



**NATIONAL ASSOCIATION  
OF TRIBAL HISTORIC  
PRESERVATION OFFICERS**

P.O. BOX 19189  
WASHINGTON, D.C. 20036-9189  
(202) 628-8476  
INFO@NATHPO.ORG  
WWW.NATHPO.ORG

April 9, 2024

*Sent via www.Regulations.gov and E-Mail*

Michael L. Connor  
Assistant Secretary of the Army (Civil Works)  
Office of the Assistant Secretary of the Army (Civil Works)  
U.S. Department of the Army  
108 Army Pentagon  
Washington, DC 20310-0108  
michael.l.connor.civ@army.mil

Lt. Gen. Scott A. Spellmon  
Commanding General and Chief of Engineers  
U.S. Army Corps of Engineers  
ATTN: CECW-CO-R  
441 G Street Northwest  
Washington, DC 20314-1000  
scott.a.spellmon@usace.army.mil  
historicpropertyreg@usace.army.mil

**Re: National Association of Tribal Historic Preservation Officers' Comments in Support of U.S. Army Corps of Engineers' Notice of Proposed Rulemaking to Rescind 33 C.F.R. Part 325, Appendix C  
Docket No. COE-2023-0004 | RIN 0710-AB46**

Dear Assistant Secretary Connor and Lt. Gen. Spellmon:

The National Association of Tribal Historic Preservation Officers (“NATHPO”) is pleased to submit the enclosed comments in support of the U.S. Army Corps of Engineers’ (“USACE”) notice of proposed rulemaking, *Processing of Department of the Army Permits; Procedures for the Protection of Historic Properties* (“Notice of Proposed Rulemaking”), published on February 9, 2024,<sup>1</sup> proposing to rescind Appendix C of 33 C.F.R. Part 325, and amending provisions of 33 C.F.R. Part 330.

For forty-four years, the USACE has used 33 C.F.R. Part 325, Appendix C (“Appendix C”), to purportedly comply with its obligations under Section 106 of the National Historic Preservation Act (“NHPA”),<sup>2</sup> instead of using the government-wide regulations promulgated by the Advisory Council on Historic Preservation (“ACHP”) and codified at 36 C.F.R. Part 800, *Protection of*

---

<sup>1</sup> 89 Fed. Reg. 9,079 (Feb. 9, 2024).

<sup>2</sup> 54 U.S.C. § 306108.

*Historic Properties* (“Part 800”).<sup>3</sup> The USACE’s use of Appendix C to purportedly comply with Section 106 has been, and continues to be, unlawful because Appendix C is not a lawful counterpart regulation. The USACE’s continued insistence on using Appendix C, despite its well-documented legal deficiencies, has served as a constant source of conflict and mistrust between the USACE, Tribal Nations, Tribal Historic Preservation Officers (“THPO”), Native Hawaiian organizations, State Historic Preservation Officers (“SHPO”), preservation organizations, cultural resource management (“CRM”) and historic preservation professionals, and the public.

NATHPO is a national, non-profit membership organization founded in 1988, comprising Tribal government officials, specifically THPOs, who implement federal and Tribal preservation laws to protect culturally important places and perpetuate Native identity, resilience, and cultural endurance. Connections to cultural heritage sustain the health and vitality of Native Peoples. NATHPO’s overarching purpose is to support the preservation, maintenance, and revitalization of the cultures and traditions of Native peoples of the United States. This is accomplished most importantly through the support of Tribal Historic Preservation Programs and THPOs, as acknowledged by the National Park Service.<sup>4</sup> There are currently 221 THPOs. NATHPO is also a voting member of the ACHP.<sup>5</sup>

The USACE’s decision to rescind Appendix C is long overdue. NATHPO fully supports this rulemaking and offers the enclosed comments to highlight issues that must be addressed upon Appendix C’s rescission to ensure that the USACE fulfills its full legal obligations under the NHPA, as well as its trust duties to Indian Country. NATHPO previously provided comments to the USACE and the U.S. Department of the Army in response to their June 3, 2022, *Notice of Virtual Public and Tribal Meetings Regarding the Modernization of Army Civil Works Policy Priorities; Establishment of a Public Docket; Request for Input*,<sup>6</sup> and to the Office of Information and Regulatory Affairs during its Executive Order 12866 regulatory review of the this proposed rulemaking.<sup>7</sup> These comments are attached. Also attached is a legal memorandum drafted by NATHPO’s legal counsel detailing the development and adoption of Appendix C and efforts over the years to update or modify it and examining Appendix C’s multiple legal deficiencies.

## **I. Appendix C is not a Lawful Counterpart Regulation and Must Be Rescinded**

Appendix C suffers from two overarching legal deficiencies that render its adoption in 1990 and its continued use unlawful. First, Appendix C was not lawfully adopted as a counterpart regulation because the ACHP never approved of or concurred in its adoption and use. Second,

---

<sup>3</sup> While Appendix C was not formally adopted by the USACE until 1990, *see* 55 Fed. Reg. 27,000 (June 29, 1990), the USACE used an earlier draft on “an interim basis” from 1980 until 1990. *Id.* at 27,000.

