



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

CECW-OR

24 JUN 2002

**MEMORANDUM FOR COMMANDERS, MAJOR SUBORDINATE COMMANDS, AND
DISTRICT COMMANDS**

SUBJECT: Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the New Advisory Council on Historic Preservation Regulations at 36 CFR Part 800

1. The purpose of this memorandum is to provide the enclosed Interim Guidance for Implementing Appendix C of 33 CFR Part 325 as modified to include the new Advisory Council on Historic Preservation Regulations at 36 CFR Part 800. Appendix C of 33 CFR Part 3 (*Processing of Department of the Army Permits; Procedures for the Protection of Historic Properties; Final Rule*) was issued on June 29, 1990. Appendix C was based on the National Historic Preservation Act of 1966. The Advisory Council on Historic Preservation (ACHP) revised its regulations in 1992 and again on December 12, 2000. There are parts of the 800 regulations that need careful consideration to determine how they would affect the Regulatory Program. Particularly, the areas of concern are: 1) scope of analysis, 2) coordination with Indian tribes and Native Hawaiians, 3) lack of cultural resource specialists in the districts and 4) public outreach and the Corps public notice process.
2. Appendix C was developed through the Administrative Procedures Act, so discarding or modifying it would require the same procedure. Other options include Memoranda of Agreements or other forms of guidance. The U.S. Army Corps of Engineers placed a Federal Register notice requesting comments on ways to harmonize Appendix C and the new 800 regulations (comment period ended May 6, 2002). Some comments have been received from State Historic Preservation Officers, district personnel and interested consultants and from some Native American tribes. Now that the comment period has ended, we will evaluate and summarize the comments and pull together a small working group to develop the appropriate vehicle to bring the regulatory program into compliance with the 800 regulations.
3. This memorandum seeks to provide interim guidance to the districts on procedures that they need to implement until a final procedure is determined. The ACHP does not endorse this guidance nor does it agree with Appendix C. The Corps is working with the ACHP to develop procedures that will protect historic properties within our ability to regulate while keeping manpower workload and permit processing time reasonable.

FOR THE COMMANDER:

Enclosure

KAREN DURHAM-AGUILERA, P.E.
Acting Chief, Operations Division
Directorate of Civil Works

Enclosure

SUBJECT: Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the New Advisory Council on Historic Preservation Regulations at 36 CFR Part 800

1. The Headquarters Office of the U.S. Army Corps of Engineers is working with the Advisory Council on Historic Preservation (ACHP) to develop a process whereby State Historic Preservation Officers (SHPOs), Tribal Historic Preservation Officers (THPOs), Native Americans, Native Hawaiians, Alaska Natives, the regulated public, and other interested parties will have the opportunity to provide the Corps with their views concerning issues related to the Corps regulatory program and the implementation of Appendix C of 33 CFR Part 325 and the new ACHP regulations at 36 CFR Part 800. This process may result in additional guidance, modifications to Appendix C, programmatic agreements, or other products.

2. The purpose of this memorandum is to provide interim guidance concerning the consideration of historic properties during the Corps permit process, until the process referred to in paragraph 1 of this memorandum is completed and any products resulting from that process are implemented. District engineers will continue to use 33 CFR Part 325, Appendix C, with the following interim guidance:

a. Public involvement and notification are emphasized by the new ACHP regulations to assess the potential effects that undertakings may have on historic properties. For the purposes of the new ACHP regulations, consulting parties include the SHPO, THPO, the designated tribal representatives (if there is not a designated THPO), Native Hawaiian organizations, Alaska natives and local government representatives. Consulting parties may also include, at the discretion of the district engineer, other individuals or groups that have a demonstrated interest (i.e., a legal or economic relationship to the undertaking or affected properties, or concerns with the undertaking's effects on historic properties) in the undertaking.

