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Engineering Exceptions to Historic Preservation Law: Why the Army Corps of Engineers' Section 106 Regulations Are Invalid

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ENGINEERING EXCEPTIONS TO HISTORIC PRESERVATION LAW: WHY THE ARMY CORPS OF ENGINEERS’ SECTION 106 REGULATIONS ARE INVALID

Melissa Lorentz†

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I. INTRODUCTION

Congress passed the National Historic Preservation Act (NHPA) to protect places of “historical, architectural, or cultural significance at the community, State or regional level . . . against the force of the wrecking ball.”\(^1\) One of the major impacts of the NHPA has been to incorporate consideration of historic resources into federal agency planning through section 106 of the Act.\(^2\) Although section 106 is procedural in nature,\(^3\) the outcome of its assessment process can influence a federal agency’s decision to either deny a permit application or prescribe mitigation measures.\(^4\)

The NHPA’s protections extend beyond the Western concept of historic sites as relics of a distant past, to a more expansive recognition of traditional cultural properties (TCPs): sites that play a major role in a culture’s historically rooted beliefs, customs, and practices.\(^5\) American Indian tribes sometimes utilize TCP designations to protect culturally significant places, including sites that are important for religious ceremonies\(^6\) or for hunting, fishing, or gathering.\(^7\) The NHPA requires tribal consultation as part of the section 106 process to help ensure that impacts on TCPs are considered.\(^8\)

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1. H.R. REP. NO. 89-1916 (1966), reprinted in 1966 U.S.C.C.A.N. 3307, 3309. Although this is a strong statement of policy, the legislative history also emphasizes a “meaningful balance . . . between preservation . . . and new construction.” See id.
In practice, federal agencies vary in their implementation of section 106.\(^9\) This is at least partly influenced by the different legal mandates and activities of the various federal agencies.\(^{10}\) Additionally, the Advisory Council on Historic Preservation (ACHP or “Council”), which was created to administer the NHPA,\(^{11}\) allows other agencies to promulgate their own section 106 regulations as long as they get Council approval.\(^{12}\) These regulations may effectively replace the ACHP’s regulations.\(^{13}\)

The Army Corps of Engineers (“Corps”) promulgated its own section 106 regulations in the 1980s.\(^{14}\) The Corps’ regulations are problematic, particularly for tribes.\(^{15}\) They significantly limit the scope of historic and cultural resource analysis under the NHPA,\(^{16}\) limit opportunities for tribal consultation,\(^{17}\) and conflict with the NHPA’s recognition of traditional cultural properties.\(^{18}\)

Furthermore, the Corps’ reliance on its own regulations exceeds its statutory and regulatory authority. The Corps’ regulations are out of compliance with the ACHP’s regulations for two reasons: (1) they conflict with the ACHP’s regulations in significant respects,\(^{19}\) and (2) the Corps has not obtained ACHP approval.\(^{20}\) Even if the ACHP did approve the Corps’ regulations,
such a regulatory delegation exceeds the ACHP’s authority under the NHPA. This article suggests possible fixes to the Corps’ procedures to resolve these inconsistencies and the resulting legal uncertainty. It concludes that a repeal of the Corps’ regulations is necessary to bring the agency’s practices back in line with the historic preservation mandate of the NHPA.

II. The National Historic Preservation Act

A. The Framework of the NHPA

Although statutory protections for historic places have existed since the early twentieth century, in the wake of post–World War II development, it became apparent that these protections were inadequate. The NHPA incorporated consideration of historic and cultural resources into federal agency planning, and it remains the cornerstone of federal protections for historic places today.

The NHPA establishes the National Register of Historic Places, a list of historically and culturally important sites. Federal agencies are directed to establish preservation programs that

21. See infra Part V.
22. See infra Part VI.
23. See infra Part VII.
identify properties eligible for the National Register and plan for the protection of those properties.\textsuperscript{28} Furthermore, section 106 of the NHPA mandates that federal agencies consider impacts on sites included on or eligible for the National Register before issuing a permit or expending federal funds on a project.\textsuperscript{29}

The NHPA created the ACHP\textsuperscript{30} to oversee the section 106 review process.\textsuperscript{31} Section 106 mandates that federal agencies “afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to [federal] undertaking[s].”\textsuperscript{32} Congress also charged the ACHP with rulemaking authority under the NHPA.\textsuperscript{33}

\textbf{B. From Historic Architecture to Traditional Cultural Properties: Bulletin 38}