<sup>4</sup> *See* 54 U.S.C. §§ 302701-302706.

<sup>5</sup> *Id.* § 304101(a)(8).

<sup>6</sup> 87 Fed. Reg. 33,756 (June 3, 2022).

<sup>7</sup> *See* Exec. No. 12866, 58 Fed. Reg. 51,735 (Sept. 30, 1993).

Appendix C violates Section 110(a)(2)(E) of the NHPA because it is inconsistent and conflicts with Part 800 and provisions of the NHPA. For a detailed discussion of Appendix C’s legal deficiencies, see the attached memorandum. These comments will only briefly address each deficiency.

Appendix C is an unlawful counterpart regulation because it was not lawfully promulgated. When the USACE began developing Appendix C in 1979,<sup>8</sup> Part 800 authorized federal agencies to develop and use their own “counterpart regulations jointly drafted by the agency and the Executive Director [of the ACHP] and *approved by* the Chairman [of the ACHP].”<sup>9</sup> When the USACE formally adopted Appendix C in 1990, the ACHP had updated its counterpart regulation provisions. The updated provisions still required the ACHP’s approval before an agency could adopt and use counterpart regulations: “When *concurred in by* the [ACHP], such regulations shall stand in place of these regulations for the purposes of the agency’s compliance with section 106.”<sup>10</sup> The ACHP has never approved or concurred in the USACE’s adoption and use of Appendix C. This fact has been repeatedly documented by the ACHP,<sup>11</sup> federal courts,<sup>12</sup> the Government Accountability Office (“GAO”),<sup>13</sup> and multiple legal scholars and commentators.<sup>14</sup> The attached memorandum provides an in-depth examination of this documentation. Moreover, in the Notice of Proposed Rulemaking, the USACE explicitly acknowledges that Appendix C “did not go through separate approval by the ACHP, as required by the NHPA and section 106 implementing regulations.”<sup>15</sup>

Appendix C is an unlawful counterpart regulation because it is also inconsistent and conflicts with Part 800 and the NHPA. In 1992, Congress amended the NHPA to require that federal agencies’ “procedures for compliance with section 306108 of this title[] . . . are consistent with regulations promulgated by the [ACHP] pursuant to section 304108(a) and(b) of this title[.]”<sup>16</sup> Accordingly, since just two years after the USACE adopted Appendix C, the USACE had a statutory obligation to revise Appendix C to be consistent with Part 800 and the NHPA.<sup>17</sup> Nearly

---

<sup>8</sup> See 45 Fed. Reg. 22,112 (Apr. 3, 1980).

<sup>9</sup> 36 C.F.R. § 800.11(a) (1979) (emphasis added).

<sup>10</sup> 36 C.F.R. § 800.15 (1990) (emphasis added).

<sup>11</sup> See, e.g., Letter from Reid J. Nelson, Acting Exec. Dir., Advisory Council on Hist. Pres., to Stacey Jensen, Off. of Assistant Sec’y of Army (Civ. Works) 1 (July 29, 2022) [hereinafter 2022 Nelson Letter] (“Appendix C was never approved by the ACHP as counterpart regulations to Section 106 and the ACHP has opposed its use as a means to comply with Section 106 for decades.”).

<sup>12</sup> See, e.g., *Comm. to Save Cleveland’s Hulets v. U.S. Army Corps of Eng’g*, 163 F. Supp. 2d 776 (N.D. Ohio 2001) (“All parties agree that there is no record of the ACHP ever approving or concurring in the [USACE’s] regulations.”).

<sup>13</sup> Gov’t Accountability Off., *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects* 53 (2019) [hereinafter GAO Report] (“According to ACHP documents, the ACHP did not concur in the final rule, indicating that it was inconsistent with ACHP regulations.”).

<sup>14</sup> See, e.g., Wesley James Furlong, *The Army Corps Needs and Appendectomy: Diagnosing the Army Corps’ Unlawful Promulgation and Use of 33 C.F.R. Part 325, Appendix C, to Comply with Section 106 of the National Historic Preservation Act*, 26 U. DENV. WATER L. REV. 1, 23-31 (2023).

<sup>15</sup> 89 Fed. Reg. at 9,080.

<sup>16</sup> 54 U.S.C. § 306102(b)(5)(A).

<sup>17</sup> See *Nat’l Mining Ass’n v. Slater*, 167 F. Supp. 2d 265, (D.D.C. 2001), *aff’d in part, rev’d in part on other grounds sub nom. Nat’l Mining Ass’n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003) (“[S]ection 110 mandates that federal

every provision of Appendix C is inconsistent or conflicts with the corresponding provisions of Part 800 and the NHPA. These inconsistencies and conflicts have been repeatedly documented by the ACHP,<sup>18</sup> federal courts,<sup>19</sup> the GAO,<sup>20</sup> and legal scholars and commentators.<sup>21</sup> The attached memorandum provides a section-by-section analysis of every single inconsistency and conflict between Appendix C and Part 800 and the NHPA. Moreover, in the Notice of Proposed Rulemaking, the USACE acknowledges “major differences related to the scope of the effort to identify and address effects to historic properties from undertakings and the nature of consultation with appropriate stakeholders.”<sup>22</sup>

Based on its unlawful promulgation and inconsistencies and conflicts with Part 800 and the NHPA, the USACE cannot use Appendix C to fulfill its Section 106 obligations.<sup>23</sup> Accordingly, NATHPO fully supports the proposed rulemaking to rescind Appendix C and use Part 800 to comply with Section 106.