b. The new ACHP regulations contain provisions requiring coordination with Indian tribes and Native Hawaiian organizations. When an Indian tribe has assumed the functions of the SHPO on tribal lands, the THPO is the official representative for the purposes of Section 106. If an Indian tribe has not assumed the responsibilities of the SHPO on tribal lands, the district engineer will consult with a representative designated by the Indian tribe, in addition to consulting with the SHPO. The new ACHP regulations also require consultation with any Indian tribe or Native Hawaiian organization that places historic and cultural significance to historic properties or traditional cultural property (TCP) that may be affected by an undertaking, even if those historic properties are located on private lands. Once consultation is complete, the Corps remains the final decision authority.

c. Memorandums of Agreement (MOAs) are necessary for resolving how adverse effects will be mitigated. The terms of an MOA should be incorporated as permit conditions, to ensure compliance with the NHPA. Although MOAs are optional under Appendix C, they are mandatory under the new ACHP regulations. If the district engineer (DE) and the SHPO or THPO agree on how to mitigate adverse effects, a MOA will be executed. The signatures of

tribal representatives are required when MOAs address activities on tribal lands. If the DE and the SHPO or THPO cannot agree upon the terms of an MOA, then the DE will request the participation of the ACHP in the consultation. The ACHP is required to respond within 45 days, but may request an extension from the agency official.

d. The revised ACHP regulations allow resolution of Section 110(k) NHPA violations, which are intentional adverse effect violations. To resolve these violations, consultation with the ACHP is necessary. If the DE determines, after consideration of comments and consultation with ACHP, to grant the permit, the DE shall notify the ACHP, the SHPO/THPO, and other parties known to be interested in the undertaking prior to issuing the permit.

e. Compliance with Section 106 of the NHPA can also be accomplished through the National Environmental Policy Act (NEPA) process. Consulting parties, such as the SHPO or THPO, should be provided the opportunity to participate early in the NEPA process. The environmental assessment and finding of no significant impact (or environmental impact statement and record of decision) must include the appropriate scoping, assessment of effects, and any consultation leading to resolution of adverse effects. If the proposed undertaking will result in adverse effects on historic properties that may qualify for inclusion in the National Register of Historic Places, a binding commitment identifying measures to avoid, minimize or mitigate such effects will be incorporated into FONSI or ROD or an MOA will be executed.

3. The following paragraphs provide further interim guidance concerning where Appendix C shall continue to be used, since there are no substantive differences between Appendix C and the new ACHP regulations:

a. The new ACHP regulations do not change the scope of analysis for the consideration of historic properties in the Corps regulatory program. The definition of the term "permit area" in Appendix C, including the three tests in that definition, should continue to be used. The limits of the permit area are constrained by the extent of Federal control and responsibility over a particular project. The district engineer remains responsible for making the final determination regarding the boundaries of the permit area. The DE can, in unusual or complex projects, seek the views of the SHPO or THPO before making the final determination.

b. The "undertaking" is the activity that requires a Corps permit. The scope of the undertaking is also dependent upon the amount of Federal control and responsibility for a particular project. The Corps is solely responsible for defining the undertaking within the Regulatory process. This includes the decision whether or not there is an effect as defined at 800.16(y) and Appendix C 1(e-f). If the Corps decides there is no effect to historic properties, the Agency Official has no further obligations under Section 106. It is important to state the Section 106 process ends when:

- it is determined there are no historic properties (800.3(a)(1))
- it is determined there are no historic properties affected (800.4(d)(1))
- sites are determined Not Eligible, with SHPO concurrence

In other words, for Section 106 to proceed, an Eligible Property must be affected.
Note documentation requirements at each step (800.11).

c. For historic properties outside of the permit area, district engineers will consider indirect effects to historic properties identified outside of the permit area during the public interest review. For example, district engineers may consider visual (i.e., aesthetic) impacts to historic properties located outside of the permit area. However, district engineers cannot require permit applicants to do cultural resource surveys outside of the permit area. It is imperative that the Corps clearly define the responsibilities of the applicants for work related to compliance with Section 106, and work that exceeds what the Corps has determined to be necessary. Applicants are welcome to undertake work beyond the scope of compliance as a voluntary measure, but the difference between what is mandatory to satisfy Section 106 and what is being voluntarily accomplished should be documented. If the applicant makes a request, these additional measures can be incorporated into the permit conditions for compliance with Section 106. As with any special condition, it must be enforceable, directly related to the Section 106 work to be undertaken, and justified in the documentation. Conditioning for compliance is provided for at Appendix C (10). Compliance with Section 106 through the NEPA process is provided for at 36 CFR 800.8, including approval of the undertaking by use of conditions at 800.8(c)(4).