Even though many historic sites are uniquely significant to American Indians, the original framework of section 106 did not effectively include tribes, causing many historic sites to be overlooked.\textsuperscript{34} Places of historic significance to tribes are often more than vestiges of a remote past; rather, they are places where Indians have engaged in religious or cultural practices since time immemorial.\textsuperscript{35} Ceremonial practices were severely impacted by the encroaching development that had prompted the enactment of the NHPA.\textsuperscript{36} The section 106 process failed to address these impacts,\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{28} National Historic Preservation Act § 110, 16 U.S.C. § 470h-2.
\item \textsuperscript{29} National Historic Preservation Act § 106, 16 U.S.C. § 470f. Originally, the statute required only federal agencies to consider effects on properties already included in the National Register. Act of Sept. 28, 1976, Pub. L. No. 94-422, tit. II, § 201(3), 90 Stat 1313, 1320 (codified as amended at 16 U.S.C. § 470f). The statute was amended in 1976 to include properties eligible for the National Register. Id.
\item \textsuperscript{30} National Historic Preservation Act § 201(a), 80 Stat. at 917 (codified as amended at 16 U.S.C. § 470s).
\item \textsuperscript{31} See 16 U.S.C. § 470j.
\item \textsuperscript{32} Id. § 470f.
\item \textsuperscript{33} Id. § 470s.
\item \textsuperscript{35} See Vine Deloria, Jr., God Is Red: A Native View of Religion 271–72 (3d ed. 2003).
\end{itemize}
Despite the congressional finding that “the historical and cultural foundations of the Nation should be preserved as a living part of our community life.”

During the late 1970s, tribes lobbied for legal protections for their religious practices, culminating in the American Indian Religious Freedom Act of 1978. The Act was a catalyst for action to explicitly recognize places of cultural significance in the section 106 process. In 1990, the U.S. Senate directed the National Park Service to “report to the Committee on Appropriations on the funding needs for the management, research, interpretation, protection and development of sites of historical significance on Indian lands.” The National Park Service responded with a report and followed up with a guidance document, Bulletin 38, the same year.

Bulletin 38 articulated the definition of traditional cultural properties that became incorporated into the NHPA. It defines a TCP as a property “eligible for inclusion in the National Register because of its association with cultural practices or beliefs of a living community that (a) are rooted in that community’s history, and (b) are important in maintaining the continuing cultural identity of the community.” Nothing in Bulletin 38, or the following NHPA amendments implementing the TCP concept, restricts TCP designations to sites of importance to tribes, but in practice it is tribes who primarily utilize TCP designations and Bulletin 38 was written with the protection of tribal resources in mind.

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37. *Keepers of the Treasures*, supra note 34, at 69.
42. *Keepers of the Treasures*, supra note 34, at i.
43. Id.
44. *Bulletin 38*, supra note 5.
45. Id. at 1.
46. Id.
47. Id. at 3.
C. Expanding the Scope of the NHPA: The 1992 Amendments

As a guidance document, Bulletin 38 does not carry the force of law. Federal agencies were unresponsive to its suggestions, so tribes lobbied for a legal mandate. The resulting 1992 amendments incorporated Bulletin 38’s definition of traditional cultural properties. It specifically provided that

(A) Properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization may be determined to be eligible for inclusion on the National Register.

(B) In carrying out its responsibilities under section 106, a Federal agency shall consult with any Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to properties described in subparagraph (A).

The amendments also provided for the protection of cultural information that may be disclosed through consultation by allowing federal officials to keep such information confidential.

Other provisions in the 1992 amendments strengthened the role of tribes in the section 106 process by implicitly recognizing the sovereignty of tribes over their own lands. The amended NHPA established a process for the creation of Tribal Historic Preservation Offices (THPOs), analogous to State Historic Preservation Offices (SHPOs). The amendments also allowed a tribe to apply its own historic preservation regulations in place of

48. Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 807 (9th Cir. 1999). But see Pueblo of Sandia v. United States, 50 F.3d 856, 862–63 (10th Cir. 1995) (holding that the failure to follow Bulletin 38 violated ACHP regulations that require the agency make a “reasonable and good faith effort” to identify historic properties).


51. Id.


53. See id. § 4006(a), 106 Stat. at 4755–57 (codified as amended at 16 U.S.C. § 470a(d)).

54. See id.
ACHP regulations on tribal lands, as long as the tribe’s regulations provided equivalent consideration to historic properties and the ACHP agreed.\textsuperscript{55}

While it recognized the role of tribes in historic preservation, the 1992 amendments also reaffirmed the ACHP’s advisory role, clarifying that the Council has authority to “promulgate such rules and regulations as it deems necessary to govern the implementation of section [106 of this Act] in its entirety.”\textsuperscript{56} The Advisory Council on Historic Preservation remains the sole federal agency authorized by statute to promulgate implementing regulations for section 106.\textsuperscript{57}

III. THE SECTION 106 PROCESS

The Council’s implementing regulations create a series of steps for the implementation of section 106, incorporating provisions for traditional cultural properties and tribal consultation from the NHPA’s 1992 amendments.\textsuperscript{58}

