MEMORANDUM

To: Richard L. Revesz, Administrator
Attn: Miraf Bisetegne
Office of Information and Regulatory Affairs

From: Wesley James Furlong, Senior Staff Attorney
Native American Rights Fund

o/b/o

National Association of Tribal Historic Preservation Officers

Date: December 12, 2023

Re: The U.S. Army Corps of Engineers' Unlawful Adoption and Use of 33 C.F.R. Part 325, Appendix C, to Fulfill Section 106 of the National Historic Preservation Act

I. Introduction

For forty-three years, the United States Army Corps of Engineers ("USACE")[1] has used 36 C.F.R. Part 325, Appendix C ("Appendix C") to purportedly comply with Section 106 of the National Historic Preservation Act ("NHPA"), 54 U.S.C. § 306108, rather than the procedures set forth in the government-wide regulations the Advisory Council on Historic Preservation ("ACHP")[2] promulgated and codified at 36 C.F.R. Part 800 ("Part 800"). The USACE's adoption and use of Appendix C has been, and continues to be, unlawful. Appendix C was not lawfully promulgated because the ACHP never approved of or concurred in its adoption and use. Moreover, nearly every provision in Appendix C is inconsistent or conflicts with the corresponding provisions

[1] Throughout this memorandum, the United States Army Corps of Engineers is referred to as the "USACE." To ensure the clarity of quoted materials, how other sources refer to the USACE has not been changed. Accordingly, in quotations, the USACE may be referred to as the "U.S. Army Corps of Engineers," the "USACE," the "Army Corps," the "Corps," or the "Corps of Engineers."
[2] Throughout this memorandum, the Advisory Council on Historic Preservation is referred to as the "ACHP." To ensure the clarity of quoted materials, how other sources refer to the ACHP has not been changed. Accordingly, in quotations, the ACHP may be referred to as the "ACHP," the "Council," or the "Advisory Council."

in Part 800 and the NHPA. The USACE's reliance on Appendix C threatens the legality of every one of its permitting decisions.

This memorandum provides the legal basis for the revision of Appendix C. First, it begins by providing background on the NHPA, the Section 106 process, and Part 800 alternate procedures. Second, this memorandum examines the USACE's development, adoption, and use of Appendix C, the USACE's subsequent interim guidance and memoranda on Appendix C's continued use and legality, and previous efforts to address Appendix C's issues. Third, it analyzes Appendix C's legal deficiencies, specifically its unlawful promulgation and its inconsistencies and conflicts with Part 800 and the NHPA.

II. The National Historic Preservation Act

Enacted in 1966, the NHPA seeks "to foster conditions under which our modern society and our historic property can exist in productive harmony and fulfill the social, economic, and other requirements of present and future generations." 54 U.S.C. § 300101(1). In passing the NHPA, Congress found and declared "that the historical and cultural foundations of the Nation should be preserved as a living part of our community life and development in order to give a sense of orientation to the American people." Pub. L. No. 89-665, § (b), 80 Stat. 915, 915 (1966). The NHPA is therefore "designed to encourage preservation of sites and structures of historic, architectural, or cultural significance." *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 787 (9th Cir. 2006) (quoting *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1093–94 (9th Cir. 2005)) (internal quotation marks omitted). To achieve this productive harmony and to encourage preservation of historic properties, Congress enacted Section 106 of the NHPA.

A. Section 106 of the NHPA

In its entirety, Section 106 provides:

> 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. Congress has called Section 106 "[o]ne of the most important provisions of the National Historic Preservation Act—the responsibilities of Federal agencies for the protection of historic resources[.]" S. REP. NO. 102-336, at 12 (1992). Section 106 does not mandate the preservation of historic properties. *See Coliseum Square Ass'n, Inc. v. Jackson*, 465 F.3d 215, 225 (5th Cir. 2006) (quoting *Bus. & Residents All. of E. Harlem v. Jackson*, 430 F.3d 584, 591 (1st Cir. 2005)) ("It does not itself require a particular outcome, but rather ensures that the relevant federal agency will, before approving funds or granting a license to the undertaking at issue, consider the potential impact of that undertaking on surrounding historic places."). Instead, it is "a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs[.]" *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999) (quoting *Apache Survival Coal. v. United States*, 21 F.3d 895, 906 (9th Cir. 1994)).

The NHPA also established the ACHP, 54 U.S.C. § 304101, which Congress delegated exclusive authority to promulgate regulations implementing Section 106. *Id*. § 304108(a) ("The Council may promulgate regulations as it considers necessary to govern the implementation of section 306108 of this title in its entirety."). These regulations are codified as Part 800, of which Subpart B, 36 C.F.R. § 800.3–800.13, establishes "a four-step review process[]" for complying with Section 106. *Concerned Citizens Coal. v. Fed. Highway Admin.*, 330 F. Supp. 2d 787, 797 (W.D. La. 2004). Every federal agency must follow this process and "comply with these regulations." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 607

(9th Cir. 2010) (citing *Pit River Tribe*, 469 F.3d at 787; *Muckleshoot Indian Tribe*, 177 F.3d at 805).

Step one, "Initiation," requires federal agencies to "determine whether the proposed Federal action is an undertaking as defined in [36 C.F.R.] § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). At this step, federal agencies must also identify consulting parties and invite them to participate in the Section 106 process. *Id*. § 800.3(c)-(f). Step two, "Identification and Evaluation," requires federal agencies to: (1) define the undertaking's "area of potential effects[,]" *id*. § 800.4(a)(1); (2) "take steps necessary to identify historic properties within the area of potential effects[,]" *id*. § 800.4(b); and (3) "apply the National Register [of Historic Places ("National Register")] criteria (36 CFR part 63 [sic]) to properties that have not been previously evaluated for National Register eligibility." *Id*. § 800.4(c)(1).[3] Step three, "Assessment," requires federal agencies to "apply the adverse effect criteria to historic properties within the area of potential effects." *Id.* § 800.5(a). Step four, "Resolution," requires federal agencies to "develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." *Id*. § 800.6(a).[4]

In 1992, Congress amended the NHPA. *See* Pub. L. No. 102-575, § 4001–22, 106 Stat. 4600, 4753–65 (1992). Two amendments are particularly relevant to this article. First, the

---

[3] The National Register criteria are codified at 36 C.F.R. § 60.4. The process by which the Keeper of the National Resister determines properties eligible for inclusion on the National Register is codified at 36 C.F.R. Part 63.

[4] This cursory summary of the Section 106 process provided here is meant to orient the reader, not to be an exhaustive discussion of the process. Section III.B of this memorandum discusses the Section 106 process in greater detail and undertakes a section-by-section analysis of Appendix C's inconsistencies and conflicts with Part 800 and the NHPA. For a more detailed discussion of the NHPA, the Section 106 process, and the 1992 amendments, *see* Wesley James Furlong, "*Subsistence is Cultural Survival": Examining the Legak Framework for the Recognition and Incorporation of Cultural Landscapes within the National Historic Preservation Act*, 22 TRIBAL L.J. 51, 63-88 (2023).

amendments obligated federal agencies to consult with Indian tribes and Native Hawaiian organizations in the Section 106 process:

> **(a) In general.**—Property of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.
>
> **(b) Consultation.**—In carrying out its responsibilities under section 306108 of this title, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to property described in subsection (a).

54 U.S.C. § 302706(a)–(b). Second, the amendments established Tribal Historic Preservation Programs and granted THPOs the authority to assume the role of SHPOs in the Section 106 process for undertakings that occur on tribal land. *Id.* § 302702.[5]

Following these amendments, the ACHP fundamentally revised Part 800. The ACHP published a notice of proposed rulemaking in 1994, 59 Fed. Reg. 50,396 (Oct. 3, 1994), and updated proposed revisions to Part 800 in 1996. 61 Fed. Reg. 48,580 (Sept. 13, 1996). The ACHP published its final revisions to Part 800 implementing the 1992 NHPA amendments in 1999. 64 Fed. Reg. 27,044 (May 18, 1999). Industry groups quickly challenged these final regulations, but the federal courts largely upheld them in 2003. *See Nat'l Mining Ass'n v. Slater*, 167 F. Supp. 2d 265, 289 (D.D.C. 2001), *aff'd sub nom. Nat'l Mining Ass'n v. Fowler*, 324 F.3d 752, 760 (D.C. Cir. 2003). Following this litigation, the ACHP initiated another rulemaking process, 68 Fed. Reg. 55,354 (Sept. 25, 2003), and published *final* revisions to Part 800 in 2004, designed to be consistent with the courts' opinions. 69 Fed. Reg. 40,544 (July 6, 2004). Today, Part 800 requires federal agencies to consult with Indian Tribes, Native Hawaiian organizations, and THPOs throughout the Section 106 process. *See* 36 C.F.R. § 800.2(c)(2). Part 800 has not been updated since 2004.

---

[5] THPOs may also assume the role of SHPOs for undertakings that may affect historic properties located on tribal lands. 36 C.F.R. § 800.2(c)(2)(i)(A). "***Tribal lands*** means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities." *Id.* § 800.16(x) (emphasis in original); 54 U.S.C. § 300319.

B. Part 800 Alternate Procedures

In addition to the "Section 106 process" set forth in Subpart B, Part 800 allows for the development, adoption, and use of "Federal agency program alternatives." *Id.* § 800.14. Program alternatives allow federal agencies to "tailor the Section 106 review process for a group of undertakings or an entire program that may affect historic properties." *Program Alternatives*, ADVISORY COUNCIL ON HIST. PRES., https://www.achp.gov/program_alternatives (last visited Dec. 8, 2023). One type of program alternative is "alternate procedures." 36 C.F.R. § 800.14(a). "Alternate procedures are a program alternative that allows federal agencies to streamline the Section 106 process by tailoring the process to the agency's programs and decision-making process." *Alternate Procedures*, ADVISORY COUNCIL ON HIST. PRES., http://www.achp.gov/program_alternatives/alternate_procedures (last visited Dec. 8, 2023) [hereinafter ACHP, *Alternate Procedures*]. Alternate procedures "substitute in whole or in part for the ACHP's Section 106 regulations under Subpart B." *Id.* Part 800 has contained provisions allowing federal agencies to develop, adopt, and use alternate procedures, or counterpart regulations as they were first called, since 1979.[6]

In 1979, the ACHP published a revised version of Part 800, clarifying that its "regulations are binding on all Federal agencies[.]" 44 Fed. Reg. 6,068, 6,068 (Jan. 30, 1979). The revised

---

[6] There is no functional difference between "alternate procedures" and "counterpart regulations," and this memorandum uses the terms interchangeably. Counterpart regulations substitute for all or part of Subpart B of Part 800, they must be promulgated through formal notice and comment rulemaking pursuant to the Administrative Procedures Act, and they are formally codified in the Code of Federal Regulations ("CFR"). *See* ACHP, *Alternate Procedures*, *supra*. While alternate procedures also substitute for all or part of Subpart B of Part 800, they are not promogulated through formal notice and comment rule making and they are not codified in the CFR; instead, they are adopted as agency guidance or procedure. *Id*. From 1979 through 1998, Part 800 only allowed agencies to adopt and use counterpart regulations, meaning the regulations required notice and comment rulemaking and codification in the CFR. *See* 36 C.F.R. § 800.11 (1979); 36 C.F.R. § 800.15 (1986). In 1999, the ACHP updated Part 800, allowing federal agencies to develop, adopt, and use alternate procedures, which "include formal Agency regulations" (*i.e.*, counterpart regulations), as well as "departmental or Agency procedures that do not go through the formal rulemaking process." 64 Fed. Reg. at 27,068. This change was meant to make the process less "arduous," by allowing federal agencies to avoid formal notice and comment rulemaking. *Alternate Procedures*, *supra*.

version of Part 800 included a new provision that "authorize[d] counterpart regulations permitting agencies to develop regulations which, if approved by the Chairman, may be used to meet certain requirements of these regulations." *Id.* at 6,068–69. The new counterpart regulation provision provided: "[r]esponsibilities of individual Federal agencies pursuant to [36 C.F.R.] § 800.4 may be met by counterpart regulations *jointly drafted* by the agency and the Executive Director and *approved by* the Chairman." 36 C.F.R. § 800.11(a) (1979) (emphasis added).[7] This provision also required federal agencies to publish notice of the proposed counterpart regulations in the Federal Register for public review and comment. *Id.* § 800.11(a). Approved counterpart regulations would "supersede the requirements of [36 C.F.R.] § 800.4." *Id.*

The ACHP updated the counterpart regulation provisions in 1986. 51 Fed. Reg. 31,115 (Sept. 2, 1986). The update provision was substantially simplified. In its entirety, the updated provision provided: "*In consultation* with the Council, agencies may develop counterpart regulations to carry out the section 106 process. When *concurred in* by the Council, such counterpart regulations shall stand in place of these regulations for the purposes of the agency's compliance with section 106." 36 C.F.R. § 800.15 (1987). Despite simplifying the original provision, the new version still required the development of counterpart regulations in consultation with and approved by the ACHP. *Id.*

The ACHP again updated the counterpart regulation provision in 1999. 64 Fed. Reg. at 27,044. The updated provisions provide for the development, adoption, and use of alternate procedures, as opposed to counterpart regulations. *See id.* at 27,068–69. The 1999 provisions are the regulations currently in effect and are codified at 36 C.F.R. § 800.14(a). The current regulations

[7] The Executive Director is "the Executive Director of the Advisory Council on Historic Preservation . . . or a designee[.]" 36 C.F.R. § 800.2(l) (1979). The Chairman is "the Chairman of the Advisory Council on Historic Preservation or a member designated to act for the Chairman." *Id.* § 800.2(k).

provide: "An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations[.]" 36 C.F.R. § 800.14(a) (2023).

Alternate procedures must be developed in "consult[ation] with the Council, the National Conference of State Historic Preservation Officers [("NCSHPO")], or individual SHPOs/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations[.]" *Id.* § 800.14(a)(1). The federal agency must also publish notice of the proposed alternate procedures in the Federal Register for public review and comment. *Id.* Finally, the federal agency cannot adopt and use the proposed alternate procedures unless and until the ACHP has approved them: "The agency official shall submit the alternate procedures to the Council for a 60-day review. If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures." *Id.* § 800.14(a)(2).

The counterpart regulation or alternate procedure provisions have been updated twice since they were first developed in 1979. Nevertheless, a common thread has persisted: each version has required that counterpart regulations or alternate procedures be developed in consultation with and approved by the ACHP before they can be used by the federal agency.

III. Development, Adoption, and Use of Appendix C

A. Promulgating Appendix C

Following the ACHP's finalization of revisions to Part 800 in 1979, the USACE began developing its own counterpart regulations for its Regulatory Program. 45 Fed. Reg. 22,112 (Apr. 3, 1980). In April 1980, the USACE published a first draft of the proposed counterpart regulations as an appendix—Appendix C—to 33 C.F.R. Part 325, its regulations governing how it processes DOA permit applications. *Id.* at 22,112. According to USACE at the time, "These proposed

regulations would establish the procedures to be followed by the U.S. Army Corps of Engineers in its regulatory program in order to comply with the National Historic Preservation Act[.]" *Id.*

According to the USACE's Federal Register notice, "These regulations have been jointly drafted with the Advisory Council on Historic Preservation as counterpart regulations pursuant to 36 CFR 800.11." *Id.* The notice acknowledged that counterpart regulations must be "approved by the Chairman of the Advisory Council." *Id.* Additionally, the notice stated that the USACE would "follow[] the procedures set forth in these regulations on an interim basis." *Id.*

In May 1984, the USACE published a revised version of Appendix C. 49 Fed. Reg. 19,036 (May 4, 1984). The revisions were the "result of the maturing Federal program for historic preservation and an October 1983[] opinion from the Office of Legal Counsel in the Department of Justice[]" that made the original version of Appendix C "no longer appropriate." *Id*. at 19,037.

