

LAND USE AND NATURAL RESOURCES

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ARMY CORPS APPENDIX C AND SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT

Business Nexus

Construction of housing, transportation, and utility infrastructure, critical flood protection facilities, and commercial land use needs clarity and consistency in one aspect of federal permitting with the US Army Corps of Engineers: compliance with Section 106 of the National Historic Preservation Act. Development of new procedures for implementing this law is necessary to allow for projects to be approved and proceed in a timely manner, in support of Strong Business, a Connected Region, and Vibrant Communities in the Sacramento region.

Requested Action

Urge the US Army Corps of Engineers (USACE), in consultation with the Advisory Council on Historic Preservation and the California State Historic Preservation Officer, to rescind Appendix C regulations and to develop and adopt clear guidance to implement Section 106 of the National Historic Preservation Act regulations.

Background

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires Federal agencies to take into account how their actions affect historic properties. Federal agencies must consult with the State Historic Preservation Officer (SHPO) and Federally-recognized Native American tribes. When a project affects wetlands, it must obtain a Clean Water Act permit from the USACE. Section 106 requires the USACE to consult with tribes and the SHPO to avoid, reduce, or resolve adverse effects on historic properties before issuing a permit.

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The USACE has historically fulfilled this obligation by using procedures in Appendix C to the USACE Regulations in 33 CFR Part 325, but Appendix C was never approved by the Advisory Council on Historic Preservation and does not meet the requirements in 36 CFR 800.14 for alternate agency procedures. Many have taken issue with the limits of Appendix C as it only governs the smaller USACE permit area, which is limited generally to only areas with wetlands (Waters of the United States). The USACE does not address the indirect effects on adjacent historic properties. This has resulted in objections from Native American Tribes and the State Historic Preservation Officer, which further delay permit issuance.

There has been Congressional interest in addressing the discrepancy between the Appendix C and Section 106 regulations to provide better clarity in the consultation process. In 2015, 2016, and 2017, several congressional representatives urged greater clarity and certainty in the Section 106 consultation process as it relates to undertakings by the USACE, and urged the USACE to prioritize the development of a program-level Programmatic Agreement to:

1. outline and clearly define the consultation timelines and response times,
2. establish definitions for reasonable and good faith effort,
3. provide consistent thresholds for agency decision makers and project applicants,
4. contribute to better efficiency within the USACE, and
5. provide needed certainty for agencies, tribes, and the regulated community.

In March 2018, the USACE expressed a commitment to respond to this need, and initiated development of this Programmatic Agreement. Responses to the public notice in support of this action were signed by Congressman John Garamendi and Congressman Tom McClintock and many from the business community.

The Sacramento District of the USACE made concerted efforts to develop a Programmatic Agreement with the California State Historic Preservation Officer, but in 2022, the District ended the initiative due to lack of consensus.

On November 30, 2022, the White House issued a press release regarding President Biden's hosting of the Tribal National Summit, in which the Administration announced new actions to support Native American communities, including the following:

Appendix C Rulemaking Effort. The U.S. Army has historically used USACE Appendix C for actions affecting historic properties under Section 106 of the National Historic Preservation Act. Tribal Nations and Native Hawaiian communities have, for many years, complained that Appendix C does not comply with Section 106 procedures. USACE is announcing a rulemaking effort proposing to rescind Appendix C. USACE would instead rely on ACHP's regulations and joint USACE/ACHP guidance for

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implementation of Section 106. The Army intends to coordinate closely with Tribal Nations and ACHP throughout this rulemaking effort.

Rescinding the problematic Appendix C regulations is an important step to better align the USACE permitting program with the Section 106 regulations. Developing replacement alternate procedures in accordance with 36 CFR 800.14 that are approved by the Advisory Council on Historic Preservation and address the five-point framework for the original Programmatic Agreement is critical for projects to proceed in a timely manner, in support of Strong Business, a Connected Region, and Vibrant Communities in the Sacramento region and nationwide.

1. <https://www.whitehouse.gov/briefing-room/statements-releases/2022/11/30/fact-sheet-biden-harris-administration-announces-new-actions-to-support-indian-country-and-native-communities-ahead-of-the-administrations-second-tribal-nations-summit/>

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