



# USET

SOVEREIGNTY PROTECTION FUND

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*Transmitted Electronically  
To [regulations.gov](https://www.regulations.gov)*

April 9, 2024

Michael L. Connor  
Assistant Secretary of the Army for Civil Works  
U.S. Army Corps of Engineers  
108 Army Pentagon  
Washington, DC 20310-0108

**Re: Proposed Rule for Processing of Department of the Army Permits; Procedures for the Protection of Historic Properties, Docket ID No. COE-2023-0004**

Dear Assistant Secretary of the Army for Civil Works Connor,

On behalf of the United South and Eastern Tribes Sovereignty Protection Fund (USET SPF), we submit these comments in response to the Proposed Rule issued by the U.S. Army Corps of Engineers (USACE) on protection of historic properties and the rescission of USACE's Appendix C permitting regulations at [33 CFR 325](#). Adoption of the Proposed Rule would ensure that USACE is in appropriate compliance with Section 106 of the National Historic Preservation Act (Sec. 106 NHPA) regulations ([36 CFR 800](#)) approved by the Advisory Council on Historic Preservation (ACHP). The USACE Appendix C regulations were first adopted in 1980 to outline permitting procedures for the protection of historic properties. However, despite continued efforts by USACE to issue interim guidance of its Appendix C regulations to comply with [36 CFR 800](#), the use of Appendix C regulations has continued to result in inconsistency and confusion regarding the extent and appropriateness of USACE review in its permitting regulations pertaining to historic properties. USET SPF has long advocated for the rescission of USACE's Appendix C regulations and our comments express support for the USACE Proposed Rule to rescind these regulations and bring USACE into compliance with ACHP's Sec. 106 NHPA regulations. Our comments also provide additional recommendations to improve funding for Tribal Historic Preservation Officers and relevant staff, and the development of Interim Guidance for USACE personnel until finalization of the Proposed Rule.

USET SPF is a non-profit, inter-tribal organization advocating on behalf of thirty-three (33) federally recognized Tribal Nations from the Northeastern Woodlands to the Everglades and across the Gulf of Mexico.<sup>1</sup> USET SPF is dedicated to promoting, protecting, and advancing the inherent sovereign rights and authorities of Tribal Nations and in assisting its membership in dealing effectively with public policy issues.

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<sup>1</sup> USET SPF member Tribal Nations include: Alabama-Coushatta Tribe of Texas (TX), Catawba Indian Nation (SC), Cayuga Nation (NY), Chickahominy Indian Tribe (VA), Chickahominy Indian Tribe—Eastern Division (VA), Chitimacha Tribe of Louisiana (LA), Coushatta Tribe of Louisiana (LA), Eastern Band of Cherokee Indians (NC), Houlton Band of Maliseet Indians (ME), Jena Band of Choctaw Indians (LA), Mashantucket Pequot Indian Tribe (CT), Mashpee Wampanoag Tribe (MA), Miccosukee Tribe of Indians of Florida (FL), Mi'kmaq Nation (ME), Mississippi Band of Choctaw Indians (MS), Mohegan Tribe of Indians of Connecticut (CT), Monacan Indian Nation (VA), Nansemond Indian Nation (VA), Narragansett Indian Tribe (RI), Oneida Indian Nation (NY), Pamunkey Indian Tribe (VA), Passamaquoddy Tribe at Indian Township (ME), Passamaquoddy Tribe at Pleasant Point (ME), Penobscot Indian Nation (ME), Poarch Band of Creek Indians (AL), Rappahannock Tribe (VA), Saint Regis Mohawk Tribe (NY), Seminole Tribe of Florida (FL), Seneca Nation of Indians (NY), Shinnecock Indian Nation (NY), Tunica-Biloxi Tribe of Louisiana (LA), Upper Mattaponi Indian Tribe (VA) and the Wampanoag Tribe of Gay Head (Aquinnah) (MA).

*Because there is Strength in Unity*

### **USET SPF Supports the Complete Rescission of the USACE Appendix C Regulations and Compliance with ACHP's Sec. 106 NHPA Regulations**

USET SPF has long opposed the continued use of and reliance on the Appendix C regulations by USACE. This has resulted in the adoption of [USET Resolution No. 2004:002, "Revision of the U.S. Corps of Engineers' Appendix C \(Procedures for the Protection of Historic Properties\)"](#), and most recently, [comments](#) filed by USET SPF to USACE on August 2, 2022. In our comments, we specifically stated that the continued use of the Appendix C regulations undermines USACE's Tribal Consultation Policy and does not explicitly recognize the authority of Tribal Nations to attach religious and cultural significance to sacred sites. Further, the Appendix C regulations do not explicitly recognize the ability of Tribal Nations to be consulting parties in review of places listed, or eligible for listing, as a historic property in the National Register of Historic Places. USET SPF strongly urged USACE to rescind its Appendix C regulations and adopt the Sec. 106 NHPA regulations promulgated by the ACHP at [36 CFR 800](#). USET SPF is pleased that USACE has finally issued this [Proposed Rule](#) to rescind its Appendix C regulations and to become compliant with ACHP's Sec. 106 NHPA (Part 800) regulations.