From 1980 until 1990, when the USACE formally adopted Appendix C, the USACE used the 1980 draft version of Appendix C to fulfill its Section 106 obligations "on an interim basis." 55 Fed. Reg. 27,000, 27,000 (June 29, 1990) ("On April 3, 1980, we published a proposed appendix C, which was approved by the Advisory Council on Historic Preservation for use on an interim basis. We have been operating under that appendix since that time."). During this time, at least one federal court held that the USACE's use of the 1980 draft Appendix C on an interim basis was unlawful. *Colorado River Indian Tribes v. Marsh* concerned the USACE's permitting of the placement of riprap along the banks of the Colorado River next to a proposed residential and commercial development. 605 F. Supp. 1425, 1427–28 (C.D. Cal. 1985). The plaintiffs alleged, *inter alia*, that in issuing the permit, the USACE violated Section 106 because the procedures set forth in the 1980 draft Appendix C were inconsistent with Part 800 and therefore could not be used by the USACE for Section 106 compliance. *See id*. at 1434–38. The United States District Court

for the Central District of California agreed. *Id*. at 1438 ("The Corps' action in accordance with and in reliance on the proposed regulations violated [the] NHPA and its regulations.").

The court noted that Appendix C "ha[d] never finally been adopted and incorporated into the Code of Federal Regulations." *Id*. at 1436. The court emphasized that "federal agenc[ies] can choose to adopt counterpart regulations related to [their] own specific programs and authorities," but they "must be approved by the chairperson of the Advisory Council[.]" *Id*. at 1437 (citing 36 C.F.R. § 800.11 (1985)) (internal citation omitted). The court found the ACHP's approval "a fact which is lacking with respect to the proposed regulation upon which the Corps relied." *Id.* The court nevertheless noted that "[i]f the responsibilities under the adopted regulations were commensurate with the responsibilities under [the] NHPA and its regulations," it might not be unlawful for the USACE to follow the 1980 draft Appendix C. *Id.* The court concluded that the 1980 draft Appendix C was not "commensurate" with Part 800. *See id.* at 1437–38.

Particularly relevant to the case was that the 1980 draft Appendix C "distinguishes between different types of [historic] property and affixes differing responsibilities to each." *Id*. at 1437. Specifically, for "properties . . . listed in or determined eligible for inclusion in the National Register," the USACE would consider "the direct and indirect reasonably foreseeable effects on such properties[.]" *Id*. at 1436–37. The USCAE defined this as the "affected area." *Id*. at 1437. "For properties which *may* qualify for inclusion," the USACE limited its Section 106 review to only those properties within "the water or uplands directly affected by" the undertaking. *Id*. at 1436 (emphasis in original). The court noted that this "distinction between properties and differing scopes of responsibility is at odds with [the] NHPA and its regulation." *Id*. at 1437.

In particular, the court pointed out that Section 106 requires federal agencies to "take into account the effect of the undertaking on any district, site, building, structure, or object that is

included in or eligible for inclusion in the National Register." *Id*. (quoting 16 U.S.C. § 470f (1985) (re-codified as amended at 54 U.S.C. § 306108)) (emphasis in original). The court further pointed to Part 800's definition of "eligible property" which "makes no distinction between determined eligible and property that may qualify[.]" *Id*. (citing 36 C.F.R. § 800.2(f) (1985)). The court concluded that "[t]he Corps' action in accordance with and in reliance on the proposed regulations violated [the] NHPA and its regulations." *Id*. at 1438.

In June 1990, the USACE published the final version of Appendix C. 55 Fed. Reg. at 27,000. The final version reflected changes made in response to public comments and the ACHP's 1986 rulemaking updating Part 800. *Id.* The Federal Register notice reemphasized that Appendix C "only addresses the procedures to be followed by the Corps in implementing its regulatory program." *Id.*; *see* 33 C.F.R. pt. 325, app. C, § 2 ("This appendix establishes the procedures to be followed by the U.S. Army Corps of Engineers (Corps) to fulfill the regulatory requirements set forth in the National Historic Preservation Act (NHPA)[] . . . as they relate to the regulatory program of the Corps of Engineers (33 CFR parts 320-334).").

B. Appendix C Interim Guidance

Since 1990, the USACE has never updated, modified, or revised Appendix C, despite the 1992 amendments to the NHPA and the ACHP's subsequent revisions to Part 800. Instead, the USACE has published a series of interim guidance and memoranda on the continued applicability and legality of Appendix C.

In March 2002, the USACE published a "request for comment" in the Federal Register, recognizing the need to address Appendix C following the 1992 NHPA amendments and the ACHP's updates to Part 800. 67 Fed. Reg. 10,822, 10,822 (Mar. 8, 2002) ("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.”). The request for comment “solicit[ed] public views on [the] 36 CFR part 800 regulation as it relates to the Corps Regulatory Program and Appendix C.” *Id.* The result of this review would be “additional guidance, modifications to Appendix C, programmatic agreements, or other products.” *Id.* Until then, the notice stated that the USACE “intend[ed] to issue interim guidance to address the use of Appendix C and the new 36 CFR part 800 regulations[.]” *Id.*

In June 2002, the USACE issued its first set of interim guidance. *See* U.S. Army Corps of Eng’rs, *Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the New Advisory Council on Historic Preservation Regulations at 36 CFR Part 800* (June 24, 2002) [hereinafter 2002 Interim Guidance]. The guidance largely catalogued the ACHP’s changes to Part 800 following the 1992 NHPA amendments and counseled individual Division and District commands that “Appendix C shall continue to be used, since there are no substantive differences between Appendix C and the new ACHP regulations[.]” *Id*. at 2, ¶ 3. The memorandum accompanying the 2002 Interim Guidance noted that “[t]he ACHP does not endorse this guidance nor does it agree with Appendix C.” Mem. from Karen Durham-Aguilera, Acting Chief, Operations Div., Directorate of Civ. Works, U.S. Army Corps of Eng’rs, to Commanders, Major Subordinate Commands, and District Commends, U.S. Army Corps of Eng’rs 1 (June 24, 2002) [hereinafter 2002 Memorandum].

In September 2004, the USACE published an advance notice of proposed rulemaking in the Federal Register to “solicit[] comments on how [its] permit application process 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 properties.” 69 Fed. Reg. 57,662, 57,662 (Sept. 27, 2004). Based on the comments received on its

2002 request for comment, the USACE "identified several options for updating [its] permitting application process to address the 1992 amendments to the NHPA and the revised 36 CFR part 800." *Id*. at 57,663. The USACE identified four options:

- Revise Appendix C to incorporate the current requirements and procedures at 36 CFR part 800.
- Revoke Appendix C and use 36 CFR part 800, subpart B when reviewing individual permit applications, and utilize Federal agency program alternatives at 36 CFR 800.14 for general permits.
- Revoke Appendix C and use 36 CFR part 800, subpart B for all individual permits and general permits.
- Revoke Appendix C and develop non-regulation alternate procedures in accordance with 36 CFR 800.14.

Id. The USACE "request[ed] comments on the appropriateness and feasibility of these options[,]" "invit[ed] suggestions for other options that we have not identified[,]" and sought "recommendations for the preferred option that would be pursued through the Administrative Procedures Act process to revise Regulatory Program procedures for the protection of historic properties." *Id.*

In April 2005, the USACE issued updated interim guidance on Appendix C. *See* U.S. Army Corps of Eng'rs, *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* (Apr. 25, 2005) [hereinafter 2005 Interim Guidance]. The accompanying memorandum stated that its purpose was "to provide interim guidance concerning the consideration of historic properties during the Corps permit process, until the new permit process procedures are finalized and become effective[,]" Mem. from Michael B. White, Chief, Operations Div., Directorate of Civ. Works, U.S. Army Corps of Eng'rs, to All Major Subordinate Comments, District Commands, U.S. Army Corps of Eng'rs 1 (Apr. 25, 2005) [hereinafter 2005 Memorandum], referring to the public process

the USACE initiated in 2002. *See* 69 Fed. Reg. at 57,662. The 2005 Interim Guidance responded to the ACHP's updates to Part 800 and superseded the 2002 Interim Guidance. 2005 Mem., *supra*, at 1, ¶¶ 2, 4. The accompanying memorandum noted that "comments received in response to the [2004 advance notice of proposed rulemaking] will be used to determine how we will revise our permit processing procedures." *Id*. at 1, ¶ 3. No revisions to Appendix C were ever implemented.

In January 2007, the USACE published a memorandum clarifying that the 2005 Interim Guidance and Appendix C "appl[y] to all [DOA] requests for authorization/verification, including individual permits (standard permits and letters of permission) and all regional general permits and nationwide permits." Mem. from Lawrence A. Lang, Acting Chief, Operations Div., Directorate of Civ. Works, U.S. Army Corps of Eng'rs, to all Major Subordinate Comments and District Commands, U.S. Army Corps of Eng'rs 1 (Jan. 31, 2007) [hereinafter 2007 Memorandum].

In 2009, the USACE published another memorandum intended "[t]o provide clear guidance with respect to the applicability and implementation of 33 CFR 325, Appendix C[.]" Mem. from James R. Hannon, Acting Chief, Operations Div., Directorate of Civ. Works, U.S. Army Corps of Eng'rs, to Regulatory Chiefs, U.S. Army Corps of Eng'rs 1, ¶ 1 (Jan. 6, 2009) [hereinafter 2009 Memorandum]. The 2009 Memorandum capped off an unsuccessful, multi-year effort by the USACE and the ACHP to revise or replace Appendix C. *See* Gov't Accountability Off., *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects* 54 (2019) [hereinafter GOA Report] ("From 2001 to 2008, Regulatory Program officials worked with ACHP officials[] . . . to revise or replace the Corps procedures but did not reach agreement on how to resolve several inconsistencies."). The 2009 Memorandum noted that "the Corps suspended its efforts to revise" Appendix C when it "and the Council were unable to reach consensus on several fundamental policy issues." 2009 Mem., *supra*, at 1, ¶ 2(b); *see* Letter from John L. Nau,

Chairman, Advisory Council on Hist. Pres., to Paul Woodley, Assistant Sec'y of Army for Civ. Works, Dep't of Army 2 (Oct. 9, 2008) ("[W]e cannot imply by our concurrence that the ACHP believes that the proposal meets either the legal standards of Section 106 or the policies that underlie the government-wide Section 106 procedures."); Letter from John Paul Woodley, Assistant Sec'y Army (Civ. Works), Dep't of Army, to John Nau, Chairman, Advisory Council on Hist. Pres. 1 (Nov. 7, 2008) ("In view of your letter dated October 9, 2008, I have instructed the Army Corps of Engineers to stand down its effort to revise Appendix C[.]"). According to a statement from the Office of the Assistant Secretary of the Army for Civil Works ("ASA-CW") accompanying the 2009 Memorandum, the ACHP and the USACE reached an impasse over three discrete issues: "1) how to define 'undertaking'; 2) what is the proper regulatory scope of analysis; and, 3) whether and how to consider indirect effects of undertakings focused on [waters of the United States]." Statement from Office of Assistant Sec'y of Army for Civ. Works, *Statement Regarding the Applicability of Appendix C for Historic Properties* 1 (Dec. 10, 2008) [hereinafter Statement from OASA-CW].

The 2009 Memorandum specifically responds to what the USACE characterized as "a mass email" "disseminated" by the ACHP that "improperly characterizes the status of Appendix C, implying that Appendix C is not a valid process for complying with the Corps' responsibilities under Section 106 of the National Historic Preservation Act." 2009 Mem., *supra*, at 1, ¶ 2(c). The ACHP email discusses the failed efforts of the ACHP and the USACE between 2006 and 2008 to resolve the "legal and policy issues related to Appendix C." Email from Frances Gilmore on behalf of Don Klima, Advisory Council on Hist. Pres., to All Staff, Advisory Council on Hist. Pres. (Dec. 2, 2008) [hereinafter Email from Gilmore]. The email recounts that the USACE "failed to resolve [the ACHP's] fundamental legal and policy difference, notably the definition of undertaking, the

designation of areas of potential effects, the scope of analysis for identification of historic properties and assessment of effects, and the nature of consultation." *Id.* The email provides a firm position from the ACHP regarding the validity of Appendix C:

> The ACHP has never approved Appendix C as a counterpart regulation for implementing Section 106. . . .
>
> . . .
>
> Meanwhile, the ACHP reiterates to Section 106 stakeholders that the Corps' Appendix C is not approved as an alternative procedure for Section 106 compliance. Accordingly, all Section 106 reviews for Corps permits need to follow the process set forth by 36 CFR Part 800 or tailored procedures approved pursuant to 36 CFR § 800.14. Only when the Corps has complied with 36 CFR Part 800 can it evidence that the Section 106 historic preservation reviews for Section 404 and Section 10 permits have been satisfactorily completed.

Id. In response, the 2009 Memorandum asserts that the UASCE did not need to secure the ACHP's approval to adopt and use Appendix C because Appendix C "was not established as a 'counterpart regulation[.]'" 2009 Mem., *supra*, at 1, ¶ 2(c).[8] Instead, the 2009 Memorandum contends that "[t]he Corps' Appendix C regulations were promulgated as stand alone [sic] regulations establishing the process by which the Corps fulfills the requirements of the National Historic Preservation Act." *Id.* The 2009 Memorandum claims that "Appendix C has been effectively implemented for nearly two decades[.]" *Id.* Finally, the 2009 Memorandum affirms that the 2005 Interim Guidance remains in effect and that "the Corps should continue to follow the procedures found at 33 CFR 325, Appendix C unless otherwise directed by this office." *Id*. at 2, ¶ 3.

C. Addressing Appendix C's "Systemic Issues"

Progress addressing Appendix C stalled for the next seven years until Congress passed the Water Infrastructure Improvements for the Nation Act ("WIINA") in 2016. *See* Pub. L. No. 114-

[8] The USACE stated precisely the opposite in the Federal Register notice in which it originally proposed Appendix C. *See* 45 Fed. Reg. at 22,112 ("These regulations have been jointly drafted with the Advisory Council on Historic Preservation *as counterpart regulations* pursuant to 36 CFR 800.11." (emphasis added)).

322, 130 Stat. 1628 (2016). Section 1120 of the WIINA directed the Secretary of the Army to submit to Congress

> a report that describes the results of a review by the Secretary of existing priorities, regulations, and guidance related to consultation with Indian tribes on water resources development projects or other activities that require the approval of, or the issuance of a permit by, the Secretary that may have in impact on tribal cultural and natural resources.

Id. § 1120(a)(3), 130 Stat. at 1643. In response, the DOA, along with the United States Department of the Interior ("DOI") and the United States Department of Justice ("DOJ"), held seven tribal consultations and a single listening session with Indian tribes in October and November 2016, and solicited written comments. U.S. Dep't of Interior et al., *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions* 4 (Jan. 2017). The DOA, the DOI, and the DOJ sought tribal input on two broad 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?
>
> 2) *Identifying Any Necessary Changes 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?

Id. The DOA, the DOI, and the DOJ published their report in January 2017. *Id.* at 5. The report extensively documented Indian tribes' concerns with and objections to the USACE's use of Appendix C to fulfill its Section 106 obligations:

> According to Tribes, the Corps' use of Appendix C has been at the heart of many consultation problems, for a number of reasons. A primary concern noted was that Appendix C has not been revised to reflect the 1992 amendments to the NHPA that make Tribal consultation mandatory. . . . Furthermore, the Tribes note that Appendix C was never approved by the ACHP, which has repeatedly expressed its view that Appendix C is not in compliance with Section 106, and that using Appendix C does not fulfill the Corps' responsibilities under Section 106. . . . Several Tribes also noted that the Corps' 2005 and 2007 "interim guidance" regarding compliance with the NHPA is insufficient.

> Numerous Tribes commented that the NHPA (and Section 106) is more expansive and comprehensive than Appendix C in the identification and consideration of historic properties, including those significant to Tribes. Additional problems with Appendix C that Tribes notes were that it results in disputed findings, uses a narrow definition of "undertaking" and of Area of Potential Effects, results in lack of input from Tribes, does not protect confidential information and does not address unanticipated discoveries, as required in Section 106.

