Business Community Comments on the
Proposed Rule; Processing of Department of the Army Permits;
Procedures for the Protection of Historic Properties

Docket ID No. COE-2023-0004

Association of American Railroads
American Farm Bureau Federation
American Gas Association
Associated General Contractors of America
American Petroleum Institute
American Road & Transportation Builders Association
Liquid Energy Pipeline Association
National Association of Home Builders
National Mining Association
National Rural Electric Cooperative Association
National Stone, Sand & Gravel Association
U.S. Chamber of Commerce

April 9, 2024

Via Regulations.gov April 9, 2024

Docket ID No. COE-2023-0004
Joseph McMahan
U.S. Army Corps of Engineers,
441 G Street NW Attn: CECW-CO-R
Washington, DC 20314-1000

RE: Proposed Rule; Processing of Department of the Army Permits; Procedures for the Protection of Historic Properties; 89 Fed. Reg. 9079; Docket ID No. COE-2023-0004

Dear Mr. McMahan:

The undersigned associations (the "Coalition") offer the following comments in response to the U.S. Army Corps of Engineers' ("Corps") proposed rule concerning procedures for the protection of historic properties under Section 106 of the National Historic Preservation Act ("NHPA"), as those procedures relate to the processing of Department of the Army permits by the Corps' Regulatory Program.[1] As explained below, the Corps should not revoke its agency-specific procedures ("Appendix C")[2] for complying with the NHPA or rely exclusively on regulations issued by the Advisory Council on Historic Preservation ("ACHP"), to be supplemented by forthcoming guidance that has not been made available for public review. The Appendix C procedures specify how the Corps demonstrates compliance with Section 106 of the NHPA. This includes the critical Nationwide Permit ("NWP") Program, a streamlined program intended to authorize minor activities with minimal review time. Rather than abandoning its longstanding agency-specific process, which is contemplated by the NHPA, to the extent needed the Corps could propose targeted amendments to Appendix C through a notice and comment rulemaking.

Our organizations represent a diverse set of economic sectors that form the backbone of the American economy—agriculture, construction, energy, home building, mining, railroads, transportation, and other sectors. Our members serve many critical needs, including addressing the digital divide in rural and large urban areas; facilitating construction of public transit to connect communities to job centers; upgrading ports; ensuring the safety and reliability of our transportation networks through road and bridge repairs and modernization; enhancing domestic agricultural production; mining critical and strategic minerals; building out water and energy infrastructure, including power lines to transmit electricity and pipelines to transport oil and natural gas, low greenhouse gas intensity hydrogen, and carbon dioxide, and other sectors that support a strong economy and progress toward meeting our ambitious climate goals; and many other national enterprises essential to meeting the needs of our modern society.

[1] Processing of Department of the Army Permits; Procedures for the Protection of Historic Properties, 89 Fed. Reg. 9079 (Feb. 9, 2024). Several Coalition members submitted comments on the proposed rule requesting that the Corps extend the comment deadline and issue the guidance contemplated by the proposed rule for public comment, including the National Mining Association; the National Rural Electric Cooperative Association; the National Stone, Sand & Gravel Association; the American Gas Association; and the National Association of Home Builders.

[2] 33 C.F.R. Part 325, Appendix C.

We support the goals of Section 106 to ensure that each federal agency identifies and assesses the effects its actions may have on historic and cultural resources, including through meaningful consultation with States, Tribes, and other stakeholders. Our members participate actively in these reviews and consultations as part of the process for seeking Corps permits for activities within the Corps' narrow water-based regulatory jurisdiction under Section 404 of the Clean Water Act ("CWA"), Sections 9 and 10 of the Rivers and Harbors Act of 1899 ("RHA"), and the Marine Protection, Research, and Sanctuaries Act of 1992 as amended.

In addition, our members have a substantial interest in a commonsense, streamlined permitting program that is predictable, efficient, transparent, provides regulatory certainty, and that is informed by stakeholder input. To that end, the Corps should retain Appendix C rather than changing a decades-old approach that was developed for a reason that remains. The unique nature of the Corps' regulatory authorities and its narrow legal jurisdiction over private activity is distinct from its role as a project agency that funds, builds, and frequently operates large federal projects, such as dams and levee systems. Appendix C lawfully implements Section 106 of the NHPA in a flexible manner that can be tailored to specific facts and that reflects the limits of the agency's legal authority under the laws that create the regulatory program.