A. Initiating Section 106

The first step in the section 106 process is to determine whether there is an undertaking that triggers section 106.\textsuperscript{59} The statutory definition of undertaking includes projects that receive federal funding or require a federal license.\textsuperscript{60} For example, the Corps has responsibilities under section 106 when it issues a dredge and fill permit under the Clean Water Act.\textsuperscript{61}

If there is an undertaking that has the potential to cause adverse effects,\textsuperscript{62} the responsible federal agency must define the

\textsuperscript{55.} Id.
\textsuperscript{57.} See 16 U.S.C. § 470s; see also 16 U.S.C. § 470h-2(a)(2)(E)(i) (requiring federal agency procedures to be consistent with the ACHP’s regulations).
\textsuperscript{58.} See 36 C.F.R. § 800.1(a) (2013).
\textsuperscript{59.} Id. § 800.3(a).
\textsuperscript{60.} 16 U.S.C. § 470w(7); see also 36 C.F.R. § 800.16(y).
\textsuperscript{62.} 36 C.F.R. § 800.5(a)(1) (“If the undertaking is a type of activity that does not have the potential to cause effects on historic properties, assuming such
“area of potential effect” (APE) of the project. The APE defines the scope of the section 106 analysis. The ACHP defines the APE as

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.

Thus, the APE is intended to include more than the direct “footprint” of a project. Indirect effects that should also be considered include potential impacts to water quality, visual effects, auditory effects, sociocultural effects, and effects on plants and animals used for subsistence or religious purposes. The scope of the affected area determines the geographic scope of the section 106 analysis.

B. Unique Considerations for Identifying TCPs

After defining the geographic scope of the section 106 analysis, the next step is to identify historic properties within the APE. The section 106 analysis must include “any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register.”

historic properties were present, the agency official has no further obligations under section 106 or this part.”.

63. Id. § 800.4(a)(1).
64. See id.
65. Id. § 800.16(d) (emphasis added).
67. Id.
68. Id.; see, e.g., ADVISORY COUNCIL ON HISTORIC PRES., COMMENTS OF THE ADVISORY COUNCIL ON HISTORIC PRESERVATION ON THE PROPOSED AUTHORIZATION BY THE MINERALS MANAGEMENT SERVICE FOR CAPE WIND ASSOCIATES, LLC TO CONSTRUCT THE CAPE WIND ENERGY PROJECT ON HORSHOE SHOAL IN NANTUCKET SOUND, MASSACHUSETTS 2–3 (2010) (describing the importance of an unobstructed view of the rising sun for ceremonies).
69. This could include changes in land use, tax rates, traffic, quality of life, and economic activity. See KING, supra note 66, at 125.
70. Id.
71. 36 C.F.R. § 800.4(a) (2013).
72. Id. § 800.4(b).
73. 16 U.S.C. § 470f (2012) (emphasis added); see also Colo. River Indian
Identifying TCPs is not a straightforward process. Ordinary historical or archeological surveys are insufficient because the cultural values that make TCPs significant are often intangible. The features that define them may be rooted in the natural landscape, yet sites sometimes retain their significance in spite of substantial development. These characteristics are inconsistent with the non-Native cultural conception of historic sites to the extent that federal officials may deny the existence of a TCP even when it objectively fits the criteria for a TCP designation.

This problem is exacerbated because TCPs must often be identified through oral tradition, rather than exclusively through documentary evidence. This puts the onus on tribes to ensure that TCPs are included in the section 106 process, which creates another conundrum: in the process of attempting to protect culturally significant places, tribes may be forced to divulge information that would ordinarily be reserved for a select few.

Tribes v. Marsh, 605 F. Supp. 1425, 1437 (C.D. Cal. 1985) (holding that all property that meets the National Register criteria is “eligible property” under section 106 and that a determination by the Secretary of Interior that the property is likely to meet the National Register criteria is not required). The National Register criteria are located at 36 C.F.R. § 60.4.

74. See BULLETIN 38, supra note 5, at 2.
75. See id.
76. See id. at 14.
77. See, e.g. GWEN WESTERMAN & BRUCE WHITE, MNI SOTA MAKOCE: THE LAND OF THE DAKOTA 214–15 (2012) (describing TCPs in Minnesota that have retained their cultural significance even though they have been severely impacted by development).

79. See Twin Cities Research Center, supra note 78, at 8–9 (doubting validity of TCP based on lack of documentary evidence); see also BULLETIN 38, supra note 5, at 12.
Although federal officials have authority to keep information confidential under certain circumstances, these protections are not always sufficient to reassure tribes. These issues are exacerbated by commonplace mistrust and breakdowns in communication between federal agencies and tribes.

