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Richard L. Revesz, Administrator
Attn: Miraf Bisetegne
Office of Information and Regulatory Affairs
Office of Management and Budget
725 17th Street Northwest
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**Re: National Association of Tribal Historic Preservation Officers' Comments on the U.S. Army Corps of Engineers' Proposed Rulemaking to Rescind 33 C.F.R. Part 325, Appendix C
RIN No. 0710-AB46**

Dear Administrator Revesz:

The National Association of Tribal Historic Preservation Officers (“NATHPO”) submits these comments in support of the U.S. Army Corps of Engineers’ (“USACE”) proposed rulemaking rescinding 33 C.F.R. Part 325, Appendix C (“Appendix C”). For forty-three years, the USACE has used Appendix C to purportedly comply with its responsibilities under Section 106 of the National Historic Preservation Act,¹ instead of using the government-wide regulations promulgated by the Advisory Council on Historic Preservation (“ACHP”) and codified at 36 C.F.R. Part 800 (“Part 800”). The USACE’s reliance on Appendix C to comply with Section 106 has been, and continues to be, unlawful because Appendix C is not a lawful Part 800 counterpart regulation. The USACE’s rulemaking to rescind Appendix C and use Part 800 to comply with Section 106 is long overdue. The only way for the USACE to adequately remedy its unlawful use of Appendix C is to rescind Appendix C and use Part 800. Accordingly, NATHPO strongly supports the USACE’s proposed rulemaking to do just that.

NATHPO is a national, non-profit membership organization founded in 1998, comprising tribal government officials, specifically Tribal Historic Preservation Officers (“THPO”), who implement federal and Tribal preservation laws to protect culturally important places that perpetuate Native identity, resilience, and cultural endurance. Connections to cultural heritage sustain the health and vitality of Native peoples. NATHPO’s overarching purpose is to support the preservation, maintenance, and revitalization of the cultures and traditions of Native peoples of the United States. This is accomplished most importantly through the support of Tribal Historic Preservation

¹ 54 U.S.C. § 306108.

Programs as acknowledged by the NPS.² There are currently 221 THPOs. NATHPO is a voting member of the ACHP.³

These comments expand upon the comments NATHPO provided the Office of Information and Regulatory Affairs (“OIRA”) on December 11, 2023. These comments provide a brief background on Section 106 and Part 800 alternate procedures, a brief history of Appendix C’s development, a brief overview of Appendix C’s legal deficiencies, an overview of this current rulemaking, and the reasons why the USACE must rescind Appendix C. Attached to these comments is a memorandum of NATHPO’s legal counsel detailing the development and adoption of Appendix C and efforts over the years to update or modify it and examining Appendix C’s multiple legal deficiencies,⁴ as well as NATHPO’s previous comments to the USACE supporting the rescission of Appendix C.

I. The National Historic Preservation Act

A. Section 106 of the NHPA

Section 106 of the NHPA requires federal agencies to take into account the effects of undertakings on historic properties prior to expending any federal funds on or issuing a permit, license, or approval for the undertaking.⁵ Congress has described this as “[o]ne of the most important provisions of the National Historic Preservation Act—the responsibility[y] of Federal agencies for the preservation of historic resources[.]”⁶ The NHPA also established the ACHP,⁷ and delegated to its exclusive authority to promulgate regulations implementing Section 106.⁸ The ACHP has promulgated these regulations at 36 C.F.R. Part 800.

Subpart B of Part 800 establishes a four-step process by which federal agencies fulfill their Section 106 responsibilities.⁹ 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.”¹⁰ At this step, federal agencies must also identify consulting parties and invite them to participate in the Section 106 process.¹¹ Step two, “Identification and Evaluation,” requires federal agencies to: (1) define the undertaking’s “area of potential effects”;¹² (2) “take steps necessary to identify historic properties within the area of potential effects”;¹³ and (3) “apply the National Register [of Historic

² See *id.* §§ 302701-302706.

³ See *id.* § 304101(a)(8).

⁴ If it is necessary to the OIRA’s Executive Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (“EO 12866”), regulatory review, NATHPO can provide copies of any of the documents cited in this comment letter or the attached memorandum upon request.

⁵ 54 U.S.C. § 306108.