Id. at 54; *see also id.* at 58 ("A number of Tribes expressed that both Federal agencies and private companies bear no consequences for allowing destruction of sacred sites, specifically noting that the Corps' Appendix C has led to the destruction of sacred sites."); *id*. at 65 ("These Tribes argued that the Corps implemented Appendix C without congressional authorization or the required approval from the Advisory Council on Historic Preservation, and that Appendix C ignores or contradicts [the] ACHP's regulations implementing the NHPA."). The report also repeatedly documented Indian tribes' calls for the USACE to revoke or revise Appendix C. *Id*. at 14 ("The Corps should revise or repeal its Appendix C[.]"); *see also id*. at 54 ("In numerous meetings and letters, Tribes called for repeal of Appendix C, noting that the Corps' application of Appendix C does not fulfill the agency's responsibilities under the NHPA and is not in compliance with Section 106."). The report concluded with the DOA's commitment to address the concerns raised by Indian tribes about Appendix C:

> The Army Corps of Engineers will update its Appendix C (33 C.F.R. 325) in 2017 in response to extensive Tribal comments calling for Appendix C's rescission or revision. (*See* "Federal Consultation with Tribes Regarding Infrastructure Decision-Making," transcript taken November 17, 2016, Rapid City, South Dakota, p. 34, lines 7-10, statement of Assistant Secretary of the Army Civil Works Jo-Ellen Darcy, committing to "improve" Appendix C).

Id. at 24. No work was undertaken to "improve" or "update" Appendix C. The USACE has continued to use Appendix C and the 2005 Interim Guidance documents to fulfill its Section 106

responsibilities. *See* 86 Fed. Reg. 2,744, 2,851 (Jan. 13, 2021) ("The Corps continues to use Appendix C and the 2005 and 2007 interim guidance to comply with Section 106 of the NHPA.").

In 2019, the Government Accountability Office ("GAO") released a report documenting the federal government's overall failure to meaningfully consult with Indian tribes about infrastructure projects. *See* GAO Report, *supra*, at 55–56. The report provided a detailed examination of the USACE's adoption and use of Appendix C, which will be discussed in greater detail in Section III.A, *infra*. It concluded that "[t]he long-standing nature of the differences between the Corps procedures and the ACHP's regulations, as well as the agencies' inability to resolve these differences over almost two decades . . . suggests that legislative action may be needed[.]" *Id.* at 55; *see* Nicole T. Carter et al., *Congressional Research Service Report No. R44880: Oil and Natural Gas Pipelines: Role of the U.S. Army Corps of Engineers* 25 (2017) ("Procedures for NHPA Section 106 compliance for the regulatory program of the Corps have been the subject of disagreements with the ACHP and some other stakeholders.").

In July 2021, the ACHP sent a letter to the Acting ASA-CW offering its "assistance in addressing the challenges that other Corps policies and regulations may pose to [its nation-to-nation relationships with Indian tribes], specifically Appendix C[.]" Letter from Reid L. Nelson, Acting Exec. Dir., Advisory Council on Hist. Pres., to Jaime A. Pinkham, Acting Assistant Sec'y of Army (Civ. Works) 1 (July 30, 2021) [hereinafter ACHP Assistance Letter]. The letter was unsparing in its assessment of Appendix C:

> In our decades of experience consulting with the Corps, states, Indian tribes, and others about projects that require Department of the Army permits from the Corps, it is evident that Appendix C does not provide adequate consideration of the effects of these undertakings on historic properties nor is it consistent with the regulations that implement Section 106 . . . . The differences between the Section 106 regulations and Appendix C are fundamental, create confusion among consulting parties, compliance Section 106 reviews, and lead at times to extensive litigation.

Id. The ACHP's conclusion was blunt: "Appendix C is fundamentally inconsistent with the government-wide Section 106 regulations and its use jeopardizes the Corps' ability to fully meet its legal obligations under Section 106. Unfortunately, these challenges can also undermine the important relationships the Corps has with Indian tribes, states, and others." *Id.* at 2. The ACHP rejected the GAO's suggestion that a legislative fix is necessary, suggesting instead that the tools already exist to solve this issue. *Id.* The letter noted that "[a] commitment to address the inconsistencies between Appendix C and the Section 106 regulations would also serve as an opportunity to strengthen relationships with federally recognized tribes and other stakeholders with an interest in preserving our nation's diverse history." *Id.* The letter concluded by urging the USACE to accept the ACHP's offer to work "on a solution to these systemic issues[.]" *Id.*

In December 2021, the Biden-Harris Administration published its Fall 2021 Unified Agenda for Regulatory and Deregulatory Actions, which included a notice of the USACE's intent to revise Appendix C through formal rulemaking. *Procedures for the Protection of Historic Properties, RIN: 0710-AB46,* OFF. OF INFO. & REGUL. AFFS., https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202110&RIN=0710-AB46 (last visited Dec. 8, 2023). The agenda item specifically stated: "The Corps would propose to revise its regulations to conform to the ACHP 800 regulations." *Id.* It further notes that since Appendix C was adopted, the NHPA was amended and Part 800 was revised. *Id.*

On June 3, 2022, the DOA and the USACE published a request for input in the Federal Register soliciting public comments on how the USACE could "modernize" its Regulatory Program. 87 Fed. Reg. 33,756, 33,756–57 (June 3, 2022). The DOA and the USACE solicited the public's input on, *inter alia*, "potential rulemaking actions regarding the Corps' Regulatory Program's implementing regulations for the National Historic Preservation Act[.]" *Id.* at 33,757.

Recognizing the "longstanding disagreement between the Corps and ACHP regarding" Appendix C, and that its use of Appendix C "can result in inconsistency and confusion," the DOA and the USACE sought "input on the best approach to modernizing Appendix C[.]" *Id.* at 33,759. Specifically, the DOA and the USACE sought

> input on whether the Corps should rely on the NHPA regulations at 36 CFR 800 promulgated by ACHP and rescind Appendix C, and if so, whether any clarifying guidance is needed on the scope of the area of potential effects for the Corps' Regulatory Program, and whether development of a Program Alternative (36 CFR 800.14) would allow for clear and consistent implementation procedures, as well as improved Tribal consultation.

Id. at 33,760. The DOA and the USACE specifically asked the public to consider the four options identified in the 2004 advance notice of proposed rulemaking. *Id.* at 33,759–60 (discussing 69 Fed. Reg. at 57,662). During June and July 2022, the USACE held eleven virtual public and tribal listening sessions, including two specifically on Appendix C. *See id.* at 33,763.

On November 30, 2022, the Biden-Harris Administration announced that the DOA and the USACE would undertake "a rulemaking effort to rescind Appendix C." White House, *Fact Sheet: Biden-Harris Administration Announces New Actions to Support Indian County and Native Communities Ahead of the Administration's Second Tribal Nation's Summit* (Nov. 30, 2022) [hereinafter White House, *Fact Sheet*]. The announcement recognized that "Tribal Nations and Native Hawaiian communities have, for many years, complained that Appendix C does not comply with Section 106 procedures." *Id.* Instead of Appendix C, the announcement stated that the "USACE would instead rely on [the] ACHP's regulations and joint USACE/ACHP guidance for implementation of Section 106." *Id.*

On January 4, 2023, the Biden-Harris Administration published its Fall 2022 Unified Regulatory Agenda and Regulatory Plan and included a more detailed notice about the USACE's proposed rulemaking. The agenda item specifically stated that Appendix C, "in its current state[,]

is not compliant with the updates to [the] NHPA or the ACHP implementing regulations for federal agencies[] . . . [and] is not compliant with the NHPA and Administration policies regarding Tribal Nations." *Appendix C Procedures for the Protection of Historic Properties, RIN 0710-AB46*, OFF. OF INFO. & REGUL. AFFS., [hereinafter Fall 2022 Unified Agenda] https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=0710-AB46 (last visited Dec. 8, 2023). The agenda item identified three alternatives for the proposed rulemaking: leave Appendix C in place; revoke Appendix C and use Part 800; or revise Appendix C. *Id.* The agenda item noted that both revoking and revising Appendix C would ensure that the USACE complied with the NHPA and Part 800. *Id.* Nevertheless, the agenda item suggests that revisions to Appendix C is not the USACE's preferred alternative because "the end result would be comparable to the recission alternative with more resources and workload effort[] . . . [and] would result in continued confusion for the public with the differing names from [the] ACHP's regulations and Civil Works implementation." *Id.*

On November 16, 2023, the USACE and DOA submitted their proposed rulemaking to rescind Appendix C to the Office of Information and Regulatory Affairs for regulatory review pursuant to Executive Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993), before the notice of proposed rulemaking is published in the Federal Register. *See Appendix C Procedures for the Protection of Historic Properties, RIN 0710-AB46*, OFF. OF INFO. & REGUL. AFFS, https://www.reginfo.gov/public/do/eoDetails?rrid=347815 (last visited Dec. 8, 2023).

IV. Appendix C is an Unlawful Counterpart Regulation

Appendix C suffers from two fundamental legal deficiencies that render its adoption and continued use unlawful. First, the USACE did not lawfully promulgate Appendix C because the ACHP never approved or concurred in it. Second, Appendix C is inconsistent and conflicts with

Part 800 and the NHPA. By relying on Appendix C to fulfill its Section 106 obligations, every permitting decision the USACE makes violates the NHPA and is, therefore, unlawful.

A. Appendix C was not Lawfully Promulgated

Despite using some version of Appendix C for forty-three years, the USACE has conspicuously been unable to provide any documentation that the ACHP approved of or concurred in Appendix C's adoption and use. The USACE has not been able to provide such documentation because none exists; the ACHP has never condoned the adoption or use of Appendix C. The lack of ACHP approval or concurrence in Appendix C makes its adoption and use unlawful.

In 1979, when the USACE published its first draft of Appendix C, Part 800 allowed federal agencies to develop and adopt counterpart regulations, provided that they were "*approved by* the Chairman" of the ACHP. 36 C.F.R. § 800.11(a) (1979) (emphasis added). Likewise, when the USACE formally adopted Appendix C in 1990, Part 800 allowed federal agencies to develop and adopt counterpart regulations, provided that they were "*concurred in by* the Council[.]" 36 C.F.R. § 800.15 (1990) (emphasis added). Thus, regardless of whether the USACE adopted Appendix C pursuant to the ACHP regulations in place when the USACE initiated its development of Appendix C or pursuant to the regulations in place when it formally adopted Appendix C, valid, lawful counterpart regulations needed to be "approved by" or "concurred in by" the ACHP. As the ACHP stated in its 2008 email regarding Appendix C: "The ACHP has never approved Appendix C as a counterpart regulation for implementing Section 106." Email from Gilmore, *supra*, at 1. This fact has been widely documented by other federal agencies, *see, e.g.*, GAO Report, *supra*, at 51–55, federal courts, *see infra*, and commentators. *See, e.g.*, Wesley James Furlong, *The Army Corps Needs and Appendectomy: Diagnosing the Army Crops' Unlawful Promulgation and Use of 33 C.F.R. Part 325, Appendix C, to Comply with Section 106 of the National Historic Preservation*

Act, 26 U. DENV. WATER L. REV. 1, 23-31 (2023) [hereinafter Furlong, *Appendectomy*]; Melissa Lorentz, Note, *Engineering Exceptions to Historic Preservation Law: Why the Army Corps of Engineers' Section 106 Regulations are Invalid*, 40 WM. MITCHELL L. REV. 1580, 1582 (2014) ("[T]he Corps has not obtained ACHP approval."); Alana K. Bevan, Comment, *The Fundamental Inadequacy of Tribe-Agency Consultation on Major Federal Infrastructure Projects*, 6 U. PA. J. L. & PUB. AFF. 561, 568 (2021) ("[T]he Corps' Regulatory Program's alternate regulations have never been approved."). Indeed, the USACE itself has admitted that the ACHP has never approved of or concurred in Appendix C. *See, e.g.*, 2002 Mem., *supra*, at 1 (admitting that the ACHP does not "agree" with Appendix C).

Whether the ACHP had approved of or concurred in Appendix C was a central issue in *Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers*, 163 F. Supp. 2d 776 (N.D. Ohio 2001). In *Cleveland's Huletts*, historic preservation organizations challenged the USACE's compliance with Section 106 when it authorized a dredging project that ultimately damaged historic properties. *Id.* at 786. The USACE determined that the undertaking would have no effect on historic properties, ended the Section 106 process, and authorized the project. *Id.* at 790. Under the version of Part 800 in place at the time, the lead federal agency's finding of no effect did not end the Section 106 process. *Id.* Upon making such a finding, the federal agency was required to notify the relevant SHPO of the finding and allow the SHPO fifteen days to concur in or object to the finding. *Id.* at 789 (discussing 36 C.F.R. § 800.5(b) (1999)). If the SHPO concurred in the finding, then the Section 106 process was over. *Id.* (discussing 36 C.F.R. § 800.5(b) (1999)).

If the SHPO objected, additional consultation was required. *Id.* (discussing 36 C.F.R. § 800.5(b) (1999)).[9]

The USACE largely did not dispute that it did not provide the SHPO notice. Instead, it argued that it was not required to comply with Part 800 because its own regulations, Appendix C, governed its Section 106 compliance:

> The Corps contends that the Court is *not* compelled to conclude that it violated the NHPA merely because the Court finds that the Corps failed to comply with the ACHP regulations set forth at 36 CFR § 800.1 *et seq.* The Corps argues that those regulations do not govern its permitting process. Because the Corps has adopted regulations governing its own authority and obligations, including those under the NHPA, the Corps contends it is against these regulations which its actions should be judged.

Id. at 791 (emphasis in original). The USACE contended that it complied with Appendix C and therefore did not violate the NHPA. *Id.* The United States District Court for the Northern District of Ohio disagreed. *Id.* at 792.

The court noted that the USACE could adopt and use its own counterpart regulations, but emphasized "that such regulations [must] be 'consistent' with those issued by the ACHP," and must be "adopted in consultation with *and . . . approved by* the ACHP." *Id.* at 791 (emphasis added). It was these two critical points that the court found Appendix C lacking. *Id.* at 791–92. The court highlighted that "[*a*]*ll parties agree* that there is no record of the ACHP ever approving or concurring in the Corps' regulations." *Id.* at 792 (emphasis added). USACE was one of the referenced parties. *Id.* at 776. Indeed, in its briefing on cross-motions for summary judgment, attorneys for the USACE stated: "The undersigned has been unable to find any specific adoption of Appendix C by the Chairman of the Advisory Council." Defs.' Reply to Pls.' Mot. for Summ.

---

[9] This process is largely unchanged in the current Part 800 regulations, although SHPOs, THPOs, and the ACHP have thirty days to object and notice must also be provided to Indian tribes and Native Hawaiian organizations. 36 C.F.R. § 800.4(d)(1).

J. 3, *Comm. to Save Cleveland's Huletts v. U.S. Army Corps of Eng's*, No. 1:99CV3046 (N.D. Ohio filed June 29, 2000) (ECF 41).[10] Moreover, the court found that "the Corp's procedures are inconsistent with, and indeed, in derogation of those ACHP regulations." *Cleveland's Huletts*, 163 F. Supp. 2d at 792. Finally, the court concluded that "the Corps cannot rely on its own regulations to determine compliance with the NHPA in the circumstances at issue in this case[.]" *Id.*; *see also Sayler Park Vill. Council v. U.S. Army Corps of Eng'rs*, No. C-1-02-832, 2002 WL 32191511, at *7–8 (S.D. Ohio Dec. 30, 2002) ("Defendants also contend that the Corps did not violate the NHPA because it complied with its own regulations as interpreted in its interim guidance. This argument fails. . . . [B]y issuing a permit to Lone Star without having complied with the regulations issued by the ACHP, the Corps violated the NHPA."); *Nat'l Trust for Hist. Pres. in U.S. v. U.S. Army Corps of Eng'rs*, 552 F. Supp. 784, 790–91 (S.D. Ohio 1982) ("Congress authorized the Advisory Council to promulgate regulations as necessary to govern the implementation of Section 106. . . . The Corps may not violate these Regulations and at the same time insist that it has complied with Section 106." (internal citations omitted)).

The ACHP, itself, on multiple occasions, has publicly stated that Appendix C was not lawfully promulgated. For instance, in comments responding to the DOA's and the USACE's Federal Register notice soliciting the public's recommendations on how to "modernize" the USACE Regulatory Program, 87 Fed. Reg. at 33,756–57, the ACHP stated:

> From the outset, it is important to note that Appendix C is not a legal substitute for the Section 106 implementing regulations (at 36 CFR Part 800) nor is it consistent with its requirements. Appendix C was never approved by the ACHP as counterpart

[10] The USACE has tacitly admitted elsewhere that the ACHP has never approved of or concurred in Appendix C. *See, e.g.*, 2002 Mem., *supra*, at 1, ¶ 3 ("The ACHP does not endorse this guidance nor does it agree with Appendix C."); Statement from OASA-CW, *supra*, at 1–2 ("The Corps acknowledges that Appendix C has not been approved as an alternate procedure pursuant to regulations adopted after [sic] Appendix C was promulgated[.]"). This statement's admission that Appendix C was not approved under the alternate procedure regulations ACHP adopted *after* Appendix C's promulgation is misleading as it implies that Appendix C was approved under the version of Part 800 in place in 1990. As discussed herein, that is false.