I. The Corps Should Retain Appendix C

The Corps should retain Appendix C. For more than 30 years, Appendix C has provided agency-specific Section 106 procedures that are consistent with the NHPA, consistent with the ACHP's regulations, and appropriately tailored to the Corps' Regulatory Program.

A. The Corps' Agency-Specific Procedures Are Encouraged by the NHPA, Which Focuses on Effects of *Agency* Actions

The NHPA contemplates the development of agency-specific procedures to implement an agency's obligations under the Act. Such a tailored approach makes sense, especially for the Corps' Regulatory Program, because the agency has unique jurisdiction established by the particulars of its substantive authorities. The NHPA does not alter the Corps' legal jurisdiction under those authorities and Section 106 is expressly limited to an "undertaking" that the federal agency has authority to "license."[3]

The NHPA provides that "[e]ach Federal agency shall establish . . . a preservation program for the identification, evaluation, and nomination to the National Register of Historic Places, and protection of historic properties."[4] The statute further requires that each agency-specific program ensures that historic properties "subject to be potentially affected *by agency actions*

[3] Section 106 reads: "The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property. The head of the Federal agency shall afford the Council a reasonable opportunity to comment with regard to the undertaking." 54 U.S.C. § 306108.

[4] *Id.* § 306102(a).

are given full consideration in planning . . . ."[5] The statute requires that the agency's "procedures" be "consistent with regulations promulgated by the [ACHP] . . . ."[6]

The NHPA does not outline a process requiring the ACHP to "approve" the agency's procedures. As the Corps recognizes in the proposed rule, the ACHP established its own process for "approving" another agency's Section 106 procedures in 1979, relying on a Presidential Memorandum on Environmental Quality and Water Resource Management issued by the Carter Administration. When amending its regulations, the ACHP stated in part that the purpose of the amendments was to "encourage agencies to develop internal regulations to comply with the requirements of the [NHPA] and [the ACHP's regulations] . . . ."[7] The ACHP further stated that the amendments were geared towards "allow[ing] Federal agencies greater flexibility in implementing the procedural requirements of [the ACHP's] regulations . . . an agency may choose to develop counterpart regulations that can be tailored to meet the specific requirements of its planning and decision making processes."[8] This is exactly the role that Appendix C plays in the Corps' permitting process.

Further, the NHPA does not modify the agency's narrow regulatory authorities or allow the agency to reach beyond its legal jurisdiction. Instead, the NHPA encourages federal agencies to adopt their own Section 106 procedures to protect resources that could potentially be affected by their own *agency actions*, the scope of which the agency has a unique understanding. For the Corps, Appendix C affords the agency the flexibility to structure its review as warranted by the particular facts of a permit application and the extent of its legal jurisdiction. For example, under the CWA, the Corps' legal jurisdiction is limited to the discharge of dredge or fill material into waters of the United States. Linear projects, like roads, pipelines, and transmission lines, typically implicate minor impacts to jurisdictional waters at crossings of such waters along the route of the overall project. That crossing, rather than the overall project, is the "undertaking" requiring NHPA review since it is the activity requiring the Corps permit.[9] Furthermore, the federal courts have consistently upheld the Corps' approach to narrowly focus their required environmental reviews to those specific areas within the Corps' jurisdiction.[10] This contrasts with, for example, the broader jurisdiction possessed by the U.S. Bureau of Land Management over private projects

[5] *Id.* at § 306102(b)(3) (emphasis added).

[6] *Id.* at § 306102(b)(5)(A).

[7] 44 Fed. Reg. 6068 (January 30, 1979).

[8] *Id.* at 6071.

[9] *See* 86 Fed. Reg. 2744 (Jan. 13, 2021) (2021 NWP Reissuance).