⁶ S. Rep. No. 102-336, at 12 (1992).

⁷ 54 U.S.C. § 304101.

⁸ *Accord id.* § 304108(a); *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 [ACHP].”).

⁹ See 36 C.F.R. §§ 800.3-800.13.

¹⁰ *Id.* § 800.3(a).

¹¹ *Id.* § 800.3(c)-(f).

¹² *Id.* § 800.4(a)(1).

¹³ *Id.* § 800.4(b).

Places (“National Register”)] criteria (36 CFR part [60]) to properties that have not been previously evaluated for National Register eligibility.”¹⁴ Step three, “Assessment,” requires federal agencies to “apply the adverse effect criteria to historic properties within the area of potential effects.”¹⁵ 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.”¹⁶ Every federal agency “must comply with these regulations.”¹⁷

In 1992, Congress amended the NHPA to require federal agencies to consult with Tribal Nations and Native Hawaiian organizations in the Section 106 process.¹⁸ These amendments also allow THPOs to take over the role of State Historic Preservation Officers (“SHPO”) in the Section 106 process.¹⁹ Federal agencies’ obligation to consult with Tribal Nations, THPOs, and NHOs is codified throughout Part 800.²⁰

B. Part 800 Counterpart Regulations/Alternate Procedures

In addition to the “Section 106 process” set forth in Subpart B, Part 800 allows federal agencies to develop, adopt, and use “Federal agency program alternatives.”²¹ 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.”²² One type of program alternative is “alternate procedures.”²³ “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.”²⁴ Alternate procedures “substitute in whole or in part for the ACHP’s Section 106 regulations under Subpart B.”²⁵

The ACHP first codified Part 800’s alternate procedures²⁶ provisions in 1979.²⁷ At the time, Part 800 provided: “Responsibilities of individual Federal agencies pursuant to [36 C.F.R.] § 800.4 may

¹⁴ *Id.* § 800.4(c)(1).

¹⁵ *Id.* § 800.5(a).

¹⁶ *Id.* § 800.6(a).

¹⁷ *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep’t of Interior*, 608 F.3d 592, 607 (9th Cir. 2010) (citations omitted).

¹⁸ 54 U.S.C. § 302706(b).

¹⁹ *Id.* § 302702.

²⁰ *See generally* 36 C.F.R. § 800.2(c)(2).

²¹ *See id.* § 800.14.

²² *Program Alternatives*, ADVISORY COUNCIL ON HIST. PRES., https://www.achp.gov/program_alternatives (last visited Dec. 8, 2023).

²³ 36 C.F.R. § 800.14(a).

²⁴ *Alternate Procedures*, ADVISORY COUNCIL ON HIST. PRES., [hereinafter *Alternate Procedures*] http://www.achp.gov/program_alternatives/alternate_procedures (last visited Dec. 8, 2023).

²⁵ *Id.*

²⁶ Until 1999, alternate procedures were called counterpart regulations. There is no functional difference between the two, except that counterpart regulations are promulgated through notice and comment rulemaking and codified in the Code of Federal Regulations. 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. 27,044, 27,068 (May 18, 1999). This change was meant to make the process less “arduous,” by allowing federal agencies to avoid formal notice and comment rulemaking. *Alternate Procedures*, *supra* note 23.

²⁷ *See* 44 Fed. Reg. 6,068 (Jan. 30, 1979).

be met by counterpart regulations jointly drafted by the agency and the Executive Director[of the ACHP] and approved by the Chairman[of the ACHP].”²⁸ The ACHP revised its counterpart regulations provision in 1986.²⁹ 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.”³⁰

The ACHP again revised these provisions in 1999.³¹ Today, Part 800 provides: “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 [ACHP]’s regulations[.]”³² Alternate procedures must be developed in “consult[ation] with the Council, the National Conference of State Historic Preservation Officers, or individual SHPOs/THPOs, as appropriate, and Indian tribes and Native Hawaiian organizations[.]”³³ The federal agency must also publish notice of the proposed alternate procedures in the Federal Register for public review and comment.³⁴ 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.”³⁵

II. Background on 33 C.F.R. Part 325, Appendix C

A. Promulgation of Appendix C

In 1979, the USACE began developing its own set of counterpart regulations. In April 1980, the USACE published a first draft of its proposed counterpart regulations as an appendix to 33 C.F.R. Part 325.³⁶ 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.”³⁷ The USACE published a revised draft of Appendix C in May 1984.³⁸ The USACE published its final version of Appendix C in June 1990.³⁹ This version was codified in the Code of Federal Regulations.