## **II. The USACE Should Make Additional Conforming Changes to 33 C.F.R. § 325.2(b)(3)**

The Notice of Proposed Rulemaking proposes making conforming changes to 33 C.F.R. § 325.2(b)(3) to reflect the rescission of Appendix C and the USACE’s use of Part 800. NATHPO supports these changes but suggests additional changes to better conform 33 C.F.R. § 325.2(b)(3) with 36 C.F.R. § 800.3(a).

Currently, 33 C.F.R. § 325.2(b)(3) reads: “(3) Historic properties. If the proposed activity would involve any property listed or eligible for listing in the National Register of Historic Places, the district engineer will proceed in accordance with Corps National Historic Preservation Act implementing regulations.”

The Notice of Proposed Rulemaking states that 33 C.F.R. § 325.2(b)(3) will be amended to read:

(3) *Historic properties.* Applications will be reviewed for the potential impact of the relevant undertaking on historic properties pursuant to section 106 of the

---

agencies must ensure that their procedures for compliance with section 106 are consistent with the regulations issued by the [ACHP] pursuant to [54 U.S.C. § 304108].” (citation omitted)).

<sup>18</sup> See, e.g., 2022 Nelson Letter, *supra* note 11, at 1-2 (“[I]t is important to note that Appendix C is not . . . consistent with [Part 800’s] requirements . . . [T]he provisions within Appendix C are in fundamental conflict with the requirements of the Section 106 implementing regulations.”).

<sup>19</sup> See, e.g., *Cleveland’s Hulets*, 163 F. Supp. 2d at 792 (The court has already found, moreover, that . . . the Corps’ procedures are inconsistent with, and indeed, in derogation of those ACHP regulations.”).

<sup>20</sup> See GAO Report, *supra* note 78, at 52 (“ACHP documents we reviewed identified several inconsistencies between the [USACE] procedures and [the] ACHP regulations[.]”).

<sup>21</sup> See, e.g., Furlong, *supra* note 14, at 31-58.

<sup>22</sup> 89 Fed. Reg. at 9,081.

<sup>23</sup> See, e.g., *Sayler Park Vill. Council v. U.S. Army Corps of Eng’rs*, No. C-1-02-832, 2002 WL 32191511, at \*8 (S.D. Ohio Dec. 30, 2002) (“[B]y issuing a permit to Lone Star without having complied with the regulations issued by the ACHP, the Corps violated the NHPA.”).

National Historic Preservation Act. The district engineer will include a statement in the public notice of their current knowledge of historic properties based on their initial review of the application (see paragraph (a)(2) of this section). If the district engineer determines that the proposed undertaking is of a type that would not have the potential to cause effects to historic properties, using the assumption that such properties are present, they will include a statement to this effect in the public notice. If the district engineer finds the proposed undertaking is of a type that has the potential to cause effects to historic properties they will continue proceeding in accordance with 36 CFR part 800.<sup>24</sup>

NATHPO generally supports these changes to 33 C.F.R. § 325.2(b)(3), as this language more accurately reflects the USACE's legal obligations under Section 106 and Part 800 and more accurately reflects the Section 106 process as set forth in Part 800. Nevertheless, NATHPO suggests that 33 C.F.R. § 325.2(b)(3) be revised to:

Applications will be reviewed **to determine whether the proposed undertaking is the type of activity that has the potential to cause effects** on historic properties pursuant to section 106 of the National Historic Preservation Act. The district engineer will include a statement in the public notice of their current knowledge of historic properties based on their initial review of the application (see paragraph (a)(2) of this section). If the district engineer determines that the proposed undertaking is **the type of activity** that **does** not have the potential to cause effects to historic properties, using the assumption that such properties are present, they will include a statement to this effect in the public notice. If the district engineer finds the proposed undertaking is **the type of activity** that has the potential to cause effects to historic properties, they will continue proceeding in accordance with 36 CFR part 800.

These changes would better conform 33 C.F.R. § 325.2(b)(3) with 36 C.F.R. § 800.3(a), which reads: "The agency official shall determine whether the proposed Federal action is an undertaking as defined in § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties."

### **III. The USACE Must Make Additional Conforming Changes to 33 C.F.R. § 330.4(g)**

The Notice of Proposed Rulemaking proposes making conforming changes to 33 C.F.R. § 330.4(g) to reflect the rescission of Appendix C and the USACE's use of Part 800. NATHPO supports these changes but notes that additional changes are needed to ensure that 33 C.F.R. § 330.4(g) conforms with Part 800.

---

<sup>24</sup> 89 Fed. Reg. at 9,087 (proposed 33 C.F.R. § 325.2(b)(3)).

