



THE SUQUAMISH TRIBE

PO Box 498 Suquamish, WA 98392-0498

THE ARMY CORPS OF ENGINEERS' APPENDIX C (NATIONAL HISTORIC PRESERVATION ACT REGULATIONS) SHOULD BE REPEALED

Background

The intent of National Historic Preservation Act (NHPA) is to protect places of historic, architectural, and/or cultural significance and to provide a meaningful balance between preservation and new construction by incorporating the consideration of historic properties and traditional cultural properties (TCPs) in federal agency planning. Prior to the NHPA, desecration of tribal sacred sites, including those used since time immemorial for religious, cultural, and ceremonial purposes, was common place. The Advisory Council on Historic Preservation (ACHP), the independent federal agency charged by Congress with overseeing implementation of the NHPA, remains the sole federal agency authorized by statute to promulgate implementing regulations for Section 106.¹ For decades the ACHP has repeatedly expressed its view that the U.S. Army Corps of Engineers' (USACE) application of Appendix C (Section 106 regulations) on proposed projects does not fulfill the agency's responsibility under the NHPA and is not in compliance with Section 106 of the NHPA. Consistent application of Section 106 regulations across agencies is essential to maintain integrity of the Section 106 process and to protect historic properties and TCPs. The NHPA provides a much more expansive recognition that TCPs play a major role in protecting indigenous cultural beliefs, customs, and practices. The NHPA requires tribal consultation as part of the NHPA process to help ensure that impacts on TCPs are considered and provides confidentiality for and protection of cultural information disclosed by tribes.² If a historic site and/or TCP is identified as a site that could be impacted by a project, the federal agency must determine whether the project will have an adverse impact on the property and must consider the views of consulting parties. The agency may consider direct and indirect effects that are far away in distance or time, including cumulative effects, as long as the effects are reasonably foreseeable.³ If an agency determines there will be an adverse effect, then the agency is required to consult with the Tribal Historic Preservation Office (THPO) or the State Historic Preservation Office (SHPO) and other consulting parties to develop alternatives to avoid, minimize, or mitigate the adverse effects.⁴

The USACE's Appendix C Section 106 regulations are not only problematic, particularly for tribes, but they significantly conflict with and are not in compliance with the NHPA and ACHP's regulations, provide less protection of historic properties and TCPs, and are invalid. The protection of traditional cultural properties and historical places was not within Congress's purview in 1802 when it enacted legislation to permanently establish the USACE.⁵ In the 1980s, the USACE promulgated its own Section 106 regulations (Appendix C), without the ACHP's approval, as a component of its general permit program and appears to be "the primary

¹ See 54 U.S.C. § 304108(a); see also 54 U.S.C. § 306102(b)(5)(A) (requiring federal agency procedure to be consistent with the NHPA's regulations).

² 54 U.S.C. § 302701(e); Protection of Historic Properties, 65 Fed. Reg. 77,698 (proposed Dec. 12, 2000) (final rule codified as amended at 36 C.F.R. § 800 (2013)).

³ 36 C.F.R. § 800.5 (a) (2013).

⁴ *Id.* § 800.6 (a).

⁵ See Act of Mar. 16, 1802, ch. 9, 2 Stat. 132; The National Trust on Historic Preservation published a report that suggests the organic act of a federal agency affects its implementation of Section 106 of the NHPA. Nat'l Trust for Historic Pres. The National Forest System: Cultural Resources at Risk 11 (May 2008).



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method of eliminating unnecessary federal control.”⁶ The USACE’s longstanding mission is in part “to strengthen our Nation’s security, energize the economy and reduce risks from disasters.”⁷ The emphasis on economic development in the USACE’s mission statement may be one of the underlying bases for the USACE’s stated regulatory policy “to avoid unnecessary regulatory controls”⁸ and that policy gives rise to the incompatibility the ACHP’s regulations. The USACE’s application of Appendix C is a root cause of the current dispute associated with the Dakota Access Pipeline project.

As compared to the ACHP’s regulations, the USACE’s Appendix C regulations significantly limit the USACE’s responsibilities. Appendix C, therefore, is less protective of historic properties and TCPs while at the same time provides more protection of economic interests. Several key components of Appendix C that are inconsistent with the NHPA and offer significantly less protection include:

(1) Appendix C Significantly Decreases the Area of Potential Effect. Appendix C significantly limits the USACE’s geographic scope/ jurisdiction of the “area of potential effect” (APE) to the “permit area” (reliance on the “waters of the United States”) rather than using a definition of APE consistent with the ACHP’s regulations that defines the APE as the geographic area(s) within which an undertaking may *directly or indirectly* cause alterations in the character or use of historic properties. The ACHP regulations further define the APE as influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking. Even if the USACE argues that its jurisdiction is constitutionally limited to “waters of the United States,”⁹ Congress can invoke its jurisdiction over Indian affairs to require the USACE to consider impacts on TCPs.¹⁰

(2) Appendix C Significantly Narrows the Definition of Adverse Effects. Appendix C significantly limits the USACE’s responsibility by narrowing the definition of adverse effects in a manner that does not follow the law, and is not in sync with the ACHP’s regulations. The limitation of the APE to the “permit area” combined with the narrowing of the definition of “adverse” effect ignores the ACHP’s regulatory requirements that consider direct and indirect effects that are far away in distance or time, including cumulative effects, as long as the effects are reasonably foreseeable. This in turn creates unnecessary and unauthorized risk for historic properties and TCP’s.