[10] See e.g., *Sierra Club v. U.S. Army Corps of Eng'rs*, 2020 WL 7389744, *11-14 (D. Me. 2020). Environmental organizations challenged under NEPA the Corps' decision to perform a segmented NEPA review focusing its review within those specific areas under the agency's jurisdiction. Environmentalists had alleged the Corps improperly segmented its required environmental review under NEPA and should have conducted an environmental review of the entire project rather than specific segments under the Corps' jurisdiction. The Court upheld the Corps' segmented NEPA analysis, stating that the Corps did not have sufficient control nor responsibility to warrant a federal review of the entire project.

built entirely on lands subject to the agency's jurisdiction under the Federal Land Policy and Management Act.

Thus, the agency-specific procedures encouraged by the NHPA are particularly necessary for an agency like the Corps, which has limited jurisdiction over private activity under its regulatory authorities.

B. Appendix C is Consistent with the NHPA and with 36 CFR Part 800

In the proposed rule, the Corps states that differences between Appendix C and the ACHP rules justify its proposal, but the Corps fails to explain *how* those differences constitute a justification for revocation of Appendix C. Appendix C is both consistent with the NHPA itself and with the ACHP's regulations at 36 CFR Part 800. As described above, the statute explicitly provides that federal agencies should design their own procedures. And Appendix C is substantively consistent with the ACHP's regulations, while tailored to the Corps' unique authorities.

The Corps has maintained that "it is far from clear that there is a conflict between the Corps' and Advisory Council's [Section 106] regulations."[11] The Corps has recognized that "[u]nder both sets of regulations," the Corps must "make [a] reasonable and good faith effort" to identify historic properties within the undertaking's area of potential effects.[12] After years of maintaining that the two sets of regulations are consistent,[13] the Corps fails to adequately explain in the proposed rule which portions of Appendix C it now considers to be inconsistent with 36 CFR Part 800.

A comparison of key terms under both sets of regulations, referenced in the proposed rule, demonstrates that Appendix C is consistent with the ACHP's regulations and with the NHPA's encouragement of agency-specific procedures that are tied to *agency* actions. For example, the ACHP defines the statutory term "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval." Appendix C tailors that definition to the action from that list that the Corps Regulatory Program undertakes: permitting. Appendix C defines undertaking as "the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 320-334." This definition should

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[11] USACE's Opposition To Plaintiff's Motion For Preliminary Injunction, *Standing Rock Sioux Tribe v. USACE* at 44 (Aug. 18, 2016) (citing *McGehee v. U.S. Army Corps of Eng'rs*, No. 3:11-CV-160-H, 2011 WL 2009969, at *16-17 (W.D. Ky. May 23, 2011) ("such conflict is not inevitable nor present here. Of course, the Corps defines 'permit area' differently than the definition of "area of potential effects," . . . but both sets of regulations recognize that effects of an undertaking outside the footprint of a project should be considered.")).

[12] *Id.* at 16 (citing 36 C.F.R. § 800.4(b)(1)).

[13] The Corps conducted a review of certain NWPs as well as Appendix C and found that Appendix C is an acceptable "'Federal Agency Program Alternative' under 36 CFR 800.14 and shall substitute for all of Subpart B of said regulation, and is fully consistent with the ACHP's regulations." *Corps' 2017 Energy-Related NWPs Review* at 5. The Corps also found that "[r]ulemaking to amend Appendix C is not necessary because the Corps issued guidance in 2005 and 2007 to make the Corps' procedures in Appendix C fully consistent with the ACHP's regulations." *Id.* The Corps reiterated its position relating to Appendix C in its most recent NWP rule. 86 Fed. Reg. 2744, 2851 (Jan. 13, 2021).

be noncontroversial since it merely re-states the relevant language from the NHPA and ACHP definitions. It reflects the language of Section 106 itself as well as the ACHP regulations while establishing the link to the applicable regulatory authorities.[14]

