



EWAC[®]

Energy and Wildlife
Action Coalition

April 9, 2024

Comments regarding:

February 9, 2024 Proposed Rule to Amend the U.S. Army Corps of Engineers Regulatory Program's Permitting Regulations to Remove Appendix C from 33 C.F.R. Part 325

Submitted by:

Energy and Wildlife Action Coalition

Filed electronically to the attention of:

U.S. Army Corps of Engineers
Attn: CECW-CO-R
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Washington, DC 20314-1000

Docket No. COE-2023-0004

I. Introduction

The Energy and Wildlife Action Coalition (“EWAC”)¹ submits these comments in response to the U.S. Army Corps of Engineers’ (“Corps”) February 9, 2024 Notice of Proposed Rulemaking (“Proposed Rule”) to amend the agency’s regulations found at 33 C.F.R. part 325 by removing Appendix C thereto (“Appendix C”).² Appendix C establishes the process by which the Corps complies with section 106 (“Section 106”) of the National Historic Preservation Act (“NHPA”) in connection with processing permit applications. EWAC provides these comments on the Proposed Rule based on the knowledge and experience of its membership.

EWAC has long advocated for and supported efforts aimed at streamlining environmental review processes, and appreciates the Corps’ recognition that inconsistent administration of Section 106 can create a “challenging” process for compliance.³ 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 affordable, reliable, and clean electricity to all communities will, in turn, further the stated priorities of the Biden–Harris Administration (“Administration”)⁴ and the will of Congress as expressed through the passage of several pieces of bipartisan legislation, including the Infrastructure Investment and Jobs Act,⁵ CHIPS and Science Act,⁶ Inflation Reduction Act,⁷ and Fiscal Responsibility Act.⁸

As is described in further detail below, EWAC believes that revising Appendix C, rather than rescinding it wholesale, would better provide clarity for the regulated community and Corps personnel charged with administering Section 106, and ensure the Section 106 compliance process does not inadvertently hinder the goals and initiatives of the Administration. In the event the Corps elects to move forward with its proposal to remove Appendix C, EWAC also provides suggestions for ensuring the regulated community and Corps personnel have sufficient guidance on how to comply with Section 106 in the specific context of the Corps’ regulatory program.

¹ EWAC is a trade association formed in 2014 whose members consist of electric utilities, electric transmission providers, and renewable energy entities operating throughout the United States, and related industry 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.

² 89 Fed. Reg. 9,079 (Feb. 9, 2024) (“Proposed Rule”).

³ Proposed Rule at 9,083.

⁴ See Executive Order 13990: Protecting Health and the Environment and Restoring Science to Tackle the Climate Crisis, 86 Fed. Reg. 7,037 (Jan. 25, 2021); Executive Order 14008: Establishment of the Office of Climate Change and Health Equity, 86 Fed. Reg. 48,745 (Aug. 31, 2021); The White House Briefing Room, *Fact Sheet: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies*, available at: <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies>.

⁵ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 (2021).

⁶ CHIPS and Science Act, Pub. L. No. 117-167 (2022).

⁷ Inflation Reduction Act, Pub. L. No. 117-169 (2022).

⁸ Fiscal Responsibility Act of 2023, Pub. L. No. 118-5 (2023).

II. Appendix C should be amended rather than rescinded in order to maintain existing clarity and avoid project delays.

In the preamble to the Proposed Rule (“Preamble”), the Corps indicates that the primary reason for removing Appendix C is to eliminate confusion caused by differences between Appendix C and Section 106 implementing regulations promulgated by the Advisory Council on Historic Preservation (“ACHP”) (“ACHP Regulations”).⁹ According to the Preamble, these differences have resulted in confusion regarding the scope of Corps review and the consultation process required in connection with various stakeholders.¹⁰ While EWAC understands the Corps’ concerns and agrees that these inconsistencies may create some degree of confusion concerning the Section 106 compliance process, EWAC believes that revising, rather than rescinding, Appendix C will better alleviate these issues for several reasons.

First, many of the provisions of Appendix C are helpful to the regulated community because they provide clear instruction on how to complete the Section 106 process in the specific context of the Corps’ administration of the Clean Water Act section 404 (“Section 404”) permitting program. Perhaps the best example of this is how Appendix C identifies the relevant “permit area” for Section 106 compliance for linear projects seeking Section 404 permitting. In the case of linear crossings, Appendix C explains that these projects “almost always *can* be undertaken without Corps authorization, if they are designed to avoid affecting the waters of the United States.”¹¹ As a result, Appendix C goes on to provide that the permit area for a linear crossing “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.”¹² This clear and precise guidance, adopted by the Corps in accordance with the rulemaking process established by the Administrative Procedure Act, is exceedingly valuable for project proponents, including EWAC members tasked with constructing, operating, and maintaining electric transmission and distribution lines. This regulatory guidance is also helpful to Corps personnel, state and tribal historic preservation offices, and members of the public in understanding the bounds of Section 106 review when the Corps’ jurisdiction over a project is limited. Similarly, the recognition in Appendix C that with respect to linear crossings of jurisdictional waters, these projects “almost always” can be completed without Corps authorization,¹³ along with its clarification that a non-water dependent project seeking permitting would not fall within the permit area under Section 106,¹⁴ provides the appropriate foundation on how to view the Section 106 process in the context of projects that, but for their use of a Corps permit, would otherwise have no federal involvement.

