



HO-CHUNK NATION

November 30, 2016

Office of the Assistant Secretary – Indian Affairs
Attn.: Office of Regulatory Affairs & Collaborative Action
1849 C Street, NW, MS 3071
Washington, DC 20240

Re: Ho-Chunk Nation Comments from
November 15, 2016 Consultation Meeting (Mystic Lake Casino)

To Whom It May Concern:

On November 15, 2016, the US Departments of the Interior, Justice, and Army invited tribal leaders to provide comment on how the federal consultation process “can better allow for timely and meaningful Tribal input from federally-recognized Tribes.” More specifically, the federal departments sought input on two issues:

1. *Promoting Meaningful Government-to-Government Engagement within the Existing Framework.*

How can Federal agencies better ensure meaningful Tribal input into infrastructure-related reviews and decisions, to protect Tribal lands, resources, and treaty rights within the existing framework? This category of questions includes topics related to how a Federal agency implements existing policies and procedures, staff training and expertise, how an agency approaches Tribal consultation, and what can be done to promote Tribal capacity to participate in timely and meaningful consultation.

2. *Identifying Any Necessary Change to the Existing Framework.*

Where and when does the current framework present barriers to meaningful consultation? What changes to the current framework would promote these goals? This category of questions includes potential change to regulations, policies, and procedures, as well as statutory changes that would increase timely and meaningful consultation.

With that, the Ho-Chunk Nation assembled a delegation to provide input. The delegation consisted of the following leadership:

Wilfrid Cleveland, President
Henning Garvin, Legislator

Robert TwoBears, Legislator
David Greendeer, Legislator
Kathleen LoneTree-Whiterabbit, Legislator
Matthew Mullen, Legislator
Colling Price, Public Relations Officer
Jon Greendeer, Executive Director of Heritage Preservation
William Quackenbush, Tribal Historic Preservation Director
Michael Murphy, Legislative Counsel
Carolyn Grzelak, Legislative Attorney
Amanda L. WhiteEagle, Attorney General

The Ho-Chunk Nation has a long history with the U.S. departments requesting the Nation's input. That history has involved discussions relating to traditional/cultural properties, easements/accessways, environmental standards/regulation, and collaborative policy building and negotiated rulemaking. The Ho-Chunk Nation understands the finite scope of regulatory authority and oversight of each department participating in the November 15, 2016 consultation.

Ho-Chunk Nation Background

The Ho-Chunk people have a deep felt, moral imperative to protect the land they call home and the living things that exist there. They recall being in the land now known as Wisconsin from the beginning of time. The Ho-Chunks' traditional territory stretches from around Green Bay, Wisconsin—where oral traditions say we began—west to Minneapolis, south to Northern Iowa and Illinois, and north to the western banks of Lake Michigan. Every point of history has a story told among the Ho-Chunk people. Our oral tradition goes back to an era when ice sheets covered the earth and the Woolly Mammoth walked the land.

Our people have always utilized their surroundings for their survival. We are and always have been hunters, fishermen, farmers, and caretakers of this land. We relied heavily on our abilities to adapt to all around us, motivated by our obligation to take care of what we had the best way that we knew how. The southern half of what is now known as Wisconsin was and is our traditional homeland; we have cared for and defended it for thousands of years. Even after multiple forced removals, we always returned on foot to take care of the land and the environment we were given.

Contemporary vernacular will dub our people *stewards* of the land. Today, albeit changed a bit, we still continue our responsibility to protect the environment we live in. Our efforts are not onerous to our Nation nor our many communities and households. Our concerns stretch to cover every living person, plant, animal, and organism we cohabitate with. For this reason, we submit the following comments.

Environmental Concerns Impacted by a Lack of Consultation

Wisconsin's tribes have rarely, if ever, been given the opportunity to provide input on industrial development projects that threaten the state's environment at times when such input would be meaningful. Some examples of this are instructive.

In the late 70s, Exxon began an initiative to mine a site in Crandon, Wisconsin adjacent to the Mole Lake Sokaogon Chippewa and Forest County Potawatomi Reservations. Large-scale metallic sulfide mining operations threatened the headwaters of our rivers, lakes, creeks, and aquifers. Vigilant opposition led to the project's political demise. First, a federal court decision recognized tribes' authority to seek treatment as State. A mining moratorium followed. Ultimately, the site was purchased from Exxon following the company's decision to abort the project entirely.