Under Appendix C, the Corps decides what "work, structure or discharge" is the activity requiring the permit to establish the parameters of its undertaking. For example, Congress did not give the Corps the authority to permit or regulate linear projects, such as pipelines and highways.[15] Rather, under Section 404 of the CWA and Section 10 of the RHA, the Corps permits activities that may be conducted as part of those overall projects — the discharge of dredge or fill material into waters of the United States or the alteration of navigable waters of the United States as part of construction of the larger nonfederal project.[16] Indeed, the Corps recognizes that it does not have the authority over construction of a linear project in uplands outside of the agency's jurisdiction, while it undertakes a permit application review.[17] Under General Condition 20 of the NWP program, a pre-construction notification is triggered by the potential for effects to historic properties only based on the "activity" authorized under the NWP – the specific activity within the legal jurisdiction of the Corps, not the entire project over which the Corps does not have permitting jurisdiction.[18]

In other words, the entirety of a nonfederal linear project with limited jurisdictional impacts cannot be viewed as an undertaking within the meaning of the NHPA for the purposes of the Corps' permitting program.[19] As previously stated, the NPHA does not expand an agency's legal jurisdiction and Section 106 is expressly limited to an "undertaking" that the federal agency has the authority to "license." In other circumstances, the Corps may have permitting authority over the entirety of the nonfederal project, such as a pier, which may only be constructed at all based on a permit issued under Section 10 of the RHA. The Appendix C definition is consistent

[14] The Corps has also stated that the word "activity" in the definition of "undertaking" under 36 CFR Section 800.16(y) "recognizes that federal agencies may not issue permits for entire projects, and those federal agencies might only issue permits or licenses for specific components of entire projects." Corps' 2017 Energy-Related NWPs Review at 113. This consistent approach is reiterated in the 2021 NWPs Reissuance, 86 *Fed. Reg.* 2744, 2850-2851 (Jan. 13, 2021).

[15] Those projects are often subject to the approval and regulatory authority of other federal agencies under specific statutory authorities. Where that is the case, the federal agency with overall regulatory authority may consider the entire nonfederal project to be an "undertaking" within the meaning of the NHPA for its own purposes.

[16] 33 U.S.C. 1344; 33 U.S.C. 403.

[17] *See* 86 Fed. Reg. 2744, 2770 (Jan. 13, 2021) ("Corps does not have the authority to prevent project proponents from conducting activities in uplands before they receive [Nationwide Permit] verifications from district engineers in response to [Pre-Construction Notifications])."

[18] 86. Fed. Reg. 2869-2870 (General Condition 20).

[19] *See, e.g., Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, 440 F. Supp. 3d 1, 27-28 (D. D.C. 2020) (under the NHPA, court "refused to find 'that a federal agency with limited jurisdiction over specific activities related to a pipeline is required to consider all the effects of the entire pipeline to be the indirectly or directly foreseeable effects of the narrower permitted activity'") (internal citations omitted), *aff'd in part and rev'd in part on other grounds*, 985 F.3d 1032 (D.C. Cir. 2021).

with the ACHP regulations, focusing on the activity requiring the Federal approval, and allows flexibility in light of the agency's unique regulatory authorities.[20]

Of course, the Corps does not limit its review to the precise footprint of the impacted water, but it does recognize the constraints of its statutory authorities. Within these parameters and consistent with the ACHP regulations, the agency considers how its own action (the issuance of a permit for a specific work, structure, or discharge) may directly or indirectly impact relevant resources. The ACHP regulations define the area of potential effects ("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, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking."[21] Appendix C similarly defines the Corps' "permit area" as "those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures." But the overarching theme remains the same, as succinctly stated in the Corps' most recent in the 2021 NWP reissuance: "The Corps' permit area or area of potential effects is limited to those areas and activities where the Corps has control and responsibility to address effects to historic properties through its permitting authorities under Section 404 of the [CWA] and Section 10 of the [RHA]."[22] Appendix C further states that an "effect" on a "designated historic property" occurs "when the undertaking may alter the characteristics of the property that qualified the property for inclusion in the National Register."[23] Appendix C further clarifies that "[c]onsideration of effects on 'designated historic properties' includes indirect effects of the undertaking."