Currently, 33 C.F.R. § 330.4(g) reads: “(g) Historic properties. No activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places, is authorized until the DE has complied with the provision of 33 CFR part 325, appendix C.”<sup>25</sup>

The Notice of Proposed Rulemaking states that 33 C.F.R. § 330.4(g) will be amended to read: “(g) *Historic properties*. No activity which has the potential to cause effects to properties listed or properties eligible for listing in the National Register of Historic Places, is authorized until the district engineer has complied with the applicable provisions of 36 CFR part 800.”<sup>26</sup>

NATHPO supports the replacement of “33 CFR part 325, appendix C” with “36 CFR part 800” since such conforming change will be necessary upon the formal rescission of Appendix C. NATHPO also supports the replacement of “which may affect” with “which has the potential to cause effects.” This change more accurately reflects the legal standard for when Section 106 of the NHPA is triggered and more closely conforms to 36 C.F.R. § 800.3(a). Additionally, the comma immediately after “Places” should be deleted.

While NATHPO supports the proposed changes to 33 C.F.R. § 330.4(g), four additional conforming changes are needed.

First, 33 C.F.R. § 330.4(g)(2), in part, reads: “If a property in the permit area of the activity is determined to be an historic property in accordance with 33 CFR part 325, Appendix C, the DE will take into account the effects on such properties in accordance with 33 CFR part 325, Appendix C.” Both references to “33 CFR part 325, Appendix C” must be replaced with “36 CFR part 800” to reflect the rescission of Appendix C. Additionally, “permit area” must be replaced with “area of potential effects.” Permit area is a term used only in Appendix C.<sup>27</sup> In contrast, Part 800 uses the term area of potential effects.<sup>28</sup> NATHPO suggests also including a citation to Part 800’s definition of area of potential effects, such that this sentence reads: “If a property in the **area of potential effects (see 36 CFR 800.16(d))** of the activity is determined to be an historic property in accordance with **36 CFR part 800**, the DE will take into account the effects on such properties in accordance with **36 CFR part 800**.”

Second, 33 C.F.R. § 800.4(g)(2)(i) reads: “After complying with the requirements of 33 CFR part 325, appendix C, authorize the activity under the NWP by adding, if appropriate, activity-specific conditions[.]” The reference to “33 CFR part 325, appendix C” must be replaced with “36 CFR part 800” to reflect the rescission of Appendix C.

Third, 33 C.F.R. § 330.4(g)(2)(ii) reads: “Prior to or concurrent with complying with the requirements of 33 CFR part 325, appendix C, he may assert discretionary authority (see 33 CFR 330.4(e)) and instruct the prospective permittee of procedures to seek authorization under a

---

<sup>25</sup> 33 C.F.R. § 330.4(g).

<sup>26</sup> 89 Fed. Reg. at 9,087 (proposed 33 C.F.R. § 330.4(g)).

<sup>27</sup> See 33 C.F.R. pt. 325, app. C, § 1(g).

<sup>28</sup> See 36 C.F.R. § 800.16(d).

regional general permit or individual permit. (See 33 CFR 330.5(d).) The reference to “33 CFR part 325, appendix C” must be replaced with “36 CFR part 800” to reflect the rescission of Appendix C.

Fourth, NATHPO suggests that 33 C.F.R. § 330.4(g)(4) be revised to read: “Prospective permittees are encouraged to obtain information on the location of historic properties from the State Historic Preservation Officer, **Indian Tribes, Tribal Historic Preservation Officers, Native Hawaiian organizations**, and the National Register of Historic Places.” Indian Tribes, THPOs, and Native Hawaiian organizations are required consulting parties in the Section 106 process and must be consulted with throughout the Section 106 process,<sup>29</sup> including in identifying historic properties.<sup>30</sup>

#### **IV. The USACE Should Develop a Nationwide Programmatic Agreement to Comply with Section 106 for Nationwide Permits**

In the Notice of Proposed Rulemaking, the USACE states that it will “work with the ACHP, Tribal Nations, Native Hawaiian Organizations, SHPOs, THPOs, and other consulting parties to develop an appropriate program alternative under 36 CFR 800.14 to establish a more efficient and effective process for [USACE] compliance with Section 106 for undertakings that rely on authorizations available through the Nationwide Permits program[.]”<sup>31</sup> As discussed in greater detail in the attached memorandum, the USACE’s current process for complying with Section 106 for nationwide permits is inadequate and unlawful. Accordingly, NATHPO generally supports the USACE’s efforts to develop a program alternative to govern Section 106 compliance for nationwide permits but has serious concerns with the USACE’s potential use of certain program alternatives. NATHPO strongly recommends that the USACE develop a nationwide programmatic agreement to govern Section 106 compliance for nationwide permits.

