

This is to further update you all on the Army's effort to revise Appendix C, Historic Properties, used to guide Corps Regulatory program compliance with Section 106 of the NHPA. Despite good faith efforts on both sides, the Army and the ACHP have not been able at this time to reach agreement on appropriate revisions to Appendix C. Copies of several letters exchanged between Secretary Woodley and Chairman Nau are attached for your information. The areas of disagreement can be boiled down to 3 key issues: 1) how to define "undertaking"; 2) what is the proper regulatory scope of analysis; and, 3) whether and how to consider indirect effects of undertakings focused on WOUS. It is well-established in law, and has long been the Corps practice, that the Corps' authority to regulate waters of the U.S. does not extend to the regulation of upland development. The Corps continues to believe that this is a fundamental principle of the Section 404 regulatory program. In contrast, the Council believes that broad definitions of "undertaking" and "area of effects" are necessary to provide proper protection to historic and cultural resources. While we are sympathetic to their perspective, we simply cannot regulate beyond the reach of our authority under the Clean Water Act. Therefore, efforts to revise Appendix C will be deferred until further notice. Appendix C remains in effect as the regulation governing Corps compliance with Section 106 of the National Historic Preservation Act vis-à-vis issuance of Department of the Army permits. For more information you may refer to the latest valid interim guidance document dated 31 Jan 2007 and the HQUSACE web site:

<http://www.usace.army.mil/cw/cecwo/reg/hptc/hptc.htm>

It has come to our attention that the ACHP has recently issued a broadcast e-mail to its staff and to Section 106 stakeholders indicating that the Corps' Appendix C is not approved as an alternative procedure for Section 106 compliance and that all Section 106 reviews for Corps permits need to follow the process set forth by 36 CFR Part 800 or tailored procedures approved pursuant to 36 CFR § 800.14. The Corps acknowledges that Appendix C has not been approved as an alternative procedure pursuant to regulations adopted after Appendix C was promulgated, but respectfully disagrees that Section 106 reviews for the Corps regulatory program cannot continue to rely on it. Appendix C is consistent with the ACHP regulations set forth in 36 CFR Part 800 to the extent possible given the Corps' CWA authority and remains the appropriate procedural vehicle for conducting Section 106 reviews for the CWA Section 404 program.

If you experience any lack of cooperation from other Section 106 stakeholders (eg, SHPOs or THPOs) regarding consultation pursuant to Appendix C, please notify this office immediately.