Appendix C itself provides examples of how the Corps' legal jurisdiction relates to its obligations under Section 106 of the NHPA and the definition of "permit area" for any particular project.[24] In one example, the Corps explains that the permit area would include an upland industrial site where that facility must be operated in conjunction with a pier and dredged channel, the latter structures requiring the Corps permit. Because the upland facility requires

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[20] That the nature of the "undertaking" is co-extensive with the scope of an agency's jurisdictional authority should be noncontroversial since the NHPA focuses on the effects of the *agency's* action and consideration of impacts and potential mitigation within the agency's authority. 54 U.S.C. § 306102(b)(3). For the Corps' Regulatory Program, this approach is reflected in its compliance with the National Environmental Policy Act where, similarly, it looks to the facts before it and the nature of its authority to define the nature of the federal action being assessed. *See* 33 C.F.R. Part 325, Appendix B. *See, e.g., Sierra Club v. U.S. Army Corps of Eng'rs*, 803 F.3d 31 (D.C. Cir. 2015). In turn, the ACHP recognizes that the NEPA action is often equivalent to the "undertaking" for purposes of Section 106, explaining: "In practice, the preferred alternative in a NEPA review may be considered equivalent to the proposed undertaking under Section 106." NEPA and NHPA: A Handbook for Integrating NEPA and Section 106, page 13 (https://www.achp.gov/digital-library-section-106-landing/nepa-and-nhpa-handbook-integrating-nepa-and-section-106).

[21] 36 CFR § 800.16(d).

[22] 86 Fed. Reg. 2851

[23] 33 CFR Part 325, Appendix C, 15(e).

[24] *Id.* at 1(g).

water access and cannot be built without the regulated activities, the Corps includes that site within the scope of the Section 106 "permit area." In another example, the Corps explains that its NHPA review would be limited to the pier where that structure is proposed only as a recreational amenity for employees at an upland facility.

Both Appendix C and the ACHP regulations require that the Corps consider the direct and indirect effects on historic properties caused by activities requiring a permit. Appendix C merely states the requirements in terms tailored to the Corps' statutory authority over work, structures or discharges impacting jurisdictional waters.

Furthermore, the Corps issued guidance, in 2005 and 2007, to ensure consistency with the ACHP's regulations in other areas. Nevertheless, in the proposed rule, the Corps suggests that Appendix C is inconsistent with the ACHP regulations because Appendix C only allows for resolution of adverse effects through a Memorandum of Agreement ("MOA") or permit conditions, while the ACHP regulations allow for the resolution of adverse effects through an MOA or a programmatic agreement. But the Corps' 2005 guidance provides mechanisms for both MOAs and programmatic agreements. The guidance provides that MOAs "are necessary for resolving how adverse effects to listed or eligible historic properties will be mitigated" and that "[a]n MOA may be incorporated into a permit through permit conditions."[25] This approach is consistent with the ACHP's approach of resolving adverse effects through an MOA, while reflecting the Corps' practice of including all project requirements in a permit's conditions. The Corps' 2005 guidance also provides the option for programmatic agreements by clarifying that "[i]f the project is particularly complex or controversial, then the district engineer will request the participation of the ACHP in the consultation."[26] This 2005 guidance language is consistent with the ACHP regulations, which contemplates the use of programmatic agreements for "complex projects or multiple undertakings."[27]

As the Corps suggests in the proposed rule, inconsistencies in consultation are not due to inconsistencies in the regulations. Rather, they are likely due to the nature of Section 106 consultations, which are highly fact specific analyses that consider a federal agency's jurisdiction in a particular situation.

C. Revoking Appendix C Would Add Cost and Delay to Permitting Process

Appendix C is appropriately tailored to the Corps' limited jurisdiction, and the agency should not diverge from an approach that has worked for the agency and the regulated public for decades. Doing so would inject the permitting process with more uncertainty and confusion, as applicants and the agency adjust to new expectations and wait for relevant guidance. This will only add to the continued uncertainty, cost, and delay related to the ever-changing regulatory definition of "waters of the United States" under the CWA. Further, without agency-specific regulations tailored to the Corps' legal jurisdiction, the agency runs the risk of being pressed to

[25] USACE 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 at 1-2, 6 (Apr. 25. 2005).

[26] *Id.* at 1.

[27] 36 CFR § 800.14(b).

expand the scope of review beyond the bounds of its lawful role and beyond the bounds of its legal authority to condition its permit decisions – imposing unnecessary cost and delay on applicants.

