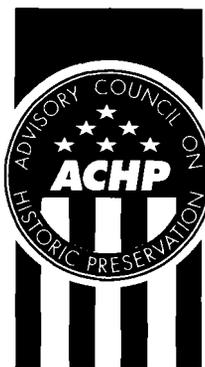


John L. Nau, III
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Preserving America's Heritage

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OCT 22 2008

OFFICE OF THE ASA (CW)
WASHINGTON, DC

October 9, 2008

Honorable John Paul Woodley, Jr.
Assistant Secretary of the Army for Civil Works
Department of the Army
108 Army Pentagon
Washington DC 20310-0108

Dear Secretary Woodley:

Thank you for your letter dated September 23, 2008, transmitting the Corps' summary concept proposal for how it would propose to revise or replace Appendix C and develop an approved alternative to the procedures set forth in subpart B of 36 CFR 800. Your letter suggests that the ACHP and the Corps are in fundamental agreement and there are only a "few remaining issues" to work through. Unfortunately, I cannot agree with your characterization. Although the ACHP has continued to stress the need for the procedures in the concept proposal to be consistent with the 36 CFR Part 800, I do not believe that the Corps has chosen to address this fundamental issue. Thus our respective agencies remain at odds over the appropriateness of your current proposal.

Let me also state at the outset that Mr. Chip Smith's follow up to the transmittal of your proposal conveyed a note of impatience with the ACHP that I do not appreciate. Apparently he was not fully aware of the disruption caused by Hurricane Ike in Texas, which had significant impacts on my operations and responsibilities.

We see three major problems with the Corps' concept proposal:

- The definition of undertaking;
- The definition of Area of Potential Effects (APE); and
- The nature of consultation required in the Section 106 process.

These are fundamental issues that define the Corps' obligations with regard to historic properties and the rights of stakeholders to participate in the Corps' implementation of Section 106.

In its concept proposal, the Corps continues to avoid consideration of the larger project that encompasses and is dependent on the permitted activity. The Corps would redefine the APE to mean only the area directly affected by the permitted activity and any "directly associated" upland area. Thus, in the case of a large residential development requiring a Corps permit to be placed within the bounds of a Civil War battlefield, the undertaking, following the Corps' definition, would only include the area directly impacted by the fill and possibly any area of "directly related" uplands that influences the specific location of the fill. Though the Corps suggests that it may consider indirect effects from the permitted actions to significant properties outside its restricted APE, it apparently will not consider the direct or indirect effects of the housing development as a whole on the landscape of the battlefield. The definition of APE in the ACHP's regulations clearly

ADVISORY COUNCIL ON HISTORIC PRESERVATION

1100 Pennsylvania Avenue NW, Suite 803 • Washington, DC 20004
Phone: 202-606-8503 • Fax: 202-606-8647 • achp@achp.gov • www.achp.gov

specifies that the APE includes the geographic area or areas within which an undertaking requiring a Federal permit may directly or indirectly affect historic properties. Therefore, in the above illustration, the Corps must consider the effects that the proposed housing development will have on the battlefield.

Over the years, a major ACHP concern with Appendix C has been its failure to properly reflect the Corps' responsibility to recognize the true extent of an undertaking's effects. The latest concept to use the NEPA-based Appendix B approach does not in any way resolve that issue. Rather, it reinforces the problem by making the Corps' scope of review less clear and subject to arbitrary interpretation by District Engineers.

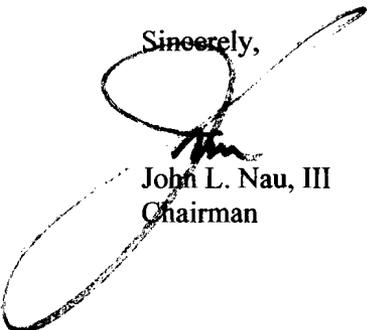
Finally, the current Corps procedures in Appendix C and those proposed in the concept proposal fail to adequately provide for consultation with Section 106 stakeholders. Section 106 requires that the Federal agency take steps to inform the public and elicit and consider their concerns while also identifying appropriate stakeholders to be invited into the consultation process as consulting parties. Consultation, "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process," is at the heart of the Section 106 process. The Corps' current procedures for dealing with General Permits, and those proposed in the concept proposal, do not acknowledge this obligation and do not meet this central standard of the Section 106 process.

In embarking on our collaborative effort to modify Appendix C, I understood our mutual goal was to achieve a reasonable, workable compromise that balanced an efficient permit process with an appropriate level of consideration for the effects on historic properties. Toward that end, the ACHP proposed an alternative that acknowledged the Corps' "small Federal handle" on these permitted activities. Modeled on the successful approach set forth in the national programmatic agreement with the Federal Communications Commission for the build out of cellular towers, the alternate approach ACHP recommended would offer significant streamlining while ensuring that effects on important historic resources were addressed in the permit approval process. I continue to believe that this approach holds out great promise for striking a reasonable balance and ultimately solving differences between the Corps and the ACHP that have divided us for many years. I regret that the Corps chose to reject this approach without first subjecting it to more careful analysis and consideration.

You suggest in your letter that the ACHP agree to the Corps publishing its concept proposal for public comment. Given the fundamental discrepancies noted above, I feel that I cannot take such a step. It is certainly the Corps' prerogative to publish its proposal and the ACHP will not stand in the way of that. However, we cannot imply by our concurrence that the ACHP believes that the proposal meets either the legal standards of Section 106 or the policies that underlie the government-wide Section 106 procedures.

Despite this impasse, I want to reaffirm the ACHP's willingness to work with the Corps to develop procedures to streamline the Section 106 process for the regulatory program. I also want to thank the Corps staff that have labored diligently in an attempt to find a better way forward.

Sincerely,



John L. Nau, III
Chairman