Programmatic agreements “allow federal agencies to govern the implementation of a particular agency program . . . or multiple undertakings similar in nature[.]”<sup>32</sup> Programmatic agreements may be appropriate “[w]hen effects on historic properties are similar and repetitive or are multi-State or regional in scope[.]”<sup>33</sup> Programmatic agreements must be developed in consultation with the ACHP, the appropriate SHPOs and THPOs, the National Conference of State Historic Preservation Officers (“NCSHPO”), and Indian Tribes and Native Hawaiian organizations,<sup>34</sup> and are effective only if the agreements are executed by the USACE, the ACHP, and the NCSHPO.<sup>35</sup>

---

<sup>29</sup> See 54 U.S.C. § 302706(b); 36 C.F.R. § 800.2(c)(2).

<sup>30</sup> See 36 C.F.R. § 800.4(b)-(c).

<sup>31</sup> 89 Fed. Reg. at 9,084.

<sup>32</sup> *Programmatic Agreements*, ADVISORY COUNCIL ON HIST. PRES., [https://www.achp.gov/program\\_alternatives/pa](https://www.achp.gov/program_alternatives/pa) (last visited Mar. 29, 2024).

<sup>33</sup> 36 C.F.R. § 800.14(b)(1)(i).

<sup>34</sup> *Id.* § 800.14(b)(2)(i).

<sup>35</sup> *Id.* § 800.14(b)(2)(iii).

The ACHP and other federal agencies routinely develop nationwide programmatic agreements;<sup>36</sup> that is, programmatic agreements that govern Section 106 for a particular agency's program at a national level. This approach fits neatly with the nationwide permit program.

A nationwide programmatic agreement would establish procedures by which the USACE and project proponents comply with Section 106 for the issuance of nationwide permits and the individual projects authorized under nationwide permits. This would satisfy the USACE's obligation to consider the programmatic effects of issuing and reissuing the nationwide permits,<sup>37</sup> as well as project-specific effects. Unlike General Condition 20, the procedures established in a nationwide programmatic agreement would not be developed in a vacuum; instead, they would be developed in consultation with interested parties. Moreover, by its nature, a nationwide programmatic agreement would provide mechanisms for signatories to ensure the USACE's compliance with the established process.<sup>38</sup>

This nationwide programmatic agreement would not cover undertakings that occur on Tribal lands. A programmatic agreement can only cover undertakings on Tribal lands if the relevant Tribal Nation or THPO signs the agreement.<sup>39</sup> As defined in the NHPA, that would cover *any* activity authorized under a nationwide permit that occurs on "all land within the exterior boundaries of any Indian reservation[.]"<sup>40</sup> For any programmatic agreement to cover undertakings on Tribal lands, the appropriate Tribal Nation or THPO must sign the agreement. NATHPO suggests that the USACE use this nationwide programmatic agreement as a template to negotiate Tribal-specific programmatic agreements for nationwide permit-covered activities on Tribal lands.

While 36 C.F.R. § 800.14 allows federal agencies to develop program alternatives other than programmatic agreements, NATHPO strongly recommends that the USACE not develop any of these different program alternatives. 36 C.F.R. § 800.14 also allows federal agencies develop alternate procedures,<sup>41</sup> exempted categories,<sup>42</sup> standard treatments,<sup>43</sup> and program comments.<sup>44</sup> As a general matter, NATHPO objects to federal agencies' use of exempted categories, standard treatments, and program comments. In NATHPO's experience, these program alternatives have been used by federal agencies to minimize their Section 106 obligations and avoid consultation with Tribal Nations, THPOs, and Native Hawaiian organizations. These program alternatives also do not provide meaningful mechanisms to hold federal agencies accountable. Moreover, programmatic agreements are flexible enough to allow the Section 106 process to be specifically

---

<sup>36</sup> See generally *Nationwide Programmatic Agreements*, ADVISORY COUNCIL ON HISTORIC. PRES., <https://www.achp.gov/protecting-historic-properties/Agreements-List/Nationwide> (last visited Mar. 29, 2024).

<sup>37</sup> *Cf. N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 454 F. Supp. 3d 985 (D. Mont. 2020).

<sup>38</sup> See 36 C.F.R. § 800.6(c)(1).

<sup>39</sup> *Id.* § 800.14(b)(2)(iii).

<sup>40</sup> 54 U.S.C. § 300319(1).

<sup>41</sup> 36 C.F.R. § 800.14(a).

<sup>42</sup> *Id.* § 800.14(c).

<sup>43</sup> *Id.* § 800.14(d).

<sup>44</sup> *Id.* § 800.14(e).



tailored for the needs of individual categories of covered undertakings. NATHPO also strongly recommends that the USACE not develop a new set of alternate procedures. The USACE purports Appendix C to be a counterpart regulation (*i.e.*, alternate procedures). In light of the decades of conflict over the USACE's use of Appendix C and the stated purpose of this rulemaking, developing new alternate procedures would undermine any trust the USACE has developed during this rulemaking process.