The Corps attempts to justify its proposed action by stating that there are challenges in implementation of Section 106 due to different interpretations of how Appendix C is to be implemented, specifically with respect to infrastructure projects and where the Corps "has regulatory jurisdiction over a very small portion of the overall project."[28] The Coalition struggles to see how revoking Appendix C and adopting the one-size-fits-all approach of the ACHP regulations would provide clarity or consistency in the Corps' Section 106 review process. The opposite seems more likely. The Corps' concern can be addressed through targeted revisions, if necessary, and staff training. Any such efforts should remain consistent with the longstanding process and reiterate that the Corps' authority is over assessment of effects from the undertaking that requires a Corps permit.[29] For example, in some instances our members have worked with Districts that implement the phrase "permit area" differently resulting in variances from project to project or even along the length of one project. Revoking Appendix C in favor of reliance on the terms of the ACHP regulations would not address this type of inconsistency – staff training is the better answer.

In particular, the Coalition is concerned about the Corps' statement that it will re-visit its approach to Section 106 compliance for the NWP Program by removing references to Appendix C.[30] To the extent this may result in the Corps broadening its review, it may result in increased need for applicants to file Pre-Construction Notifications ("PCN") seeking verification of whether the proposed activities qualify for NWP authorization – contrary to the purpose of the NWP Program. Further, removing references to Appendix C would be inconsistent with the agency's legal jurisdiction and longstanding justification for its approach. For example, relying on Appendix C the preamble to the 2021 NWPs explains: "[i]f an historic property is not directly or indirectly affected by the *proposed NWP activity*, the Corps does not have the authority to prevent effects to historic properties caused by activities outside of its control and responsibility."[31] This statement is consistent with the NHPA, the ACHP regulations, and the Corps' legal jurisdiction.

Moreover, NWP General Condition 20 protects cultural resources and lawfully implements the Corps' obligations under the NHPA by specifying that the only activities that are immediately authorized by NWPs are those with "no potential to cause effects" to historic properties. Otherwise, a non-federal applicant must submit a PCN and "shall not begin the activity until notified by the district engineer either that the activity has no potential to cause effects to historic properties or that consultation under Section 106 of the NHPA has been completed."[32] In cases where a non-Federal applicant has identified historic properties on which

[28] 2017 Energy-Related NWPs Review at 159.

[29] 86 Fed. Reg. 2851.

[30] 89 Fed. Reg. 9080.

[31] 86 Fed. Reg. 2826 (Jan. 13, 2021) (emphasis added).

[32] *Id.* at 2850, 2869 (General Condition 20).

the activity may have the potential to cause effects and a Section 106 review is triggered, the applicant cannot begin work even if the 45-day PCN review period has passed, until the USACE has provided notification or until the NHPA Section 106 consultation is completed.[33] In fact, as the Corps states, "[t]o help ensure protection of historic properties, the 'Historic Properties' general condition establishes a higher threshold than the threshold set forth in the Advisory Council's NHPA section 106 regulations for initiation of section 106 consultation."[34]

To avoid injecting unnecessary and increased uncertainty, delays, and costs into the existing regulatory program, Appendix C should not be revoked. Further, the NWP Program and General Condition 20 should not be changed in response to this proposed rule. In addition, in any future NWP reissuances or modifications, the Corps should retain its consistent approach that "[t]he NWP regulations at 33 CFR 330.4(g) and the 'Historic Properties' general condition (general condition 20), ensure that all activities authorized by NWPs comply with section 106 of the NHPA."[35]

II. To the Extent Changes Are Needed, the Corps Could Propose Revisions to Appendix C

To the extent needed, targeted changes to Appendix C can be proposed by way of notice and comment rulemaking. For example, if the Corps determines that the 2005 and 2007 guidance documents do not provide sufficient clarity surrounding topics like the use of programmatic agreements, as discussed above, the Corps could easily propose to revise and modernize portions of Appendix C to incorporate the topics set out in these guidance documents.