Once a TCP has been identified, there are further difficulties in defining its scope. As implied by the statutory definition, historic properties can vary greatly in size. This is particularly true for TCPs, which can vary from small, scattered parcels to cultural districts spanning thousands of acres. Federal officials often find it difficult to deal with large, nebulous historic landscapes. Some require TCPs to have fixed boundaries even when those boundaries are completely arbitrary. Commenting on the planned revision of Bulletin 38, a consultant called the size and scale of TCPs “intimidating.” The Bureau of Reclamation commented that TCPs should be discrete, small locations that would be easier to

84. See Bulletin 38, supra note 5, at 20.
85. See 16 U.S.C. § 470f; see also ADVISORY COUNCIL ON HISTORIC PRES., TRADITIONAL CULTURAL LANDSCAPES IN THE SECTION 106 REVIEW PROCESS 1 (2012).
86. See Sara K. Van Norman, Protecting Off-Reservation Tribal Resources from State and Federal Projects, in EMERGING ISSUES IN TRIBAL-STATE RELATIONS 7 (2013 ed.).
88. See Hoonah Indian Ass’n v. Morrison, 170 F.3d 1223, 1231 (9th Cir. 1999) (upholding a Forest Service decision to deny TCP status to the route of a survival march because oral history revealed there were several routes (one for strong men and another for women, children, and old people) and thus the route lacked a single, concrete boundary). But see KING, supra note 66, at 126–27 (describing a Corps decision that a TCP did not need to have boundaries).
manage. However, Bulletin 38 as it is currently written does allow for defining arbitrary boundaries when it would otherwise be impossible to proceed with a section 106 analysis.

C. Predicting and Managing Adverse Effects

Once a historic site has been identified, the agency must determine whether the project will have an adverse effect on the property. The agency must consider the views of the consulting parties, including tribes, and the public in making this determination.

An adverse effect occurs when an undertaking directly or indirectly alters any characteristic qualifying a property for the National Register. The agency may consider effects that are far away in distance or time, as well as cumulative effects, as long as the effects are reasonably foreseeable.

If the agency determines there will be an adverse effect, then the agency must consult with the SHPO or THPO and other consulting parties to develop alternatives to avoid, minimize, or mitigate the adverse effects. The ACHP must be given an opportunity to comment on the proposed undertaking and suggest mitigation measures. The ACHP could suggest denial of the permit altogether, but it is up to the agency to decide whether to implement the ACHP’s suggestions. The consultation process may

90. Bureau of Reclamation, supra note 87, at 7.
91. See BULLETIN 38, supra note 5, at 20–21.
92. 36 C.F.R. § 800.5(a) (2013).
93. See id.
94. Id. § 800.5(a)(1).
95. Id.
96. Id. § 800.6(a). 97. See 16 U.S.C. § 470f (2012); 36 C.F.R. § 800.9(c)(2)(i) (“[T]he Council shall provide the agency official with . . . any possible mitigation of the adverse effects.”).
98. See 36 C.F.R. § 800.9(i) (“[T]he Council shall provide the agency official with its opinion as to whether circumstances justify granting assistance to the applicant.”).
99. See, e.g., Quechan Indian Tribe of the Fort Yuma Indian Reservation v. U.S. Dep’t of Interior, 547 F. Supp. 2d 1033, 1047 (D. Ariz. 2008) (holding that it was lawful for the Bureau of Reclamation to transfer “land[s] on which no eligible sites were found” and only retain lands where eligible sites were found pending completion of the section 106 process).
also culminate in a memorandum of agreement between the parties on how the undertaking will proceed.\(^{100}\)

Although initial consultation is required, consultation may be terminated if the agency, ACHP, SHPO, or THPO determines "that further consultation will not be productive."\(^{101}\) The agency still must consider the ACHP’s comments in making a final decision.\(^{102}\)

Historic properties are sometimes discovered during the course of an undertaking.\(^{103}\) If there are no prior plans that cover the treatment of these properties, the agency must "make reasonable efforts to avoid, minimize, or mitigate [impacts] to such properties."\(^{104}\)

### IV. AREAS OF REGULATORY CONTRADICTION

The National Historic Preservation Act grants the ACHP, and only the ACHP, the authority to promulgate implementing regulations.\(^{105}\) The ACHP has, in turn, delegated the authority to other federal agencies to implement alternate procedures for the section 106 process, substituting them for the ACHP’s regulations.\(^{106}\) But this does not mean that federal agencies can implement wildly different section 106 programs. The procedures must be consistent with the ACHP’s regulations, and the agency must obtain ACHP approval.\(^{107}\)

The Corps did promulgate its own section 106 regulations in the 1980s, codified as “Appendix C” to the Corps’ regulations on processing permits.\(^{108}\) However, there is no record that the ACHP has approved Appendix C,\(^{109}\) and Appendix C conflicts with the