Finally, NATHPO appreciates that the development of any program alternative, including a nationwide programmatic agreement, will take a considerable amount of time. In the Notice of Proposed Rulemaking, the USACE states that its goal is to develop a program alternative by 2026, when it is next scheduled to re-issue its nationwide permits.<sup>45</sup> In the interim, the USACE will continue to use General Condition 20, except that the USACE would use Part 800 and not Appendix C when complying with General Condition 20.<sup>46</sup>

NATHPO believes that this timeline is reasonable but has concerns about the continued use of General Condition 20, as explained in the attached memorandum, even with the replacement of Appendix C with Part 800. Under General Condition 20, the USACE initiates Section 106 reviews for specific projects authorized under a nationwide permit 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[.]”<sup>47</sup> This is problematic because it makes Section 106 review conditional on the project proponent self-certifying that its undertaking may affect a historic property. It also conditions Section 106 review on a determination that the specific undertaking may affect a historic property, which is inconsistent with Part 800.<sup>48</sup> Accordingly, while the USACE develops a program alternative for nationwide permits, NATHPO recommends that the USACE require the submission of a preconstruction notification from proponents for all activities carried out pursuant to certain nationwide permits.

First, the USACE already requires proponents to submit preconstruction notifications for the following nationwide permits: 7, 8, 17, 29, 34, 38, 39, 40, 42, 44, 45, 46, 49, 50, 52, 53, 54, 55, 56, and 59. NATHPO recommends that upon receipt of a preconstruction notification for an activity falling under one these nationwide permits, the USACE should comply with the procedures set forth in General Condition 20 before authorizing the activity.

Second, the USACE already requires proponents to submit preconstruction notifications for the following nationwide permits in certain circumstances: 3, 12, 13, 14, 18, 22, 23, 27, 31, 33, 36,

---

<sup>45</sup> 89 Fed. Reg. at 9,084.

<sup>46</sup> *Id.* The notice of proposed rulemaking incorrectly identifies the applicable condition as General Condition 18. *Id.* The correct condition is General Condition 20. See 86 Fed. Reg. 2,744, 2,869 (Jan. 13, 2021).

<sup>47</sup> 86 Fed. Reg. 2,869 (Gen. Condition 20(c)).

<sup>48</sup> *Accord* 36 C.F.R. § 800.3(a); *Sisseton-Wahpeton Oyate of Lake Traverse Rsvr. v. U.S. Army Corps of Eng'rs*, No. 3:11-CV-03026-RAL, 2016 WL 5478428, at \*7 (D.S.D. Sept. 29, 2016) (“The NHPA’s implementing regulations require that this initial question not involve site-specific details of the project and historic properties existing within the APE, but look only at the type of work planned generally, assuming there could be historical properties present.”).

37, 43, 48, 51, 57, and 58.<sup>49</sup> NATHPO recommends that the USACE require the submission of preconstruction notifications for these nationwide permits in every instance, and upon receipt of a preconstruction notification for an activity falling under one of these nationwide permits, the USACE should comply with the procedures set forth in General Condition 20 before authorizing the activity. Alternatively, if the USACE is not inclined to require the submission of a preconstruction notification in every instance for these specific nationwide permits, it should nevertheless comply with the procedures set forth in General Condition 20 before authorizing the activity in the instances when a proponent is already required to submit a preconstruction notification.

Finally, the USACE currently does not require preconstruction notifications for the following nationwide permits: 1, 2, 4, 5, 6, 9, 10, 11, 15, 16, 17, 19, 20, 24, 25, 28, 30, 32, 35, and 41; unless required by a general condition. NATHPO recommends that the USACE require a preconstruction notification for nationwide permits 6, 15, 16, 19, 25, 30, and 32, and upon receipt of a preconstruction notification for an activity falling under one of these nationwide permits, the USACE should comply with the procedures set forth in General Condition 20 before authorizing the activity.<sup>50</sup>

## **V. The USACE Should Consider Developing Programmatic Agreements for General Permits**

In addition to nationwide permits, the USACE issues three other types of general permits: regional general permits, programmatic general permits, and state programmatic general permits. As with nationwide permits, NATHPO recommends that the USACE develop programmatic agreements to govern its Section 106 compliance for the issuance of these general permits. As discussed above, programmatic agreements can be developed at a national level to cover Section 106 for a nationwide program. They may also be developed for programs at the state level, multi-state level, or regional level. Accordingly, programmatic agreements can be developed that adequately cover the same geographic scope as their corresponding general permits, provided that the appropriate SHPOs sign the agreements. In order to reduce redundancy in developing these programmatic agreements, which may cover only individual USACE districts or divisions, NATHPO suggests the USACE develop prototype programmatic agreements at the national level that can be tailored and adopted as appropriate by individual districts and divisions.

As with nationwide programmatic agreements, a state programmatic agreement, a multi-state programmatic agreement, or a regional programmatic agreement would not apply to the issuance of general permits for covered activities occurring on Tribal lands. The USACE, either at a national, division, or district level would need to enter into Tribal-specific programmatic agreements to cover undertakings occurring on Tribal lands.

---

<sup>49</sup> Section 106 compliance for Nationwide Permits 20 and 37 may be covered by 36 C.F.R. § 800.12.

<sup>50</sup> The USACE may fulfill its Section 106 obligations for Nationwide Permit 15 if it adopts the Section 106 review conducted by the United States Coast Guard.