### **Develop Interim Guidance for USACE Personnel to Comply with ACHP's Sec. 106 NHPA Regulations Until Finalization of Proposed Rule to Rescind the Appendix C Regulations**

During the Tribal Listening Session held on March 21, 2024, several commenters recommended that USACE Headquarters (HQ) issue Interim Guidance to District Commands to engage in consultation with appropriate parties on whether it should switch from Appendix C to ACHP's Part 800 regulations until issuance of a Final Rule. USET SPF supports this recommendation to ensure that new projects being considered now will be required to conduct Sec. 106 NHPA review under ACHP's Part 800 regulations. This will ensure that once a Final Rule rescinding the Appendix C regulations is adopted, USACE HQ and District Commands will be quick to implement Part 800 of the regulations. USET SPF also supports USACE leadership developing case studies of projects typically requiring Sec. 106 NHPA review and how Part 800 will apply to such projects once the Final Rule is promulgated. We strongly recommend that USACE consult with Tribal Nations on developing these case studies, as well as collaborate with relevant Tribal organizations and associations. Further, the development of Final Guidance to implement Part 800 regulations must be conducted in consultation with Tribal Nations and collaboration with the relevant Tribal organizations and associations. We also strongly recommend that USACE work with Indian Country to develop appropriate training for its personnel on compliance with Part 800 regulations once Appendix C regulations are rescinded.

### **Identify Resources and Technical Assistance to Support THPOs and Related Tribal Personnel**

Another concern that was raised during the Public Listening Session held on February 22, 2024 was that once Appendix C regulations are rescinded, Tribal Historic Preservation Officers (THPOs) will receive an influx of Sec. 106 NHPA reviews. While these reviews are critically important, funding for THPOs has consistently remained woefully inadequate, which has further been exacerbated by the new infrastructure funding opportunities authorized by the Bipartisan Infrastructure Law (BIL) and the Inflation Reduction Act (IRA). New infrastructure projects by BIL and IRA have stretched the already limited resources and personnel for THPOs as they have witnessed increasing environmental, cultural, and historic reviews for the permitting of these projects. It is also important to note that not all Tribal Nations have dedicated THPO staff due to the federal government's failure to uphold its trust and treaty obligations to fully fund these positions.

In the instances that Tribal Nations have a THPO and/or cultural or natural resources department, oftentimes these individuals and departments are inundated with multiple infrastructure projects and permit applications that exceed their available capacity and resources—again, due to chronic federal

underfunding. The primary responsibilities of these individuals and departments are the review of applications and permits infrastructure projects. These reviews can be lengthy because they are often broken into multiple, segmented reviews of a single project and span across multiple federal and state agency jurisdictions and oversight. Furthermore, these individuals and departmental staff may fulfill multiple roles within Tribal government due to historic and persistent funding shortfalls for these positions. It is not uncommon for a cultural resource manager to also fulfill the role of a natural resource manager or serve in an emergency management role.

USET SPF strongly recommends that USACE, in coordination with ACHP and other federal partners, identify additional and necessary technical and personnel resources and assistance required for Tribal Nations to fully participate in conducting reviews for USACE projects being brought into compliance with Part 800 regulations. While the source of funding for THPOs is allocated through the Department of the Interior's National Park Service, and, in some cases, supplemented by the general funds of Tribal Nations, USACE must actively coordinate with Tribal Nations to identify additional federal resources and technical assistance to address increases in Sec. 106 NHPA reviews of USACE undertakings.

### **Conclusion**

The Civil Works programs of USACE have a profound impact on Tribal Nations, our natural and cultural resources, our environments, and our cultural and religious practices. These impacts can occur on our traditional homelands, adjacent to our lands, or in upstream areas where those impacts will reach our communities. USACE must be cognizant of its activities and make every effort to consult with Tribal Nations meaningfully, effectively, and appropriately. Recission of the Appendix C regulations developed and used by USACE is a necessary and long overdue course correction to come into compliance with ACHP's Part 800 regulations for the Sec. 106 NHPA review process. This action upholds USACE's trust and treaty obligations to Tribal Nations and will ensure that Tribal Nations are appropriately consulted and involved in the Sec. 106 NHPA review process for USACE undertakings. We reiterate, however, that as USACE transitions from using the Appendix C regulations and adopts ACHP's Part 800 regulations, that the necessary Interim and Final Guidance for USACE personnel to be compliant with Part 800 regulations is developed in consultation with Tribal Nations. We also strongly recommend that USACE, in coordination with federal partners, identify the appropriate resources and technical assistance required for Tribal Nations to fully participate in Sec. 106 NHPA reviews of USACE undertakings. We look forward to continuing this dialogue with you on these critically important issues. Should you have any questions or require further information, please contact Ms. Liz Malerba, USET SPF Director of Policy and Legislative Affairs, at [LMalerba@usetinc.org](mailto:LMalerba@usetinc.org) or 615-838-5906.

Sincerely,



Chief Kirk Francis  
President



Kitcki A. Carroll  
Executive Director