B. Previous Efforts to Revise, Replace, or Revoke 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

²⁸ 36 C.F.R. § 800.11(a) (1980).

²⁹ See 51 Fed. Reg. 31,115 (Sept. 2, 1986)

³⁰ 36 C.F.R. § 800.15 (1987).

³¹ 64 Fed. Reg. at 27,044.

³² 36 C.F.R. § 800.14(a) (2023).

³³ *Id.* § 800.14(a)(1).

³⁴ *Id.*

³⁵ *Id.* § 800.14(a)(2).

³⁶ 45 Fed. Reg. 22,112 (Apr. 3, 1980).

³⁷ *Id.* at 22,112.

³⁸ 49 Fed. Reg. 19,036 (May 4, 1984).

³⁹ 55 Fed. Reg. 27,000 (June 29, 1990).

ACHP's updates to Part 800.⁴⁰ 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."⁴¹ The result of this review would be "additional guidance, modifications to Appendix C, programmatic agreements, or other products."⁴² 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[.]"⁴³

In June 2002, the USACE issued its first set of interim guidance.⁴⁴ 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[.]"⁴⁵

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."⁴⁶ 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."⁴⁷ These options included (1) revising Appendix C to be consistent with Part 800; (2) revoke Appendix C, use Part 800 when issuing individual permits, and use a Part 800 program alternative for general permits; (3) revoke Appendix C and use Part 800 for all permits; or (4) revoke Appendix C and develop new alternate procedures.⁴⁸

The USACE never proceeded with this rulemaking. Instead, in April 2005, the USACE issued updated interim guidance on Appendix C.⁴⁹ And in January 2007 and January 2009, the USACE published two memoranda that asserted the continued applicability and legality of Appendix C.⁵⁰

In 2016, Congress directed the Secretary of the Army to report on "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 this issuance of a permit by, the [USACE]."⁵¹ In 2017, along with the Departments of the Interior and Justice, the Department of the Army

⁴⁰ 67 Fed. Reg. 10,822, 10,822 (Mar. 8, 2002).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ 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)

⁴⁵ *Id.* at 2, ¶ 3.

⁴⁶ 69 Fed. Reg. 57,662, 57,662 (Sept. 27, 2004).

⁴⁷ *Id.* at 57,663.

⁴⁸ *Id.*

⁴⁹ 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).

⁵⁰ See Mem. from Lawrence A. Lang, Acting Chief, Operations Div., Directorate of Civ. Works, U.S. Army Corps of Eng'rs, to all Major Subordinate Commands and District Commands, U.S. Army Corps of Eng'rs (Jan. 31, 2007); 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 (Jan. 6, 2009).

⁵¹ Pub. L. No. 114-322, § 1120(a)(3), 130 Stat. 1628, 1643 (2016)

published its report.⁵² In this report, the Departments documented Tribal Nations’ concerns with and objections to the USACE’s use of Appendix C.⁵³ The report concluded with a commitment by the Department of the Army that “[t]he Army Corps of Engineers w[ould] updates its Appendix C (33 C.F.R. 325) in 2017 in response to extensive Tribal comments calling for Appendix C’s revision or revision.”⁵⁴ This work never happened.

C. The Current Rulemaking

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.⁵⁵ The agenda item specifically stated: “The Corps would propose to revise its regulations to conform to the ACHP 800 regulations.”⁵⁶

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.⁵⁷ 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[.]”⁵⁸ 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[.]”⁵⁹ 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.⁶⁰

The DOA and the USACE specifically asked the public to consider the four options identified in the 2004 advance notice of proposed rulemaking.⁶¹ During June and July 2022, the USACE held eleven virtual public and tribal listening sessions, including two specifically on Appendix C.⁶²

⁵² U.S. Dep’t of Interior et al., *Improving Tribal Consultation and Tribal Involvement in Federal Infrastructure Decisions* (Jan. 2017).