d. The new ACHP regulations encourage the use of existing procedures to fulfill consultation requirements. For Corps permits, the public notice procedures at 33 CFR Part 325 will satisfy the requirement for public involvement and notification, provided all consulting parties receive copies of public notices. Consultation with Indian tribes and Native Hawaiians may require additional effort beyond the notification by the public notice. The public notice must accurately describe the undertaking's effects on historic properties and the knowledge of the types of historic properties potentially affected. Review of listed properties in the National Register of Historic Places is often inadequate to convey negative information or the potential to impact historic properties not currently identified (deeply buried prehistoric sites for example). Section 3(a) of Appendix C encourages the use of other appropriate sources of information to obtain information on historic properties, including contacts with local historical societies, museums, and universities. The public notice should not contain locational and sensitive information related to archeological sites, to protect those sites from harm, theft, or destruction; such information should be provided to SHPOs and THPOs by separate notice. If the undertaking will have no effect on historic properties, there should be a "no effect" statement in the public notice. If the district engineer has made a preliminary determination that the undertaking will have "no adverse effect", the comment period for the public notice may be as little as 15 days.

e. Effect determinations are still made by the district engineer, after soliciting the views of the consulting parties. If the SHPO or THPO disagrees with the district engineer's determination concerning effects on historic properties, the district engineer can either consult with the SHPO or THPO to resolve the disagreement or request the ACHP to review the finding. If the SHPO or the THPO concurs with the district engineer's determination of "no effect", then the Section 106 process ends. If the SHPO or THPO agrees with the district engineer's finding of "no adverse effect", and there is no disagreement from any other consulting party (if involved), the district engineer is no longer required to request the comments of the ACHP.

f. If there are adverse effects on historic properties, the consultation process will include consideration of alternatives that will avoid, minimize, or mitigate those adverse effects. In cases where there are adverse effects on historic properties, the district engineer is required to notify the ACHP. The ACHP may elect to participate in the consultation process.

g. The new ACHP regulations refer to the "agency official", which is the person that has the approval authority for an undertaking. The agency official also has the authority to commit the Federal agency to take necessary actions to ensure compliance with Section 106 of the NHPA. In most circumstances, the district engineer is considered the "agency official".

h. In Appendix C(2)(c) and 36 CFR 800.2(2) designation of a lead Federal agency is critical. The Regulatory portion of a project may be part of a larger process of Federal involvement by numerous agencies. Districts should make sure they are the lead agency before undertaking the Section 106 process, then including other potentially involved Federal agencies in their decision. Districts should not be undertaking Section 106 compliance for other Federal agencies with greater jurisdiction. Appendix C provides for the acceptance of work already undertaken by outside agencies. The Corps will generally accept the compliance of the lead Federal agency. If a State or other Federal agencies have already undertaken compliance work that is acceptable to cover the Section 106 process, copies of compliance letters from the consulting agencies may be all that is necessary to document compliance. Section 106 compliance should not be duplicated by agencies.

i. Activities authorized by nationwide permits are subject to General Condition 12, which requires compliance with Appendix C. Regional and programmatic general permits should be conditioned to require compliance with Appendix C. Specific activities authorized by general permits that may affect historic properties should be coordinated with the SHPO or THPO, and the ACHP if necessary. If general permit time frames cannot be met because of the amount of time necessary to resolve issues concerning historic properties, then the general permit authorization should be suspended until resolution is achieved.

The general permit verification could also be conditioned to prohibit commencement of construction until the historic property issues are resolved in accordance with the provisions of Appendix C. If an MOA is necessary to address adverse effects on historic properties, then the terms of the MOA should be incorporated into the general permit verification as special conditions.