The Corps may wish to propose changes to Appendix C in support of the Tribal consultation process. The Corps has previously recognized the importance of modernizing the consultation process in the context of the Regulatory Program to improve Tribal consultations.[36] The Corps should consider revising Appendix C to incorporate the 2005 guidance document's discussion of consultation with Tribes and update that process as needed. Such revisions could include discussions of the role of the Tribal History Preservation Officer; what types of communications constitute "meaningful communications" between Tribal governments and district engineers; and the process for effectively considering the interests of Tribes during the district engineer's decision-making process.

Proposing targeted revisions to Appendix C, as well as associated implementation processes, rather than altering a long-established approach, would foster a permitting program that is predictable, efficient, transparent, and informed by stakeholder input.

III. Any Additional Guidance Should be Subject to Public Notice and Comment

[33] *Id.* at 2869 (General Condition 20).

[34] *Id.* at 2850.

[35] *Id.* at 2849.

[36] 87 Fed. Reg. 33756 (June 3, 2022). Several Coalition members also submitted written recommendations in response to the Corps' modernization proposal and expressed support for a robust Tribal consultation process, including the American Exploration and Mining Association; Industrial Minerals Association – North America; National Association of Home Builders; National Mining Association; National Stone, Sand, and Gravel Association; and the U.S. Chamber of Commerce.

In addition to proposing to revoke Appendix C, the Corps proposes that "[a]s a supplement, the Corps would also work with the ACHP to draft and disseminate guidance for the Corps' Regulatory Program to include illustrative examples regarding how to apply the 36 CFR part 800 regulations to potential permitting scenarios." The Corps believes this would "ensure clarity and consistency for the Corps as well as transparency for the regulated public as to how the Corps Regulatory Program would comply with section 106 of the NHPA through its implementing regulations at 36 CFR 800."

However, there is no indication that the regulated community would have the opportunity to review and provide comments on the guidance issued. Thus, it is unclear whether the guidance would provide clarity to applicants or inject unnecessary uncertainty into a well-settled Section 106 review process that is tailored to the Regulatory Program. If the Corps decides that it is inclined to revoke Appendix C and issue guidance, the Coalition urges that, before it take any such steps, the Corps issue the guidance in draft form and solicit and respond to public comment, consistent with the Administrative Procedure Act. The Corps cannot issue substantive guidance that will dictate the parameters of the permit review process without this engagement. The Coalition also urges the Corps to engage in a constructive dialogue with the regulated community to ensure that the historic preservation outcomes sought are achieved as the Corps considers any Section 106 regulatory changes.

IV. The Proposed Rule Fails to Justify its Conclusion Under the Regulatory Flexibility Act

The Corps concludes in the proposed rule that its revocation of Appendix C would not have a significant economic impact on small entities within the meaning of the Regulatory Flexibility Act. Respectfully, the Coalition disagrees. Any additional process and delay, on top of existing permitting delays, has the potential to significantly impact small entities.

In particular, the Corps dismisses any impact on small entities based on the Corps' assumption that those entities already work under the ACHP regulations by virtue of working with the Corps' Civil Works program or with other federal agencies when multiple authorizations are required for a project. First, the Corps has provided no data for its assertion that many small entities that need Corps regulatory permits also have experience with the Corps' Civil Works program and are experienced with the ACHP regulations in that context.

Second, the Corps' assertion is belied by the very nature of the permitting program. For example, the CWA applies to any "water of the United States" located on any type of property in the United States, including private property. As the Corps is well aware, individuals, families, small entities, and even larger entities regularly seek Corps permits where no other federal authorization is required. Any additional process will impose additional cost and delay, for example in the context of the NWP Program, as explained above. The NWP program is used for residential developments, small surface mining impacts, commercial developments, renewable energy projects, maintenance of existing flood control features, and reshaping drainage ditches, amongst many other activities. These are not the sorts of activities typically conducted by those with experience building for the Corps' Civil Works Program or the types of large-scale projects that might require numerous federal authorizations.

The Corps' assumptions are stated without support, and, as a result, deprive the public of the opportunity to understand potential impacts on small entities as required by the Regulatory Flexibility Act.

V. Conclusion

The Coalition appreciates the opportunity to provide comments and urges the Corps to withdraw the proposed rule and retain Appendix C.

Sincerely,

Association of American Railroads
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