> regulations to Section 106 and the ACHP has opposed its use as a means to comply with Section 106 for decades.

Letter from Reid J. Nelson, Acting Exec. Dir., Advisory Council on Hist. Pres., to Stacey Jensen, Off. of Assistant Sec'y of Army (Civ. Works) 1 (July 29, 2022) [hereinafter ACHP Modernization Letter]. The ACHP's comments are consistent with its previous position on this issue. *See e.g.*, Email from Gilmore, *supra*, at 1 ("The ACHP has never approved Appendix C as a counterpart regulation for implementing Section 106.").

Additionally, the GAO has extensively documented the lack of ACHP approval of or concurrence in Appendix C in its 2019 report on tribal consultation for infrastructure projects. GAO Report, *supra*, at 51–55. The GAO dedicated an entire chapter of its report to Appendix C, extensively detailing its development, adoption, and inconsistencies with Part 800 and the NHPA. *Id.* The GAO reported that, in 1981, the Chairman of the ACHP did approve an early version of Appendix C. *Id*. at 53. The ACHP's "approval" of the 1981 version of Appendix C should not be given much weight; as the GAO reported, the USACE never published that version in the Federal Register, and neither the ACHP nor the USACE could provide a copy of the 1981 version of Appendix C purportedly approved of by the ACHP. *Id.* In any event, this is not the version that the Corps adopted in 1990. *Id.*

The GAO reported that in 1984, the USACE submitted an updated version of Appendix C to the ACHP, which refused to approve it, stating that the USACE needed to make it available for public comment. *Id.* The USACE eventually published this version in the Federal Register. *Id.* (citing 49 Fed. Reg. at 19,036). The GAO reported that the USACE continued to work with the ACHP on Appendix C through the end of the 1980s, providing the ACHP revised versions of Appendix C in 1986 and 1987. *Id.* The GAO reported that the ACHP informed the USACE that these versions were inconsistent with the NHPA and Part 800. *Id.*

According to the GAO report, in 1988, the USACE provided the OMB a final version of Appendix C to be published in the Federal Register. *Id.* at 54. The OMB consulted with the ACHP, which provided revisions in 1988 and 1989. *Id.* Nevertheless, the OMB "acknowledged . . . that it might not be possible to resolve some of the issues with the regulation to the satisfaction of all parties." *Id.* The GAO reported that "[a]ccording to ACHP documents, the ACHP did not concur in the final rule, indicating that it was inconsistent with ACHP regulations." *Id.* Notwithstanding the ACHP's objections, the OMB approved the publication of this version of Appendix C in the Federal Register. *Id.* at 51.

The USACE has never proffered documentation that purports to show the ACHP's approval of or concurrence in Appendix C. *See, e.g.*, *id.* at 51–52 (explaining that the USACE "agreed there was no record of the ACHP concurring in the regulation finalized in 1990"). Perhaps recognizing that it cannot in good faith assert that the ACHP has approved of or concurred in Appendix C, the USACE has asserted that it did not need to obtain the ACHP's approval or concurrence to adopt and use Appendix C. *See* Off. of Assistant Sec'y of Army (Civ. Works) & Off. of Gen. Couns., *Review of 12 Nationwide Permits Pursuant to Executive Order 12783*, at 111 (Sept. 25, 2017) [hereinafter OASA(CW)/OGC REPORT]. This assertion has taken two forms: first, that neither Part 800 nor the NHPA require the USACE to obtain the ACHP's approval or concurrence; and second, that Appendix C is not a counterpart regulation, but a standalone regulation promulgated pursuant to the USACE's inherent rulemaking authority. Neither of these assertions hold water.

In a 2017 report on its nationwide permit ("NWP") program, the USACE extensively discussed its continued use of Appendix C. *Id.* at 155–60. The report responded to public comments on the NWP program, including one comment that "stated that 33 CFR part 325,

Appendix C is not approved by the Advisory Council on Historic Preservation (ACHP) as a program alternative, as required by 36 CFR 800.14." *Id.* at 110. In response, the report states:

> The ACHP's regulations at 36 CFR 800.14(a) states [sic] that an "agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E)[[11]] of the [NHPA]." Both 36 CFR 800.14(a) and NHPA section 110(a)(2)(E) state that a federal agency's program alternative has to be "consistent" with the ACHP's regulations. Neither of those provisions state that those program alternatives have to be "approved" by the ACHP.

Id. at 111; *see also* 82 Fed. Reg. 1,860, 1,959 (Jan. 6, 2017) ("Both 36 CFR 800.14(a) and NHPA Section 110(a)(2)(E) state that a federal agency's program alternative has to be 'consistent' with the ACHP's regulations. Neither of those provisions state that those program alternatives have to be 'approved' by the ACHP."). There are three fundamental issues with the USACE's assertion. First, the USACE is incorrect that 36 C.F.R. § 800.14(a) does not require ACHP approval of program alternatives. While the provision does not use the word "approval" or "approve," the regulation's requirement of ACHP approval is unambiguous. In relevant part, the provision states "[t]he agency official shall submit the proposed alternate procedures to the Council *for a 60-day review period*. *If the Counsel finds the procedures to be consistent with this part*, it shall notify the agency official and the agency official may adopt them as final alternate procedures." 36 C.F.R. § 800.14(a)(2) (2023) (emphasis added). Thus, Section 800.14(a)(2) unambiguously requires the ACHP's approval before alternate procedures can be adopted and used, as without its review and determination that they are consistent with Part 800, an agency cannot adopt them. Moreover, the ACHP interprets Section 800.14(a) as requiring ACHP approval: "[Alternate] Procedures, *approved by the ACHP* and adopted by the agency, substitute in whole or in part for the ACHP's Section 106 regulations under Subpart B." ACHP, *Alternate Procedures*, *supra*.

---

[11] Codified at 54 U.S.C. § 306102(b)(5)(A).

The NHPA unambiguously delegates Section 106 rulemaking authority exclusively to the ACHP: "[t]he Council may promulgate regulations as it considered necessary to govern the implementation of Section 306108 of this title in its entirety." 54 U.S.C. § 304108(a). Federal courts have unanimously recognized the ACHP's exclusive rulemaking authority in this arena. *See, e.g.*, *Te-Moak Tribe*, 608 F.3d at 607 (quoting 16 U.S.C. § 470s (2010) (re-codified as amended at 54 U.S.C. § 306108(a)) ("The NHPA explicitly delegates authority to the Advisory Council on Historic Preservation 'to promulgate such rules and regulations as it deems necessary to govern the implementation' of section 106."); *CTIA-Wireless Ass'n v. Fed. Commc'ns Comm'n*, 466 F.3d 105, 116 (D.C. Cir. 2006) ("Congress has entrusted one agency with interpreting and administering section 106 of the NHPA: the Council. . . . Congress has authorized the Council to administer the provision at issue here: section 106."); *McMillan Park Comm. v. Nat'l Capital Planning Comm'n*, 968 F.2d 1283, 1287 (D.C. Cir. 1992) ("[T]he Advisory Council's regulations implementing the NHPA[are] promulgated under authority granted by Congress[.]" (citation omitted)); *Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161, 166 (1st Cir. 2003) ("Fortunately, the NHPA delegates authority to the Advisory Council on Historic Preservation (the 'Council') to promulgate regulations interpreting and implementing § 106." (citation omitted)). Accordingly, courts afford the ACHP's interpretations of its own regulations substantial deference. *See, e.g.*, *McMillian Park*, 968 F.2d at 1288 ("[W]e nevertheless believe the Advisory Council regulations command substantial judicial deference."); *CTIA-Wireless*, 466 F.3d at 117 ("Given that *we* must defer under *Andrus*[*v. Sierra Club*, 442 U.S. 347 (1979),] and *McMillan Park* to the Council's reasonable interpretation of the meaning of section 106, we cannot see how it was arbitrary and capricious for the FCC to choose to do so as well." (emphasis in original, internal citation omitted)). More to the point, courts afford no deference to the USACE's

interpretations of Part 800 and the NHPA. *See, e.g.*, *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1088 (D.C. Cir. 2019) (quoting *Amax Land Co. v. Quarterman*, 181 F.3d 1356, 1368 (D.C. Cir. 1999) ("[W]e 'owe no deference to the Corps' interpretation of a statute it does not administer[.]'" (brackets omitted from original)); *c.f. United Keetoowah Band of Cherokee Indians in Okla. v. Fed. Commc'ns Comm'n*, 933 F.3d 728, 738 (D.C. Cir. 2019) ("We owe no deference to the FCC's interpretations of the NHPA[.]"). Where the ACHP's and the USACE's interpretations differ or conflict, the ACHP's interpretations must prevail. *See, e.g.*, *Semonite*, 916 F.3d at 1088–89 (rejecting the USACE's interpretation of the NHPA for the ACHP's and the National Park Service's interpretation and remanding to the USACE to use the "proper definition"); *Sayler Park*, 2002 WL 32191511, at *24 ("Consequently, the Corps Interim Guidance is inconsistent with the ACHP Interim Guidance and irrelevant." (footnote omitted)). Thus, the USACE's interpretation that Section 800.14(a) does not require ACHP approval is irrelevant and incorrect.

Second, the USACE's reference to Section 800.14(a) of the current version of Part 800 is irrelevant. As discussed in Section I.B, *supra*, the ACHP did not adopt the current alternate procedure provisions in the Part 800 regulations until 1999. The USACE adopted Appendix C in 1990. At that time, Part 800 explicitly required counterpart regulations to be "*concurred in by* the Council[.]" 36 C.F.R. § 800.15 (1990) (emphasis added). Moreover, the version of Part 800 in place when the USACE began developing Appendix C in 1979 required counterpart regulations to be "*approved by* the Chairman[]" of the ACHP. 36 C.F.R. § 800.11(a) (1979) (emphasis added). Even assuming arguendo that the current version of Part 800 does not require ACHP approval, the USACE developed and adopted Appendix C under two versions of Part 800 that explicitly required the ACHP's approval. *See Cleveland's Huletts*, 163 F. Supp. 2d at 791 (citing 36 C.F.R. § 800.15

(1998)) ("The ACHP regulations themselves also authorize the issuance of counterpart regulations. Again, however, that authority is limited to regulations which are adopted in consultation with *and are approved by* the ACHP." (emphasis in original, citation omitted)).

Third, the USACE's reliance on Section 110(a)(2)(E) of the NHPA is misplaced. Section 110(a)(2)(E) merely requires federal agencies' procedures for complying with Section 106 to be "consistent with the regulations promulgated by the Council pursuant to section 304108(a) and (b) of this title[.]" 54 U.S.C. § 306102(b)(5)(A). This provision was included in the NHPA in 1992. *See* Pub. L. No. 102-575, § 4012(2), 106 Stat. at 4760. The ACHP's subsequent rulemaking implementing the 1992 NHPA amendments produced the current alternate procedures regulations, which explicitly require the ACHP's approval. *Accord* 64 Fed. Reg. at 27,051 ("Section 110(a)(2)(E) of the [NHPA] requires that procedures implementing section 106, including these substitute procedures, be consistent with the Council's regulations."); 36 C.F.R. § 800.14(a) (2023) ("An agency official may develop procedures to implement section 106 and substitute them for all or part of subpart B of this part if they are consistent with the Council's regulations pursuant to section 110(a)(2)(E) of the act."). The ACHP continues to interpret Section 800.14(a) as requiring the ACHP's approval to adopt and use alternate procedures. ACHP, *Alternate Procedures*, *supra*.

In its 2009 Memorandum, the USACE asserts that "Appendix C was not established as a 'counterpart regulation,' and, as such, did not require approval of the Council." 2009 Mem., *supra*, at 1, ¶ 2(c). Instead, the 2009 Memorandum claims that "[t]he Corps' Appendix C regulations were properly promulgated as stand alone [sic] regulations establishing the process by which the Corps fulfills the requirements of the National Historic Preservation Act." *Id.* This assertion is legally false and belied by the USACE's own characterizations of Appendix C.

The USACE does not possess inherent or statutory authority to promulgate "stand alone [sic]" regulations that purport to implement Section 106 or prescribe the procedures by which the USACE complies with Section 106. "It is axiomatic that administrative agencies may issue regulations only pursuant to authority delegated to them by Congress." *Am. Libr. Ass'n v. Fed. Commc'ns Comm'n*, 406 F.3d 689, 691 (D.C. Cir. 2005). Accordingly, when it comes to the promulgation of regulations, the USACE, like all other federal agencies, "literally has no power to act . . . unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n*, 476 U.S. 355, 374 (1986). Here, Congress has conferred Section 106 rulemaking power on the ACHP, not the USACE.

The USACE does not cite any statute that purports to provide it with the authority to promulgate "stand alone [sic]" regulations that implement Section 106. *See* 2009 Mem., *supra*, at 1, ¶ 2(c); GAO Report, *supra*, at 52 ("In response to our questions, Corps attorneys told us that the Corps had authority to issue its own regulations implementing section 106 but did not cite a specific statute."). Nor can it, as the NHPA explicitly delegates this authority to the ACHP, and the ACHP alone. *See* 54 U.S.C. § 304108(a). Instead, the USACE presumably relies on its inherent rulemaking authority to promulgate regulations that prescribe how it carries out its obligations under other statutes, such as the Clean Water Act ("CWA") and the Rivers and Harbors Act ("RHA"). *See* GAO Report, *supra*, at 52 n.93 ("[USACE attorneys] also stated that the Supreme Court has long recognized that agencies have implied authority to issue legislative regulations to formulate policy and make rules to fill any gap in a law left implicitly or explicitly by Congress."). Congress's express and unambiguous delegation of rulemaking authority to the ACHP supersedes any implied authority the USACE may perceive it has to promulgate regulations setting forth the procedures by which its complies with Section 106 while fulfilling its obligations under the CWA

and the RHA. *See West Virginia v. Env't. Prot. Agency*, 142 S. Ct. 2587, 2609 (2022) (quoting Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999)) ("Agencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency may add pages and change the plot line.'" (brackets omitted)); *see also N.Y. Stock Exch. LLC v. Secs. & Exch. Comm'n*, 962 F.3d 541, 546 (D.C. Cir. 2020) (quoting *Colo. River Indian Tribes v. Nat'l Indian Gaming Comm'n*, 466 F.3d 134, 139 (D.C. Cir. 2006)) ("The controlling principle here is that 'an agency's general rulemaking authority does not mean that the specific rule the agency promulgates is a valid exercise of that authority." (brackets omitted)). The USACE's authority to promulgate Section 106 implementing "regulations is limited to the scope of authority Congress has delegated to it." *Am. Libr. Ass'n*, 406 F.3d at 698 (citing *Michigan v. Env't. Prot. Agency*, 268 F.3d 1075, 1081 (D.C. Cir. 2001)). Here, Congress has delegated to the USACE no such authority.

Moreover, the USACE's characterization that Appendix C is not a counterpart regulation but, instead, a "stand alone [sic]" regulation is belied by the USACE's own characterization of Appendix C elsewhere. For example, when developing Appendix C, the USACE explicitly stated that Appendix C was a counterpart regulation: "These regulations have been drafted . . . as counterpart regulations pursuant to 36 CFR 800.11." 45 Fed. Reg. at 22,112. More recently, the USACE affirmed its own understanding that Appendix C is a counterpart regulation. In its 2017 report on the NWP program, the USACE called Appendix C "an acceptable 'Federal Agency Program Alternative' under 36 CFR 800.14," stating that it "shall substitute for all of Subpart B of said regulation" and that it "is fully consistent with the ACHP's regulations." OASA(CW)/OGC REPORT, *supra*, at 5. And in 2021, in its Federal Register notice reissuing and modifying its NWPs,

the USACE stated that "Appendix C remains in effect as a counterpart regulation to 36 CFR part 800[.]" 86 Fed. Reg. at 2,826.