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100. See 36 C.F.R. § 800.6(c).
101. Id. § 800.7(a).
102. See id. § 800.6(c); City of Alexandria v. Slater, 198 F.3d 862, 871 (D.C. Cir. 1999).
104. 36 C.F.R. § 800.13(b).
107. 36 C.F.R. § 800.14(a).
109. Comm. to Save Cleveland’s Hulett’s v. U.S. Army Corps of Eng’rs, 163 F.
ACHP’s regulations in several respects.\textsuperscript{110} In 2005, the Corps issued interim guidance\textsuperscript{111} that improves on some of these areas of contradiction, but even this guidance continues to contradict key provisions of the ACHP’s regulations.\textsuperscript{112}

A. \textit{Geographic Scope of Analysis}

One serious inconsistency is the Corps’ definition of the “area of potential effect” (APE).\textsuperscript{113} The ACHP defines the APE as “the geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties.”\textsuperscript{114} In contrast, the Corps limits the APE to the “permit area.”\textsuperscript{115}

The Corps may have limited its analysis to the permit area based on case law that arose under a different statute, the National Environmental Policy Act (NEPA). Like the NHPA, NEPA is a procedural statute,\textsuperscript{116} but it imposes broader environmental review requirements than the NHPA.\textsuperscript{117} Two cases decided in 1980, \textit{Winnebago Tribe of Nebraska v. Ray}\textsuperscript{118} in the Eighth Circuit and \textit{Save the Bay, Inc. v. U.S. Army Corps of Engineers}\textsuperscript{119} in the Fifth Circuit,
allowed the Corps to limit the scope of its environmental review under NEPA to the Corps’ traditional area of jurisdiction: waters of the United States—or the “permit area”—of a project. A few years later, the Corps issued Appendix B to its regulations, which essentially codified Winnebago Tribe of Nebraska and Save the Bay. Appendix B was controversial, but the Council on Environmental Quality, which has rulemaking authority under NEPA, approved the regulations.

Appendix C was issued around the same time as Appendix B, and the Corps likely extended its rationale for limiting the scope of analysis under NEPA to limiting the APE under the NHPA. Several courts have also extended NEPA principles to the NHPA because there is much more NEPA case law to draw upon. However, extending NEPA case law to the NHPA in the context of section 106 would be a mistake.

The NHPA’s 1992 amendments put traditional cultural properties (TCPs) under the statute’s protection and explicitly require federal agencies to consider impacts to TCPs. Even if the Corps argues that its jurisdiction is constitutionally limited to “waters of the United States,” Congress can invoke its jurisdiction over Indian affairs to require the Corps to consider impacts on TCPs. Requiring federal agencies to consider impacts to TCPs granting pipeline construction permit).


122. The Environmental Protection Agency opposed the Corps’ proposal and the matter was referred to the Council on Environmental Quality. See Implementation of National Environmental Policy Act; Council Recommendations, 52 Fed. Reg. 22517-02, 22518 (June 12, 1987).

123. Id. at 22520.


125. See, e.g., Ringred v. City of Duluth, 828 F.2d 1305, 1309 (8th Cir. 1987) (holding that because parking ramp construction was not a NEPA “major Federal action[,]” it must not be a NHPA “undertaking” either).


effectively expanded their jurisdictional authority, ensuring federal programs are consistent with the United States’ trust responsibility toward tribes. Because the federal government has constitutional power over Indian affairs, the Corps cannot claim that jurisdictional limitations preclude consideration of TCPs outside of the “permit area.”

The only published NHPA case on point invalidated the Corps’ limited definition of the area of potential effect (APE). When Appendix C was still in the proposal stage, a California district court held that the Corps’ reliance on its proposed regulations was contrary to the statutory language of the NHPA. The court directed the Corps to instead rely on the ACHP’s definition of the APE.

Yet the Corps went on to finalize its rule the following year. In its 2005 interim guidance, the Corps reiterated its intention to continue limiting the scope of the APE. The guidance specifically referenced and disregarded the ACHP’s regulations.

jurisdiction over relations with other sovereigns, including Indian nations, is vested in the federal government through the “necessary concomitants of nationality”). Although the doctrine of plenary power has been repeatedly recognized by the U.S. Supreme Court as granting Congress total control over Indian affairs, this article does not advocate for plenary power in its current form. See Robert T. Coulter, The Plenary Power Doctrine, in NATIVE LAND LAW § 6.13 (West, Westlaw 2013) (“[In early decisional law, t]he plenary power doctrine simply referred to the fact that the Constitution gave the limited powers that the federal government could exercise in relation to Indian nations to Congress and left no residual powers to the states.”).

