



**Remarks on the Army Corps of Engineers’  
Notice of Intent and Request for Public Comments  
For the Retrospective Review of Regulations at 33 CFR 320-332 and 334  
Under Executive Order 13563**

**January 17, 2012**

The Society for American Archaeology (SAA) appreciates the opportunity to provide input on the Army Corps of Engineers’ (USACE) plan to conduct a review of its Regulatory Program at 33 CFR 320-332 and 334, under the framework provided in Executive Order 13563. We agree with the USACE that these regulations are significant and that a retrospective review is appropriate.

SAA is an international organization that, since its founding in 1934, has been dedicated to research, interpretation, and protection of the archaeological heritage of the Americas. With nearly 7000 members, the Society represents professional archaeologists in colleges and universities, museums, government agencies, and the private sector. SAA has members in all 50 states as well as many other nations around the world.

SAA has long believed that USACE’s cultural resources protection procedures, contained within Appendix C of 33 CFR Part 325, are problematic in many ways. In general, Appendix C—which was never approved as a counterpart regulation by the Advisory Council on Historic Preservation (ACHP)—has been applied inconsistently across the country, and has limited the Corps’ ability to fulfill its stewardship responsibilities toward the historic and prehistoric resources that lie in its areas of jurisdiction.

In our responses to the questions listed in the *Federal Register* notice of November 16, 2011, we note some specific examples of problems with Appendix C, and propose an alternative approach.

1. *How should the Corps modify its Regulations to ensure that they are serving their stated purpose efficiently and effectively?*

The Project Review Area (PRA) delineations used by USACE under Appendix C are often needlessly narrow, and by definition do not consider the full range of direct, indirect and/or long-term consequences of their permitted work. Traditional Cultural Properties are not explicitly discussed in Appendix C, and the issue of human remains and associated funerary objects is not addressed. Appendix C does not contain all of 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.

Given the above, we do not believe it feasible to try to alter Appendix C. We recognize that USACE’s permitting program has temporal and structural constraints that are not particularly compatible with standard compliance of 36 CFR Part 800. We therefore recommend that USACE

make use of the flexibility offered by 36 CFR 800.14 to design a new compliance process. In doing so, USACE should examine the whole range of activities covered by both individual and general permits; consider the potential of different types of activities to affect different kinds of historic properties, both directly and indirectly; and develop programmatic approaches to Section 106 compliance that are compatible with the permitting process and the needs of permittees, but also enable USACE to take into account the full range of effects of its undertakings on historic properties.

2. *How can we reduce burdens and maintain flexibility for participants in the regulatory process in a way that will promote the protection of waters of the United States via the improvement of the Regulations?*

The history of Section 106 implementation demonstrates that effective cultural resource protection can be accomplished without undue burdens upon stakeholders, and in a reasonably efficient manner. A new process developed under 800.14 could mesh the efficiency of Section 106 implementation while accommodating the needs of USACE permittees.

3. *How can the process set forth in the Regulations better achieve simplified and efficient outcomes?*

As per our answer to Question #1, a new process is needed in lieu of Appendix C to achieve the more efficient outcomes needed by the USACE and stakeholders alike.

4. *How can the Regulations be changed to better harmonize with, be consistent with, and coordinate effectively with, other federal regulations and environmental review procedures?*

Under Appendix C, PRA determinations are often disjointed from other portions of review areas that adhere to Section 106. Also, the timing of the determination of a PRA is frequently incompatible with that of the Area of Proposed Effect under Section 106. This disconnectedness impairs the efficiency of the review process and its outcomes. Again, we believe that scrapping Appendix C in favor of a new approach under §800.14 is the most effective option and would greatly improve the situation.

5. *How can we ensure that information developed to support findings under the Regulations is guided by objective scientific evidence?*

The scientific integrity and objectivity of archaeological data gathered under implementing regulations are of paramount importance to SAA. Without high-quality information, and access to it, the federal cultural resources system would be meaningless. Paragraph E of Section 5 in Appendix C lists a number of activities that may take place during project investigations. These activities should be included in new regulations, and authorized activities should be consistent with the Secretary of Interior's Standards and Guidelines for Archeology and Historic Preservation, and with the Register of Professional Archaeologists Code of Conduct and Standards of Research Performance.

6. *Are there better ways to encourage public participation and an open exchange of views as part of the regulatory review? Please cite specific areas where improvements could be made and indicate what tools or mechanisms might be made available to achieve this goal.*

Appendix C does not place the same emphasis on consultation as does 36 CFR 800. Although USACE's 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. Even now, after the issuance in 2007 of a clarification to the 2005 interim guidance that the new consultation standard was applied to general permits or non-reporting permits (GPs, NWP), we find that it is applied inconsistently to these categories of permits. The successor regulations to Appendix C should mandate a more extensive consultation process.

7. *The NWP program allows for comment and periodic review during the reauthorization process every five years. How else can the periodic review of the NWP program be utilized to comply with this E.O.?*

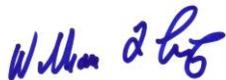
In addition to soliciting public review comments, USACE should commission an independent analysis of the NWP program, including interviews of participants and stakeholders, with a written report that identifies how regulations can be improved.

8. *How else might we modify, clarify, or improve the Regulations to reduce burdens, promote predictability, and increase efficiency?*

See above responses. USACE needs to clearly articulate its Regulations and make sure they are implemented in an appropriate manner.

Again, SAA supports this review of these important issues, and looks forward to working with USACE in the near future to develop a new, more effective, and more efficient cultural resources regulatory framework.

Sincerely,



William F. Limp  
President