The ACHP has never approved of or concurred in Appendix C. Therefore, it was not lawfully promulgated. Moreover, the UASCE's arguments that Appendix C is not a counterpart regulation or that it did not need ACHP approval or concurrence are meritless. *See* ACHP Modernization Letter, *supra*, at 1 ("There is no legally authorized option outside the program alternatives provided in 36 CFR 800.14 for an agency to develop alternate Section 106 alternate procedures, let alone implementing regulations.").

B. Appendix C is Inconsistent and Conflicts with Part 800 and the NHPA

In addition to being unlawfully promulgated, Appendix C is unlawful because it is inconsistent and conflicts with Part 800 and the NHPA. Part 800 currently requires alternate procedures to be "consistent with the Council's regulations[.]" 36 C.F.R. § 800.14(a); *id.* § 800.14(a)(2) ("If the Council finds the procedures to be consistent with this part, it shall notify the agency official and the agency official may adopt them as final alternate procedures."). While the earlier counterpart regulation provisions of Part 800 did not explicitly require counterpart regulations to be consistent with Part 800, consistency was strongly implied.[12] Even if Part 800 did not require counterpart regulations to be consistent with Part 800 when Appendix C was adopted in 1990, they must be consistent today. In 1992, Congress amended the NHPA requiring that federal agencies' "procedures for compliance with section 306108 of this title[] . . . are consistent with regulations promulgated by the Council pursuant to section 304108(a) and (b) of

[12] The 1979 version required counterpart regulations to be "jointly drafted by th[e] agency and the Executive Director [of the ACHP] and approved by the Chairman [of the ACHP]." 36 C.F.R. § 800.11(a) (1979). The 1986 version required counterpart regulations to be developed "in the consultation process." 36 C.F.R. § 800.15 (1986). It is unreasonable to believe that the ACHP would help develop and approve counterpart regulations that were inconsistent with Part 800. *C.f.* Presidential Memorandum on Environmental Quality and Water Resources Management 2 (July 12, 1978) (directing certain federal agencies to develop agency-specific Section 106 procedures, which would be approved "*if consistent with* the [ACHP's] regulations[]" (emphasis added)).

this title[.]" 54 U.S.C. § 306102(b)(5)(A); *see* Pub. L. No. 102-575, § 4012(2), 106 Stat. at 4760. Accordingly, since 1992, just two years after its adoption, the USACE had an affirmative, statutory obligation to revise Appendix C to be consistent with Part 800. *See Slater*, 167 F. Supp. 2d at 282 ("[S]ection 110 mandates that federal agencies must ensure that their procedures for compliance with section 106 are consistent with the regulations issued by the Council pursuant to [54 U.S.C. § 304108]." (citation omitted)). Most of Appendix C's provisions are inconsistent or conflict with Part 800's and the NHPA's corresponding provisions, which has been widely documented by the GAO, *See* GAO Report, *supra*, at 52 ("ACHP documents we reviewed identified several inconsistencies between the Corps procedures and [the] ACHP regulations, including that the Corps procedures (1) define the geographic area to be analyzed narrowly, (2) improperly assigned the Corps' analytical responsibilities to third parties, and (3) limited opportunities for consultation with tribes and others."), the ACHP, *see, e.g.*, ACHP Modernization Letter, *supra*, at 1–2 ("[I]t is important to note that Appendix C is not . . . consistent with [Part 800's] requirements . . . [T]he provisions within Appendix C are in fundamental conflict with the requirements of the Section 160 implementing regulations."); ACHP Assistance Letter, *supra* note 19, at 1–2 ("The differences between the Section 106 regulations and Appendix C are fundamental[.] . . . Appendix C is fundamentally inconsistent with the government-wide Section 106 regulations[.]"); Advisory Council on Hist. Pres., *Improving Tribal Consultation in Infrastructure Projects* 13–14 (May 24, 2017) [hereinafter ACHP, *Improving Consultation*] ("These regulations are inconsistent with the government-wide Section 106 regulations issued by the ACHP in key areas, including the establishment of areas of potential effect, consultation with Indian tribes, and the resolution of effects."); federal courts, *see, e.g.*, *Cleveland's Huletts*, 163 F. Supp. 2d at 792 ("The Court has found, moreover, that[] . . . the Corps procedures are inconsistent with, and indeed, in derogation

of those ACHP regulations."); *c.f. Sayler Park*, 2002 WL 32191511, at *7 ("Consequently, the Corps Interim Guidance is inconsistent with the ACHP Interim Guidance and irrelevant." (footnote omitted)); *Marsh*, 605 F. Supp. at 1437 ("[Appendix C's] distinction between properties and differing scopes of responsibility is at odds with [the] NHPA and its regulations."); *Sisseton-Wahpeton Oyate of Lake Travers Rsvr. v. U.S. Army Corps of Eng'rs*, No. 3:11-CV-03026-RAL, 2016 WL 5478428, at *5 (D.S.D. Sept. 29, 2016) ("The Corps and the Advisory Council disagree about whether the Corps' regulations comply with the NHPA is several areas."), and commentators. *See e.g.*, Furlong, *Appendectomy*, *supra*, at 31-58; Lorentz, *supra* note 186, at 1592-03; Jerald "Cliff" McKinney, II & Casey Rockwell, *Digging Up Bones: Archaeological Compliance Issues in Retail Development*, 46 REAL EST. L.J. 533, 543 (2018) ("Throughout Appendix C, the Corps uses standards and definitions that are substantially different from the ACHP's regulations."); Robert D. Anderson et al., *Federal Environmental Laws Affecting Real Estate: A Review of Clean Water Act Section 404, the Endangered Species Act, the National Environmental Policy Act, and Section 106 of the National Historic Preservation Act*, 46 ARIZ. ST. L.J. 598, 631 (2014) ("The ACHP and Corps regulations differ in various ways[.]"). Moreover, in the 2022 Fall United Agenda, the USACE specifically states that Appendix C "is not compliant with the updates to [the] NHPA and the ACHP['s] implementing regulations[.]" Fall 2022 United Agenda, *supra*.

1. Appendix C, Section 1. Definitions

i. Section 1(a) and 1(b)

Section 1(a) defines "designated historic property" as:

> "Designated historic property" is a historic property listed in the National Register of Historic Places (National Register) or which has been determined eligible for listing in the National Register pursuant to 36 CFR Part 63. A historic property that, in both the opinion of the SHPO and the district engineer, appears to meet the

criteria for inclusion in the National Register will be treated as a "designated historic property."

33 C.F.R. pt. 325, app. C, § 1(a). Section 1(b) provides: "'Historic property' is a property which has historical importance to any person or group. This term includes the types of districts, sites, buildings, structures or objects eligible for inclusion, but not necessarily listed, on the National Register." *Id.* § 1(b).

The NHPA defines "historic property" as "any prehistoric or historic district, site, building, structure, or object included on, or eligible for inclusion on, the National Register, including artifacts, records, and material remains relating to the distort, site, building, structure, or object." 54 U.S.C. § 300308. Additionally, the NHPA clarifies that "[p]roperty of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register." *Id.* § 302706(a).

Accordingly, Part 800 defines "historic property" as:

> (1) *Historic Property* means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.
>
> (2) The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

36 C.F.R. § 800.16(l)(1)-(2). Appendix C's use of the term designated historic property conflicts with Part 800 and the NHPA. Section 106 requires federal agencies to "take into account the effect of the undertaking on any *historic property*." 54 U.S.C. § 306108 (emphasis added). Historic property is a statutorily defined term. Appendix C appears to distinguish between historic properties that are formally listed or determined eligible for inclusion on the National Register and

properties that have not previously been evaluated for National Register eligibility but nevertheless meet the criteria. This is inconsistent with Part 800, which treats all three types of historic properties the same in the Section 106 process. 36 C.F.R. §§ 800.4(c)(1), 800.16(l). Additionally, Appendix C fails to acknowledge properties of traditional religious and cultural importance to Indian tribes and Native Hawaiian organizations.

ii. Section 1(e)

Section 1(e) defines "effect" as: "[a]n '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. Consideration of effects on 'designated historic properties' includes indirect effects of the undertaking." 33 C.F.R. pt. 325, app. C § 1(e). Additionally, the 2005 Interim Guidance states: "An indirect effect is also caused by the undertaking, but occurs later in time or is farther removed in distance, and is still reasonably foreseeable. Examples of indirect effects include visual and noise impacts resulting from the undertaking[.]" 2005 Interim Guidance, *supra*, at 4, § 6(i).

Part 800 defines "effect" as: "[a]lteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register." 36 C.F.R. § 800.16(i) (emphasis removed). Part 800 clarifies that an undertaking may cause direct or indirect effects, as well as "reasonably foreseeable effects . . . that may occur later in time, be farther removed in distance or be cumulative." *Id.* § 800.5(a)(1). Appendix C is inconsistent with Part 800 because it does not require the USACE to consider cumulative effects, and improperly characterizes reasonably foreseeable, later occurring, and farther removed effects as indirect.

The 2005 Interim Guidance's examples of indirect effects—specifically, visual and auditory effects—conflict with the ACHP's and federal courts' interpretations of what direct and

indirect mean under the NHPA. In *National Parks Conservation Association v. Semonite*, the USACE determined that the construction of a transmission line would only indirectly affect a historic property because it would cause only "visual impacts on the historic resource" 916 F.3d at 1087, and would "not 'physically' intrude on the [historic property]." *Id.* at 1088. The United States Court of Appeals for the District of Columbia Circuit rejected this interpretation, agreeing with the ACHP and the National Park Service ("NPS") that direct "refer[s] to causation and not physicality." *Id.* (citations omitted); *see id*. (quoting *Quarterman*, 181 F.3d at 1368) ("[W]e 'owe no deference to the Corps's interpretation of a statute it does not administer.'" (brackets removed from original)). While *Semonite* dealt with NHPA Section 110(f) reviews,[13] the ACHP has interpreted the holding as "clarify[ing] how effects in the Section 106 process may be defined as direct and indirect." Mem. from ACHP Off. of Gen. Couns., to ACHP Staff, *Recent Court Decision Regarding the Meaning of "Direct" in Sections 106 and 110(f) of the National Historic Preservation Act* 1 (June 7, 2019) [hereinafter ACHP OGC Memorandum]. In its post-*Semonite* guidance, the ACHP notes that this clarification "will change the approach to defining effects based on physicality and recognize instances where direct effects may be visual, auditory, or atmospheric." *Id.* at 3.

iii. Section 1(f)

Section 1(f) defines "undertaking" as: "[t]he term 'undertaking' as used in this Appendix means the work, structure or discharge that requires a Department of the Army permit pursuant to the Corps regulations at 33 CFR 325-335." 33 C.F.R. pt. 325, app. C, § 1(f). The 2005 Interim

[13] Section 110(f) provides: "Prior to the approval of any Federal undertaking that may directly and adversely affect any National Historic Landmark, the head of the responsible federal agency shall to the maximum extent possible undertake such planning and actions as may be necessary to minimize harm to the landmark." 54 U.S.C. § 306107. Federal agencies generally rely on the Section 106 process to comply with Section 110(f). *See Presidio Hist. Ass'n v. Presidio Tr.*, 811 F.3d 1154, 1169 (9th Cir. 2016) ("Section 110(f) cannot be read in a vacuum. It builds on the general consultation process set out in Section 106[.]").

Guidance clarifies that "[t]he scope of the undertaking is also dependent upon the amount of Federal control and responsibility for a particular project." 2005 Interim Guidance, *supra*, at 2–3, § 6(c).

Part 800 and the NHPA define "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction over 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." 36 C.F.R. § 800.16(y); 54 U.S.C. § 300320(1)–(3).[14]

Section 106 requires federal agencies to "take into account the effects of *the undertaking* on any historic property." 54 U.S.C. § 306108. Under Part 800, a federal agency is required to take into account the effects of the *entire* undertaking, irrespective of whether only a portion of the undertaking falls under the agency's jurisdiction (*i.e.*, is implemented by or on behalf of the agency or occurs on property managed or controlled by the agency), is funded by the agency, or is permitted by the agency. *See, e.g.*, 36 C.F.R. § 800.9(c)(3). The ACHP has clarified that Part 800 "define[s] the undertaking as *the entire project*, portions of which may require federal authorization or assistance." Letter from Reid J. Nelson, Dir., Off. of Fed. Agency Programs, Advisory Council on Hist. Pres., to Col. John W. Henderson, Dist. Eng'r, U.S. Army Corps of Eng'rs, *Dakota Access Pipeline Project* 1 (May 6, 2016) [hereinafter ACHP DAPL Letter] (emphasis added); *see also* ACHP Modernization Letter, *supra*, at 2 ("[I]n accordance with law and regulation, the 'undertaking' should not be defined as the permit or grant itself, nor should it

[14] The NHPA also includes in its definition of undertaking projects, activities, and programs that are "subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency." 54 U.S.C. § 300320(4). The D.C. Circuit has clarified, however, "that 'section 106 . . . applies by its terms only to *federally funded* or *federally licensed* undertakings[]' and not to undertakings that are merely 'subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency[.]'" *Fowler*, 324 F.3d at 760 (citations omitted, emphasis and ellipses in original).

be limited to the part of the project that is under the specific jurisdiction over the federal permit or grant. Rather, the undertaking is the overall project which, as proposed, cannot move forward or be completed without the federal authorization or the federal assistance (36 CFR § 800.16(y)).”). In contrast, Appendix C defines the undertaking as only the portion of the project, activity, or program that requires a permit from the USACE. 33 C.F.R. pt. 325, app. C, § 1(f). This directly conflicts with Part 800 and the NHPA and serves to constrain the scope of the USACE's Section 106 reviews.

iv. Section 1(g)

Section 1(g) defines "permit area" as:

> (1) The term "permit area" as used in this Appendix means those areas comprising the waters of the United States that will be directly affected by the proposed work and uplands directly affected as a result of authorizing the work or structures. The following three tests must all be satisfied for an activity outside the waters of the United States to be included within the "permit area":
>
> > (i) Such activity would not occur but for the authorization of the work of structure within the waters of the United States;
> >
> > (ii) Such activity must be integrally related to the work or structures to be authorized within waters of the United States. Or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program, and
> >
> > (iii) Such activity must be directly associated (first order impact) with the work or structures to be authorized.

Id. § 1(g). Additionally, the 2005 Interim Guidance states: "The district engineer remains responsible for making the final determination regarding the boundaries of the permit area. The district engineer can, in unusual or complex projects, seek the views of the SHPO/THPO before making a final determination." 2005 Interim Guidance, *supra*, at 3, § 6(d).

The concept of a "permit area" does not exist within the NHPA and Part 800. Instead, Part 800 defines an "area of potential effects," or "APE" as:

> Area of potential effects means 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 the undertaking and may be different for different kinds of effects caused by the undertaking.

36 C.F.R. § 800.16(d). Appendix C's concept of a permit area conflicts with "area of potential effects" defined in Part 800 in three predominant ways. *See Cleveland's Huletts*, 163 F. Supp. 2d at 792 (citing *Marsh*, 605 F. Supp. at 1437) ("The Corps, accordingly, cannot rely on its own regulations . . . to define the 'permit area[.]'").[15] First, the permit area limits the scope of the USACE's Section 106 reviews to only those areas of the project, activity, or program that require a permit from the USACE, mirroring Appendix C's definition of undertaking. *See* 2005 Interim Guidance, *supra*, at 3, § 6(d), at 3 ("The limits of the permit area are constrained by the extent of Federal control and responsibility over a particular project (i.e., the undertaking)."). This limitation directly conflicts with Part 800's definition of area of potential effects. The area of potential effects encompasses the area that the *entire* undertaking may affect, even portions that are outside the jurisdiction or control of the lead federal agency. 36 C.F.R. § 800.16(d). The area of potential effects—the geographic area within which the federal agency is responsible for identifying historic properties, assessing potential effects, and resolving adverse effects—is not limited to only, or by, those parts of the undertaking under the jurisdiction or control of the federal agency. According to the ACHP:

> We recognize that federal agencies may have limited jurisdiction over, or involvement in, an undertaking in some circumstances, limiting their ability to identify historic properties and to resolve adverse effects comprehensively throughout the APE for the entire undertaking. However, even in circumstances where such limitations exist, the federal agency remains responsible for taking into account the effects of the undertaking on historic properties.

---

[15] *Cleveland's Huletts* concerned the 1998 version of Part 800 which defined area of potential effects as "the geographic area or areas within which an undertaking may cause changes in the character or use of historic properties, if any such properties exist." 36 C.F.R. § 800.2(c) (1998).

