

August 2, 2022

Ms. Stacey Jensen
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, D.C. 20310-0108

Mr. Joseph Redican
Headquarters USACE
441 G Street N.W.
Washington, D.C. 20314-1000

Submitted electronically via www.regulations.gov

Re: Notice of Virtual Public and Tribal Meetings Regarding the Modernization of Army Civil Works Policy Priorities, Department of the Army, U.S. Army Corps of Engineers, DoD; Establishment of a Public Docket; Request for Input; 87 Fed. Reg. 33756; Docket No. COE-2022-0006

Dear Ms. Jensen and Mr. Redican:

The undersigned trade associations appreciate the opportunity to comment on the *Federal Register* notice regarding the modernization of several Army Civil Works policy priorities.¹ Our associations represent a large cross-section of America's construction, home building, mining, manufacturing, and energy sectors, and the broad business community—all of which are vital to a thriving national economy and provide much needed jobs in communities across the country, including low-income and Tribal communities. Our members regularly engage with the Corps Regulatory, Infrastructure, and Flood Control Programs and therefore have a direct and substantial interest in this notice.

Before responding to the specific requests for comment in the *Federal Register* notice, we offer the following policy priorities and principles important to industry and the broad business community for your consideration. We appreciate the opportunity to work with the Army and the Corps and look forward to continued engagement on these and other important issues.

- **Align Corps Districts' activities** — Corps actions often vary widely among various Districts. We suggest that any modernization approach incorporate the importance of consistency across Districts, accounting for regional needs and differences.
- **Offer regular engagement for the business community** — The Corps does not have a process for ongoing informal or formal discussions with businesses or the broad stakeholder community. A modern Corps should include this kind of engagement.
- **Streamline the permitting process** — Meeting America's ambitious climate and infrastructure goals requires that projects are permitted in a reasonable timeframe with clear, predictable, and durable requirements.

¹ 87 Fed. Reg. 33756 (June 3, 2022).

- **Provide more interagency coordination** —The Corps should increase its active participation in current mechanisms, such as the water subcabinet, the White House Office of Science and Technology Policy, and others needed to foster increased collaboration across U.S. government agencies.
- **Catalyze public-private partnerships** — More must be done beyond the cost share requirements to mobilize private capital and other non-federal funding to support key civil works projects.
- **Leverage unique military capabilities and cross branch coordination** — The Corps’ military capabilities and dual use technologies should be more readily integrated into the civil works programs to enable more value for taxpayer investments. In addition, more effective coordination with other military branches should be encouraged when practicable.
- **Promote green infrastructure** — Traditional and legacy assets are not able to keep up with extreme weather events and other natural disasters. Established and early-stage equipment and technology companies are rapidly innovating new approaches to manage water flow that can often be deployed more rapidly and are less expensive than traditional approaches, especially when combined with green infrastructure. Federal, state, and local laws should appropriately promote the use of such green infrastructure coupled with smart or digital solutions.
- **Identify flexible, consistent, and well-defined approaches to include Tribal consultations** — We strongly support regular, meaningful, and robust consultation with Tribal Nations and recognize the critical role that Tribes have in managing their land and water resources as part of a Corps modernization effort. More discussion and flexibility is needed.
- **Collaborate with the business community and regulated entities in developing any environmental justice guidance** — We want to share our experiences, best practices, and ideas with you and help ensure any guidance affecting the regulatory program is practicable on the ground. We also would like to ensure that the Corps considers the important role of business in disadvantaged communities.

In response to the Army’s request for comment on specific issue areas identified in the *Federal Register* notice, we offer the following comments.

1. Tribal Consultation Policy

Alaska Native Corporations

We support the Corps’ intent to amend its Tribal Consultation Policy to provide that the Corps will consult with Alaska Native Corporations (ANCs) on the same basis as Indian Tribes under Executive Order 13175. ANCs generally provide the voices of the regional and village shareholders that they represent. They embody the concepts of self-determination that underlie the Alaska Native Claims Settlement Act and are therefore important voices in the consultation process as federal agencies like the Army make decisions that affect them.

Tribal Consultation on Approved Jurisdictional Determinations as a Policy Matter

We strongly support regular, meaningful, and robust consultation with Tribal Nations and recognize the critical role that Tribes have in managing their land and water resources. However, as explained below, we respectfully submit that the technical process of making approved jurisdictional determinations (AJDs), which the Corps performs thousands of times per year, does not fit well with incorporating a new step involving Tribal consultation, and that Tribal consultation should instead occur at different stages in the Corps permitting and decision-making processes. We believe this delineation of process roles would better serve the purposes of AJDs and Tribal consultation, and effective engagement of both Corps and Tribal resources.

