

U.S. Army Corps Permitting: Proposed Revocation of Historic Properties Regulation

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The US Army Corps of Engineers (USACE) recently issued a proposed rule (the Proposed Rule) that, if finalized, will change the regulations applicable to the agency's compliance with the National Historic Preservation Act (NHPA) for purposes of USACE's Regulatory Program.

Background

- Section 106 of the NHPA requires federal agencies to consider the effects of their actions on historic properties. The statute, and the Advisory Council on Historic Preservation's (ACHP's) regulations at 36 CFR Part 800, dictate the process. The regulations define key statutory terms such as "undertaking" (the activity that is the subject of review) and "area of potential effects" (the area in which historic properties may be directly or indirectly altered by the undertaking).
- Congress amended the NHPA in 1992. The ACHP issued and revised implementing regulations several times, with the last revision in 2004.
- The USACE Regulatory Program issued its own implementing regulations in 1990 without ACHP review. While USACE has issued more recent guidance, the agency has not updated the regulations despite longstanding disagreement with ACHP over differences between the USACE rules and the ACHP rules, including over the definitions of "undertaking" and "area of potential effects."

USACE's Proposed Rule

- A simpler proposal is hard to imagine. USACE proposes to revoke its own NHPA implementing regulation for the Regulatory Program, at 33 CFR Part 325, Appendix C, and, instead, use the ACHP rules. USACE also proposes to make other conforming changes to its regulations.
- In addition, the USACE Regulatory Program intends to "work with the ACHP" to create guidance, including examples of potential permitting scenarios, to help Regulatory Program personnel and the public.

Anticipated Impact

This proposal brings the Regulatory Program in line with the rest of USACE as well as with most other federal agencies that rely on the ACHP regulations. However, it may change the Regulatory Program's approach to compliance with the NHPA in some scenarios, particularly where USACE and the ACHP have disagreed over the scope of an activity or area that should be subject to the Section 106 requirements.

The proposed change could mean that USACE expands its review of effects to historic properties beyond its usual bounds. For example, the change could implicate the scope of review in some instances where the agency would typically focus review on the proposal within its limited water-based jurisdiction — discharge of fill material into a regulated water under Section 404 of the Clean Water Act, for example — rather than a larger project of which the discharge is a small component. Anticipating this issue, USACE states up front that it “will take into account, among other factors, the degree and scope of the Federal involvement in the undertaking and the relationship of the Federal actions to the overall proposed activities.”

Given existing inconsistencies in implementation of Section 106 among USACE Districts already, it remains to be seen how this proposal, if implemented, will impact any particular project. We can expect this change to drive dialogue on this topic during the permitting process and with outside stakeholders.

Comments are due no later than April 9, 2024. The Proposed Rule is published at 89 Fed. Reg. 9079 (February 9, 2024).

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