ACHP DAPL Letter, *supra*, at 1; *see also* ACHP Modernization Letter, *supra*, at 2 ("While the Section 106 implementing regulations allow a federal agency to consider the level of federal involvement in the undertaking in determining the scope of its identification efforts and resolution of any adverse effects, the APE must be based upon the undertaking and all of its related parts. In contrast, the Appendix C use of the 'permit area' to narrowly define the scope of the undertaking generally allows the Corps to only review the area or part of the project directly linked to its permit, rather than the entire project."). Part 800 defines the area of potential effect only by the undertaking's potential effects, without consideration of the purported limits of the federal agency's jurisdiction or control over the undertaking. *See* 36 C.F.R. § 800.16(d).

Second, the permit area is defined by considering only the potential *direct* effects of the undertaking, whereas the area of potential effects is defined by considering the potential *direct and indirect* effects of the undertaking. *Id.* Third, Part 800 requires federal agencies to define the area of potential effects for every undertaking "[i]n consultation with the SHPO/THPO[,]" *id.* § 800.4(a)(1), whereas Appendix C requires such consultation for only "unusual or complex projects[.]" 2005 Interim Guidance, *supra*, at 3, § 6(d). Appendix C's use of a permit area, in conjunction with its definition of undertaking, limit the scope of the USACE's Section 106 reviews and conflict with Part 800 and the NHPA. *See* ACHP Assistance Letter, *supra*, at 1 ("The Corps' application of this narrower view leads to Section 106 reviews that . . . minimiz[e] the potential for consideration of effects to historic properties that may be located within the broader project area[.]"); *c.f. Pres. Soc'y of Charleston v. U.S. Army Corps of Eng'rs*, No. 2:12-2942-RMG, 2013 WL 6488282, at *10 (D.S.D. Sept. 18, 2013) (USACE violated the NHPA by not initiating Section 106 for construction of proposed cruise ship terminal after determining the undertaking "had no potential to case effects to historic properties in or outside of the permit area" because the USACE

"considered the scope of the project to be limited to the additional pilings that directly came into contact with the navigable waters and" not the rest of the associated terminal construction (quotation marks omitted)); *Marsh*, 605 F. Supp. at 1438 ("[T]he Corps looked at the effects on properties that may qualify for inclusion in the National Register solely within the 'permit area[]' . . . and failed to look at the effects on like properties in the broader 'affected area.'").[16]

2. Appendix C, Section 3. Initial Review

Section 3(a) requires the USACE to conduct an initial review of "district files and records, the latest published version(s) of the National Register, lists of properties determined eligible, and other appropriate sources of information to determine if there are any designated historic properties which may be affected by the proposed undertaking." 33 C.F.R. pt. 325, app. C, § 3(a). Appendix C further requires the USACE to "consult with other appropriate sources of information for knowledge of undesignated historic properties which may be affected by the proposed

[16] While *Marsh* concerned the initial 1980 draft of Appendix C, the court's conclusions about the inadequate scope of the USACE's Section 106 review is relevant to the current version of Appendix C. Under the initial draft of Appendix C, the USACE's Section 106 responsibilities extended to any properties that met the National Register criteria (whether they were listed on the National Register, previously determined eligible for inclusion on the National Register, or met the National Register criteria but had not been previously evaluated) within the "permit area," while these responsibilities were limited to only properties listed on the National Register or previously determined eligible for inclusion on the National Register (and *not* those that met the National Register criteria but had not been previously evaluated) within the "affected area." *Marsh*, 605 F. Supp. at 1437. The initial draft of Appendix C defined permit area nearly identically to how it is defined today. *Compare* 45 Fed. Reg. at 22,112 (to be codified at 33 C.F.R. pt. 325, app. C, § 2(a)) ("The term 'permit area' as used in this appendix means those areas comprising the water of the United States that will be physically affected by the proposed work or structures and uplands directly affected as a result of authorizing the work of structures."), *with* 33 C.F.R. pt. 325, app. C, § 1(g)(1) ("The term 'permit area' as used in this Appendix means those areas comprising the waters of the United States that will be directly affected by the proposed work and uplands directly affected as a result of authorizing the work or structures."). Affected area was defined nearly identically to how Part 800 then defined "area of the undertaking's potential environmental impact," which is nearly identical to Part 800's current definition of "area of potential effect." *Compare* 45 Fed. Reg. at 22,113 (to be codified at 33 C.F.R. pt. 325, app. C, § 3) ("The term 'affected area' as used in this appendix is that geographic area within which direct and indirect effects of the proposed work and/or structures, if permitted, could reasonably be expected to occur. This is the area of potential environmental impact and, in most cases, will exceed the limits of the permit area."), *with* 36 C.F.R. § 800.2(o) (1981) ("'Area of the undertaking's potential environmental impacts' means that geographic area within which direct and indirect effects generated by the undertaking could reasonably be expected to occur and thus cause a change in the historical, architectural, archaeological, or cultural qualities possessed by a National Register or eligible property."), *and* 36 C.F.R. § 800.16(d) (2022) ("Area of potential effects means 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.").

undertaking." *Id.* This initial review informs both the need for and level of further investigations to identify historic properties that the undertaking potentially affects. *Id.* § 5(a), (c).

Part 800 outlines specific and detailed steps federal agencies must take to determine the scope of their efforts to identify historic properties:

> (2) Review existing information on historic properties within the area of potential effects, including any data concerning possible historic properties not yet identified;
>
> (3) Seek information, as appropriate, from consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the area, and identify issues related to the undertaking's potential effects on historic properties; and
>
> (4) Gather information from any Indian tribe or Native Hawaiian organization identified pursuant to [36 C.F.R.] § 800.3(f) to assist in identifying properties, including those located off tribal lands, which may be of religious and cultural significance to them and may be eligible for the National Register, recognizing that and Indian tribe or Native Hawaiian organization may be reluctant to divulge information regarding the location, nature, and activities associated with such sites. The agency should address concerns raised about confidentiality pursuant to [36 C.F.R.] § 800.11(c).

36 C.F.R. § 800.4(a)(2)–(4). Appendix C does not require the USACE to approach consulting parties, including SHPOs and THPOs, Indian tribes and Native Hawaiian organizations, and other individuals and organizations, about the existence of and concerns for historic properties potentially located within the permit area. *See* 33 C.F.R. pt. 325, app. C, § 8. Consultation is the most important part of the Section 106 process: "[t]he goal of consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties." 36 C.F.R. § 800.1(a). Appendix C minimizes the role of consultation in the Section 106 process at the very earliest stages of the USACE's review.

3. Appendix C, Section 4. Public Notice

In relevant part, Section 4(a) provides: "the district engineer's current knowledge of the presence or absence of historic properties and the effects of the undertakings upon these properties will be included in the public notice." 33 C.F.R. pt. 325, app. C, § 4(a). While Appendix C does not elaborate further, the USACE's regulations elsewhere require a public notice to be issued within fifteen days of receipt of an application for a DOA permit. 33 C.F.R. § 325.2(a)(2). This public notice solicits "comments and information necessary to evaluate the probably impact on the public interest." *Id.* § 325.3(a). Appendix C does not contain any other provisions regarding public notice in the USACE's Section 106 process.

In contrast, Part 800 provides detailed procedures for involving the public throughout the Section 106 process. *See* 36 C.F.R. § 800.2(d)(1) ("The views of the public are essential to inform Federal decision-making in the section 106 process."); *Winnemem Wintu Tribe v. U.S. Dep't of Interior*, No. 2:09-cv-01072-FCD EFB, 2009 WL 10693214, at *7 (E.D. Cal. Sept. 15, 2009) ("NHPA's regulations also require federal agencies to provide interested members of the public reasonable opportunity to participate in the section [106] process." (citations omitted)). For instance, Part 800 requires federal agencies to "seek and consider the views of the public in a manner that reflects the nature and complexity of the undertaking and its effects on historic properties, the likely interest of the public in the effects on historic properties, . . . and the relationship of the Federal involvement to the undertaking." 36 C.F.R. § 800.2(d)(1). The requirement to involve the public is codified throughout Part 800. *Id.* § 800.3(e).

When initiating the Section 106 process, the federal agency is required to "plan for involving the public" by "identify[ing] the appropriate points for seeking public input and for notifying the public of proposed actions." *Id.* If the federal agency determines that no historic

properties will be affected, it must "make th[at] determination available for public inspection prior to approving the undertaking." *Id.* § 800.4(d)(1). Federal agencies must "consider any views concerning such effects which have been provided by . . . the public." *Id.* § 800.5(a). Finally, federal agencies must "provide an opportunity for members of the public to express their views on resolving adverse effects of the undertaking." *Id.* § 800.6(a)(4). While federal agencies may fulfill these public notice obligations through other statutes' public involvement procedures, they must nevertheless provide the public with notice of, and the opportunity to comment on, the undertaking, historic properties, potential effects, and measures to resolve adverse effects. *See id.* § 800.2(d)(3). Appendix C's limited public notice requirement is therefore inconsistent with the requirements of Part 800.

4. Appendix C, Section 5. Investigations

i. Section 5(b)

Section 5(b) provides:

> Where the scope and type of work proposed by the applicant or the evidence presented leads the district engineer to conclude that the chance of disturbance by the undertaking to any potentially eligible historic property is too remote to justify further investigation, he shall so advise the reporting party and the SHPO.

33 C.F.R. pt. 325, app. C, § 5(b). Part 800 provides detailed procedures for how a federal agency makes a determination of no historic properties affected. *See* 36 C.F.R. § 800.4(b). First, the federal agency must provide the SHPO or the THPO documentation of its determination that the undertaking will not affect any historic properties or that there are not any historic properties within the area of potential effects. *Id.* § 800.4(d)(1). The federal agency must also provide notice of this determination to all consulting parties, including Indian tribes, Native Hawaiian organizations, and the public. *Id.*

Second, the SHPO or the THPO and the ACHP have thirty days to review this determination. *Id.* § 800.4(d)(1)(i), (iii). If they do not object within that timeline, the federal agency's Section 106 obligations are fulfilled. *Id.* § 800.4(d)(1)(i). If the SHPO or the THPO objects, the federal agency must either engage in additional consultation or request that the ACHP review its determination. *Id.* § 800.4(d)(1)(ii). If the ACHP's views are requested, it has thirty-days to provide an opinion regarding the determination. *See id.* § 800.4(d)(1)(iv)(A).

If the ACHP provides an opinion or it objects to the determination, the federal agency is required to take the ACHP's opinion into consideration when making a final decision about whether to affirm the finding. *Id.* § 800.4(d)(1)(iv)(C). The head of the federal agency is also required to provide the ACHP and all consulting parties with "a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's opinion[.]" *Id.* Appendix C does not contain these important provisions.

ii. Section 5(f)

Section 5(f) provides:

> The Corps of Engineers' responsibilities to seek eligibility determinations for potentially eligible historic properties is limited to resources located within water of the U. S. [sic] that are directly affected by the undertaking. The Corps responsibilities to identify potentially eligible historic properties is limited to resources located within the permit area that are directly affected by related upland activities. The Corps is not responsible for identifying or assessing potentially eligible historic properties outside the permit area, but will consider the effects of undertakings on any known historic properties that may occur outside the permit area.

33 C.F.R. pt. 325, app. C, § 5(f). The 2005 Interim Guidance further states that the USACE "cannot require permit applicants to do cultural resource surveys outside the permit area as it has been defined during the Section 106 process." 2005 Interim Guidance, *supra*, at 3, § 6(f).

As discussed in Section IV.B.1, *supra*, Appendix C's use of permit area, combined with its definition of undertaking, unlawfully restricts the scope of the USACE's Section 106 review to only those portions of projects, activities, or programs that require a USACE permit. Here, Section 5(f) further restricts the scope of review by limiting the USACE's efforts to evaluate the National Register eligibility of historic properties to only those within waters of the United States.[17] Part 800 requires federal agencies, including the USACE, to "take into account the effects of *the undertaking* on any historic property[,]" 54 U.S.C. § 306108 (emphasis added), and clarifies that "the undertaking" is any "project, activity, or program . . . requiring a Federal permit, license, or approval[.]" *Id*. § 300320(3); 36 C.F.R. § 800.16(y). A federal agency's Section 106 review, including the identification and the National Register-eligibility evaluation of historic properties, extends to "the *entire* project," not just the components subject to that agency's permitting authority. ACHP DAPL Letter, *supra*, at 1 (emphasis added).

Furthermore, Appendix C's limitation of the USACE's identification effort only to those properties "directly affected" by the undertaking conflicts with Part 800. First, Part 800 requires federal agencies to assess the undertaking's potential direct and indirect effects, including "reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative." 36 C.F.R. § 800.5(a)(1).[18] Second, Part 800 requires federal agencies to identify historic properties within the area of potential effects *before* assessing the undertaking's potential effects. *Accord id.* § 800.4(d)(2) ("If the agency official finds that there are

---

[17] Section 5(f) is also internally inconsistent. In its first sentence, Section 5(f) states that the USACE will only determine the National Register eligibility of potential historic properties located within waters of the United States. 33 C.F.R. pt. 325, app. C, § 5(f). Yet, in the very next sentence, Section 5(f) states that the USACE will determine the National Register eligibility of potential historic properties within the permit area. *Id*. Waters of the United States and permit area are not necessarily coterminous, as the permit "compris[es] 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." *Id.* § 1(g)(1) (emphasis added).

[18] Moreover, the USACE's interpretation of direct effect conflicts with the ACHP's and the D.C. Circuit's interpretations. *See* ACHP OGC Mem., *supra*, at 3; *Semonite*, 916 F.3d at 1088–89.

historic properties which may be affected by the undertaking, the agency official shall notify all consulting parties[] . . . [and] invite their views on the effects and assess adverse effects, if any[. . . .]"); *id.* § 800.5(a) ("[T]he agency official shall apply the criteria of adverse effect to historic properties within the area of potential effects."). Appendix C therefore flips the Section 106 process, limiting the USACE's identification efforts to only those historic properties that will be affected by the undertaking.

Finally, Appendix C's provisions regarding the consideration of effects "on any known historic properties that may occur outside the permit area" conflict with Part 800 and the NHPA and is internally inconsistent with the purpose of defining a permit area. 33 C.F.R. pt. 325, app. C, § 5(f) (2022); *see* 2005 Interim Guidance, *supra*, at 3, § 6(d) ("The limits of the permit area are constrained by the extent of Federal control and responsibility over a particular project (i.e., the undertaking)."). Part 800 requires federal agencies to identify historic properties within the area of potential effects. *See* 36 C.F.R. § 800.1(a). Part 800 clarifies that historic properties include not only those listed on the National Register, but also those that meet the National Register criteria, including ones that have not previously been evaluated for National Register eligibility. *Id.* § 800.4(c)(1). Appendix C does not define the term "known historic properties." *See* 33 C.F.R. pt. 325, app. C, § 1(a)–(b). This term implies that the USACE's identification efforts outside the permit area are limited to only historic properties that are listed on the National Register or have previously been determined eligible for listing, which is inconsistent with Part 800. *See* 36 C.F.R. § 800.4(c)(1); *id.* § 800.14(a)(l).

5. Appendix C, Section 6. Eligibility Determinations

i. Section 6(a) and 6(b)

Section 6(a) establishes a process for determining the National Register eligibility of "historic properties within waters of the U. S. [sic] that will be directly affected by the undertaking[.]" 33 C.F.R. pt. 325, app. C, § 6(a). Section 6(b) established a process for determining the National Register eligibility of a "historic property outside of waters of the U. S. [sic] that will be directly affected by the undertaking[.]" *Id.* § 6(b).

Part 800 does not permit federal agencies to utilize different procedures for determining the National Register eligibility of historic properties based on their physical location. 36 C.F.R. § 800.4(c)(2). The area of potential effects defines the geographic area within which federal agencies must identify and evaluate the National Register eligibility of historic properties. *Id.* § 800.4(b). The scope of the federal agency's permitting jurisdiction is irrelevant in determining the area of potential effects and in evaluating the National Register eligibility of historic properties within that area.