First, the Clean Water Act (CWA) is clear that the Corps is the entity charged with making jurisdictional determinations and the Corps has promulgated detailed regulations and technical guidance governing how these decisions are made.² Furthermore, decades of litigation, continuing today, has shaped how jurisdictional waters are defined. The Corps cannot now decide to consider new factors other than the criteria in properly promulgated regulations when determining whether a parcel contains jurisdictional waters. Doing so would introduce new uncertainties, delays, and litigation risks into routine Corps decision-making processes that must be conducted efficiently to prevent backlogs.

An AJD serves a singular, limited purpose – to indicate the presence, absence, or limits of “waters of the United States” (WOTUS) on a parcel.³ It does not authorize any activity. Simply put, AJDs determine whether the criteria of the regulation promulgated by the U.S. Environmental Protection Agency and the Army defining WOTUS are satisfied for a given parcel. Jurisdiction is determined using the Corps’ 1987 Wetland Delineation Manual and its ten regional supplements or by identifying the presence of an ordinary high water mark as defined by Corps methodology. These documents contain scientific and technical analyses and standardized processes for assessing jurisdiction under the CWA developed by the Corps with public input.⁴ Given that an AJD is strictly based on the presence or absence of specific criteria, it is unclear to us how the Army would propose to incorporate Tribal consultation into making these fact-based decisions.

The *Federal Register* notice raises questions about whether the Corps can consider information outside the WOTUS regulation, such as Indigenous Traditional Ecological Knowledge (ITEK), in making jurisdictional determinations. We recognize ITEK and support its use when appropriate. However, determining jurisdiction through AJDs is a defined process, not a

² 33 CFR 320.1(a)(6) (“The Corps authorized its district engineers to issue formal determinations concerning the applicability of the Clean Water Act or the Rivers and Harbors Act of 1899 to activities or tracts of land...”); 33 CFR 320.1(a)(2) (referring to a district engineer’s decision on an approved jurisdictional determination); 33 CFR 325.9 (“District engineers are authorized to determine the area defined by the terms ‘navigable waters of the United States’ or ‘waters of the United States.’” See also RGL 05-05 (The Corps “determines, on a case-by-case basis, the extent of geographic jurisdiction for purpose of administering its regulatory program. For purpose of Section 404 of the Clean Water Act (CWA), the lateral limits of jurisdiction over non-tidal water bodies extend to the ordinary high water mark (OHWM), in the absence of adjacent wetlands.”).

³ 33 CFR 331.2.

⁴ See 1987 Wetland Delineation Manual (“Procedures described for both routine and comprehensive wetland determinations have been tested and found to be reliable...the basic approach for making wetland determinations should not be altered (i.e. the determination should be based on the dominant plant species, soil characteristics, and hydrologic characteristics of the area in question).”

discretionary policy decision subject to the input of third parties (whether they be other federal agencies, Tribes, states, project proponents, or other stakeholders). Opening up the process to third-party comment and input would fundamentally change the process in ways that would impose severe burdens on limited Corps resources (and, indeed, on the resources of parties who would need to provide comment and input, including not only Tribes, but all other stakeholders). Moreover, it is unclear what kind of information would be obtained during Tribal consultation that would change the determination of whether a parcel meets the WOTUS criteria. Opening jurisdictional determinations to factors and policy input outside of the WOTUS regulation is not supported by the statutes, caselaw, or Corps regulations.

Additionally, Executive Order 13175 and President Biden's Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships do not compel Tribal consultation on AJDs. AJDs do not satisfy the definition of "policies that have Tribal implications" that triggers Tribal consultation as defined in EO 13175.⁵ The Order, as affirmed in President Biden's Memorandum, defines such policies as "regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes."⁶ AJDs are not regulations, legislative comments or proposed legislation, or policy statements or actions with substantial direct effects relating to Tribes that would necessitate Tribal consultation under President Biden's direction. As stated earlier, an AJD does not authorize any activity that could impact a tribe, directly or indirectly. While we strongly support robust Tribal consultation, and recognize that may include ITEK, that information warrants consideration at the appropriate time under the National Environmental Policy Act and its implementing regulations, and in the permitting and decision-making processes for specific projects or actions.