## **VI. The USACE Must Issue Guidance Directing District and Division Commands to Use Part 800 in Ongoing Section 106 Reviews**

While NATHPO applauds the USACE's decision to rescind Appendix C and use Part 800 to comply with Section 106 going forward, NATHPO understands that the USACE will continue to use Appendix C to purportedly comply with Section 106 for ongoing Section 106 reviews, as well as Section 106 reviews initiated between now and the formal rescission of Appendix C. Based on the stated goal of rescinding Appendix C, Appendix C's well-documented legal deficiencies, and the Notice of Proposed Rulemaking's explicit acknowledgement that Appendix C was never approved by the ACHP and is inconsistent with Part 800, it is unacceptable that the USACE would continue to use Appendix C for ongoing Section 106 reviews notwithstanding its formal rescission. Accordingly, NATHPO strongly urges the USACE and the Office of the Assistant Secretary of the Army for Civil Works ("OASA-CW") to immediately issue interim guidance to USACE district and division commands directing them to immediately switch to using Part 800 to comply with Section 106.

The interim guidance should direct district and division commands to use Part 800 in the first instance for all new regulatory undertakings commenced between the date the guidance is issued and the date Appendix C is formally rescinded. For all ongoing Section 106 reviews, the interim guidance should direct district and division commands to utilize Part 800 instead of Appendix C moving forward. For these ongoing reviews, the interim guidance should direct district and division commands to consult with the existing consulting parties, including Tribal Nations, THPOs, Native Hawaiian organizations, SHPOs, and the ACHP, as the case may be, and secure their approval to make the switch to Part 800 before doing so. While NATHPO believes that Appendix C should never be used, we understand that individual circumstances may be such that consulting parties may not want the regulations changed.

The goal of this consultation should be to switch to Part 800, but that switch should only happen if it is the consensus of consulting parties to switch to Part 800. Moreover, this consultation should identify steps and determinations previously made by the USACE utilizing Appendix C that need to be re-done utilizing Part 800; for example, defining the undertaking's area of potential effects and redefining the actual undertaking.

NATHPO does not believe that this directive would be disruptive to ongoing and yet-to-be-commenced Section 106 reviews. As NATHPO has detailed in its previous comments on this issue, the USACE's permitting process is not fundamentally incompatible with Part 800. While USACE staff may not have as much familiarity with Part 800 as staff in other federal agencies, consulting parties such as Tribal Nations, THPOs, Native Hawaiian organizations, SHPOs, and the ACHP, as well as essentially every CRM and historic preservation professional and firm are well-versed in Part 800, as it is the default procedures used in every other context. NATHPO has every confidence in the ability of the USACE's staff to transition quickly to Part 800 and follow its procedures particularly with oversight from existing consulting parties. Moreover, once the rulemaking is finalized and Appendix C rescinded, USACE staff will have to use Part 800 for

every single undertaking. Beginning that transition now will only aid the USACE in ensuring a smooth transition in the future.

Finally, NATHPO believes that the issuance of interim guidance is appropriate and legally sound. Notwithstanding the USACE's continued position that Appendix C was lawfully promulgated counterpart regulations, codified in the Code of Federal Regulations, the USACE has issued three sets of interim guidance that have modified how Appendix C is applied. The USACE first did so in 2002, then again in 2005, and again in 2009. While Appendix C has never been revised since it was codified in 1990, this series of interim guidance has been used by the USACE to modify the procedures set forth in Appendix C and to, purportedly, bring it in line with the 1992 amendments to the NHPA and the current version of Part 800. Moreover, as described through these comments and in the attached memorandum, Appendix C is not a lawful counterpart regulation. Accordingly, since Appendix C was not lawfully promulgated in the first place, there should be no concern with issuing guidance directing district and division commands to not use it prior to its formal rescission.

If the USACE and the OASA-CW are unwilling to issue this interim guidance before the formal rescission of Appendix C, NATHPO strongly recommends that the USACE and the OASA-CW issue this guidance upon Appendix C's formal rescission regarding the then on-going Section 106 reviews. NATHPO has previously requested that the OASA-CW issue similar guidance on May 30, 2023. That letter is attached.

## **VII. The USACE Should Revoke Its Prior Interim Guidance and Memoranda**

Since it was formally adopted in 1990, Appendix C has never been revised or updated despite the NHPA being substantially amended in 1992 and the ACHP substantially reworking Part 800 in 1999. Instead, the USACE has published a series of interim guidance and memoranda that have sought to conform Appendix C to the current version of Part 800 and that have asserted Appendix C's legality and consistency with Part 800. As discussed in the attached memorandum, this interim guidance and memoranda do not cure Appendix C of its legal deficiencies and have served as a basis for the USACE to assert the lawfulness of its continued use of Appendix C. With the formal rescission of Appendix C, the USACE should formally revoke the following interim guidance and memoranda:

- (1) Memorandum from Karen Durham-Aguilera, Acting Chief, Operations Division, Directorate of Civil Works, U.S. Army Corps of Engineers, to Commands, Major Subordinate Commands, and District Commands, U.S. Army Corps of Engineers (June 24, 2002)
- (2) U.S. Army Corps of Engineers, *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)