(3) Appendix C Does Not Require Tribal Consultation. Appendix C does not require consultation with tribes but provides merely that tribes “may be consulted as part of the district engineer’s investigations”; it does not require consultation with tribes at any point.¹¹ The ACHP’s regulations require tribal consultation and consultation with THPO and SHPO. Further, if the district engineer deems there is little likelihood that historic properties exist or will be affected, only a public notice is required. Public notice is not an adequate procedure

⁶ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206 (Nov. 13, 1986) (codified as amended at 33 C.F.R. § 325 app. C (2013)); 33 C.F.R. § 320.1 (a) (3).

⁷ Mission and Vision – Headquarters U.S. Army Corps of Engineers, <http://www.usace.army.mo:/About/Mission-and-Vision/> (visited on October 3, 2016).

⁸ 33 C.F.R. § 320.1 (a) (3).

⁹ *Rapanos v. United States*, 547 U.S. 715, 741 (2006).

¹⁰ See *United States v. Lara*, 541 U.S. 193, 201-02 (2004) (jurisdiction over relations with other sovereigns, including Indian nations, is vested in the federal government through the “necessary concomitants of nationality.”)

¹¹ 33 C.F.R. § 325 App. C (5) (e)(2013) (“[I]nvestigations may consist of . . . further consultations with . . . Indian tribes . . .” (emphasis added); *Id.* § 325 App. C(9)(a) (“[M]ay coordinate . . . with . . . any appropriate Indian tribe . . .” (emphasis added)).



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for government-to-government consultation. Government-to-government consultation is most effective when commenced as early as possible in the federal decision-making process. Finally, Appendix C grants the USACE the sole right to terminate consultation, unlike the ACHP regulations that provide for other parties to terminate consultation.

(4) Appendix C Fails to Fully Protect Confidentiality. The NHPA and the ACHP's regulations require agencies to withhold confidential information during the process of identifying historical properties/TCPs "when disclosure may cause significant invasion of privacy; risk harm to the historic property; or impede the use of a traditional religious site by practitioners."¹² Appendix C only protects information from disclosure when there is a "substantial risk of harm, theft, or destruction."¹³ Unlike the ACHP's regulations, this provision does not include language that protects the integrity of TCPs for the purpose of cultural practice. Although destruction of a property is of concern, the cultural uses of a TCP are often significant and are not offered protection by Appendix C. A lower standard of confidentiality is allowed in Appendix C.

Unauthorized Delegation of Rulemaking Authority

Three federal courts have enjoined the USACE from using Appendix C, holding that Appendix C is inconsistent with the ACHP's regulations.¹⁴ Congress did not explicitly or implicitly delegate regulatory authority to the USACE to promulgate its own Section 106 regulations under an authorizing statute; a federal agency does not have independent legislative power. If Congress intended to delegate authority to other agencies besides the ACHP, it would have done so explicitly.¹⁵ By promulgating and utilizing regulations that narrow its Section 106 responsibilities, the USACE has violated both the intent and the letter of the law. In addition, Appendix C allows the USACE to avoid the Section 106 review process and has the effect of excluding analysis of TCPs as mandated by Congress.¹⁶ Although Appendix C may reflect the USACE's mission to promote economic development, the USACE's mission and authorizing statutes do not adequately integrate historic preservation into the agency's mandate and give rise to the desecration of sacred sites. The NHPA and the ACHP's regulations should consistently govern historic preservation when a federal agency has a conflicting mission that is likely to prioritize other values over historic preservation.

For all the above reasons, the repeal of Appendix C will eliminate the application of incongruent regulations that provide less protection for historic properties and TCPs during the permit review of a proposed development project, will foster integrity and consistency in future application of the Section 106 regulatory process, and will provide certainty for all stakeholders, including project developers. The USACE must comply with all federal laws in its review of permit applications, including the NHPA.

¹² 36 C.F.R. § 800.11(c) (1).

¹³ 33 C.F.R. § 325 App. C (4) (c) (2013).

¹⁴ See *Colo. River Indian Tribes v. Marsh*, 605 F.Supp.1425, 1437 (C.D. Cla.1985) (invalidating Corps definition of "permit area"); *Comm. To Save Cleveland's Huletts v. U.S. Army Corps of Eng'rs*, 163 F. Supp.2d 776, 791-92 (N.D. Ohio 2001) (voiding permit for Corps failure to wait for ACHP comments); *Salyer Park Vill. Council v. U.S Army Corps of Eng'rs*, 2003 WL 22423202, at *4 (S.D. Ohio Jan. 17, 2003) (permanent injunction because Corps improperly terminated consultation). But see *Sierra Club v. Slater*, 120 F.3d 623, 636 (6th Cir. 1997) (holding that the Corps could follow a provision in Appendix C that allows the Corps to rely on a lead agency in complying with the NHPA); *McGehee v. U.S. Army Corps of Eng'rs*, 2011 WL 2009969 at *5 (W.D. Ky. May 23, 2011)(holding that ACHP and Corps definition of the APE did not conflict under the circumstances).

¹⁵ See *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.")

¹⁶ See 54 U.S.C. § 302706.