134. 2005 INTERIM GUIDANCE, supra note 111, at (6)(d) (“The definition of ‘permit area’ in Appendix C . . . should continue to be used.”).
135. Id.
B. Identification of Historic Properties

The ACHP’s regulations require agencies to consult with tribes in the process of identifying historic properties within the APE.\(^{136}\) This is another area where the Corps has enumerated exceptions in an attempt to limit its section 106 responsibilities.\(^{137}\) Appendix C provides for three situations in which the district engineer may unilaterally determine that there is little likelihood that historic properties exist or may be affected: (1) areas that have been extensively modified by previous work, (2) areas created in modern times, and (3) work that is so limited in scope that it is unlikely to affect historic properties even if they were present.\(^{138}\) The ACHP’s regulations provide for the third exception, but not for the first two.\(^{139}\)

Appendix C’s first exception, areas modified by previous work, potentially excludes TCPs from analysis. A TCP may retain its cultural and historic significance even after development significantly modifies the area.\(^{140}\) Since the Corps’ regulations do not mention the concept of TCPs, there is even more danger that TCPs may be left out of a Corps section 106 analysis.\(^{141}\) TCPs can be easily overlooked absent proper consultation, since the cultural values that make a TCP significant are often intangible.\(^{142}\)

C. Determination of Adverse Effects

Another way Appendix C limits the Corps’ responsibility is by narrowing the definition of adverse effects.\(^{143}\) The ACHP has provided for an expansive definition of adverse effect:

136. 36 C.F.R. 800.4(b) (2013).
137. See 33 C.F.R. § 325 app. C(3)(b).
138. Id.
139. 36 C.F.R. § 800.3(a)(1).
140. See, e.g., WESTERMAN & WHITE, supra note 77, at 214–15 (describing TCPs in Minnesota that have retained their cultural significance even though they have been severely impacted by development).
142. BULLETIN 38, supra note 5, at 14.
143. See 33 C.F.R. § 325 app. C(15).
when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association . . . . Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.  

The ACHP’s regulations list several examples of potential adverse effects, including visual, atmospheric, or auditory effects. The ACHP’s regulations also specifically provide that transfer, lease, or sale of the property out of federal ownership or control may be an adverse effect, unless there are legally enforceable conditions to ensure long-term preservation of the property’s historic character.

In contrast, the Corps provides three exceptions where an effect will not be considered adverse: (1) where the property only has research value and that value can be substantially preserved by conducting research, (2) when the undertaking is limited to rehabilitation of buildings and structures, or (3) when the undertaking is limited to the transfer, lease, or sale of historic property.

The research exception in the Corps’ regulations is out of date. In 1986, the year Appendix C was adopted, the ACHP’s regulations also contained a research exception, but the ACHP eliminated this exception in 1999. The destruction of an archeological site or another property with research value is now unambiguously an adverse effect under the ACHP’s regulations. The regulations do provide that an agency may comply with the Archeological and Historic Preservation Act in the place of the NHPA when a property is valued solely for its scientific or archeological data, but this provision only covers post-review discoveries. Therefore, the Corps’ blanket exception for

144. 36 C.F.R. § 800.5(a)(1) (emphasis added).
145. Id. § 800.5(a)(2).
146. Id. § 800.5(a)(2)(vii).
147. 33 C.F.R. § 325 app. C(15)(c).
148. See King, supra note 25, at 73.
149. Id.
150. Id.
151. 36 C.F.R. § 800.13(b)(2).
properties of pure research value is out of sync with the current ACHP regulations.\textsuperscript{152}

\textbf{D. Tribal Consultation}

Consultation with tribes is an integral component of the common law federal trust responsibility.\textsuperscript{153} Effective consultation is also crucial to achieving the goal of cultural resource protection under section 106\textsuperscript{154} because consultation is often the only way to identify TCPs.\textsuperscript{155}

The ACHP’s regulations incorporate the tribal consultation requirements of the 1992 amendments.\textsuperscript{156} Any tribe that attaches cultural significance to a property that “\textit{may be affected by an undertaking},” regardless of the location of the historic property, should be included as a consulting party.\textsuperscript{157} This includes consultation on the scope of the APE, the identification and evaluation of historic properties, the potential effects of the undertaking on the properties, and the resolution of adverse effects.\textsuperscript{158}

Appendix C provides only that tribes \textit{may} be consulted as part of the district engineer’s investigations.\textsuperscript{159} Its language does not require consultation with tribes at any point.\textsuperscript{160} Where tribes are

\begin{itemize}
\item \textsuperscript{152} Compare 33 C.F.R. § 325 app. C(15)(c) (providing three exceptions for undertakings that would otherwise be considered adverse), \textit{with} 36 C.F.R. § 800.5(a) (describing potential adverse effects without providing exceptions).
\item \textsuperscript{153} See generally Routel & Holth, \textit{supra} note 129.
\item \textsuperscript{154} Attakai v. United States, 746 F. Supp. 1395, 1408 (D. Ariz. 1990).
\item \textsuperscript{157} 36 C.F.R. § 800.2(c)(2)(ii) (emphasis added).
\item \textsuperscript{158} Id. § 800.2(c)(2)(ii)(A).
\item \textsuperscript{159} 33 C.F.R. § 325 app. C(5)(e) (2013) (“[I]nvestigations \textit{may} consist of . . . further consultations with . . . Indian tribes . . . .” (emphasis added)); id. § 325, app. C(9)(a) (“[M]ay coordinate . . . with . . . any appropriate Indian tribe . . . .” (emphasis added)).
\item \textsuperscript{160} See id. § 325 app. C.
mentioned, they are referred to on similar terms as other interested parties.  

