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# Appendix C Removal Proposed Rule Action

Thank you for joining, the meeting will start at 1 pm ET.

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- Select **“Switch to Phone Audio,”** and
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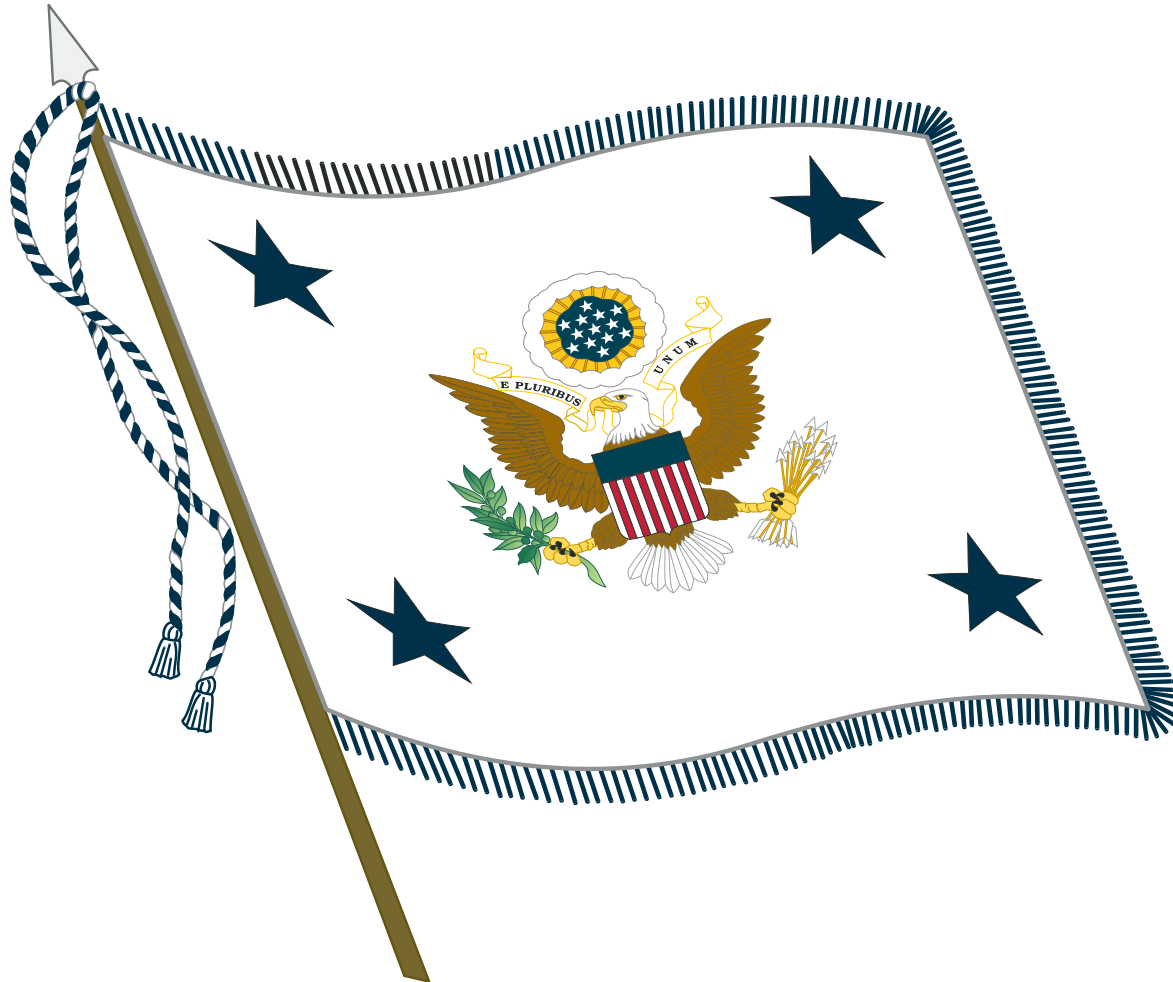
The slides and recording for this meeting will be posted to Army’s webpage (<https://www.army.mil/asacw>).



# Appendix C Removal Proposed Rule



## Webinar February 22, 2024



- This meeting is open to the public.
- The objective of today's meeting is to:
  - Provide a brief overview of the proposed rule action to remove Appendix C from the CFR.
  - Hear feedback from the public regarding the proposed action.
- If you have any clarifying questions, please send them to:  
[usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil](mailto:usarmy.pentagon.hqda-asa-cw.mbx.asa-cw-reporting@army.mil).
- The overview meeting slide deck includes the following slides and has been posted on the Army's website:  
<https://www.army.mil/asacw>.

