



***CONFIDENTIAL DRAFT***

**August 2, 2022**

Comments regarding:

**June 3, 2022 Request for Input on the Corps' Implementing Regulations for the National Historic Preservation Act**

Submitted by:

**Energy and Wildlife Action Coalition**

Filed electronically at <https://www.regulations.gov> under:

Docket No. COE-2022-0006

The Energy and Wildlife Action Coalition (“EWAC”)<sup>1</sup> submits these comments in response to the U.S. Army Corps of Engineers’ (“Corps”) June 3, 2022 Notice of Virtual Public and Tribal Meetings Regarding Modernization of Army Civil Works Policy Priorities, Establishment of a Public Docket, and Request for Input (“Request”) to inform potential future rulemaking regarding the Corps’ Tribal consultation policy and Tribal Partnership Program, the Corps’ regulatory program’s implementing regulations for the National Historic Preservation Act (“NHPA”), and other issues.<sup>2</sup> While the Request is part of a broader effort to modernize the Corps’ Civil Works Program through a number of related policy initiatives, the focus of EWAC’s comments is on potential changes to the Corps’ implementing regulations for section 106 of the NHPA (“Section 106”), found at Appendix C to 33 C.F.R. Part 325 (“Appendix C”). EWAC provides these comments on the Request based on the knowledge and experience of its membership.

As an initial matter, EWAC generally supports the Corps’ efforts to clarify regulatory processes, particularly with respect to how project proponents should comply with Section 106 in the context of Clean Water Act section 404 (“Section 404”) permitting. In addition to ensuring compliance with relevant statutes and regulations, clear and defined processes reduce uncertainty for project proponents, including EWAC members, who develop and operate renewable energy facilities and electric transmission and distribution facilities. Providing clean, affordable, and reliable electricity to all communities will, in turn, further stated priorities of the Biden-Harris Administration (“Administration”).<sup>3</sup>

Given the above, EWAC encourages the Corps to consider certain nuances of Section 106 compliance in connection with the agency’s Section 404 permitting program, and to take care that, in developing new regulations, the Corps does not inhibit the goals and initiatives of the Administration.

**I. The Corps Should Not Rescind Appendix C in Favor of Reliance on ACHP Regulations.**

In its Request, the Corps notes that some inconsistency exists between Appendix C and Section 106 implementing regulations promulgated by the Advisory Council on Historic Preservation (“ACHP”), which oversees federal agency compliance with Section 106.<sup>4</sup> The Corps further explains that inconsistency between Corps and ACHP regulations has resulted in “lengthy

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<sup>1</sup> EWAC is a national coalition formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related trade associations. The fundamental goals of EWAC are to evaluate, develop, and promote sound environmental policies for federally protected wildlife and closely related natural resources while ensuring the continued generation and transmission of reliable and affordable electricity. EWAC supports public policies, based on sound science, that protect wildlife and natural resources in a reasonable, consistent, and cost-effective manner. EWAC is a majority-rules organization and therefore specific decisions made by the EWAC Policy Committee may not always reflect the positions of every member.

<sup>2</sup> 87 Fed. Reg. 33,756 (June 3, 2022).

<sup>3</sup> Building a Better Grid Initiative, available at: <https://www.energy.gov/oe/articles/building-better-grid-initiative>.

<sup>4</sup> 86 Fed. Reg. at 33,759.

and challenging” Section 106 consultations.<sup>5</sup> Among the solutions the Corps is considering to address this inconsistency is rescinding Appendix C in its entirety and, instead, relying on ACHP’s Section 106 implementing regulations found at 36 C.F.R. Part 800 (“ACHP Regulations”).<sup>6</sup>

EWAC recommends the Corps maintain Appendix C and make any necessary modifications rather than rescinding it wholly in favor of ACHP Regulations.<sup>7</sup> While it is true that Appendix C differs somewhat from ACHP Regulations, many aspects of Appendix C are helpful to the regulated community because they provide, in many cases, clear instruction on how NHPA compliance should occur in the specific context of Section 404 compliance. Indeed, as the Corps indicates in Appendix C, the regulation’s very purpose is to “provide for the maximum consideration of historic properties within the time and jurisdictional constraints of the Corps regulatory program.”<sup>8</sup>