⁵³ See generally *id.* at 14, 54-58, 65.

⁵⁴ *Id.* at 24 (citation omitted).

⁵⁵ *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).

⁵⁶ *Id.*

⁵⁷ 87 Fed. Reg. 33,756, 33,756–57 (June 3, 2022).

⁵⁸ *Id.* at 33,757.

⁵⁹ *Id.* at 33,759.

⁶⁰ *Id.* at 33,760.

⁶¹ *Id.* at 33,759–60 (discussing 69 Fed. Reg. at 57,662).

⁶² 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.”⁶³ 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.”⁶⁴ 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.”⁶⁵

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.”⁶⁶ 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.⁶⁷ The agenda item noted that both revoking and revising Appendix C would ensure that the USACE complied with the NHPA and Part 800.⁶⁸ 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 rescission 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.”⁶⁹

On November 16, 2023, the USACE and DOA submitted their proposed rulemaking to rescind Appendix C to the OIRA for EO 12866 regulatory review before the notice of proposed rulemaking is published in the Federal Register.⁷⁰

III. Appendix C is an Unlawful Counterpart Regulation

Appendix C suffers from two overarching legal deficiencies. First, Appendix C was not lawfully promulgated because the ACHP never approved of or concurred in its adoption and use. Second, Appendix C is inconsistent and conflicts with Part 800 and the NHPA. These facts have been well documented by federal courts, federal agencies, and commentators.

⁶³ White House, *Fact Sheet: Biden-Harris Administration Announces New Actions to Support Indian Country and Native Communities Ahead of the Administration’s Second Tribal Nation’s Summit* (Nov. 30, 2022).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Appendix C Procedures for the Protection of Historic Properties, RIN 0710-AB46*, OFF. OF INFO. & REGUL. AFFS., <https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=0710-AB46> (last visited Dec. 8, 2023).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *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).

A. Appendix C was not Lawfully Promulgated

Appendix C was not lawfully promulgated because the ACHP has never approved of or concurred in its adoption and use. When the USACE initiated its rulemaking process to develop Appendix C in 1979, Part 800 allowed federal agencies to develop and adopt counterpart regulations, provided that they were “approved by the Chairman” of the ACHP.⁷¹ When the USACE formally adopted Appendix C in 1990, Part 800 allowed federal agencies to develop and adopt counterpart regulations, provided that they were “concurrent in by the Council[.]”⁷² 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 “concurrent in by” the ACHP. This fact has been widely documented by federal courts, federal agencies, and commentators.

For example, in *Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers*, the United States District Court for the Northern District of Ohio was directly presented with the issue of whether Appendix C was lawfully promulgated.⁷³ While the court noted that the USACE had the authority to adopt and use its own counterpart regulations, the court emphasized that those regulations had to be “adopted in consultation with and . . . approved by the ACHP.”⁷⁴ The court held that Appendix C was not properly adopted because “[a]ll parties agree that there is no record of the ACHP ever approving or concurring in the Corps’ regulations.”⁷⁵

The ACHP, itself, has stated on multiple occasions that it never approved of or concurred in the adoption or use of Appendix C. Most recently, in comments responding to the USACE’s 2022 request for input, the ACHP stated: “Appendix C was never approved by the ACHP as counterpart regulations to Section 106 and the ACHP has opposed its use as a means to comply with Section 106 for decades.”⁷⁶ These comments are consistent with the ACHP’s previous public positions.⁷⁷

Likewise, in 2019, the Government Accountability Office (“GAO”) published a report on the federal government’s overall failure to adequately consult with Tribal Nations about infrastructure projects.⁷⁸ In that report, the GAO dedicated an entire chapter to the USACE’s adoption and use of Appendix C.⁷⁹ The GAO report detailed the interagency back-and-forth between the ACHP, the

⁷¹ 36 C.F.R. § 800.11(a) (1979).

⁷² 36 C.F.R. § 800.15 (1990).

⁷³ *Comm. to Save Cleveland's Huletts v. U.S. Army Corps of Eng's*, 163 F. Supp. 2d 776 (N.D. Ohio 2001).

⁷⁴ *Id.* at 791.

⁷⁵ *Id.* at 792.