In October of 2000, the Ho-Chunk Nation joined forces with Concerned Citizens of Newport against a proposed water mining operation near the Wisconsin Dells area, a significantly historical area of the Ho-Chunk people. Later, a court ruled in favor of Midwest Environmental Advocates against the Wisconsin DNR who thought Perrier's operation would not harm the environment. Perrier moved on.

Recently, tribal and non-tribal citizens mounted up against Gogebic Taconite (GTAC) Corp. GTAC planned to build a mining operation large enough to eliminate one of the largest landscapes in that region of the state. The aesthetic losses paled in comparison to the degradation of our state's natural waterways and underlying water systems. Once again, staunch opposition of a collective body of citizens, organizations, and tribes led to the abandonment of the project.

Currently, Enbridge runs Line 61, a tar sands oil pipeline, from Superior (Northern Border) to Pontiac, Illinois through the middle of the state. This line currently transfers over 400,000 barrels of diluent. The diluent threatens life along its path with an undefinable impact zone and has left at its point of extraction in Canada a scene of barren, lifeless devastation.

Enbridge is currently seeking to upgrade its 13 pump stations in the state to either expand the transfer capacity of its current line or twin Line 61 requiring an additional 200 feet of area to increase the flow to 1.2 million barrels per day. The intent of this expansion is projected to double the highly controversial Dakota Access Pipeline with an environmental threat level incomparable to anything witnessed in the Midwest. The threat overshadows the 2010 Enbridge rupture of Line 5 in Kalamazoo, MI which released nearly 1 million gallons of crude in to the environment causing massive death to every leaving lifeform in its path.

These are solid examples to which tribes have been given insufficient notification if any much less, an opportunity to convey their thoughts on projects that directly or indirectly effect their communities, lands, and membership. Sovereign nations were forced to be treated as citizens and sometimes cast out as "non-residents" in very limited public forums held well after lawmakers passed bills and agency officials took measures to pave the way for the corporations to advance their plans.

There is a series over the last two decades in which consultation did not reflect proper notice nor a reasonable opportunity to respond. In this time period, major projects circumvented the consultation requirements which are universally expected by tribes in a government-to-government relationship.

The above-listed are not isolated cases. Examples of this culture of disregard for meeting the basic or even minimum guidelines for consultation include but are not limited to the push to host a proposed nuclear waste facility, an unregulated sulfuric acid railway transport, the Duluth (to Wausau, WI), the railway expansions over traditional and cultural properties, the rampant proliferation of Frac Sand Mining operations, large-scale cranberry operations, and (but not limited to) industrial factory (pig) farming.

General Recommendations On Consultation/Consultation Process

The Ho-Chunk Nation has experience consulting with various federal agencies, including the Army, National Park Service, General Services Administration, Advisory Council on Historic Preservation, National Indian Gaming Commission, Bureau of Indian Affairs, Department of Interior, H.U.D. and the Department of Transportation. The Nation has found that Federal agency consultation with Tribes needs improvement. We offer the following comments:

1. Tribes should be treated as sovereign nations by Federal agencies during consultation, not as members of the general public. This means tribes should be the first to receive communication about a project that could have tribal impacts, and that tribes should have greater input into the process of federal decision-making before the federal decision is made. This will ensure proper respect for tribal sovereignty and that Federal agencies are honoring their Trust duty.
2. Federal agency consultation with tribes must be meaningful. Meaningful consultation means more than just checking a box. More than a boilerplate letter to several tribes, informal communication with a tribal member or staffer, or a single meeting with a tribe. And it certainly is not meeting with a tribe to inform them of a decision that has already been made. Meaningful consultation begins with communication that is early, frequent, and made to several officials of the tribe. Federal agencies making decisions that impact tribal interests on infrastructure projects should recognize tribal law, standards and criteria for consultation. After consultation with a tribe, the tribe may then issue a motion of support for a decision, or reject the decision, pursuant to tribal law or procedure.
3. The consultation process should allow tribes to provide information, data, and evidence regarding a federal action that will be included in the agency's record as it makes a decision. As with federal "notice and comment rulemaking," the federal agency should be required to respond to such tribal information and then justify its final decision in writing.
4. There should be a method of dispute resolution or enforcement when Federal agency consultation fails. This could mean that each agency has their own approach or a uniform framework is adopted, either by Federal rule, agency policy, or as an agreement entered into with a tribe at the outset of consultation.

