



September 18, 2017

Lt. Gen. Todd T. Semonite
Commanding General and Chief of Engineers
U.S. Army Corps of Engineers
Attn: CECW-CO-N (Ms. Mary Coulombe)
441 G St. NW
Washington, DC 20314-1000

Re: COE-2017-0004

Dear General Semonite:

This document contains the comments of the Coalition for American Heritage regarding the U.S. Army Corps of Engineers' (COE) notice titled "United States Army, Corps of Engineers; Subgroup to the DOD Regulatory Reform Task Force, Review of Existing Rules," Docket No. COE-2017-0004, 82 Fed. Reg. 33470 (Notice). We appreciate the opportunity to provide input on this important issue.

The Coalition for American Heritage is made up of heritage professionals, scholars, small businesses, non-profit groups, and history-lovers from across the country who work together to support and promote our nation's commitment to historic preservation.

The Notice was promulgated by the Corps of Engineers Subgroup to the DoD Regulatory Reform Task Force in accordance with Executive Order 13777, "Enforcing the Regulatory Reform Agenda. In that light, the CAH strongly recommends that the COE take this opportunity to revise or replace Appendix C of 33 CFR part 325. This set of procedures, which was never approved as a counterpart regulation by the Advisory Council on Historic Preservation, has been problematic in several ways and has left the COE vulnerable to litigation. More to the point, from our perspective, the Appendix C procedures have been applied inconsistently across the country and have limited the COE's ability to be a good steward of America's historic and prehistoric heritage. Some specific issues include:

- The Project Review Area (PRA) delineations used by USACE under Appendix C are often needlessly narrow, and by definition do not consider the full range of direct or indirect reasonable foreseeable and cumulative effects of their permitted work. Properties of religious and cultural significance are not explicitly discussed in Appendix C. Further, Appendix C does not contain all of the current definitions used in 36 CFR 800, so one must refer to the 2005 interim guidance, as well as the guidance clarification enacted in 2007, to attempt to reconcile 36 CFR 800 with Appendix C.

- Under Appendix C, PRA determinations are often disjointed from other portions of review areas that adhere to Section 106. Also, the timing of the determination of a PRA is frequently incompatible with that of the Area of Proposed Effects under Section 106. This disconnectedness impairs the efficiency of the review process and its outcomes. Again, we believe that discarding Appendix C in favor of a new approach under §800.14 is the most effective option and would greatly improve the situation.
- Appendix C does not place the same emphasis on consultation as does 36 CFR 800. Although USACE's Interim Guidance of April 25, 2005, has a section on Tribal consultation to draw attention to this important part of the review process, communication with Indian tribes, especially in terms of the comprehensiveness of the information provided, continues to be an impediment to successful consultation. Though a clarification to the 2005 interim guidance was issued in 2007 that applied a new consultation standard to general permits or non-reporting permits (GPs, NWRPs), we find that it is applied inconsistently to these categories of permits. The successor regulations to Appendix C should mandate a more extensive consultation process that more clearly defines what constitutes good faith consultation and could mitigate USACE litigation risk.

Given the above, we do not believe it feasible to try to alter Appendix C of 33 CFR part 325. We recommend that USACE discard Appendix C and make use of the flexibility offered by 36 CFR 800.14 to design a new compliance process. In doing so, USACE should examine the whole range of activities covered by both individual and general permits; consider the potential of different types of activities to affect different kinds of historic properties, both directly and indirectly; and develop programmatic approaches to Section 106 compliance that are compatible with the permitting process and the needs of permittees, but also enable USACE to take into account the full range of effects of its undertakings on historic properties.

The history of Section 106 implementation demonstrates that effective cultural resource protection can be accomplished without undue burdens upon stakeholders, and in a reasonably efficient manner. A new process developed under 800.14 could mesh the efficiency of Section 106 implementation while accommodating the needs of USACE permittees.

Again, thank you for the opportunity to comment on the proposed rulemaking. We look forward to reviewing any proposed rules and commenting on this issue in the future.

Sincerely,

American Anthropological Association
American Cultural Resources Association
Society for American Archaeology
Society for Historical Archaeology
Aspen Ridge Consultants
Captain Pollard's Flintlock Farm
Council for Northeast Historical Archaeology
Council of South Carolina Professional Archaeologists
Crow Canyon Archaeological Center
Florida Public Archaeology NW
George W. Bush Childhood Home
Heritage Ohio
The Lost Arts Collaborative of North America

Missouri Germans Consortium
Pennsylvania Archaeological Council
Preserve Rhode Island
Preservation Maryland
Preservation Utah
San Francisco Museum and Historical Society
Save Our Heritage Organisation
Society for California Archaeology
Stately Oaks