

NCSHPO

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August 2, 2022

Ms. Stacy Jensen
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

RE: Docket ID: COE-2022-0006; Comments on Army Corps Regulatory Program Procedures for the Protection of Historic Properties at 33 CFR 325, Appendix C

Dear Ms. Jensen:

The National Conference of State Historic Preservation Officers (NCSHPO) appreciates the opportunity provided to our members to participate in a July 27th listening session dedicated to the Federal Register notice, dated June 2, 2022, from the Department of the Army, Civil Works with the U.S. Army Corps of Engineers (Corps) which, among other things, seeks public input regarding how it complies with Section 106 of the National Historic Preservation Act (Section 106), 54 USC 306108. Given the statutory role that State Historic Preservation Officers (SHPOs) have in the Section 106 process, our members have many years of experience in working with the Corps and their compliance with the National Historic Preservation Act.

The consensus of SHPOs which was delivered during the listening session was and is abundantly clear – our members recommend that Appendix C be rescinded, that the Corps should rely on the standard Section 106 consultation process outlined in 36 CFR Part 800, and that substantial training should be offered to relevant Corps staff to educate them on the requirements of the National Historic Preservation Act as well as the implementation of Section 106. It was also noted that while program alternatives are offered to the standard Section 106 process under 36 CFR Part 800, that such alternatives should be carefully considered and focused on specific types of undertakings. Alternately, programmatic agreements directly with individual states or a region of states may help to tailor the process to provide relevant and appropriate efficiencies.

Fundamental to the position of SHPOs that Appendix C should be rescinded are observations based in both law and practice. First, and foremost, congress bestowed upon the Advisory Council on Historic Preservation (ACHP) the responsibility for and jurisdiction over the Section 106 process. The ACHP's regulations governing this process are the ones found in 36 CFR Part 800. While these regulations do provide federal agencies different paths to achieve compliance, they do not permit an agency to unilaterally develop their own process, with different requirements and definitions, and without any consultation with statutorily required consulting parties. Therefore, in our view, Appendix C is not only problematic, it is illegal – which should be reason enough for its rescission.

Aside from the poor legal ground Appendix C rests upon, in practice, it deviates from the intent of the NHPA which not only causes tremendous confusion – but also causes needless project delays and results

in lawsuits because it binds the Corps into following a flawed process. Perhaps the most serious of these deviations is the Corps' use of "permit area," instead of the "area of potential effect," which is stated in the ACHP's regulations. The corps repeatedly chooses a narrow "permit area" in defining their area of jurisdiction for an undertaking which frequently bears no resemblance to the actual "area of potential effect," or area where the effects of the project upon historic properties will be realized. This results in their overlooking serious effects to historic properties – even when they may be obvious. The result is conflict, poor consultation with federally recognized Tribes and other stakeholders, legal challenges, and in the worst cases, unmitigated adverse effects to historic properties.

Another problem of particular importance to SHPOs is the 10-day review period mandated in Appendix C. The ACHP regulations provide SHPOs with a 30-day review period. Once again, SHPOs were never consulted on this reduced review period and, given the complexity of many Corps projects, it is wildly unrealistic. Each SHPO, on average, consults on more than 2,000 undertakings per year. They simply do not have the capacity to meet a 10-day review requirement – particularly one that accompanies a process developed outside of standard consultation protocols and is thus inherently deficient.

SHPOs are committed to their statutory role outlined in the NHPA and are eager to work with the Corps to find appropriate solutions to achieve compliance with Section 106 - while delivering the infrastructure projects of importance to all of us. Thank you again for the opportunity to comment and for your interest in addressing the many issues associated with Appendix C.

Respectfully,



Erik M. Hein
Executive Director