Legal Response

Specifically with respect to the second question asked within the Federal Consultation Framing Paper, the Ho-Chunk Nation offers the following recommendations:

I. Repeal Appendix C to 33 CFR Part 325, Promulgated by the Army Corps of Engineers, because it contradicts Section 106 of the National Historic Preservation Act.

A. Background

“Congress enacted the National Historic Preservation Act (“NHPA”) in 1966 to foster conditions under which our modern society and our prehistoric and historic resources can exist in productive harmony.” *CTIA-Wireless Ass’n v. FCC*, 466 F.3d 105 (D.C. Cir. 2006), *citing* 16 U.S.C. § 470-1(1). The NHPA has been characterized as a “stop, look, and listen” statute that requires agencies to fully consider the effects of its actions on historic, cultural, and sacred sites. *See, e.g., Te-Moak Tribe of Western Shoshone v. Nevada v. U.S. Dep’t of Interior*, 608 F.3d 592, 606 (9th Cir. 2010). Section 106 of the NHPA requires that prior to issuance of any federal funding, permit, or license, agencies must take into consideration the effects of that “undertaking” on historic properties. 54 U.S.C. § 306108. Agencies “must *complete* the section 106 process *prior* to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license.” 36 C.F.R. § 800.1 (emphasis added). The NHPA also created the Advisory Council on Historic Preservation (“ACHP”), an independent agency charged with implementing the Act, as well as the National Register of Historic Places, the nation’s official registry of historically and culturally important sites. 54 U.S.C. §§ 304101, 304102.

The Section 106 process requires consultation between agencies and Indian Tribes on federally funded or authorized “undertakings” that could affect sites that are on, or could be eligible for, listing in the National Register, including sites that are culturally significant to Indian Tribes. 54 U.S.C. § 302706 (properties “of traditional religious and cultural importance to” a Tribe may be included on the National Register, and federal agencies “shall consult with any Indian Tribe...that attaches religious or cultural significance” to such properties); 36 C.F.R. § 800.2(c)(2). “Consultation is the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the Section 106 process.” *Id.* § 800.16(f). Consultation must occur regarding sites with “religious and cultural significance” to Indians even if they occur on ancestral or ceded land. *Id.* § 800.2(c)(2)(ii)(D). An agency official must “ensure” that the process provides Tribes with “a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties....articulate its views on the undertaking’s effects on such properties, and participate in the resolution of adverse effects.” *Id.* § 800.2(c)(ii)(A). This requirement imposes on agencies a “reasonable and good faith effort” by agencies to consult with Tribes in a “manner respectful of tribal sovereignty.” *Id.* 36 C.F.R. § 800.2(c)(2)(ii)(B); *see also id.* § 800.3(f) (any Tribe that “requests in writing to be a consulting party shall be one”).

Section 106 consultation involves a multi-step process to evaluate potential effects to listed or potentially eligible sites. *See, e.g. Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999). A threshold step is determining the area of potential effects (“APE”) of the federal undertaking. 36 C.F.R. § 800.4(a)(1). The APE is defined to include the area “within which an undertaking may directly or indirectly cause

alterations in the character or use of historic properties....” *Id.* § 800.16(d). An agency must then identify historic properties within the APE that could potentially be affected. *Id.* § 800.4(b). The agency must evaluate the historic significance of such sites, and determine whether they are potentially eligible for listing under the National Register. *Id.* § 800.4(c). Next, the agency must evaluate the potential effects that the undertaking may have on those properties, *id.* § 800.5, and, finally, the agency must resolve any such adverse effects through the development of mitigation measures. *Id.* § 800.6. At every one of these steps, the agency *must* consult with Indian tribes that attach religious and cultural significance to affected sites, even if they are outside Tribal lands. *Id.* § 800.3(f); § 800.4(a); § 800.5(c)(2); § 800.6; *id.* § 800.2(c)(ii)(D).

The National Historic Preservation Act grants the ACHP, and only the ACHP, the authority to promulgate implementing regulations. *See* 16 U.S.C. § 470s (2012). The ACHP has, in turn, delegated the authority to other federal agencies to implement alternate procedures for the Section 106 process, substituting them for the ACHP’s regulations. (36 C.F.R. § 800.14(a); Protection of Historic Properties, 65 Fed. Reg. 77,698, 77,723 (proposed Dec. 12, 2000) (final rule codified as amended at 36 C.F.R. § 800). But this does not mean that federal agencies can implement wildly different Section 106 programs. The procedures must be consistent with the ACHP’s regulations, and the agency must obtain ACHP approval. (36 C.F.R. § 800.14(a).)

