



## SOCIETY FOR AMERICAN ARCHAEOLOGY

August 2, 2022

Mr. Joseph Redican  
Headquarters USACE  
441 G Street NW  
Washington, DC 20314-1000

Docket ID No. COE-2022-0006

Dear Mr. Redican:

The Society for American Archaeology (SAA) appreciates the opportunity to provide the following written comments on the US Army Corps of Engineers' (USACE) effort, as outlined in the June 3, 2022, edition of the *Federal Register*, to modernize its Civil Works program. We are particularly interested in the potential rulemaking actions regarding the regulations implementing the USACE Regulatory Program's procedures for compliance with the National Historic Preservation Act (NHPA). This is an issue of long-standing concern for the archaeological and cultural resources preservation communities.

The SAA is an international organization that, since its founding in 1934, has been dedicated to research about and interpretation and protection of the archaeological heritage of the Americas. With nearly 5,500 members, the SAA represents professional and avocational archaeologists, archaeology students in colleges and universities, and archaeologists working for tribal agencies, museums, government agencies, and the private sector. The SAA has members throughout the United States, as well as in many nations around the world.

The Advisory Council on Historic Preservation (ACHP) oversees implementation of Section 106 of the NHPA through regulations promulgated and codified at 36 CFR 800. Subpart C of 36 CFR 800 allows agencies to develop their own Program Alternatives to comply with the statute, in lieu of using 36 CFR 800 Subpart B. The USACE published Appendix C in 1990 as a counterpart regulation, prior to the 2004 revisions of 36 CFR 800 that include the Subpart C Program Alternative mechanism. Subpart C requires that a program alternative be developed in consultation with the ACHP; the National Conference of State Historic Preservation Officers or individual SHPO/THPOs, as appropriate; and Indian tribes and Native Hawaiian organizations. The ACHP must approve the proposed Program Alternative. The ACHP never approved Appendix C as a counterpart regulation.

As stated in the June 3, 2022, *Federal Register* notice, the USACE is once again soliciting input on how it can best comply with the NHPA. In that document, the USACE posed three questions on how to address the Appendix C situation. We shall address each question in turn.

- 1. What is the best approach to modernize Appendix C?** The SAA strongly believes that agencies must take into account the impact on historic properties or Native American sacred sites of the entire undertaking. For example, when evaluating the impact of a large

pipeline project, the USACE treats each stream crossing of the pipeline as a separate undertaking. Having agencies make different decisions on the Area of Proposed Effect is confusing for the public, tribes, and local government.

- a. Traditional Cultural Properties are not explicitly discussed in Appendix C, and the issue of human remains and associated funerary objects is not addressed. The 1992 amendments to the NHPA required federal agencies to consult on properties of religious and cultural significance to Indian tribes and Native Hawaiians. Appendix C never took the amendments into account, nor does it meet the current standard of working with tribes on ethnographic analyses of critical cultural places.
  - b. Appendix C does not contain all the current definitions used in 36 CFR 800, so one must refer to the 2005 interim guidance, as well as the guidance clarification enacted in 2007, to attempt to reconcile 36 CFR 800 with Appendix C, but such reconciliation is in reality often not practicable. Further, these policies do not have the force of law. As the USACE itself stated in its Register announcement, “The Corps’ Regulatory Program’s reliance on Appendix C and multiple guidance documents can result in inconsistency and confusion among the regulated public, State and Tribal Historic Preservation Offices, Tribes, and others. In addition, the longstanding disagreement between Regulatory and ACHP regarding differences between the Corps’ implementing regulations and those promulgated by ACHP concerning the Regulatory scope for permit area has resulted in lengthy and challenging consultations.”
2. **Should the Corps rely upon the ACHP’s 800 regulations and rescind Appendix C, and if so, is clarifying guidance needed on the Area of Proposed Effects for the Corp’s Regulatory Program?** Relying on the existing ACHP 800 regulations would result in an improvement over the continued use of Appendix C, especially with the latter’s narrow criteria for defining an undertaking’s area of potential effects on historic properties. Nevertheless, it is not the best option for moving forward. The SAA agrees with the USACE that its permitting program has unique needs that are not ideally compatible with standard 36 CFR Part 800 compliance, and we would encourage the USACE to make use of the flexibility offered by §800.14 to design a compliance process that better suits the Corps’ permitting procedures and the needs of permittees. In doing so, the SAA believes that the USACE needs to incorporate the legal terms and definitions in 36 CFR 800, as this would facilitate the consultation process with SHPOs, THPOs, tribes, and other consulting parties as those definitions are now in common usage.
  3. **Would the development of a Program Alternative allow for clear and consistent implementation procedures, as well as improved Tribal consultation?** From our perspective, this approach would be the most effective and appropriate, *provided that it does not conflict with 36 CFR 800* and foreshorten the consultation process, especially with tribes. Developing a Program Alternative will enable the Corps to most effectively identify and take into account the effects of its permitting actions on all potentially affected historic properties.

Adoption of a Program Alternative that does not conflict with 36 CFR 800 will have the added advantage of integrating NHPA compliance with the NEPA process. The regulations at 36 CFR 800.8(a)(1) state, “Federal agencies are encouraged to coordinate compliance with section 106 and the procedures in this part with any steps taken to meet

the requirements of the National Environmental Policy Act (NEPA).” This adoption should facilitate compliance with both Section 106 and the NEPA.

**Regarding tribal consultation:**


Throughout its history, Appendix C has *impeded and worked against* successful and meaningful consultation with tribal nations, rather than facilitated them. We agree with the following statements, also included in the Register announcement: even though “the Interim Guidance of April 25, 2005, has a section on Tribal consultation to draw attention to this important part of the review process, communication with Indian tribes, especially in terms of the comprehensiveness of the information provided, continues to be an impediment to successful consultation,” and “Tribes have also stated that the lack of updated and consistent implementing regulations reflecting the current NHPA language for the Corps’ Regulatory Program indicates that the Corps is not meeting their statutory and Tribal trust responsibilities.” With its Presidential Memorandum of January 21, 2021 (supplementing and reinforcing EO 13175 and the Presidential Memorandum of 2009), the current administration made tribal consultation on a government-to-government basis a top priority. It is imperative that the USACE take advantage of the expectations that the new Memorandum provides to reexamine Appendix C regarding tribal consultation, and to entertain alternative procedures.

The history of Section 106 implementation demonstrates that effective cultural resource protection can be accomplished without undue burdens on stakeholders, and in a reasonably efficient manner. The key has been open consultation in a timely manner that treats stakeholders with respect and takes into consideration their concerns, whether supportive of or opposed to a project. A new process developed under 800.14 would increase the efficiency of Section 106 implementation while accommodating and responding to the USACE’s mission, along with the needs of USACE permittees. In addition, it would enable the USACE to fulfill its tribal consultation responsibilities and in essence streamline the review process by having all parties familiar and comfortable with the regulatory framework of a Program Alternative.

The SAA strongly supports this timely review of the USACE’s regulatory program and urges the USACE to rescind Appendix C and develop a Program Alternative under the Subpart C regulations. A new policy for complying with the NHPA can and will enable the USACE to enhance its historic resource preservation capabilities, improve the integration of multiagency NHPA review processes, and dramatically increase the quality and comprehensiveness of its tribal consultation activities.

We thank you for your time and consideration of this important issue.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Sandweiss', with a horizontal line underneath.

Daniel H. Sandweiss, Ph.D., RPA  
President, Society for American Archaeology