⁷⁶ 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 2022 Nelson Letter].

⁷⁷ *See, e.g.*, 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) (“The ACHP has never approved Appendix C as a counterpart regulation for implementing Section 106.”).

⁷⁸ *See* Gov’t Accountability Off., *Tribal Consultation: Additional Federal Actions Needed for Infrastructure Projects* (2019) [hereinafter GAO Report].

⁷⁹ *Id.* at 51-55.

USACE, and the Office of Management and Budget in the 1980s when the USACE was developing Appendix C.⁸⁰ The GAO report repeatedly documents the ACHP’s refusal to approve of or concur in Appendix C, including the final draft that was codified in 1990: “According to ACHP documents, the ACHP did not concur in the final rule, indicating that it was inconsistent with ACHP regulations.”⁸¹ Multiple commentators have also documented the fact that the ACHP has never approved of or concurred in the adoption and use of Appendix C.⁸² The attached memorandum provides a more in-depth discussion of this issue.

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

The USACE’s continued use of Appendix C is unlawful because Appendix C is inconsistent and conflicts with Part 800 and the NHPA. In 1992, Congress amended the NHPA to require that federal agencies’ “procedures for compliance with section 306108 of this title[] . . . are consistent with regulations promulgated by the [ACHP] pursuant to section 304108(a) and (b) of this title[.]”⁸³ Accordingly, since just two years after the USACE adopted Appendix C, the USACE had a statutory obligation to revise Appendix C to be consistent with Part 800.⁸⁴ Nearly every one of Appendix C’s provisions are inconsistent or conflict with Part 800 and the NHPA. This fact has been documented by multiple federal courts, the ACHP and the GAO, and commentators.

For example, in *Cleveland’s Hulett’s*, the Northern Ohio District Court found that “the [USACE’s] procedures are inconsistent with, and indeed, in derogation of those ACHP regulations.”⁸⁵ The ACHP has also repeatedly stated that Appendix C is not consistent with Part 800.⁸⁶ The GAO also

⁸⁰ *Id.*

⁸¹ *Id.* at 53.

⁸² See, e.g., Wesley James Furlong, *The Army Corps Needs and Appendectomy: Diagnosing the Army Corps’ 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); 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.”).

⁸³ 54 U.S.C. § 306102(b)(5)(A).

⁸⁴ See *Nat’l Mining Ass’n v. Slater*, 167 F. Supp. 2d 265, (D.D.C. 2001), *aff’d in part, rev’d in part on other grounds sub nom. Nat’l Mining Ass’n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003) (“[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 [ACHP] pursuant to [54 U.S.C. § 304108].” (citation omitted)).

⁸⁵ *Cleveland’s Hulett’s*, 163 F. Supp. 2d at 792; *c.f. Saylor Park Vill. Council v. U.S. Army Corps of Eng’rs*, No. C-1-02-832, 2002 WL 32191511, at *7 (S.D. Ohio Dec. 30, 2002) (“Consequently, the Corps Interim Guidance is inconsistent with the ACHP Interim Guidance and irrelevant.” (footnote omitted)); *Colo. River Indian Tribes v. Marsh*, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985) (“[Appendix C’s] distinction between properties and differing scopes of responsibility is at odds with [the] NHPA and its regulations.”).

⁸⁶ See, e.g., 2022 Nelson Letter, *supra* note 76, 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 106 implementing regulations.”); 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 2021 Nelson Letter] (“The differences between the Section 106 regulations and Appendix C are fundamental[.] . . . Appendix C is fundamentally inconsistent with the government-wide Section 106

extensively documented Appendix C's inconsistencies with Part 800 in its 2019 tribal consultation report.⁸⁷ Likewise, multiple commentators have extensively documented and discussed Appendix C's inconsistencies and conflicts with Part 800 and the NHPA.⁸⁸ The attached memorandum provides a section-by-section analysis of every single provision in Appendix C that is inconsistent or conflicts with Part 800 and the NHPA.