The U.S. Army Corps of Engineers (hereinafter, “Corps”) did promulgate its own Section 106 regulations in the 1980s, codified as “Appendix C” to the Corps’ regulations on processing permits. *See* 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 (2013)). However, there is no record that the ACHP has approved Appendix C, *see Comm. to Save Cleveland’s Hulett v. U.S. Army Corps of Eng’rs*, 163 F. Supp. 2d 776, 792 (N.D. Ohio 2001), and Appendix C conflicts with the ACHP’s regulations in several respects.

B. Regulatory Inconsistencies

One inconsistency is the Corps’ definition of the “area of potential effect” (APE). *See Comm. to Save Cleveland’s Hulett*, 163 F. Supp. 2d at 789, 791–92. The ACHP defines the APE as “the geographic area or areas within which an undertaking may *directly or indirectly* cause alterations in the character or use of historic properties.” 36 C.F.R. § 800.16(d) (2013) (emphasis added). In contrast, the Corps limits the APE to the “permit area.” *See* 33 C.F.R. § 325 App. C(5)(f) (2013).

The NHPA’s 1992 amendments put traditional cultural properties (TCPs) under the statute’s protection and explicitly require federal agencies to consider impacts to TCPs. *See* 16 U.S.C. § 470a(d)(6) (2012). Even if the Corps argued that its jurisdiction is constitutionally limited to “waters of the United States,” Congress can invoke its jurisdiction over Indian affairs to require the Corps to consider impacts on TCPs. *See United States v. Lara*, 541 U.S. 193, 201–02 (2004) (explaining that jurisdiction over relations with other sovereigns, including Indian nations, is vested in the federal government through the “necessary concomitants of nationality”). Requiring federal agencies to consider impacts to TCPs effectively expanded their jurisdictional authority,

ensuring federal programs are consistent with the United States' trust responsibility toward tribes. Because the federal government has constitutional power over Indian affairs, the Corps cannot claim that jurisdictional limitations preclude consideration of TCPs outside of the "permit area."

Another area of inconsistency between Appendix C and Section 106 regulations has to do with the identification of historic properties. The ACHP's regulations require agencies to consult with tribes in the process of identifying historic properties within the APE. *See* 36 C.F.R. 800.4(b) (2013). Yet, the Army Corps has enumerated exceptions in an attempt to limit its section 106 responsibilities. *See* 33 C.F.R. § 325 App. C(3)(b). Appendix C provides for three situations in which the district engineer may unilaterally determine that there is little likelihood that historic properties exist or may be affected: (1) areas that have been extensively modified by previous work, (2) areas created in modern times, and (3) work that is so limited in scope that it is unlikely to affect historic properties even if they were present. *Id.* The ACHP's regulations provide for the third exception, but not for the first two. *See* 36 C.F.R. § 800.3(a)(1). Appendix C's first exception - areas modified by previous work - potentially excludes TCPs from analysis. Some archeologists and tribes argue that a TCP may retain its cultural and historic significance even after development significantly modifies the area. Since the Corps' regulations do not mention the concept of TCPs, there is even more danger that TCPs may be left out of a Corps Section 106 analysis. TCPs can be easily overlooked absent proper consultation, since the cultural values that make a TCP significant are sometimes intangible. *See* PATRICIA L. PARKER & THOMAS F. KING, NAT'L PARK SERV., GUIDELINES FOR EVALUATING AND DOCUMENTING TRADITIONAL CULTURAL PROPERTIES 1 (1990, rev. 1998) BULLETIN 38 at 14.

Another way Appendix C limits the Corps' responsibility is by narrowing the definition of adverse effects. *See* 33 C.F.R. § 325 App. C. On the other hand, the ACHP has provided for an expansive definition of adverse effect:

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 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.*

See 36 C.F.R. § 800.5(a)(1) (emphasis added). The ACHP's regulations list several examples of potential adverse effects, including visual, atmospheric, or auditory effects. *Id.* § 800.5(a)(2). The ACHP's regulations also specifically provide that transfer, lease, or sale of the property out of federal ownership or control may be an adverse effect, unless there are legally enforceable conditions to ensure long-term preservation of the property's historic character. *Id.* §800.5(a)(2)(vii).