- After the opening presentation, anyone participating who would like to speak may use the raise their hand feature and will be called upon to provide remarks.
- There will be a five-minute waiting period where if no additional attendees request to speak, we will conclude the meeting early.
- Comments provided during today's session are equally weighted with any written comments provided to the docket.



# ASA(CW) Mr. Connor Welcome



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Michael Connor, Army Civil Works

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# Agenda



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1. Background on National Historic Preservation Act (NHPA) Section 106 & Corps Implementing Procedures
2. Historical Timeline
3. Major Differences between 36 CFR 800 and Appendix C Regulations
4. Overview of Previous Comments
5. Overview of Proposed Rule
6. How to Submit Comments
7. Comments from the public

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- Section 106 of the National Historic Preservation Act (NHPA) requires that “the head of any Federal department...having authority to permit any undertaking,...prior to the issuance of any permit..., take into account the effect of the undertaking on any historic property.”
- The Advisory Council on Historic Preservation (ACHP) oversees federal agency compliance with the NHPA. The NHPA authorizes ACHP to promulgate regulations to govern the implementation of section 106 in its entirety (36 CFR 800).
- The NHPA requires that a Federal agency’s procedures for compliance with Section 106 be consistent with the Section 106 implementing regulations issued by the ACHP.

- The Corps Regulatory Program administers 3 laws:

Section 404 of the Clean Water Act

Sections 9 and 10 of the Rivers and Harbors Act of 1899

Section 103 of the Marine Protection, Research, and Sanctuaries Act

- There are 2 types of permit actions:

Individual Permits

General Permits





# Corps Implementing Procedures for Section 106



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- Army Civil Works programs, other than the Corps Regulatory Program, use the ACHP's 800 regulations for federal agency compliance with Section 106 of the NHPA.
- The Corps Regulatory Program promulgated separate regulations which govern its procedures relative to Section 106 of the NHPA in 1990, Appendix C to 33 CFR 325.



# Historical Timeline Overview



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- 1966 – NHPA enacted
- 1971 – EO 11593, Protection and Enhancement of the Cultural Environment
- 1978 – Presidential Memorandum on Environmental Quality and Water Resource Management
- 1979 – ACHP publishes a final rule at 36 CFR 800 for Section 106 implementing regulations
- 1980 – The Corps publishes a proposed rule (Appendix C); no final rule was issued at the time
- 1984 – The Corps publishes a revised proposed rule on Appendix C
- 1990 – The Corps publishes a final rule for Appendix C under the APA process. Separate ACHP review and approval was not obtained.



# Historical Timeline Overview



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- 1992 – NHPA amended
- 1999/2000 – ACHP publishes final rules amending the 800 regs to address the 1992 amendments to the NHPA
- March 2002 – The Corps issues a Federal Register notice to solicit comments on how Section 106 procedures should be revised
- June 2002 – The Corps issues interim guidance
- July 2004 – ACHP publishes a final rule amending the 800 regs
- September 2004 – The Corps publishes an ANPRM
- 2005 – The Corps issues revised interim guidance, replacing 2002 guidance
- 2007 – The Corps issues additional interim guidance



# Major Differences



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- There are several differences between the 36 CFR 800 and Appendix C regulations.
- Major differences include:

ISSUE	APPENDIX C	800 REGULATION
Identifying the Undertaking		
Scope of Undertaking Subject to Review	<ul style="list-style-type: none"><li>• Permit Area</li></ul>	<ul style="list-style-type: none"><li>• Area of Potential Effects</li></ul>
Tribal Consultation	<ul style="list-style-type: none"><li>• Silent</li></ul>	<ul style="list-style-type: none"><li>• Robust discussion</li></ul>
Tools to Resolve Adverse Effects	<ul style="list-style-type: none"><li>• Memorandum of Agreement</li><li>• Permit Conditioning</li></ul>	<ul style="list-style-type: none"><li>• Memorandum of Agreement</li><li>• Programmatic Agreement</li></ul>

- There are also timeline differences for the review process.



# Undertaking



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## APPENDIX C

...means the work, structure or discharge **that requires a Department of the Army permit** pursuant to the Corps regulations.

## 800 REGULATION

...means a project, activity, or program funded in whole or in part under the **direct or indirect jurisdiction** of a Federal agency, including those...requiring a Federal permit, license or approval.



# Scope of Undertaking Subject to Review Permit Area vs Area of Potential Effects



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## APPENDIX C

“Permit area”...means those areas comprising the waters of the United States that will be **directly** affected by the proposed work or structures and uplands **directly** affected as a result of authorizing the work or structures. The following **three tests must all be satisfied** for an activity undertaken **outside** the waters of the United States **to be included** within the "permit area":

- (i) Such activity would not occur **but for** the authorization of the work or structures within the waters of the United States;
- (ii) Such activity must be **integrally related** to the work or structures to be authorized within waters of the United States. Or, conversely, the work or structures to be authorized must be essential to the completeness of the overall project or program, and
- (iii) Such activity must be **directly associated** (first order impact) with the work or structures to be authorized.

