



Sisseton-Wahpeton Sioux Tribe

LAKE TRAVERSE RESERVATION

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November 23, 2016

Office of the Assistant Secretary – Indian Affairs
Office of Regulatory Affairs & Collaborative Action
1849 C Street, NW, MS 3642
Washington, DC 20240

Re: **Federal Consultation with Tribes Regarding Infrastructure Decision-Making**

Dear Assistant Secretary,

On behalf of the Sisseton-Wahpeton Oyate of the Lake Traverse Reservation, I am responding to your solicitation for comments pertaining to federal consultation with tribes regarding infrastructure decision-making. The motivation for your initiative to consult with Indian tribes on infrastructure decision-making is the Dakota Access Pipe Line (“DAPL”). Accordingly, our comments are focused on DAPL and other decisions made by the U.S. Army Corps of Engineers.

INTRODUCTION

Since 1986, the Corps of Engineers’ has operated under its own regulations to comply with the National History Preservation Act (“NHPA”), which are found at 33 C.F.R. § 325, App. C.¹ The Corps’ regulations are commonly referred to as Appendix C. 77 FR 10184, 10250. The NHPA requires that the Corps’ Appendix C must be consistent with the regulations issued by the ACHP. 54 U.S.C. § 306102. The Advisory Council on Historic Preservation (“ACHP”) has determined that the Corps’ regulations are not consistent with the ACHP’s regulations. Consequently, Appendix C, as supplemented by the Corps own Interim Guidance in 2005 and 2007, has not been approved by the ACHP as required by 36 C.F.R. § 800.14. Thus, the ACHP’s regulations must govern the Corps’ NHPA responsibilities for DAPL, but the ACHP’s regulations have been ignored.

¹ Final Rule for Regulatory Programs of the Corps of Engineers, 51 Fed. Reg. 41,206, 41,236 (Nov. 13, 1986) (codified as amended at 33 C.F.R. § 325 app. C).

1. The Corps is acutely aware that Appendix C fails to comply with the NHPA.

The Corps has acknowledged that Appendix C no longer complies with the NHPA. As far back as 2002, 2003, 2004, and 2005, the Corps published notice in the Federal Register that Appendix C must be amended to comply with the 1992 NHPA amendments, as well as the 2000 and 2004 regulations issued by the ACHP. The Corps only ended up issuing Interim Guidance to Appendix C in 2005² and 2007.³ Despite over 14 years of publicly acknowledging that Appendix C is legally deficient, the Corps still fails to make the changes necessary to Appendix C or otherwise adhere to the ACHP's regulations in order to comply with the NHPA.

As early as 2002, the Corps understood that Appendix C did not conform with the ACHP's regulations:

On January 11, 2001, the Advisory Council on Historic Preservation (ACHP) finalized its regulations at 36 CFR Part 800 to comply with the 1992 amendments to the National Historic Preservation Act (NHPA). Currently the Corps Regulatory Program uses procedures found at 33 CFR part 325, Appendix C, to comply with the NHPA and other laws dealing with historic properties. 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.

Request for Comments, 67 FR 10822, 10822 (Mar. 8, 2002). Later in 2002, the Corps once again explained that "significant changes" to the NHPA and the ACHP regulations required changes to Appendix C. Unified Agenda, 67 FR 74095, 74098 (Dec. 9, 2002).

In 2003, the Corps published the same planning information in the Federal Register, but this time specified that the Corps would either propose changes to Appendix C or "work with the ACHP to develop other Federal agency program alternatives, to comply with the requirements of the NHPA and other historic preservation laws." Unified Agenda, 68 FR 72459, 72462 (Dec. 22, 2003).

In 2004, the Corps issued an advanced notice of proposed rulemaking to solicit comments on "how our permit application processing 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 property." Procedures for the Protection of Historic Properties, 69 FR 57662, 57622 (Sept. 27, 2004).

In 2005, the Corps again announced that it needed to revise Appendix C due to the "substantial changes in policy" achieved by Congress's 1992 amendments to the NHPA and the ACHP's new 2000 and 2004 regulations. Unified Agenda, 70 FR 64132, 64134 (Oct. 31, 2005).

To date, the ACHP has never approved Appendix C. Also in 2005, the Corps issued its "Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation

² http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/InterimGuidance_25apr05.pdf

³ http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/inter_guide2007.pdf

Regulations at 36 CFR Part 800.”⁴ The Corps explained that it had already issued “interim guidance” in 2002 “to address the changes to the section 106 process until our permit processing procedures can be revised through the Administrative Procedures Act process.” 2005 Interim Guidance, p. 1.

2. The ACHP has repeatedly and consistently informed the Corps that Appendix C fails to comply with the NHPA.

The ACHP has informed the Corps that Appendix C does not comply with the NHPA or the ACHP’s regulations and, still, the Corps has done nothing.