In contrast, the Corps provides three exceptions where an effect will not be considered adverse: (1) where the property only has research value and that value can be substantially preserved by conducting research, (2) when the undertaking is limited to

rehabilitation of buildings and structures, or (3) when the undertaking is limited to the transfer, lease, or sale of historic property. *See* 33 C.F.R. § 325 App. C (15)(c). The research exception in the Corps' regulations is out of date. In 1986, the year Appendix C was adopted, the ACHP's regulations also contained a research exception. *See*, THOMAS F. KING, FEDERAL PLANNING AND HISTORIC PLACES: THE SECTION 106 PROCESS (2000) at 73. However, the ACHP eliminated this exception in 1999. *Id.* The destruction of an archeological site or another property with research value is now unambiguously an adverse effect under the ACHP's regulations. *Id.*

There are also inconsistencies in the area of tribal consultation. From the Ho-Chunk Nation's perspective, consultation with tribes is an integral component of the common law federal trust responsibility. Effective consultation is also crucial to achieving the goal of cultural resource protection under Section 106. *See Attakai v. United States*, 746 F. Supp. 1395, 1408 (D. Ariz. 1990), because consultation is often the only way to identify TCPs. *See* Dean B. Suagee & Jack F. Trope, *Protection of Native American Sacred Places on Federal Lands*, 54 ROCKY MNT. MIN. L. INST. 12-1, § 12.02[2][c] (2008).

The ACHP's regulations incorporate the tribal consultation requirements of the 1992 NHPA amendments. *See, e.g.*, the National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, tit. XL, § 4006, 106 Stat. 4600, 4755-57 (codified as amended at 16 U.S.C. § 470A(d)(1)(C) (2012)) ("The Secretary shall consult with Indian tribes, other Federal agencies, State Historic Preservation Officers, and other interested parties . . ."), and 36 C.F.R. § 800.2(c)(2)(i)-(ii) (discussing consultation on tribal lands in the absence or presence of an appointed THPO and the consultation on historic properties of significance). Any tribe that attaches cultural significance to a property that "may be affected by an undertaking," regardless of the location of the historic property, should be included as a consulting party. (36 C.F.R. § 800.2(c)(2)(ii) (emphasis added). This includes consultation on the scope of the APE, the identification and evaluation of historic properties, the potential effects of the undertaking on the properties, and the resolution of adverse effects. *Id.* § 800.2(c)(2)(ii)(A).

Yet, the Army Corp's Appendix C provides only that tribes *may* be consulted as part of the district engineer's investigations. *See* 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)). The language of Appendix C does not *require* consultation with tribes at any point. *See id.*, § 325 App. C. Where tribes are mentioned, they are referred to on similar terms as other interested parties. *See, e.g., id.* § 325 App. C(4)(a) (public notice will be sent to tribes).

Appendix C further limits consultation requirements when the district engineer determines there is little likelihood that historic properties exist or will be affected. *See* 33 C.F.R. § 325 App. C(3)(b). In such cases, Appendix C requires the district engineer only to provide public notice explaining the determination. *Id.* Considering that the district engineer might not consult with tribes in defining the area of potential effect, this means a tribe might not find out that the undertaking affects a TCP until the public notice stage. *Id.* Generic public notice is not an adequate procedure for government-to-

government consultation. Rather, the process contemplated by the ACHP is more fitting and effective when commenced as early as possible in the federal decision-making process. *See generally* 36 C.F.R. § 800.16(f) (defining consultation as the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them).

C. As applied by the Army Corps to the Standing Rock Sioux

Unfortunately, many of the inconsistencies described above were evident in the way the Army Corp mishandled the Dakota Access Pipeline ("DAPL") permit and its application of Appendix C with respect to the Standing Rock Sioux tribe. The Army Corps' made determinations of eligibility as well as its "No Historic Properties Affected" and "No Adverse Effect" findings for portions of DAPL located in Iowa, Illinois, North Dakota, and South Dakota. The Corps stated that its determinations were appropriate and that its Section 106 review was completed. However, the Corps was at odds with the ACHP, specifically with respect to Appendix C.

The ACHP notified the Army Corps that Appendix C was not a substitute for the Section 106 regulations. The ACHP pointed out to the Corps that the differences between the Section 106 regulations and Appendix C are substantial and continue to confuse consulting parties and complicate Section 106 reviews. Chief among these differences includes the Corps decision, on this case, to review each Pre-construction Notification crossing as a separate undertaking and thereby dismiss the potential for effects to historic properties that may be located within the broader project area of an undertaking when properly defined under the Section 106 regulations.