IV. Appendix C Must Be Repealed

Based on its unlawful promulgation and inconsistencies and conflicts with Part 800 and the NHPA, the USACE cannot use Appendix C to fulfill its Section 106 obligations.⁸⁹ In 2004 and in 2022, the USACE identified four options for resolving these legal deficiencies: (1) revise Appendix C and make it consistent with Part 800 and the NHPA; (2) rescind Appendix C and develop new alternate procedures pursuant to 36 C.F.R. § 800.14(a); (3) rescind Appendix C and use Part 800, Subpart B for individual permits and develop a federal agency program alternative pursuant to 36 C.F.R. § 800.14 for general permits; or (4) rescind Appendix C and use Part 800, Subpart B for individual and general permits.⁹⁰

As discussed above, Appendix C suffers from serious legal deficiencies that render its continued use by the USACE unlawful. Moreover, Appendix C is toxic. For more than forty years, the USACE has relied on some version of Appendix C to sideline Tribal Nations, THPOs, and Native Hawaiian organizations in the Section 106 process, and to minimize the consideration and protection of historic and cultural resources in its permitting decisions. While revisions to Appendix C could fix its inconsistencies and conflicts with Part 800, it would do nothing to repair the USACE's reputation with Tribal nations, THPOs, Native Hawaiian organizations, SHPOs, and

regulations[.]"); Advisory Council on Hist. Pres., *Improving Tribal Consultation in Infrastructure Projects* 13–14 (May 24, 2017) (“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.”).

⁸⁷ See GAO Report, *supra* note 78, at 52 (“ACHP documents we reviewed identified several inconsistencies between the [USACE] procedures and [the] ACHP regulations[.]”).

⁸⁸ See, e.g., Furlong, *supra* note 82, at 31-58; Lorentz, *supra* note 82, 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[.]”).

⁸⁹ See *Cleveland’s Hulett’s*, 163 F. Supp. 2d at 792 (“[T]he Corps cannot rely on its own regulations to determine compliance with the NHPA in the circumstances at issue in this case[.]”); *Saylor Park*, 2002 WL 32191511, at *8 (“[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)); 2021 Nelson Letter, *supra* note 86, at 2 (“[Appendix C’s] use jeopardizes the Corps’ ability to fully meet its legal obligations under Section 106.”); Email from Gilmore, *supra* note 77, at 1-2 (“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.”).

⁹⁰ See 69 Fed. Reg. at 57,663; 87 Fed. Reg. at 33,760.

the rest of the preservation profession. Moreover, simply revising Appendix C would suggest that the USACE is not seriously committed to addressing these systemic issues and that it did not listen to Tribal Nations, THPOs, SHPOs, and the public during this rulemaking process. Accordingly, the only acceptable path forward is for the USACE to fully rescind Appendix C and use Part 800 to comply with Section 106.

Nonetheless, NATHPO recommends that the USACE consider developing a nationwide programmatic agreement to govern Section 106 compliance for its nationwide permit program.⁹¹ NATHPO also recommends that the USACE consider developing programmatic agreements to govern Section 106 compliance for other general permits, including regional general permits, programmatic general permits, and state programmatic general permits. Programmatic agreements can be national, regional, or state-specific.⁹² Moreover, the USACE can develop prototype programmatic agreements at the national level that can be used by Division and District Commands to develop regional or state-specific programmatic agreements.⁹³

While NATHPO fully supports this rulemaking, the rescission of Appendix C is only the beginning of the USACE's work. NATHPO cautions that the USACE cannot continue to rely on narrow interpretations of Part 800 to limit its Section 106 obligations. The USACE must give full effect to Part 800, and act in a manner consistent with the regulations, statutory text, ACHP policy and guidance, and Tribal Nations', THPOs', and others' settled understanding of how Section 106 works.

V. Conclusion

NATHPO fully supports the USACE's proposed rulemaking to rescind Appendix C. For forty-three years, the USACE has used Appendix C to purportedly comply with Section 106. The USACE's use of Appendix C has been, and continues to be, the source of significant conflict and mistrust between the USACE, Tribal Nations, and THPOs. Appendix C's rescission would be a significant step forward by the USACE in repairing its government-to-government relationship and trust responsibility with Indian Country. Should you have any questions, please do not hesitate to contact me at valerie@nathpo.org



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⁹¹ See 36 C.F.R. § 800.14(b)(1)-(2) (2023).

⁹² See *id.*

⁹³ See *id.* § 800.14(b)(4).