On October 9, 2008, the ACHP informed the Corps that it sees “major problems with the Corps’ concept proposal: the definition of undertaking; the definition of Area of Potential Effects; and the nature of consultation required in the Section 106 process.”⁵ On November 7, 2008, the Corps responded to the ACHP that “I have instructed the Army Corps of Engineers to stand down its efforts to revise Appendix C, *Historic Properties*, the regulation currently in force for complying with section 106.”⁶

Seven years later, the ACHP once again informs the Corps that Appendix C is legally deficient:

Developed in 1990 and known generally as Appendix C (“Procedures for the Protection of Historic Properties”) of 33 C.F.R. 325 (“Processing of Department of the Army Permits”), the Corps uses this regulation to comply with Section 106. The Corps did not, as required, develop Appendix C as an alternative pursuant to 36 C.F.R § 800.14. Further, the ACHP has never approved Appendix C as a counterpart regulation for implementing Section 106, as required by Section 110(a)(2)(E) of the NHPA, because it differs from the Section 106 regulations in many ways, especially in terms of a number of essential core elements including: the definition of undertaking; the delineation of the APE; the scope of effort for identification of historic properties in the APE; and the nature of consultation during the Section 106 review.⁷

The Corps has ignored the ACHP for years now and it Indian tribes who suffer the consequences.

3. Despite the Corps knowledge that Appendix C is legally defective, the Corps still utilized Appendix C on the Dakota Access Pipeline.

Instead of following the ACHP’s regulations, as it was required to do under the NHPA, the Corps followed its own regulations, which both the ACHP and the Corps have acknowledged to be legally deficient.

⁴ http://www.usace.army.mil/Portals/2/docs/civilworks/regulatory/InterimGuidance_25apr05.pdf See Department of Defense, Unified Agenda, Statement of Regulatory Priorities, 72 FR 69793, 69794 (Dec. 10, 2007).

⁵ October 9, 2008, correspondence to Assistant Secretary of the Army for Civil Works, Paul Woodley, from Chairman John Nau, Advisory Council on Historic Preservation.

⁶ November 7, 2008, correspondence to Chairman John Nau, Advisory Council on Historic Preservation, from Assistant Secretary Woodley.

⁷ <http://www.achp.gov/docs/fapc.pdf>

Federal Courts have determined that Appendix C is without legal force. Because it is not consistent with the NHPA or the ACHP's regulations, "the Corps cannot rely on its own regulations to determine compliance with the NHPA." Comm. to Save Cleveland's Hulets v. U.S. Army Corps of Eng., 163 F.Supp.2d 776, 792 (N.D.Ohio 2001), see, Colorado River Indian Tribes v. Marsh, 605 F.Supp. 1425, 1437 (1985) (Appendix C cannot be relied upon by the Corps to only consider the permit area, as opposed to the ACHP's Area of Potential Effects.). Thus, "the Corps' reliance on its own regulations exceeds its statutory and regulatory authority." Lorentz, Melissa (2014) "Engineering Exceptions to Historic Preservation Law: Why the Army Corps of Engineers' Section 106 Regulations Are Invalid," William Mitchell Law Review: Vol. 40: Iss. 4, Article 11.

4. Appendix C ensures that a fraction of the Dakota Access Pipeline is subject to the NHPA.

According to the U.S. Army Corps of Engineers, one of the most environmentally destructive mechanisms – an oil pipeline – is not subject to regulation by the United States government and is, therefore, largely exempt from the NHPA:

No federal agency has jurisdiction over oil pipelines. For this project, USACE has jurisdiction over a very small portion of the overall pipeline and may not regulate where it does not have jurisdiction. In this case, it may only regulate the areas where the pipeline crosses waters of the United States or federal real property interests acquired and managed by the Corps for flood control and navigation projects.⁸

The Corps then construes its legal obligation to comply with the National Historic Preservation Act as synonymous with its legal obligations under the Clean Water Act. Whether the Corps must regulate the entire length of the 1,100 mile oil pipeline under the Clean Water Act ("CWA") is a separate issue from its duty to consider the entire pipeline under the NHPA.

This is so because the NHPA does not limit itself to the Corps' direct jurisdiction, such as a CWA permit. Instead, the NHPA requires the Corps, prior to its approval, to "take into account the effect of the undertaking on any historic property" for undertakings under its direct jurisdiction and under its "indirect jurisdiction." 54 U.S.C. § 306108. Further, the Corps "shall afford the Council a reasonable opportunity to comment with regard to the undertaking." 54 USCA § 306108. The present situation occurred because the Corps carried out its duties under Appendix C, which is invalid and legally deficient, and then ignored the comments provided by the ACHP.

5. The Corps allows the permittee to carry out its federal responsibilities under the NHPA.

To make matters even worse, the Corps also maintains General Conditions to Nationwide Permits, such as NWP 12, which purports to allow the permittee to carry out the Corps' section 106 responsibilities. General Condition 20 pertains to the National Historic Preservation Act and explains that a permittee determines whether historic properties may be effected.

⁸ <http://www.nwo.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-Article-View/Article/749823/frequently-asked-questions-dapl/>

The Corps cannot be informed of its NHPA responsibilities by a permittee. "Where the non-Federal applicant has identified historic properties . . . the non-Federal applicant shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects or that consultation under Section 106 of the NHPA has been completed."⁹ The Corps turns the NHPA on its head and turns a federal responsibility into a private, and biased, responsibility.

Conclusion

The Tribe appreciates the opportunity to consult with you on this important matter and looks forward to changes being made in Federal law that will result in compliance with the NHPA, as well as timely and meaningful consultation.

Sincerely,



Dave Flute
Chairman

⁹ http://www.usace.army.mil/Portals/2/docs/civilworks/nwp/2012/NWP2012_corrections_21-sep-2012.pdf Even if the Corps receives a pre-construction notification, then it will merely follow Appendix C. Id.