



August 2, 2022

Stacey M. Jensen
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108
Via email: usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil

Re: Modernization of Army Civil Works Policy Priorities Solicitation of Input (Docket ID No. COE-2022-0006)

Dear Ms. Jensen:

The American Cultural Resources Association (ACRA), the trade association for firms that specialize in cultural resource management (CRM), appreciates this opportunity to comment on the U.S. Army Corps of Engineers' Notice and Solicitation of Input on Modernization of Army Civil Works Policy Priorities, in particular Section III.A, "Corps' Regulatory Program Procedures for the Protection of Historic Properties at 33 CFR 325, Appendix C."

ACRA member firms undertake much of the legally mandated CRM studies and investigations in the United States and employ thousands of CRM professionals, including archaeologists, architectural historians, anthropologists, historians, and an increasingly diverse group of other specialists. To help guide smart, sustainable economic development and safeguard important historic and cultural heritage assets, ACRA members apply specialized research skills within a framework of federal, state, local, and/or Tribal law and facilitate an open dialogue where every stakeholder has a voice.

As the USACE notes, "there has been longstanding disagreement between the Corps and ACHP [the Advisory Council on Historic Preservation] regarding differences between the Corps' Regulatory Program Appendix C and the regulations promulgated by ACHP governing the [National Historic Preservation Act] Section 106 process," a dichotomy that "can result in inconsistency and confusion among the regulated public, State and Tribal Historic Preservation Offices, Tribes, and others," and impairs the Corps' ability to meet its statutory and Tribal responsibilities. ACRA commends USACE for stating that "rulemaking on Appendix C is a priority policy initiative which will serve to modernize the Regulatory Program."

The ACHP regulations at 36 CFR 800 that govern the Section 106 process are the product of an extensive and long-standing cycle of consultation, development, evaluation, and amendment. While not perfect, they provide a high level of consistency, clarity, and certainty to Section 106 proceedings. This ensures that all stakeholders have a voice in the process and that the need for

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development is balanced with the need to consider the impacts of such development on our nation's cultural heritage.

ACRA strongly believes that it is in the best interests of the Corps, its stakeholders, and the public for the Corps to rescind Appendix C and adopt the ACHP Section 106 regulations under 36 CFR 800.

Adopting the ACHP regulations for its regulatory program will result in stronger and more meaningful consultation with Tribal governments and descendant communities, better enabling the Corps to fulfill its trust responsibility to Tribal Nations. It also will lessen inconsistencies between how the Corps approaches Section 106 reviews and those of other federal agencies that follow 36 CFR 800, and would improve consistencies among Corps districts on how Appendix C is implemented. These efforts will reduce litigation and unnecessary delays, ultimately leading to a smoother and more streamlined process for the Corps, its clients, and partners.

Adoption of the ACHP regulations also will ensure that the Corps' regulatory program will evolve over time without the need for updates. ACHP's regulations have matured over the years as our nation's approach to CRM, historic preservation, community engagement and inclusion, and potential impacts has changed. It is a near certainty that the ACHP regulations will continue to evolve over time; and, by adopting these regulations, the Corps will provide long-term certainty and predictability to its regulatory program.

In addition, rescinding Appendix C and adopting the ACHP regulations will move the Corps' regulatory program away from the current narrow definition of "permit area" and towards the ACHP regulations' definition of "area of potential effects." The Appendix C "permit area" definition often fails to reflect the broad and complete range of direct and indirect foreseeable and cumulative effects of permitted work. The permit area interpretation creates a higher risk of adverse impacts to values and resources of cultural or historical significance and confusion and unnecessary delays due to conflicts with other portions of review areas that adhere to the ACHP regulations. By adopting the ACHP regulations and their definition of "area of potential effects," the Corps will ensure that reviews under its regulatory program are aligned with those of other agencies.

For these reasons, ACRA strongly recommends that USACE rescind Appendix C and adopt the ACHP's 36 CFR 800 regulations. Should the Corps opt against rescinding Appendix C, then ACRA would strongly recommend the Corps develop a program alternative subject to approval by ACHP and in close consultation with stakeholder groups as per 36 FR 800.14

We appreciate USACE's work on this important issue and its consideration of ACRA's views.

Sincerely,



Amanda Stratton
Executive Director