The ACHP acknowledged that although Appendix C provides measures for the identification and protection of historic properties, it remains fundamentally inconsistent with the government-wide Section 106 regulations and the standards applied by all other federal agencies in the protection of historic properties. As it related to the DAPL and Standing Rock Sioux, such inconsistencies left the Corps unable to fully meet its legal obligations under Section 106.

D. Regulatory Fix

At least three federal courts have enjoined the Army Corps from using Appendix C, as it is inconsistent with the Protection of Historic Properties regulations under 36 C.F.R. 800. *See Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985) (invalidating Corps definition of "permit area" in Appendix C, which was a proposed regulation at the time); *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 the Corps issued without waiting for ACHP comment); *Slayer Park Vill. Council v. U.S. Army Corps of Eng'rs*, No. C-1-02-832, 2003 WL 22423202, at *4 (S.D. Ohio Jan. 17, 2003) (permanently enjoining construction permit because Corps improperly terminated consultation). This calls the legality of the Corps' implementing regulations into question, creating an uncertainty for tribes and other governments. This, combined with the points raised above, highlight the need for a regulatory fix.

The most straightforward solution to the problem of contradictory regulations is to change the regulations themselves. The Ho-Chunk Nation urges the repeal of Appendix C altogether. Because there are many points of inconsistency, a repeal would be the simplest and most comprehensive fix.

A less desirable solution would be to amend Appendix C. Any amendments should eliminate the Corps' definition of "area of potential effect" and incorporate the ACHP's definition. The Corps should also eliminate the exceptions that allow the district engineer to determine that historic properties are unlikely to be present and the exceptions to what may be considered an "adverse effect." There need to be stronger provisions for confidentiality, and tribal consultation should be integrated throughout the section 106 process. At minimum, the Corps should promulgate regulations that would make enforceable the consultation provisions already laid out in guidance documents.

II. Amend Section 404 of the Clean Water Act Must to Prohibit the Use of National Permits to Avoid Tribal Consultation.

A. Background

Congress enacted the Clean Water Act in order to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To accomplish this goal, the Act prohibits the discharge of any pollutant, including dredged spoil or other fill material, into waters of the United States unless authorized by a permit. *Id.*, § 1311(a); 33 C.F.R. pt. 328 (defining waters of the United States). Unless statutorily exempt, all discharges of dredged or fill material into waters of the United States must be authorized under a permit issued by the Corps. 33 U.S.C. § 1344(a)-(e).

The Rivers and Harbors Act similarly prohibits a number of activities that impair ports, channels and other navigable waters. Section 10 of the Act, 33 U.S.C. § 403, among other things, makes it unlawful "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of" any navigable water without a permit from the Corps. Like § 404 permits, § 10 permits may be issued as individual permits or pursuant to the Nationwide Permit program and are generally subject to many of the same regulations. A separate provision of the Act, known as "Section 408," makes it unlawful to "build upon, alter, deface, destroy, move, injure, obstruct by fastening vessels thereto or otherwise, or in any manner whatever impair the usefulness of any sea wall, bulkhead, jetty, dike, levee, wharf, pier, or other work built by the United States" without a permit from the Corps. *See* 33 U.S.C. § 408. Prior to issuance of a § 408 permit, the Corps must determine whether the use or occupation will be injurious to the public interest or impair the usefulness of the project.

The Corps is authorized to issue two types of permits under its § 404 and § 10 authorities: individual permits and general permits. *Id.* The Corps issues individual permits on a case-by-case basis. *Id.*, § 1344(a). Decisions on such permits are made after a review involving, among other things, site specific documentation and analysis, public notice and opportunity for a hearing, a "public interest analysis," and a formal determination. 33 C.F.R. § 322.3; Parts 323, 325. The Clean Water Act also authorizes the Corps to issue "general" permits on a state, regional or nationwide basis. 33 U.S.C. § 1344(e). Such

general permits may be issued for any category of similar activities that “will cause only minimal adverse environmental effects when performed separately, and will have only minimal cumulative adverse effect on the environment.” *Id.* The purpose of this approach to permitting is to “regulate with little, if any, delay or paperwork certain activities that have minimal impacts.” 33 C.F.R. § 330.1(b).