Appendix C weakens requirements for not only (non-THPO) tribal consultation, but also consultation with the SHPO or THPO in the process of determining the APE. Under the ACHP’s regulations, agencies are required to consult with the SHPO or THPO when defining the APE. But the Corps’ interim guidance provides only that “[t]he district engineer can, in unusual or complex projects, seek the views of the SHPO/THPO before making the final determination.” Where the limitation of “unusual or complex projects” originates, or what it means, is a mystery.

When it comes to identification of historic properties, the ACHP’s regulations require the agency official to consult not only with the SHPO or THPO, but with “any Indian tribe or Native Hawaiian organization that might attach religious and cultural significance to properties within the area of potential effects.” Consultation should be initiated “early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process.” The ACHP also specifies that the agency official should consider applicable tribal laws when identifying historic properties. The Corps’ regulations, in contrast, do not mention tribes (or even THPOs) in the context of identifying historic properties. Appendix C merely requires that the district engineer consult with the SHPO and “other appropriate sources of information.”

Appendix C further limits consultation requirements when the district engineer determines there is little likelihood that historic properties exist or will be affected. In such cases, Appendix C requires the district engineer only to provide public notice.

161. See, e.g., id. § 325 app. C(4)(a) (public notice will be sent to tribes).
162. See id. § 325 app. C(5)(f) (limiting investigation to the permit area with no provision for consultation).
163. 36 C.F.R. § 800.4(a).
164. 2005 INTERIM GUIDANCE, supra note 111, at (6)(d).
165. See id.
166. 36 C.F.R. § 800.4(b).
167. Id. § 800.1(c).
168. Id. § 800.4(b)(1).
170. Id. § 325 app. C(3)(b).
explaining the determination. Considering that the district engineer might not consult with tribes in defining the area of potential effect, this means a tribe might not find out that the undertaking affects a TCP until the public notice stage.

Public notice is not an adequate procedure for government-to-government consultation, which is most effective when commenced as early as possible in the federal decision-making process. Additionally, Appendix C limits consideration of properties that are discovered during the public comment stage: “The evidence must set forth specific reasons for the need to further investigate within the permit area . . . .” This language may be merely an attempt to reword the ACHP’s regulation for properties discovered post-review, which requires an agency official to specify the National Register criteria used to assume the property is eligible for section 106 analysis. But the language of Appendix C implies that it is the interested party who must supply specific reasons to investigate further, even when concerns arise during the initial review process. This places an unnecessary burden on

171. Id.
172. See id.
173. See Routel & Holth, supra note 129, at 456 (“There is a fundamental difference between the public participation process (notice and comment), which is an information-gathering exercise, and consultation, which is a government-to-government process that requires greater involvement in decision making by Indian tribes.”). See generally 36 C.F.R. § 800.16(f) (defining consultation as the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them).
174. See, e.g., Dean B. Swagee, Consulting with Tribes for Off-Reservation Projects, 25 NAT. RESOURCES & ENV’T, Summer 2010, at 54, 56; Walker & de Bie, supra note 7, at 5-15; Carol Berry, Pipeline Creates Tribal Dissent, INDIAN COUNTRY TODAY (Sept. 27, 2010), http://indiancountrytodaymedianetwork.com/ictarchives/2010/09/27/pipeline-creates-tribal-dissent-81747.
175. 33 C.F.R. § 325 app. C(5)(a) (emphasis added).
176. See 36 C.F.R. § 800.13(c) (2013) (“The agency official . . . may assume a newly-discovered property to be eligible for the National Register for purposes of section 106. The agency official shall specify the National Register criteria used to assume the property’s eligibility so that information can be used in the resolution of adverse effects.”).
177. See 33 C.F.R. § 325 app. C(5)(a) (“When the initial review, addition submissions by the applicant, or response to the public notice indicates the existence of a potentially eligible property, the district engineer shall examine the pertinent evidence . . . .”).
tribes who may not have been adequately informed prior to the public comment stage. 178

Both the ACHP’s and the Corps’ regulations allow for termination of consultation where consultation proves unproductive. 179 But the two regulations specify different terms under which termination may occur. 180 The ACHP’s regulations allow termination only when consultation to resolve adverse effects has been attempted and failed. 181 Any party may terminate consultation, including the tribe. 182 If it is the agency that chooses to terminate consultation, the agency official must provide the ACHP an opportunity to comment. 183 Although the Corps can terminate consultation under Appendix C, there is no mention of other parties terminating consultation. 184 Furthermore, Appendix C discusses ACHP comments, but does not explicitly say that the Corps must provide the ACHP with the opportunity to comment. 185