Additionally, a federal agency must identify historic properties within the area of potential effects *before* it assesses whether the undertaking will affect those properties. *Id.* § 800.4(b)–(d); *id.* § 800.5(a). It would be impossible to determine first whether an undertaking will affect any specific historic property within the area of potential effects without having first identified the historic properties within the area of potential effects. Under both Part 800 and Appendix C, a property is "adversely affected" when the undertaking alters the characteristics of a historic property that make it eligible for inclusion in the National Register; this occurs when the undertaking diminishes the property's integrity of location, design, setting, materials, workmanship, feeling, or association such that the characteristics that make it eligible for the

National Register are altered. *Id.* § 800.5(a)(1); 33 C.F.R. pt. 325, app. C, § 15(b). A federal agency cannot determine how an undertaking diminishes a property's integrity without first identifying the property, determining the type, or types, of integrity it retains, and the National Register criteria it meets. *See* 36 C.F.R. § 800.5(a)(1); 33 C.F.R. pt. 325, app. C, § 1(d) (citing 36 C.F.R. § 60.4).

Finally, adverse effects are not limited to only direct effects. Part 800 requires federal agencies to assess the direct and indirect effects of an undertaking, and further notes that "[a]dverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be [they] farther removed in distance or cumulative." 36 C.F.R. § 800.5(a)(1). Appendix C only considers direct and indirect effects, and, as discussed in Section IV.B.1, *supra*, the UASCE's interpretation of "indirect" is inconsistent with the ACHP's interpretation.

ii. Section 6(b)(3) and 6(c)

Section 6(b) provides:

> For a historic property outside of waters of the U. S. [sic] that will be directly affected by the undertaking the district engineer will, for the purposes of this Appendix and compliance with the NHPA:
>
> > (1) treat the historic property as a 'designated historic property,' if both the SHPO and the district engineer agree that it is eligible for inclusion in the National Register; or
> >
> > (2) treat the historic property as not eligible, if both the SHPO and the district engineer agree that it is not eligible for inclusion in the National Register: [sic] or
> >
> > (3) treat the historic property as not eligible unless the Keeper of the National Register determines it is eligible for or lists it on the National Register. (See paragraph 6.c below.)

33 C.F.R. pt. 325, app. C, § 6(b)(1)–(3). Section 6(c) provides:

> If the district engineer and the SHPO do not agree pursuant to paragraph 6.b.(I) [sic] and the SHPO notifies the district engineer that it is nominating a potentially eligible historic property for the National Register that may be affected by the undertaking, the district engineer will wait a reasonable period of time for that

> determination to be made before concluding his action on the permit. Such a reasonable period of time would normally be 30 days for the SHPO to nominate the historic property plus 45 days for the Keeper of the National Register to make such determination. The district engineer will encourage the applicant to cooperate with the SHPO in obtaining the information necessary to nominate the historic property.

Id. § 6(c).

Part 800 provides:

> If the agency official determines any of the National Register criteria are met and the SHPO/THPO agrees, the property shall be considered eligible for the National Register for section 106 purposes. If the agency official determines the criteria are not met and the SHPO/THPO agrees, the property shall be considered not eligible. If the agency official and the SHPO/THPO do not agree, or if the Council or the Secretary [of the Interior] so request, the agency official shall obtain a determination of eligibility from the Secretary pursuant to 36 CFR part 63. If an Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to a property off tribal lands does not agree, it may ask the Council to request the agency official to obtain a determination of eligibility.

36 C.F.R. § 800.4(c)(2).

Section 6(b)(3) does not allow the ACHP or the Secretary of the Interior to require the USACE to obtain a determination of eligibility from the Keeper. *See* 33 C.F.R. pt. 325 app. C, § 6(b)(3). Section 6(c)'s requirement that the SHPO—without mention of THPOs, Indian Tribes, or Native Hawaiian organizations—*nominate* the property to the National Register conflicts with Part 800 (which requires only that the federal agency obtain a *determination of eligibility* from the Keeper). *Compare id.* § 6(c), *with* 36 C.F.R. § 800.4(c)(2). Historic properties do not need to be listed on the National Register to be considered in the Section 106 process. *See* 36 C.F.R. § 800.16(l)(l). Section 6(b)(3) and 6(c) are also internally inconsistent with Section 6(a)(3), which is generally consistent with Part 800.

Notwithstanding the fact that a property does not need to be listed on the National Register, the process established in Section 6(c) is unworkable. First, Section 6(c) suggests that thirty days is a reasonable time for a SHPO to nominate a property to the National Register. This is wildly

inconsistent with the National Register regulations, which set forth a highly detailed and lengthy process SHPOs must follow to nominate properties to the National Register. 36 C.F.R. § 60.6. The nomination process requires SHPOs to present a fully developed nomination form to their State Review Board, *id.* § 60.6(j), provide thirty- to seventy-five-days' notice of the action to the public, *id.* § 60.6(c)–(d), and provide land owners the opportunity to comment on, and possibly object to, the nomination. *Id.* § 60.6(g). The State Review Board must consider the property and make a recommendation about its eligibility and whether it should be listed. *Id.* § 60.6(j). The SHPO must then make its own recommendation and decide whether to forward the nomination to the Keeper. *Id.* § 60.6(k). If the SHPO and the State Review Board cannot agree, the regulations provide processes for resolving that disagreement. *Id.* § 60.6(l). Under no circumstances could a SHPO nominate a property to the National Register in thirty days. Appendix C also fails to account for historic properties located on federal lands. *See* 33 C.F.R. pt. 325 app. C, § 1(a)–(b). Likewise, the National Register regulations set forth a detailed process for how Federal Preservation Officers ("FPO") may nominate properties located federal lands to the National Register. 36 C.F.R. § 60.9(a)–(c). Like with SHPO nominations, nominations from FPOs cannot be completed within thirty days.

Second, Section 6(c) fails to account for THPOs, Indian tribes, and Native Hawaiian organizations. If a THPO has assumed the role of the SHPO or the undertaking is located on Tribal lands, the USACE must resolve its disagreement on the eligibility of a historic property with the THPO or Indian tribe. *See id.* § 800.4(c)(2). The National Register regulations do not provide a process for Indian tribes, Native Hawaiian organizations, and THPOs to nominate property to the National Register. *See* 36 C.F.R. pt. 60. Instead, they are limited to submitting a "request for nomination" to the appropriate SHPO, or FPO, if the property is located on federal lands, who in

turn nominates the property to the National Register. *See* 36 C.F.R. § 60.11; 54 U.S.C. § 302104(c). SHPOs have sixty days to respond to a request for nomination. 36 C.F.R. § 60.11(a). If the SHPO determines that the property is adequately documented, and appears to meet the National Register criteria, it must then present the nomination to the State Review Board following the same procedures outlined above. *Id.* § 60.11(c).

6. Appendix C, Section 7. Assessing Effects

i. Section 7(a)

Section 7(a) provides: "[d]uring the public notice comment period or within 30 days after the determination or discovery of a designated historic property the district engineer will coordinate with the SHPO and determine if there is an effect and if so, assess the effect." 33 C.F.R. pt. 325, app. C, § 7(a).

Part 800 provides:

> In consultation with the SHPO/THPO and any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to identified historic properties, the agency official shall apply the criteria or adverse effect to historic properties within the area of potential effects. The agency official shall consider any views concerning such effects which have been provided by consulting parties and the public.

36 C.F.R. § 800.5(a). Appendix C does not require the USACE to "consult" with the SHPO, only to "coordinate," a term not defined in Appendix C.

ii. Section 7(b)

Section 7(b) provides: "If the SHPO concurs with the district engineer's determination of no effect or fails to respond within 15 days of the district engineer's notice to the SHPO or a no effect determination, then the district engineer may proceed with the final decision." 33 C.F.R. pt. 325, app. C, § 7(b).

Part 800 establishes detailed procedures by which SHPOs, THPOs, and the ACHP can object to a finding of no effect. First, the federal agencies must provide documentation to the SHPO or the THPO of its finding of no adverse effects. 36 C.F.R. § 800.4(d)(1). The federal agency must also provide notice of this determination to all consulting parties (including Indian tribes and Native Hawaiian organizations) and the public. *Id.*

Second, the SHPO or the THPO and the ACHP have thirty days to review this determination. *Id.* § 800.4(d)(1)(i), (iii). If they do not object within those thirty days, the federal agency's Section 106 obligations are fulfilled. *Id.* If the SHPO or the THPO objects, the federal agency must either engage in additional consultation with the SHPO or the THPO or request that the ACHP review its determination. *Id.* § 800.4(d)(1)(ii).

Third, if the ACHP receives a request to review its determination, it has thirty days to review the finding and provide an opinion to the federal agency. *Id.* § 800.4(d)(1)(iv)(A). When the ACHP provides an opinion, the head of the federal agency is required to respond to the opinion and provide the ACHP, as well as all consulting parties, with "a summary of the decision that contains the rational for the decision and evidence of consideration of the Council's opinion[.]" *Id.* § 800.4(d)(1)(iv)(C). The federal agency may then either reverse its initial finding or affirm its initial findings (should it affirm its finding, such agency will have fulfilled its Section 106 responsibilities). *Id.* If the ACHP does not respond to the federal agency's request within thirty days, the federal agency's Section 106 responsibilities are fulfilled. *Id.* § 800.4(d)(1)(iv)(A). Appendix C, Section 7(b) contains none of these provisions and halves the time SHPOs have to respond.

iii. Section 7(c)

Section 7(c) provides: "[i]f the district engineer, based on his coordination with the SHPO (see paragraph 7.a.), determines that an effect is not adverse, the district engineer will notify the ACHP and request the comments of the ACHP." 33 C.F.R. pt. 325, app. C, § 7(c). If the ACHP does not object or respond to the notice within thirty days, the USACE will proceed based on its finding of no adverse effects. *Id.* If the ACHP timely objects, it may provide recommended conditions that would resolve adverse effects. *Id.* If the USACE accepts those conditions, it may proceed with its finding of no adverse effects. *Id.* If the USACE rejects the conditions, it will treat the effects as adverse. *Id.*

Part 800 establishes detailed procedures under which any consulting party can object to a finding of no adverse effect, not just the ACHP. 36 C.F.R. § 800.5(c)(2)(i)–(ii). First, the federal agency must provide the SHPO or the THPO, Indian tribes or Native Hawaiian organizations, the ACHP, and all other consulting parties thirty days to review the finding. *Id.* Indian tribes and Native Hawaiian organizations may request that the ACHP object to a finding of no adverse effect. *Id.* § 800.5(c)(2)(iii). In making a finding of no adverse effect for a property of traditional religious and cultural significance to an Indian tribe or Native Hawaiian organization, the federal agency should seek the concurrence of the Indian tribe or Native Hawaiian organization. *Id.*

Second, if a consulting party objects within thirty days, the federal agency must consult with the objecting party or request the ACHP to review the finding. *Id.* § 800.5(c)(2)(i).

Third, if the ACHP objects to the finding, or its views are requested by the federal agency, the federal agency must "take into account the Council's opinion in reaching a final decision on the finding." *Id.* § 800.5(c)(3)(ii)(A). The ACHP has fifteen days to provide its views if requested by the federal agency. *Id.* § 800.5(c)(3)(i). Additionally, the federal agency must provide the

ACHP, the SHPO or THPO and all consulting parties with "a summary of the decision that contains the rational for the decision and evidence of consideration of the Council's opinion[.]" *Id.* § 800.5(c)(3)(ii)(B). Section 7(c) is inconsistent with Part 800 as it only allows the ACHP to object to a finding of no adverse effect.

iv. Section 7(d)

Section 7(d) provides: "[i]f an adverse effect on designated historic properties is found, the district engineer will notify the ACHP and coordinate with the SHPO to seek ways to avoid or reduce effects on designated historic properties. Either the district engineer or the SHPO may request the ACHP to participate." 33 C.F.R. pt. 325, app. C, § 7(d).

Part 800 provides: "[t]he agency official shall consult with the SHPO/THPO and other consulting parties, including Indian tribes and Native Hawaiian organizations, to develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize, or mitigate adverse effects on historic properties." 36 C.F.R. § 800.6(a).

Appendix C requires only that the USACE "coordinate," not "consult," with the SHPO, and does not require either action with the THPO, Indian tribes and Native Hawaiian organizations, or other consulting parties. *See* 33 C.F.R. pt. 325, app. C, § 7(d). Appendix C also does not require the USACE to develop and consider alternatives and modifications to the undertaking or methods of mitigating adverse effects. *See id.* Additionally, Part 800 allows the SHPO or the THPO, Indian tribes and Native Hawaiian organizations, or any other consulting party to request the ACHP's involvement in the consultations to resolve adverse effects. 36 C.F.R. § 800.6(a)(1)(ii).

7. Appendix C, Section 8. Consultation

Section 8 provides: "[a]t any time during permit processing, the district engineer may consult with the involved parties to discuss and consider possible alternatives or measures to avoid or minimize the adverse effects of a proposed activity." 33 C.F.R. pt. 325, app. C, § 8.

In 1992, the NHPA was specifically amended to require federal agencies to consult with Indian tribes and Native Hawaiian organizations in the Section 106 process. 54 U.S.C. § 302706(b). The ACHP's subsequent rulemaking codified this requirement throughout Part 800. Specifically, Part 800 provides:

> Section 101(d)(6)(B) of the act requires the agency official to consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. Such Indian tribe or Native Hawaiian organization shall be a consulting party.

36 C.F.R. § 800.2(c)(2)(ii). Moreover, consultation is a mandatory part of the Section 106 process. Part 800 requires federal agencies to consult with SHPOs and THPOs, *id.* § 800.2(c)(1)–(2)(i)(A), Indian tribes and Native Hawaiian organizations, *id.* § 800.2(c)(2)(B)(ii), local governments, *id.* § 800.2(c)(3), applicants, *id.* § 800.2(c)(4), and other consulting parties, *id.* § 800.2(c)(5), at each step of the Section 106 process. *See, e.g.*, *id.* §§ 800.4(a)–(d), 800.5(a)–(b), 800.6(a)–(b). As Part 800 makes clear, "[t]he section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning." *Id.* § 800.1(a)..

Appendix C generally, and Section 8 specifically, entirely fails to address the 1992 amendments and the USACE's statutory obligations to consult with Indian tribes and Native Hawaiian organizations in the Section 106 process and recognize the role of THPOs. To be sure,

the 2005 Interim Guidance recognizes that the USACE must consult with Indian tribes and Native Hawaiian organizations. *See* 2005 Interim Guidance, *supra*, at 1, § 2. But this *guidance* is not codified in the Code of Federal Regulations as part of Appendix C. *See generally* 33 C.F.R. pt. 325, app. C, § 8. Moreover, the guidance fails to acknowledge that the USACE is statutorily mandated to consult with Indian tribes and Native Hawaiian organizations, instead stating only that "[t]he ACHP regulations contain provisions requiring consultation[.]" 2005 Interim Guidance, *supra*, at 1, § 2. Appendix C's assertion that consultation is discretionary in the Section 106 process—"the district engineer *may* consult with the involved parties[,]" 33 C.F.R. pt. 325, app. C, § 8 (emphasis added)—conflicts with Part 800's and the NHPA's explicit mandates that the Section 106 process is conducted in consultation with consulting parties. *Accord Quechan Tribe of Fort Yuma Indian Rsrv. v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1109 (S.D. Cal. 2010) ("Indian tribes are entitled to *special consideration* in the [Section 106 process.]"); *Standing Rock Sioux Tribe v. U.S. Army Corps of Eng'rs*, No. 16-5259, slip op. at 2 (D.C. Cir. Oct. 9, 2016) (*per curiam* order) (Section 106's "consultative process—designed to be inclusive and facilitate consensus—ensures competing interest are appropriately considered and adequately addressed.").

Appendix C is also silent regarding how the USACE consults with Indian tribes for undertakings occurring on tribal lands. Under Part 800, if an Indian tribe has a THPO, the THPO assumes the role of the SHPO, and the federal agency consults with the THPO as it would the SHPO. 36 C.F.R. § 800.3(c)(1). If the Indian tribes does not have a THPO, the federal agency consults with the Indian tribe "in addition to and on the same basis as" the SHPO. *Id*. § 800.3(d). While the 2005 Interim Guidance directs the USACE to consult with the THPO or Indian tribe in these instances, it is only guidance.