Second, the Corps is already struggling with the workload in responding to permit applications under Section 404, including completing the Section 106 process in connection with processing those permit applications. Rescinding Appendix C in favor of developing additional guidance at a later date likely will increase the agency’s workload by requiring additional

⁹ 36 C.F.R. Part 800.

¹⁰ Proposed Rule at 9,081.

¹¹ Appendix C at (1)(g)(4)(i) (emphasis in the original).

¹² *Id.* at (1)(g)(4)(ii).

¹³ *Id.* at (1)(g)(4)(i).

¹⁴ *Id.* at (1)(g)(3); 54 U.S.C. § 306108.

resources to develop fresh guidance and train the various districts on how to apply that new guidance, and could leave agencies, project proponents, and the public in the untenable position of having little clarity as to the appropriate scope of Section 106 review. Creating regulatory uncertainty at a time when expeditious deployment of renewable energy and transmission and distribution infrastructure is of paramount importance is antithetical to the Administration goals of addressing climate change, modernizing the power grid, and pursuing environmental justice. Revising the portions of Appendix C that are inconsistent with the ACHP Regulations would be more expeditious and create less regulatory uncertainty than rescinding Appendix C wholesale. In the example above, the Corps could simply revise Appendix C to rename the term “permit area” as the “area of potential effect” to better align with ACHP Regulations.¹⁵ For additional suggestions on how Appendix C could be revised to better align with ACHP Regulations, please refer to section III of EWAC’s comments to the Corps’ June 3, 2022 Request for Input on the Corps’ Implementing Regulations for the National Historic Preservation Act,¹⁶ which are attached to this letter for ease of reference.

Finally, rescinding Appendix C could inadvertently hinder the Administration’s clean energy goals by eliminating a regulatory resource that has been useful for project proponents since its adoption and provides clear direction on compliance with Section 106 in the specific context of the Section 404 permitting process. Taken together, the Administration’s efforts to promote clean energy and Congress’s inclusion of clean energy initiatives in the Information Reduction Act have resulted in a significant influx of renewable energy, transmission, and distribution projects, many of which will implicate multiple regulatory regimes simultaneously. Retaining Appendix C is critical to projects utilizing the Section 404 permitting process and needing a clear path for Section 106 compliance. For these and other reasons, the Corps should reconsider its proposal to remove Appendix C.

III. If the Corps removes Appendix C, a program alternative should be developed with ACHP to address Section 106 compliance in the specific context of Section 404 permitting and be subject to public review and comment.

In the event the Corps rescinds Appendix C, EWAC appreciates that the Corps has indicated its intention to 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, and to make that program alternative available for public review and comment prior to its finalizing. It is important that any such program alternative explicitly consider the Corps’ limited jurisdiction over matters pertaining to Section 106 in the context of the Section 404 permitting program and, in particular, the nationwide permitting (“NWP”) program. Any agreement between the Corps and ACHP should ensure the scope of Section 106 compliance for activities that could proceed without any federal involvement, such as those electing to utilize one or more NWPs, is commensurate with that minimal level of federal jurisdiction. As noted previously, the current language in Appendix C regarding the scope of Corps’ jurisdiction in the context of linear projects is a useful example of how to provide a clear and explicit description of Corps jurisdiction and breadth of the Section 106 review.

¹⁵ Proposed Rule at 9,081–9,082.

¹⁶ 87 Fed. Reg. 33,756 (June 3, 2022).

By clearly defining the appropriate scope and roles of state and tribal historic preservation offices in the program alternative, the Corps can ensure that such roles follow both the letter and intent of Section 106 and do not unduly hinder project review. Any program alternative should also acknowledge that a project proponent's self-certification under General Condition 20 of the NWP program satisfies ACHP Regulations found at 36 C.F.R. Part 800 and, therefore, does not require additional survey or other work to be performed by the project proponent to satisfy Section 106. This concept could also be added to General Condition 20 the next time the Corps re-issues the NWPs. Finally, any program alternative should ensure that the public review process associated with Section 106 compliance for Corps permits does not result in a new and novel means for project opponents to stall or halt clean energy projects.

