." 36 C.F.R. § 79.3(a).

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In conclusion, the Coalition supports the Corps' proposal to modernize its Regulatory branch through rescinding its Appendix C guidance. The Corps should coordinate management of an orderly transition to using the 36 C.F.R. Part 800 regulations through public and tribal consultation.

Thank you for the opportunity to comment on this process.

Best regards,



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³ Dept. of the Army, U.S. Army Corps of Eng'rs, Regulation No. 1105-2-100 at C-34 (Apr. 22, 2000).