For example, in the context of identifying the relevant “permit area” for Section 106 compliance for linear projects seeking Section 404 permitting, Appendix C provides specific illustrations on the breadth and scope of Corps jurisdiction over an area and, thus, the breadth and scope of Section 106 consideration in connection with the same. In the case of linear crossings of jurisdictional waters, the Corps acknowledges that these projects “almost always *can* be undertaken without Corps authorization, if they are designed to avoid affecting the waters of the United States.”<sup>9</sup> The Corps then explains that, as a result, “in the case of a linear crossing, the permit area shall extend in either direction from the [jurisdictional] crossing to that point at which alternative alignments leading to reasonable alternative locations for the crossing can be considered and evaluated.”<sup>10</sup> This kind of guidance, specific to the Section 404 permitting program, is invaluable for project proponents, including EWAC members tasked with constructing, operating, and maintaining electric transmission and distribution lines, and should be retained.

EWAC recognizes that while the intent of Appendix C was, at the time it was promulgated, to provide clarity to the Corps and the regulated community on how to comply with Section 106 in the context of the Section 404 program, due to changes in ACHP Regulations, policy, and federal agency practices, Appendix C now is in some ways out of step with common practices and Section 106 processes. For that reason, EWAC provides some suggestions for modifications of Appendix C throughout this comment letter. EWAC reserves the right to provide additional comments on modifications to Appendix C should the Corps ultimately publish a proposed rulemaking regarding Section 106 at a later date.

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.* at 33,760.

<sup>7</sup> 36 C.F.R. Part 800.

<sup>8</sup> 33 C.F.R. 325 Appendix C 2(f).

<sup>9</sup> *Id.* at (1)(g)(4)(ii) (emphasis in the original).

<sup>10</sup> *Id.*

## **II. EWAC Supports Modification to Appendix C where Needed to Conform to ACHP Regulations.**

As noted above, while EWAC appreciates that the language in Appendix C differs from the ACHP Regulations, members nevertheless find some of the specific language in Appendix C to be useful in the context of Section 404 compliance. For that reason, EWAC supports retention of Appendix C, with modifications to language that directly conflicts with ACHP Regulations or where simple changes in terminology would eliminate confusion. In short, EWAC supports retaining helpful direction provided by Appendix C, even where there are differences in terminology between Appendix C and ACHP Regulations so long as the spirit of the Corps' regulations do not differ from the spirit of the ACHP Regulations.

For example, to assist the Corps and project proponents in determining the proper area to analyze for Section 106 purposes, Appendix C includes a definition of "permit area," which is defined as: "those areas comprising the waters of the United States that will be directly affected by the proposed work or structures and uplands directly affected as a result of authorizing the work or structures."<sup>11</sup> The definition of "permit area" then lays out a three-part test to further clarify what areas should be included in the "permit area" and further provides examples of how a permit area would be viewed in various Corps permitting contexts. While the term "permit area" differs from the term "area of potential effect" as set forth in Section 106 and ACHP Regulations, a simple change in terminology could limit confusion while maintaining the helpful direction specifically relevant to the Section 404 permitting program.

## **III. EWAC Supports Additional Changes to Appendix C to Provide Greater Certainty and Clarification.**

While there are many aspects of Appendix C that are helpful to the regulated community, EWAC recognizes that greater clarity on the scope and process for Section 106 compliance could be achieved by modifying Appendix C. Below, EWAC provides examples of the kinds of provisions of Appendix C that would benefit from revision. Inclusion of these examples is for illustrative purposes only, and EWAC reserves the right to provide further suggestions should the Corps publish a proposed rulemaking regarding Section 106 compliance in the future.

First, there appears to be some internal inconsistency within Appendix C on how to establish the scope of Section 106 review relative to direct and indirect effects. For example, while Appendix C defines the term "permit area" as "those areas comprising the waters of the United States that will be *directly* affected by the proposed work or structures and uplands *directly* affected as a result of [such work]"<sup>12</sup> Appendix C defines the term "effects" to include "*indirect* effects of the undertaking" on designated historic structures.<sup>13</sup> Moreover, Appendix C includes an explanation on how the Corps views what constitutes an "adverse effect" on a designated historic property. The Corps' view of adverse effects seems to imply that adverse effects include effects that one would typically view as indirect (e.g., neglect of a property resulting in its deterioration

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<sup>11</sup> *Id.* at 1(g)(1).