## 800 REGULATION

“Area of potential effects”...means the geographic area or areas within which an undertaking may **directly or indirectly** cause alterations in the character or use of historic properties, if any such properties exist. The area of potential effects is **influenced by the scale and nature** of an undertaking and may be different for different kinds of effects caused by the undertaking.



# Early Engagement



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- Army published a Federal Register notice (FRN) on June 3, 2022, to announce an effort to modernize and advance the Corps Civil Works program.
- Gather Tribal and public input to help shape future decision-making.
- One of the policy initiatives was on 33 CFR 325, Appendix C, the Corps Regulatory Program's implementing procedures for compliance with Section 106 of the National Historic Preservation Act.



# Overview of Comments and Virtual Meetings



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- Four virtual meetings held with ~300 total attendees
- Summary of written comment statistics for Appendix C
  - 127 written comments and/or letters received
    - 29 Tribes provided comment letters
    - 98 comment letters received from stakeholders, state and federal governments, industry, historical societies, and citizens
- Majority of comments favored removal of Appendix C:
  - Concerns with definition of undertaking and permit area
  - Non-compliance with National Historic Preservation Act
  - Has resulted in lengthy and challenging consultations
  - Drives inconsistency across Corps Districts
  - Consultation discussion lacking





# Proposed Rule Action



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- Soliciting input on removal of Appendix C from 33 CFR 325.
- The Corps would utilize and follow the section 106 implementing regulations at 36 CFR part 800.
- As a supplement, develop joint guidance with ACHP to include illustrative examples.



# Proposed Rule Action - 33 CFR 325



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- Amend part 325 by removing Appendix C.
- § 325.2 Processing of applications. (b)(3) Historic properties.
- Current Language: If the proposed activity would involve any property listed or eligible for listing in the National Register of Historic Places, the district engineer will proceed in accordance with **Corps NHPA implementing regulations**.
- Proposed Language: Applications will be reviewed for the potential impact of the relevant undertaking on historic properties pursuant to **section 106 of the National Historic Preservation Act**. The district engineer will include a statement in the public notice of their current knowledge of historic properties based on their initial review of the application (see 33 CFR 325.2(a)(2)). If the district engineer determines that the proposed undertaking is of a type that would not have the potential to cause effects to historic properties, **using the assumption that such properties are present**, they will include a statement to this effect in the public notice. If the district engineer finds the proposed undertaking is of a type that has the potential to cause effects to historic properties, they will **continue proceeding in accordance with 36 CFR part 800**.

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# Proposed Rule Action – 33 CFR 330



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- 33 CFR 330.4(g) - addresses the Nationwide Permit Program's compliance with section 106 of the NHPA.
- Proposing to amend paragraph (g) by removing the references to Appendix C and replacing them with references to the applicable provisions of 36 CFR part 800.
- Proposing to remove the remaining subparagraphs of paragraph (g) in the regulation because they are superseded by the current Nationwide Permits regulation/issued permits with general conditions finalized in January 2021.
- Continue to utilize the January 2021 regulation regarding General Condition 20 for historic properties. Once notification occurs under General Condition 20, the Corps would then proceed using 36 CFR part 800 for Section 106 compliance.
- Separate but parallel effort, the Corps and ACHP work to develop a program alternative for Nationwide Permits compliance with Section 106 to align with issuance of the next cycle of Nationwide Permits (issuance in 2026).

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# Comments on Proposed Rule



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- Public Comment Period open until **April 9, 2024**
- How to Submit Comments:
- *Identify comments by docket number COE–2023–0004 and/or RIN 0710–AB46 and use any of the following methods:*
  - **Federal eRulemaking Portal:** <http://www.regulations.gov>
    - Follow the online instructions for submitting comments.
  - **Email:** [historicpropertyreg@usace.army.mil](mailto:historicpropertyreg@usace.army.mil)
    - Include the docket number, COE–2023–0004, in the subject line of the message.
  - **Mail:** U.S. Army Corps of Engineers  
Attn: CECW–CO–R  
441 G Street NW  
Washington, DC 20314–1000

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# Comments



# How to Request to Speak



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- If you would like to speak, please raise your hand.
  - On a computer (or mobile device), select the **Reactions** button then click on “**Raise Hand**”
  - If you called in, you may also press \*9 on your phone to raise your hand.
- When it is your turn to speak, I will call on you by using your name or phone number.
- At that time, you can unmute yourself by pressing the unmute button on your screen or dialing \*6 on your phone.
- Please feel free to turn on your video while you are speaking.
- For technical issues, please use the chat function.



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**This meeting has ended**

Thank you for participating!