The Corps issued the current set of 48 nationwide permits (“NWP”) in February of 2012. 77 Fed. Reg. 10184 (Feb. 21, 2012). The 2012 NWPs in “most cases” authorize discharge into regulated waters without any further process involving the Corps. In effect, the NWP pre-authorizes certain categories of discharge, without any additional approval from, or even notification to, the Corps. 33 C.F.R. § 330.1(e)(1). In other instances, discharges cannot occur until the proponent of the action files a “pre-construction notification” (“PCN”) to the Corps, and receives verification from the Corps that the proposed action is consistent with the terms of the NWP. *Id.* § 330.6(a). The specifics of whether or not a PCN is required are spelled out in each individual NWP as well as a series of “general conditions” accompanying the NWP. 77 Fed. Reg. at 10282.

The NWP program also includes a set of general conditions that are applicable to all NWPs, include NWP 12. General Condition 20 (“GC 20”) addresses historic properties. Under GC 20, a non-federal permittee must submit a PCN “if the authorized activity may have the potential to cause effects to any historic priorities listed on, determined to be eligible for listing on, or potentially eligible for listing on the National Register of Historic Places, including previously unidentified properties.” *Id.* at 10284. If a PCN is provided, the Corps purports to comply with Section 106 of the NHPA prior to verifying that the NWP is applicable, and work may not commence until such verification is provided. 33 C.F.R. § 330.5(g)(2). Conversely, if no PCN is provided, no Section 106 process occurs. NWP 12 was formally adopted by the Corps in a “Decision Document” signed by Major General Michael J. Walsh on Feb. 13, 2012. Ex. 1. In responding to public comment regarding potential impacts to tribal sites, the Decision Document states that compliance with NHPA on NWP implementation is carried out via GC 20. *Id.* at 10.

Against this general backdrop, the Army Corps deferred to NWP 12 and General Condition 20 for critical portions of the DAPL, especially those nearing federal lands and TCPs of the Standing Rock Sioux tribe. Because issuance of NWP 12 was a federal undertaking, Section 106 consultation was required to determine the effect of such undertaking on historic properties. 54 U.S.C. § 306108 (“prior to the issuance of any license, [the Federal agency] shall take into account the effect of the undertaking on any historic property”) (emphasis added); 36 C.F.R. § 800.1(c) (agency official must “complete” Section 106 process prior to issuance of license). However, the Corps did not consider the impacts of NWP 12 on historic or culturally significant properties, or otherwise engage in the Section 106 consultation process, prior to issuance of NWP 12 in 2012. Instead, the 2012 Decision Document adopting NWP 12 states simply that Section 106 is addressed through GC 20, which largely shifts the responsibility for Section 106 compliance to private project proponents – here, the private company.

By enacting NWP 12 and GC 20 in the DAPL and Standing Rock Sioux situation, the Army Corps authorized discharges into waters of the United States in a way that sidestepped the entire Section 106 process. Under NWP 12 and GC 20, private project

proponents make their own determinations as to the effects on tribally significant sites without any involvement of the Tribes. Under NWP 12 and GC 20, Tribes are not provided any opportunity, let alone a reasonable one, to identify their concerns or assist in the identification of historic sites. Under NWP 12 and GC 20, the Corps is not responsible for the findings and determinations regarding adverse effects. Under NWP 12 and GC 20, private project proponents decisions can be made in a vacuum, with no input, no notice, no accountability, and no oversight.

B. Legal Recommendations

Based on the above points and authorities, the Ho-Chunk Nation supports the arguments set forth by the Standing Rock Sioux tribe and ACHP with respect to the Clean Water Act, Nationwide Permit 12 and General Condition 20. The law should be amended to prevent the Army Corps from delegating its federal duty to third parties to perform tribal consultation and the analysis of adverse impacts on cultural properties. Tribes should also be more involved in the process of PCNs by project proponents and the Army Corps. In the DAPL matter, the Corps failed to adequately consult with tribes regarding the identification and assessment of eligibility and effects on properties of religious and cultural significance to them that could have been affected by the undertaking in PCN areas, in the vicinity of water crossings within the project right of way. Instead, the assessment of impacts was initially swayed by the private party's assumption that no PCNs were required under GC 20 of the Nationwide Permit protocols.

In conclusion, if you should have any questions or concerns, then please contact me at your earliest convenience.

Sincerely,



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