<sup>12</sup> *Id.* (emphasis added)

<sup>13</sup> *Id.* at 1(e) (emphasis added).

or destruction). These seeming inconsistencies can make determining the proper scope of a Section 106 analysis challenging for the Corps and for the regulated community.

Second, section 15(c)(1) of Appendix C states that effects of an undertaking that would otherwise be deemed adverse may be considered as not adverse where:

[T]he designated historic property is of value only for its potential contribution to archaeological, historical, or architectural research, and when such value can be substantially preserved through the conduct of appropriate research, and such research is conducted in accordance with applicable professional standards and guidelines.<sup>14</sup>

The above provision was based on an ACHP guidance document issued in 1980 that has since been superseded and stands in contrast to the way other federal agencies approach adverse effects. To eliminate confusion, EWAC recommends bringing section 15(c)(1) of Appendix C in line with current ACHP guidelines and practices.

Finally, EWAC recommends Appendix C be revised to provide explicit direction that the Corps should, wherever practicable, begin coordination and consultation with Native American Tribes (“Tribes”) early in a given permitting process. For example, typically, the Corps does not begin to define what constitutes an “undertaking” until the agency has a permit application in hand that it has deemed complete. This delay in determining the undertaking in connection with a specific permit application can then cause delays in the initiation of coordination with potentially affected Tribes. Initiating Tribal consultation earlier in the permitting process would allow project proponents and the Corps to identify and address concerns relating to Tribal resources in a way that aligns with project development timelines and budgets, and better ensures resolutions that are acceptable to the affected Tribes. By contrast, the Corps’ general practice of later coordination with Tribes can result in increased permitting timelines and costs and can frustrate the underlying purpose of Tribal consultation.

#### **IV. Section 13 of Appendix C Should be Revised to Clarify How Applicants Should Comply with Section 106 in the Context of Nationwide Permitting.**

Section 13 of Appendix C (“Section 13”), titled “Nationwide General Permits,” briefly discusses the process for complying with Section 106 in the context of the Corps’ Section 404 Nationwide Permitting (“NWP”) program. Unfortunately, neither Section 13 nor general condition 20 of the NWP program (“General Condition 20”)<sup>15</sup> provides instruction to the Corps on the degree of authority the agency has to require project proponents to conduct cultural resource surveys in connection with the submission of a pre-construction notification (“PCN”). This lack of guidance has, from time to time, proven problematic in the context of the Corps’ administration of the NWP program; some districts frequently insist project proponents complete significant additional survey work that goes beyond the area under the Corps’ jurisdiction in order for the agency to deem a

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<sup>14</sup> *Id.* at 15(c)(1).

<sup>15</sup> 86 Fed. Reg. 73,522 (Dec. 27, 2021).

PCN complete and begin processing a NWP verification. This insistence, in turn, creates delay in project implementation and can increase cost and uncertainty for a project.

To address this problem, EWAC recommends the Service revise Section 13 to clarify that where a PCN must be submitted pursuant to General Condition 20, a district engineer may not require an applicant to perform additional survey work outside the “permit area” as defined by Appendix C in order for the agency to deem a PCN complete.

Should the Corps elect to rescind Appendix C altogether, EWAC recommends the Corps and ACHP enter into a programmatic alternative acknowledging that a project proponent’s self-certification under General Condition 20 satisfies ACHP Regulations found at 36 C.F.R. Part 800 and, therefore, does not require additional survey or other work be performed by the project proponent in order to satisfy the Corps’ Section 106 obligations. This concept should also be added to General Condition 20, as discussed in greater detail below.