If the Army nonetheless decides to issue a proposal, for notice and public comment, to conduct Tribal consultation on AJDs (or some subset of AJDs) as a policy decision, the Army should consider the following:

- **The practical impact on the Corps' Regulatory Program.** The Corps provides thousands of AJDs per year. Given existing backlogs and challenges, it can take project proponents months if not years to obtain an AJD. In many cases, the Corps' actions involve critical infrastructure and natural resource projects that would often benefit environmental justice communities. How will the Corps manage additional obligations and associated regulatory burdens given its limited resources consistent with its mandate and 33 CFR 320.1(a)?⁷ The Army should conduct an appropriate regulatory burden analysis, making the data publicly available, as well as determining the realistic costs

⁵ Executive Order 13175, Consultation and Coordination with Indian Tribal Governments, 65 Fed. Reg. 67249 (Nov. 6, 2000); Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, (Jan. 26, 2021).

⁶ Executive Order 13175.

⁷ 33 CFR 320.1(a)(3) (the Corps "seeks to avoid unnecessary regulatory controls;" 33 CFR 320.1(a)(4) ("[r]educing unnecessary paperwork and delays is a continuing Corps goal;" 33 CFR 320.1(a)(5) (the Corps "believes that state and federal regulatory programs should complement rather than duplicate one another.")

and benefits of the new requirements, prior to issuing any proposal to mandate Tribal consultation on AJDs.

- **How the Corps will ensure any information obtained is transparent and publicly available.** We understand ITEK often is not available to the general public. How will the Corps ensure information from Tribes used to inform an AJD is available to the public in a transparent manner consistent with all laws, legal requirements, and Corps regulations and guidance?⁸ How will the Corps resolve instances of objections to claims made on the basis of ITEK, including potential conflicts involving ITEK provided by different Tribes or involving a claim of conflict between ITEK and the technical information contained in Corps manuals?
- **Whether such a requirement is duplicative with Tribal consultation requirements that would occur in the context of making permit decisions.**

2. Corps' Regulatory Program Procedures for the Protection of Historic Properties at 33 CFR 325, Appendix C

The Army seeks input on whether the Corps should rescind 33 CFR 325, Appendix C, and rely on the Advisory Council on Historic Preservation's (ACHP) regulations at 36 CFR 800. We strongly support the continued use of Appendix C to manage work around historic properties and believe the Corps should not rescind Appendix C and should not adopt the Advisory Council's regulations at 36 CFR Part 800.

The National Historic Preservation Act (NHPA) requires federal agencies to develop procedures for compliance with Section 106 that are consistent with regulations found at 36 CFR Part 800.⁹ The Corps Regulatory Program's NHPA implementing procedures were initially developed in 1978 and revised in consultation with the ACHP in 1979. In 1979, the ACHP issued a Memorandum confirming the ACHP's belief that "the process we have developed in consultation with [Office of Archeology and Historic Preservation] OAHP and the Corps will ensure proper consideration of historic and cultural resources in the Corps decision-making process without being unnecessarily burdensome to SHPOs, the Corps, or individual applicants for Section 10 and Section 404 permits."¹⁰ The Memorandum specifically addressed the concept of implementing Section 106 on the basis of a "permit area" and acknowledged that the District Engineer's responsibilities in conducting investigations is limited to the permit area.¹¹ These regulations were promulgated in 1990¹² and supplemented by issuance of Guidance in 2005 and 2007 to reflect revisions to the ACHP regulations and to maintain consistency as required by the NHPA. In 2009, the Corps affirmed the validity and continued applicability of Appendix C for

⁸ 33 CFR 331.2 (the Corps "will" provide the "basis of jurisdictional determination"). *See also* RGL 16-01 Q&A document ("Corps districts will ensure that the information in the file adequately supports any AJD. The file shall, to the maximum extent practicable, explain the rationale for the determination, disclose the data and information relied upon, and, if applicable, explain what data or information received greater or lesser weight, and what professional judgment or assumptions were used in reaching the determination.").

⁹ 54 U.S.C. 306102(b)(5)(A).

¹⁰ Advisory Council on Historic Preservation Memorandum to State Historic Preservation Officers, Aug. 21, 1979.

¹¹ *Id.* at pg. 3-4.

¹² See 55 Fed. Reg. 2700, June 29, 1990.

fulfilling its obligations under Section 106 of the NHPA.¹³ Any effort to update the Part 325 regulations should codify the 2005 and 2007 guidance documents. The Army has not provided any evidence that this approach would not be sufficient for meeting the Corps' Section 106 compliance obligations.

