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LAND USE AND NATURAL RESOURCES (LUNR)

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

Requested Action:

We urge the U.S. Army Corps of Engineers (USACE), in consultation with the Advisory Council on Historic Preservation, to consult with the regulated community in its development of new procedures to implement Section 106 of the National Historic Preservation Act regulations.

Business Nexus

Compliance with Section 106 of the National Historic Preservation Act needs greater clarity and consistency related to federal permitting with the U.S. Army Corps of Engineers for construction of housing, transportation and utility infrastructure, critical flood protection facility, and commercial land use needs. Development of new procedures for implementing this law is necessary to allow for projects to be approved and proceed in a timely manner.

Background

Section 106 of the National Historic Preservation Act of 1966 (NHPA) requires federal agencies to consider 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.

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 U.S.). The USACE does not address the indirect effects to adjacent historic properties. This has caused objections from Native American Tribes and the State Historic Preservation Officer, which further delay permit issuance.

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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, Congressman Tom McClintock, and many from the regional 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.

Subsequently, on November 30, 2022, the White House issued a press release¹ regarding President Biden's hosting of the Tribal National Summit in which the Administration announced new actions to support Native American communities, which include 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 implementation of Section 106. The Army intends to coordinate closely with Tribal Nations and ACHP throughout this rulemaking effort.

On February 9, 2024, the USACE published a proposed rule in the Federal Register (Vol. 89, No. 28; docket number COE-2023-0004 and/or RIN 0710-AB46) that proposes to rescind Appendix C and temporarily adopt the official regulations in 36 CFR 800 et seq. The USACE will develop interim guidance for the Regulatory Program while simultaneously, begin consultation on new alternative regulations pursuant to 36 CFR 800.14 that will replace the former Appendix C procedures.

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In the rulemaking effort, the USACE will be seeking input from Tribal Nations and State Historic Preservation Officer. But equally important is seeking input from those who bear the cost and time burden in the resulting procedures: private applicants and local and state agencies who are seeking Federal assistance. In practice, the regulated community is not afforded an equal opportunity to be at the table during consultation, and often, the concerns of the regulated community are not treated with the same weight as those of other consulting parties.²

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.

Sources

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/>
2. 236 CFR 800.2(c)(4) allows applicants for Federal assistance, permits, licenses, and other approvals to be consulting parties under the regulations implementing Section 106 of the National Historic Preservation Act.