IV. Any Corps guidance issued to replace Appendix C should provide clarity and regulatory certainty to project proponents seeking to obtain a permit under Section 404, and be subject to public review and comment.

EWAC generally supports agency use of guidance where such guidance is clear, adheres to the governing statute and regulations, and has been subject to public review and input. EWAC believes it is crucial that the Corps administer its permitting programs in a manner that is consistent and predictable to best facilitate the deployment, transmission, and distribution of renewable energy. Below, we provide suggestions for any forthcoming guidance and provide examples of areas where the Corps could provide clarity for project proponents.

EWAC appreciates the Corps' commitment in the Preamble to work with ACHP to draft guidance that would include "illustrative examples" on how to apply Section 106 to various potential Corps' permitting situations.¹⁷ In developing any guidance, we urge the Corps to make clear that the scope of Section 106 compliance for activities subject to Corps review should be commensurate with the agency's limited jurisdiction in the context of Section 404 permitting. The examples currently set forth in Appendix C with respect to the "permit area" should be carried forward in any guidance document to clarify that the "area of potential effect" of a Section 404 permit should be tailored to the narrow jurisdiction of the Corps for any given project. EWAC encourages the Corps to consider how best to address the issue of "indirect effects" on historical resources in the specific context of the Corps' Section 404 permitting program. Similarly, discussion of the appropriate level of survey effort in any guidance should be proportional to the jurisdictional limits of the Corps.

Clear guidance on the appropriate level of cultural resource surveys in the context of pre-construction notifications ("PCN") under the NWP program would be helpful to the regulated community. Section 13 of Appendix C, titled "Nationwide General Permits," briefly discusses the process of Section 106 compliance in the context of the Corps' Section 404 NWP program, but lacks instruction on the degree of authority through which the agency can require project proponents to conduct cultural resource surveys in connection with the submission of a PCN. This lack of guidance has resulted in inconsistent administration of the NWP program across different Corps districts, with some districts insisting project proponents complete additional survey work beyond the scope of Corps' jurisdiction in order for the agency to deem a PCN complete and begin processing a NWP verification. As a result, projects have suffered increased

¹⁷ Proposed Rule at 9,085.

costs, delays, and regulatory uncertainty. Future guidance could also 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 “area of potential effect,” or “permit area” as currently defined by Appendix C, in order for the agency to deem a PCN complete. Such guidance would prevent further delays to the development of clean energy infrastructure and ensure a streamlined NWP permitting process.

EWAC encourages the Corps to provide the public an opportunity to review and comment on any draft Section 106 guidance and, once the guidance is finalized, to provide informational sessions to both regulators and the public to ensure Section 106 is applied consistently across the Corps’ districts. A thorough public review process will also provide the regulated community advance notice on whether and to what extent Section 106 will apply to a given jurisdictional activity and will apprise the general public on ways they can participate in the Section 106 process.

Finally, to provide regulatory certainty for project proponents in the event the Corps removes Appendix C, EWAC recommends the Corps issue guidance that would take effect concurrently with the effective date of any final rule removing Appendix C. Any lag between rescission and issuance of guidance could result in confusion and delay as project proponents and Corps regional offices are left to interpret ACHP regulations on an individual basis. Having guidance in place should the Corps rescind Appendix C will ensure a smooth transition for both the Corps and project proponents.

V. EWAC encourages the Corps to adopt deadlines for completion of the Corps’ Section 106 review through a program alternative or issued guidance.

Whether the Corps elects to retain and revise Appendix C or to remove Appendix C in favor of relying on guidance, EWAC encourages the agency to adopt deadlines by which the Corps must complete its Section 106 review in connection with the Section 404 process in situations where consultation with State Historic Preservation Officers, Tribal Historic Preservation Officers, or ACHP is not needed and, where consultation is required, to develop deadlines for internal agency review prior to consultation.

Accordingly, EWAC recommends the Corps’ review of Section 106 compliance be completed within 60 days of the agency’s receipt of an application for Section 404 authorization. EWAC also recommends a deadline of 15 days after receipt of a permit application for the Corps to request additional information from an applicant to assist the agency in fulfilling its Section 106 obligations. Establishing deadlines through a program alternative or Corps-issued guidance will provide the regulated community with regulatory certainty while speeding up the deployment of renewable energy generation and electric infrastructure, which in turn will aid the Administration in meeting its clean energy priorities.

VI. Conclusion

EWAC appreciates the Corps considering its comments regarding its Proposed Rule to rescind Appendix C and reiterates the importance of regulatory certainty and streamlined regulations to the Administration's clean energy and electric infrastructure deployment goals and initiatives. EWAC welcomes the opportunity to discuss these comments with the Corps in greater detail.

Please feel free to contact the following EWAC representatives:

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