The Army has not provided a compelling reason for rescinding Appendix C. The Army's primary concern appears to be an interest in reducing its long-standing difference of views with the ACHP, particularly regarding differences in interpretation of the scope of review and the ACHP's position that Appendix C is not legitimate because it was not approved by the ACHP under 36 CFR 800.14. But the Act does not require a federal agency to seek alternative procedures under 800.14, nor is there a statutory requirement that the Advisory Council must approve an agency's regulations. Furthermore, the Army's assertion that the ACHP "oversees agencies compliance" with their statutory responsibilities under the NHPA is not a correct interpretation of the Act.¹⁴

The ACHP was established by Congress as an independent agency whose mission was to provide the President and Congress with advice as to policies and programs on historical preservation. The Act authorized the Council to promulgate regulations establishing procedures for evaluating the effect of a federal action on historic property. The Act also directs federal agencies to promulgate their own regulations, consistent with the Council's regulations. Where an agency has its own regulations, courts have consistently held that the agency's regulations govern decision-making, provided they are not inconsistent with the Part 800 regulations. Most courts have generally regarded an agency's regulations as inconsistent when they are less restrictive procedurally than the Council's. Courts have also consistently upheld this limitation on the ACHP's statutory authority, finding the NHPA to be a procedural statute, imposing no substantive standards on agencies.¹⁵

Should the Army nonetheless decide to issue a proposal, for notice and public comment, to change Appendix C, the Army should consider the following:

- The NHPA is a procedural statute and does not dictate substantive results;
- The ACHP was established as an independent agency intended to provide advice about historic preservation; the ACHP does not have authority to mandate substantive requirements;
- Appendix C was developed specifically for use in the Corps Regulatory Program and adheres to the Corps' jurisdictional reach. Accordingly, any consideration of adoption of the ACHP Part 800 regulations, or of parts thereof, must carefully take into account the implications of a broader definition of "federal undertaking" and "area of potential

¹³ See Memorandum for Regulatory Chiefs, Headquarters Regulatory Community of Practice Guidance on the Continued Use and Applicability of 33 CFR 325, Appendix C, Jan. 6, 2009.

¹⁴ See 55 Fed. Reg. 33756, 33759, June 3, 2022.

¹⁵ *Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752 (D.C. Cir. 2003); *Narragansett Indian Tribe v. Pollack*, Civil Action No. 20-576 (RC), 2022 U.S. Dist. LEXIS 458880 (D.D.C. Mar. 15, 2022) ("More generally, Section 106 does not dictate substantive results. Instead, Section 106 is a procedural statute requiring a federal agency to take certain steps prior to beginning a project.").

effect” including the significant additional burden that would be imposed on the Corps’ Regulatory Program. Any effort to update the Part 325 regulations should instead codify the 2005 and 2007 guidance documents.

- Some members of the undersigned associations have experienced challenges in complying with Section 106 implementation programs adopted under ACHP Part 800 by other federal agencies, including the Bureau of Land Management (BLM). Many project proponents and BLM field offices have encountered duplicative and inefficient permitting challenges under these processes. We encourage the Corps not to invite these same challenges into its own Regulatory Program.

3. Environmental Justice Guidance for the Corps Regulatory Program

The Army intends to issue guidance specific to the Regulatory Program and seeks input on how best to incorporate consideration of environmental justice in the Corps Regulatory Program. We strongly support the Army and Corps’ commitment to addressing the impacts of its actions on communities with environmental justice concerns and ensuring the fair treatment and meaningful involvement of all people. We want to partner with the Army and the Corps in this effort and encourage you to:

- **Collaborate with the business community and regulated entities in developing this guidance.** We want to share our experiences, best practices, and ideas with you and help ensure any guidance affecting the regulatory program is practicable on the ground.
- **Recognize and understand the important role of the business community in economically disadvantaged communities.** We care deeply about environmental and economic justice. Our members create jobs and other economic and social development opportunities in the communities that need it most, including communities with environmental justice concerns. The Army should recognize and consider these important economic opportunities and the environmental stewardship efforts our members often undertake in considering any policy or regulatory changes involving environmental justice. An efficient and predictable Regulatory Program is necessary to continue supporting these opportunities.
- **Ensure any guidance is consistent with the law and supports the Corps’ mandate to balance the protection of aquatic resources and navigation while allowing responsible development.**

Thank you for the opportunity to comment. We look forward to working with the Army and the Corps on next steps. If you have any questions in the meantime, please contact Caitlin McHale at cmchale@nma.org or (202) 463-2646.

Sincerely,

American Exploration and Mining Association
Industrial Minerals Association – North America
National Association of Home Builders
National Mining Association
National Stone, Sand, and Gravel Association
U.S. Chamber of Commerce