**V. General Condition 20 of the Nationwide Permitting Program Should be Revised to More Closely Align with Appendix C.**

In addition to retaining (and amending, as necessary) Appendix C, as the Corps considers updating its regulations relating to Section 106 compliance, consideration should also be given as to how the language of General Condition 20 could be revised to conform with Appendix C. Presently, Appendix C and General Condition 20 differ in some respects, which can create confusion for the regulated community on whether and when a PCN may be required under General Condition 20. For example, and as alluded to above, General Condition 20 does not specify that a project proponent should look to the “permit area” as defined by Appendix C. Instead, General Condition 20 instructs that a PCN is required where “the NWP activity might have the potential to cause effects to any historic properties...”<sup>16</sup> While it is reasonable to assume that the phrase “NWP activity” is synonymous with the “permit area,” this ambiguity creates an opportunity for the Corps to apply General Condition 20 inconsistently across districts, including the requirement in some districts for a project proponent to conduct surveys well beyond what would be considered the “permit area” under Appendix C. Likewise, General Condition 20 requires a PCN be submitted where the NWP activity “might have the potential to cause effects to...previously unidentified properties.”<sup>17</sup> We are unaware of Corps guidance or policy further describing what may be intended by the phrase “unidentified properties.” Similar to the example above, this ambiguity can result in the Corps requiring additional survey or other requirements that delay deployment of much needed infrastructure and may be beyond the scope of Section 106 and Appendix C.

For these reasons, EWAC recommends that General Condition 20 be revised to clarify that when a non-federal permittee is analyzing whether an activity might have the potential to cause effects to any historic properties, the non-federal permittee should use the definitions and framework set forth in Appendix C, including specifically Section 13.

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<sup>16</sup> *Id.* at 73,566.

<sup>17</sup> *Id.*

**VI. Should the Corps Rescind Appendix C, the Agency Should Issue Guidance or Seek a Program Alternative with ACHP Regarding Section 106 Compliance in the Specific Context of the Corps' Permitting Program.**

Should the Corps ultimately elect to rescind Appendix C in its entirety and, instead, rely on ACHP Regulations, EWAC recommends the agency issue guidance or, preferably, seek a program alternative such as a programmatic agreement with ACHP setting forth how compliance with Section 106 will function in the specific context of the Corps' various permitting programs.

Any such guidance or program alternative should specifically acknowledge and consider the fact that the Section 404 permitting program and, in particular, NWPs, address activities that in many instances could proceed without any level of federal involvement. As such, the scope of Section 106 compliance for these kinds of activities should be commensurate with that minimal level of federal jurisdiction. For example, current language in Appendix C regarding the scope of Corps' jurisdiction in the context of linear projects is particularly useful, as is described elsewhere in this comment letter.

Should the Corps rescind Appendix C and move forward with issuing guidance or negotiating a program alternative between the ACHP and others, ample opportunities should be given to the public to provide input on those processes.

**VII. The Corps Should Consider Adopting Deadlines for Requiring Completion of the Corps' NHPA Review.**

With respect to both nationwide and individual permits under Section 404, the Corps should consider adopting deadlines by which the Corps must complete its Section 106 review for a given authorization. EWAC understands that deadlines specific to the Corps may not improve timeliness of Section 106 review where the Corps must consult with State Historic Preservation Officers ("SHPOs"), Tribal Historic Preservation Officers ("THPOs"), or ACHP. However, institution of deadlines for the Corps will ensure regulatory certainty for the myriad projects across the country where consultation is not necessary or where deadlines speed the pace of internal Corps review prior to consultation with SHPOs, TPHOs, and ACHP. To that end, EWAC recommends Corps' review of Section 106 compliance be completed within 60 days of the agency's receipt of an application for Section 404 authorization. EWAC further recommends that, to the extent the Corps requires additional information from the applicant in order to make a Section 106 determination, the agency must request the additional information within 15 days of its receipt of the permit application.

Given the Administration's emphasis on addressing environmental threats caused by climate change, the Corps' Section 106 implementing regulations should encourage timely completion of the agency's review process for renewable energy generation, transmission, and distribution projects, in order to meet the shared goal of a more sustainable future.<sup>18</sup>

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<sup>18</sup> See Exec. Order No. 14008 86 F.R. 7619 (2021); Exec. Order No. 14057, 86 F.R. 70935 (2021).

**VIII. Conclusion.**

EWAC reiterates its support for regulations that provide clear direction for agencies and the regulated community, so that projects may move forward with predictability. Such regulations will avoid inadvertently making it more difficult to achieve other Administration priorities, including reducing greenhouse gases, fighting climate change, and upgrading the nation's electric infrastructure.<sup>19</sup> EWAC is grateful for the opportunity to provide comments on this initiative and welcomes the opportunity to discuss them with the Corps in greater detail.

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<sup>19</sup> *Id.*