8. Appendix C, Section 9. ACHP Review and Comment

Section 9 provides the procedures the USACE will follow if the ACHP (1) "determines that coordination with the SHPO is unproductive;" (2) "the ACHP[] . . . requests additional information in order to provide its comments;" or (3) "the ACHP objects to any agreed resolution of impacts on designated historic properties." 33 C.F.R. pt. 325, app. C, § 9(a). Section 9(a) requires the USACE to provide certain documentation to the ACHP, the applicant, the SHPO, Indian tribes, and certified local governments. *Id.* § 9(a)(1)–(4). Section 9(a) provides: "[t]he district engineer will not delay his decision but will consider any comments these parties may wish to provide." *Id.* § 9(a). Additionally, Section 9(b) provides:

> [t]he district engineer will provide the ACHP 60 days from the date of the district engineer's letter forwarding the information in paragraph 9.a., to provide its comments. If the ACHP does not comment by the end of this comment period, the district engineer will complete processing of the permit application.

Id. § 9(b).

The Section 106 process must be completed before a federal agency takes a final action or makes a final decision—*i.e.*, issues a permit, authorizes or undertakes an activity, or provides funding. 36 C.F.R. § 800.1(c) (quoting 54 U.S.C. § 306108) ("The agency official 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.'"). If consultation has been terminated, or if the ACHP objects to the proposed measures to resolve adverse effects, the Section 106 process has not concluded and the USACE cannot simply proceed to a final permit decision. In either situation, the USACE must demonstrate that it has taken the ACHP's comments into consideration.

When consultation has been terminated, Part 800 provides the ACHP an opportunity to formally comment on the undertaking and the federal agency's Section 106 process. *Id.* § 800.7(c). Upon the termination of consultation, the ACHP has forty-five days to provide the federal agency

with its comments. *Id.* § 800.7(c)(2). Part 800 requires the federal agency to "take into account the Council's comments in reaching a final decision on the undertaking[,]" *id.* § 800.7(c)(4), and provide the ACHP with "a summary of the decision that contains the rationale for the decision and evidence of consideration of the Council's comments . . . *prior to* approval of the undertaking[.]" *Id.* § 800.7(c)(4)(i) (emphasis added). This summary must also be provided to all consulting parties and the public. *Id.* § 800.7(c)(4)(ii)-(iii). Thus, the termination of consultation alone does not end the Section 106 process.

Moreover, Part 800 requires federal agencies to develop and consider alternatives and modifications to the undertaking that would avoid, minimize, or mitigate adverse effects to historic properties. *Id.* § 800.6(a). When the ACHP is involved in a Section 106 review, the federal agency, the SHPO or the THPO, and the ACHP must "agree on how the adverse effects will be resolved[.]" *Id.* § 800.6(b)(2). If these parties cannot agree on how to resolve the adverse effects, any party may terminate consultation. *Id.* § 800.7(a). As explained above, termination does not immediately end the Section 106 process. *See id.* § 800.7(c).

Appendix C does not provide a process consistent with the process set forth Part 800 for the termination of consultation and ACHP review. Moreover, Appendix C does not require the USACE to take into consideration the ACHP's comments when consultation has been terminated or provide the ACHP with a summary of how its comments were considered.

9. Appendix C, Section 11. Historic Properties Discovered During Construction

Section 11 provides:

> [a]fter the permit has been issued, if the district engineer finds or is notified that the permit area contains a previously unknown potentially eligible historic property which he reasonably expects will be affected by the undertaking, he shall immediately inform the Department of the Interior Departmental Consulting Archeologist and the regional office of the NPS of the current knowledge of the potentially eligible historic property and the expected effects, if any, of the

> undertaking on that property. The district engineer will seek voluntary avoidance of construction activities that could affect the historic property pending a recommendation from the National Park Service pursuant to the Archeological and Historic Preservation Act of 1974. Based on the circumstances of the discovery, equity to all parties, and considerations of the public interest, the district engineer may modify, suspend or revoke a permit in accordance with 33 CFR 325.7.

33 C.F.R. pt. 325, app. C, § 11.

Part 800 establishes detailed procedures for when "historic properties are discovered *or unanticipated effects on historic properties are found* after the agency official has completed the section 106 process[.]" 36 C.F.R. § 800.13(b) (emphasis added). Upon the discovery of a new property or unanticipated effect, Part 800 requires the federal agency to "make reasonable efforts to avoid, minimize or mitigate adverse effects to such properties[.]" *Id.* Additionally, if the undertaking has not been approved or funded, or construction has not commenced, the federal agency must consult to resolve any adverse effects pursuant to 36 C.F.R. section 800.6. *Id.* § 800.13(b)(1). If the federal agency, the SHPO or THPO, or any Indian tribe or Native Hawaiian organization agrees that a property is valuable "solely for its scientific, prehistoric, historic or archeological data," the federal agency may comply with procedures set forth in the Archaeological and Historic Preservation Act, 54 U.S.C. §§ 312501–312508; 43 C.F.R. pt. 7, instead of Part 800. 36 C.F.R. § 800.13(b)(2).

If construction has commenced, the agency official has forty-eight hours to inform the SHPO or the THPO, Indian tribes or Native Hawaiian organizations, and the ACHP of the discovery and what actions "the agency official can take to resolve adverse effects." *Id.* § 800.13(b)(3). This notice must include the federal agency's assessment of the property's National Register eligibility and the proposed actions to resolve any adverse effects. *Id.* The SHPO or the THPO and Indian tribes or Native Hawaiian organizations have forty-eight hours to respond. *Id.* The federal agency must then take into account the SHPO or the THPO and Indian tribes or Native

Hawaiian organizations' recommendations and provide them with a report of the actions taken. *Id.* Appendix C contains none of these provisions and only applies to discoveries of new properties, not unanticipated adverse effects.

10. Appendix C, Section 12. Regional General Permits

Section 12 provides:

> In developing general permits, the district engineer will seek the views of the SHPO and, [sic] the ACHP and other organizations and/or individuals with expertise or interest in historic properties. Where designated historic properties are reasonably likely to be affected, general permits shall be conditioned to protect such properties or to limit the applicability of the permit area.

See 33 C.F.R. pt. 325, app. C, § 12. Section 12 delegates to district engineers a nebulous obligation to "seek the views of the SHPO" and others and to place conditions on regional general permits. *Id.* Section 12 does not establish any sort of process by which the district engineer must obtain the views of the SHPO and others or how the district engineer would assess effects and place conditions on regional general permits. *See id.* Presumably, the district engineer would use Appendix C, although this is not entirely clear. *C.f.* 2007 Memorandum, *supra*, at 1, § 2 ("The purpose of this memorandum is to provide clarification with respect to the Interim Guidance. The Interim Guidance applies to all [DOA] requests for authorization/verification, including . . . all regional general permits and nationwide permits."). As explained in Section IV.A, *supra*, the USACE lacks any authority to promulgate regulations that purport to implement Section 106; this includes both Appendix C and any other general permit-specific procedures. *See* 54 U.S.C. § 304108(a). The "process" set forth in Section 12 is entirely inconsistent with Part 800. Section 12 does not require the USACE to consult with the SHPO, the ACHP, and others, but instead only requires that the USACE seek the SHPO, ACHP, and others' views. Section 12 does not even mention Indian tribes, THPOs, and Native Hawaiian organizations.

General permits are issued programmatically and not in response to any specific project, permit application, or request for authorization. Accordingly, so long as a project meets the requirements of a general permit, it may proceed without any further authorization from the USACE. The USACE must nevertheless comply with Section 106 before it issues general permits, even if specific undertakings are not known at the time. *C.f. N. Plains Res. Council v. U.S. Army Corps of Eng'rs*, 454 F. Supp. 3d 985 (D. Mont. 2020) (USACE's reissuance of NWP 12 and reliance on General Condition 18 to satisfy Endangered Species Act obligations was unlawful because the USACE was required to consider potential effects to listed species at a programmatic level through programmatic consultation with United States Fish & Wildlife Service). As discussed in greater detail in Section V, *infra*, programmatic agreements may provide the USACE with a more legally sound, yet flexible, tools to comply with Section 106 and address the effects of activities undertaking pursuant to general permits on historic properties at both a programmatic and project-specific level.[19]

11. Appendix C, Section 13. National General Permits

Like Section 12, Section 13 establishes a Section 106 review process for the issuance of NWPs entirely separate from Appendix C. 33 C.F.R. pt. 325, app. C, § 13(a)–(b). This process is codified as NWP General Condition 20. 86 Fed. Reg. at 2,869–70 (Gen. Condition 20). General Condition 20 is inconsistent with Part 800 and unlawful.

Under General Condition 20, the USACE will initiate Section 106 review for a specific project authorized under an NWP only if the project proponent submits a preconstruction notification to the USACE indicating that "the NWP activity might have the potential to cause effects to any historic property[.]" *Id.* at 2,870 (Gen. Condition 20(c)). General Condition 20

[19] Programmatic agreements may be developed at the national, regional, or state level. *See* 36 C.F.R. § 800.14(b)(2).

encourages applicants to consult with the SHPO or the THPO to determine the presence of possible historic properties. *Id.* (Gen. Condition 20(c)).

Upon receipt of a preconstruction notification, General Condition 20 requires the district engineer to "carry out appropriate identification efforts commensurate with potential impacts[.]" *Id.* (Gen. Condition 20(c)). Based on the preconstruction notification and the identification effort, the district engineer will determine whether the "activity has the potential to cause effects on historic properties." *Id.* (Gen. Condition 20(c)). If the district engineer determines there is a potential to cause effects, "[t]he district engineer will conduct consultation with consulting parties identified under 36 CFR 800.2(c)" in making a no historic properties affected determination, a no adverse effects determination, or an adverse effects determination. *Id.* (Gen. Condition 20(c)).

General Condition 20 flips the Section 106 process on its head. Part 800 prescribes how federal agencies determine whether Section 106 review is required: "[t]he agency official shall determine whether the proposed Federal action is an undertaking as defined in [36 C.F.R.] § 800.16(y) and, if so, whether it is a type of activity that has the potential to cause effects on historic properties." 36 C.F.R. § 800.3(a). The Section 106 process is initiated if the undertaking has the *potential* to cause adverse effects to historic properties. This determination is made before the federal agency determines whether any historic properties will actually be affected. *Accord id.* §§ 800.4(b)–(c), 800.5(a); *see Sisseton-Wahpeton Oyate*, 2016 WL 5478428, at *7 ("The NHPA's implementing regulations require that this initial question not involve site-specific details of the project and historic properties existing within the APE, but look only at the type of work planned generally, assuming there could be historical properties present.").

Moreover, it is the obligation of the federal agency, not the applicant, to initiate the Section 106 process and engage in consultation with SHPOs and THPOs, not to mention Indian tribes,

Native Hawaiian organizations, and other consulting parties. *See* 36 C.F.R. § 800.2(a) ("It is the statutory obligation of the Federal agency to fulfill the requirements of section 106 and to ensure that an agency official with jurisdiction over an undertaking takes legal and financial responsibility for section 106 compliance[.]"). General Condition 20 abdicates the USACE's responsibility to initiate the Section 106 process and engage in consultation to identify and evaluate historic properties. Finally, General Condition 20 simply requires the district engineer to consult with consulting parties if they determine Section 106 review is required. Presumably, the district engineer would follow the procedures set forth in Appendix C, although this is not clear from the terms of General Condition 20. *C.f.* 2007 Memorandum, *supra*, at 1, § 2. In any event, this is inconsistent with the procedures set forth in Part 800.

Like with other general permits, NWPs are issued programmatically, not in response to any specific permit application. Nevertheless, the USACE has an obligation to address NWP-authorized activities' potential effects to historic properties at a programmatic level and at the project-specific level. *C.f. N. Plains Res. Council*, 454 F. Supp. 3d at 992. Like with the other general permits, a programmatic agreement may provide the best tool for the USACE to comply with Section 106 for the NWP program and take into account effects to historic properties at both the programmatic and project-specific level. Thus, reliance on General Condition 20 to satisfy the USACE's Section 106 obligations for the entire NWP program is insufficient and unlawful.

12. Appendix C, Section 14. Emergency Procedures

Section 14 provides:

> In an emergency situation the district engineer will make every reasonable effort to receive comments from the SHPO and the ACHP, when the proposed undertaking can reasonably be expected to affect a potentially eligible or designated historic property and will comply with the provisions of this Appendix to the extent time and the emergency situation allows.

33 C.F.R. pt. 325, app. C, § 14.

Part 800 establishes the procedures by which federal agencies may comply with Section 106 in emergency situations. 36 C.F.R. § 800.12.[20] Pursuant to Part 800, federal agencies must

> [n]otify[] the Council, the appropriate SHPO/THPO and any Indian tribe or Native Hawaiian organization that may attach religious and cultural significance to historic properties likely to be affected prior to the undertaking and affording them an opportunity to comment within seven days of notification. If the agency official determines that circumstances do not permit seven days for comment, the agency official shall notify the Council, the SHPO/THPO and the Indian tribe or Native Hawaiian organization and invite any comments within the time available.

Id. § 800.12(b)(2).

Appendix C does not require the USACE to notify the ACHP, SHPOs or THPOs, or Indian tribes or Native Hawaiian organizations, nor does it require the USACE to provide them with an opportunity to comment on the undertaking and potential effects. Moreover, what the USACE considers an emergency is likely inconsistent with what constitutes an emergency under Part 800. The USACE's regulations define an emergency as "a situation which would result in an unacceptable hazard to life, a significant loss of property, or an immediate, unforeseen, and significant economic hardship[.]" 33 C.F.R. § 325.2(C)(4). Part 800 defines an emergency as "a disaster or emergency declared by the President, a tribal government, or the Governor of a State or another immediate threat to life or property[.]" 36 C.F.R. § 800.12(b). An immediate, unforeseen, and significant economic hardship is likely not an emergency under Part 800.

13. Appendix C, Section 15. Criteria of Effect and Adverse Effect

Section 15(c) provides examples of effects from undertakings that would otherwise be adverse unless specific conditions are met:

[20] Part 800 allows federal agencies to develop alternate procedures for emergency situations, so long as they are approved by the ACHP. 36 C.F.R. § 800.12(a). Section 14 is not such an alternate procedure because Appendix C has never been approved by the ACHP and it was not developed pursuant to this provision of Part 800.

> (1) When the designated historic property is of value only for its potential contribution to archeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines;
>
> (2) When the undertaking is limited to the rehabilitation of buildings and structures and is conducted in a manner that preserves the historical and architectural value of affected designated historic properties through conformance with the Secretary's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings",[[21]] [sic] or
>
> (3) When the undertaking is limited to the transfer, lease, or sale of a designated historic property, and adequate restrictions or conditions are included to ensure preservation of the property's important historic features.

33 C.F.R. pt. 325, app. C, § 15(a)(1)–(3).

The first and third examples are inconsistent with Part 800. In both cases, the examples describe mitigation measures used to resolve adverse effects. While mitigation measures may be used to resolve adverse effects, their use necessarily means that there was, and continues to be, an adverse effect to the historic property. 36 C.F.R. § 800.6(a); *see* Council on Env't Quality & Advisory Council on Hist. Pres., *NEPA and NHPA: A Handbook for Integrating NEPA and Section 106*, at 24 (2013) [hereinafter CEQ & ACHP] ("If adverse effects cannot be avoided or minimized, then the Federal agency seeks other ways to mitigate those effects to historic properties." (footnote omitted)). Mitigation in the Section 106 process does not, and is not intended to, avoid or limit the severity of an adverse effect. Mitigation seeks to accommodate for the values and significance lost by the adverse effect while recognizing that the effect itself cannot be avoided or minimized. *See* CEQ & ACHP, *supra*, at 24 (noting that "[i]n the Section 106 process, the term 'mitigate' is distinct from the terms 'avoid' and 'minimize,' and means to compensate for the adverse effects to historic

[21] *See* 36 C.F.R. pt. 68.

properties."); *id.* at 40 (explaining further that mitigation measures "resolve specific adverse effects to identified historic property or properties by offsetting such effects.").

V. Conclusion

Appendix C is an unlawful counterpart regulation and the USACE's past and continued use of Appendix C to comply with Section 106 is unlawful. Appendix C was not lawfully promulgated because the ACHP has never approved of or concurred in its adoption and use. Moreover, Appendix C violates Section 110 of the NHPA because it is not consistent and conflicts with Part 800 and the NHPA. The USACE must rescind Appendix C through formal notice and comment rulemaking and use Part 800 to comply with Section 106.notice