



October 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 letter provides the comments of the American Cultural Resources Association (ACRA) regarding the U.S. Army Corps of Engineers' (USACE) notice titled "United States Army, Corps of Engineers; Subgroup to the Department of Defense (DoD) Regulatory Reform Task Force, Review of Existing Rules," Docket No. COE-2017-0004, 82 Fed. Reg. 33470 (Notice). The Notice was promulgated by the USACE Subgroup to the DoD Regulatory Reform Task Force in accordance with Executive Order (EO) 13777, "Enforcing the Regulatory Reform Agenda." We appreciate the opportunity to provide input on this important issue.

ACRA is the national trade association supporting and promoting the common interests of cultural resource management (CRM) firms of all sizes, types and specialties. Our member firms undertake much of the legally-mandated CRM studies and investigations conducted in the United States. We offer comments as skilled practitioners that regularly work with the USACE to consider the impacts of federal actions on historic resources—these resources represent a tangible and significant component of our shared heritage.

ACRA strongly recommends that the USACE take this opportunity to revise or replace Appendix C of 33 CFR part 325. Appendix C has proven problematic in several ways and has left the USACE vulnerable to litigation. An even greater concern is that the Appendix C procedures have not been applied consistently by USACE districts across the country. The inconsistent application of these rules limits the USACE's ability to fulfill its role as a strong steward of America's historic and prehistoric heritage. Moreover, the lack of consistent application has resulted in inefficiencies in project permitting schedules and budgets. Some specific issues regarding Appendix C include:

- The Project Review Area (PRA) and areas of jurisdiction delineations used by USACE under Appendix C are often exceedingly narrow, and 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. We recommend broadening the PRA to account for potential effects on historic properties of all kinds.
- Under Appendix C, PRA delineations are often geographically disjointed from other portions of review areas that adhere to Section 106 of the National Historic Preservation Act (NHPA), as amended. This increases the potential for redundant and/or incomplete field surveys, efforts to identify other historic properties, and government to government consultation. The timing of the PRA delineation is frequently incompatible with defining the Area of Potential Effects (APE) in the Section 106 process. This disjunction impairs review efficiency and outcomes. We believe

that discarding Appendix C in favor of the established and proven approach under 36 CFR §800.14 (as part of the implementing regulations of the National Historic Preservation Act) is the most effective option and would greatly streamline and improve your regulatory process.

- Appendix C does not include all current definitions used in 36 CFR Part 800 (the implementing regulations of the NHPA) and other federal laws, so one must refer to the 2005 interim guidance, as well as the guidance clarification enacted in 2007, to attempt to reconcile 36 CFR Part 800 with Appendix C. Please consider changes to synchronize Appendix C with 36 CFR 800, especially with respect to aligning the terms and definitions used and insuring the concurrence of these alternate procedures with the Advisory Council on Historic Preservation (§800.14 Federal agency program alternatives).
- Appendix C does not place sufficient emphasis on effective tribal consultation. Although USACE's Interim Guidance of April 25, 2005 has a section on tribal consultation to draw attention to this important part of the identification and review process, the guidance are applied inconsistently and do not adequately explain the importance of respectful, open dialog in that identification process. 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, NWPs), again we offer that it is applied inconsistently across USACE districts to these permit categories. The inconsistencies and inadequacies of the current guidance continue to undermine the already tenuous relationships between Tribal entities and the USACE, and ultimately results in significant impediments to successful consultation. 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.

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 that addresses the points raised herein. 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 that are in compliance with the law, compatible with the permitting process and the needs of permittees, and also enable USACE to take into account the full range of effects of its undertakings on historic properties. We believe the use of Appendix C makes the USACE regulatory process more difficult and time-consuming, and the changes recommended above would directly address the directives of EO 13777 and EO 13807 targeting regulatory reform.

There are numerous examples of effective programmatic and alternative approaches to Section 106 implementation that demonstrate how effective cultural resource protection can be accomplished without undue burdens upon stakeholders, and in a reasonably efficient manner. A process developed under §800.14 could achieve efficiency of Section 106 implementation while accommodating the needs of USACE permittees.

Again, ACRA thanks 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,  
/s/

Kimberly L. Redman, M.A., RPA  
President  
American Cultural Resources Association