- (3) Memorandum from Michael B. White, Chief, Operations Division, Directorate of Civil Works, U.S. Army Corps of Engineers, to All Major Subordinate Commands, District Commands, U.S. Army Corps of Engineers (Apr. 25, 2005)
- (4) U.S. Army Corps of Engineers, *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* (Apr. 25, 2005)
- (5) Memorandum from Lawrence A. Land, Acting Chief, Operations Division, Directorate of Civil Works, U.S. Army Corps of Engineers, to All Major Subordinate Commands and District Commands, U.S. Army Corps of Engineers (Jan. 31, 2007)
- (6) Statement from Office of Assistant Secretary of the Army for Civil Works, *Statement Regarding the Applicability of Appendix C for Historic Properties* (Dec. 10, 2008)
- (7) Memorandum from James R. Hannon, Acting Chief, Operations Division, Directorate of Civil Works, U.S. Army Corps of Engineers, to Regulatory Chiefs, U.S. Army Corps of Engineers (Jan. 6, 2009)

#### **VIII. The USACE Must Engage in Nation-to-Nation Consultation with Tribal Nations on the Development of its Joint ACHP Guidance**

In the Notice of Proposed Rulemaking, the USACE states that “[a]s a supplement” to the rulemaking, it is working “with the ACHP to draft and disseminate guidance for the Corps’ Regulatory Program to include illustrative examples regarding how the apply the 36 CFR part 800 regulations to potential permitting scenarios.”<sup>51</sup> The goal of this guidance is to “ensure clarity and consistency . . . as well as *transparency for the regulated public* as to how the Corps Regulatory would comply with section 106 of the NHPA through its implementing regulations at 36 CFR 800.”<sup>52</sup> NATHPO supports the development of this guidance. Nevertheless, NATHPO is concerned that this guidance is being developed in a vacuum.

One of the stated goals of this guidance is to ensure “transparency” regarding how the USACE is complying with Section 106. That transparency starts with the development of this guidance. NATHPO requests that the USACE and the ACHP engage in Nation-to-Nation consultation with Tribal Nations and THPOs in the development of this guidance in accordance with Executive Order No. 13175 and the USACE’s and the ACHP’s individual Tribal consultation policies. Likewise, the USACE and the ACHP should engage in consultation with Native Hawaiian organizations and SHPOs. Finally, the USACE and the ACHP should provide the public with an opportunity to review and comment on this guidance.

---

<sup>51</sup> 89 Fed. Reg. at 9,084.

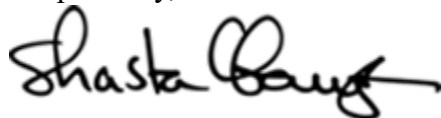
<sup>52</sup> *Id.* (emphasis added).

Once the USACE rescinds Appendix C and moves forward with utilizing Part 800, it will be up to consulting parties in individual Section 106 processes to ensure that the USACE is following Part 800 correctly. While the ACHP has an oversight role and may be involved in the review of some undertakings, for the vast majority of the USACE's Section 106 processes, the ACHP will not be involved. Since it will fall on consulting parties—Tribal Nations, THPOs, Native Hawaiian organizations, SHPOs, and preservation organizations—as well as CMR firms, historic preservation professionals, and the public to hold the USACE accountable, these entities should be involved in the development of the guidance that the USACE will use to comply with Part 800.

## IX. Conclusion

NATHPO is pleased to submit these comments in support of the USACE's proposed rulemaking to rescind Appendix C. This action has been forty-four years in the making and represents a significant step by the USACE to repair its relationships with Indian Country. NATHPO applauds and commends the leadership and staff in the OASA-CW and the USACE for seeing this rulemaking through to this point. As this rulemaking continues, and the USACE develops programmatic agreements and guidance, NATHPO looks forward to continuing to work with the USACE, the OASA-CW, and their staff to implement the full rescission of Appendix C and adoption of Part 800. Should you have any questions about NATHPO's comments, please do not hesitate to contact us by email at: [sgaughen@palatribe.com](mailto:sgaughen@palatribe.com) and [valerie@nathpo.org](mailto:valerie@nathpo.org); or our legal counsel, Wesley James Furlong, Native American Rights Fund, by email at: [wfurlong@narf.org](mailto:wfurlong@narf.org).

Respectfully,



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



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

Attachments (4)

Memorandum re. Appendix C Legal Deficiencies (Apr. 9, 2024)  
NATHPO Comments to OIRA re. Appendix C Rulemaking (Dec. 12, 2023)  
NATHPO Letter to ASA-CW Connor re. Interim Guidance (May 30, 2023)  
NATHPO Comments to USACE re. Appendix C Rescission (Aug. 2, 2022)

c.c.

Jaime A. Pinkham, Principal Deputy Assistant Secretary of the Army (Civil Works)  
U.S. Department of the Army

Sarah C. Bronin, Chair  
Advisory Council on Historic Preservation

Reid J. Nelson, Executive Director  
Advisory Council on Historic Preservation