The Corps took steps to correct these problems by including provisions on tribal consultation in its 2005 interim guidance, but the guidance still lacks detail on when and how consultation should occur during the section 106 process. 186 The Department of Defense and the Corps have also issued guidance documents, pursuant to executive order, 189 that broadly define tribal

178. See id. § 325 app. C(3)(b).  
179. Compare 36 C.F.R. § 800.7(a) (“After consulting to resolve adverse effects pursuant to § 800.6(b)(2), the agency official, the SHPO/THPO, or the Council may determine that further consultation will not be productive and terminate consultation.”), with 33 C.F.R. § 325 app. C(8) (“The district engineer will terminate any consultation immediately upon determining that further consultation is not productive.”).  
180. Compare 36 C.F.R. § 800.7(a), with 33 C.F.R. § 325 app. C(8).  
181. 36 C.F.R. § 800.7(a).  
182. Id.  
183. Id. § 800.7(a)(1).  
184. 33 C.F.R. § 324 app. C(8).  
185. See id.  
186. 2005 INTERIM GUIDANCE, supra note 111, at 1, ¶ 2. The guidance refers to the government-to-government relationship between tribes and the federal government and specifies that public notice alone is inadequate consultation. Id.  
188. U.S. ARMY CORPS OF ENG’RS, TRIBAL CONSULTATION POLICY (2012); see also U.S. ARMY CORPS OF ENG’RS, CONSULTING WITH TRIBAL NATIONS: GUIDELINES FOR EFFECTIVE COLLABORATION WITH TRIBAL PARTNERS (2010).  
189. See Exec. Order No. 13,175, 65 Fed. Reg. 67,249 (Nov. 6, 2000);
consultation procedures, but these documents are not specific to section 106. In practice, the Corps’ guidance on tribal consultation has been applied inconsistently, perhaps because agency guidance is less enforceable than legislative rules.

E. Confidentiality

Confidentiality is a major concern for tribes seeking protection of traditional cultural properties. When the public becomes informed about the location and character of a sacred site, the site may be subject to desecration, and religious practitioners may fear for their privacy and safety. Even absent this threat, there may be cultural concerns with disclosing the location of sacred sites. This kind of information may be privileged to the extent that it is reserved for only a certain segment of the tribe’s population. Tribes may be so reluctant to divulge information about sacred places that they may delay action until faced with the possibility of complete destruction of the site. By the time such destruction is imminent enough to warrant divulging privileged information, it may be too late in the section 106 process to protect the site.


190. See U.S. Dep’t of Def., supra note 188; U.S. Army Corps of Eng’rs, Consulting with Tribal Nations: Guidelines for Effective Collaboration with Tribal Partners, supra note 188; U.S. Army Corps of Eng’rs, Tribal Consultation Policy, supra note 188.


193. See Palmer et al., supra note 82, at 45.


195. See, e.g., Pueblo of Sandia v. United States, 50 F.3d 856, 861 n.5 (10th Cir. 1995).

196. See Bulletin 38, supra note 5, at 19.

197. Charles W. Smythe, The National Register Framework for Protecting Cultural Heritage Places, 26 GEO. WRIGHT F. 14, 19 (2009); see, e.g., Dussias, supra note 4, at 68 (“Because of the belief that such sites and their locations should not be discussed with outsiders, the Tribe did not disclose the site’s existence until it appeared there was no other choice.”).

198. See, e.g., Dussias, supra note 4, at 68.

199. See Progress on Updating National Register Bulletin 38, supra note 49.
To mitigate this problem, the NHPA and the ACHP’s regulations require agency officials to take confidentiality concerns into account during the process of identifying historic properties. The agency is required to withhold information about the location, character, or ownership of a historic property from documentation “when disclosure may cause a significant invasion of privacy[,] risk of harm to the historic property[,] or impede the use of a traditional religious site by its practitioners.”

In contrast, Appendix C only protects information from disclosure when there is a “substantial risk of harm, theft, or destruction.” This provision does not include language that protects the integrity of TCPs for the purpose of cultural practices. While destruction of property is one cause of concern for tribes, the cultural uses of a TCP are often significant. Thus, cultural uses of a property warrant protection, as provided for in the ACHP’s regulations.

V. Unauthorized Delegation of Rulemaking Authority

Since Appendix C is inconsistent with the Protection of Historic Properties regulations under 36 C.F.R. section 800, at least three district courts have enjoined the Corps from using Appendix C. This calls the legality of the Corps’ implementing
regulations into question, creating an uncertainty that not only impacts tribes, but impedes the ability of project developers to plan effectively.\textsuperscript{207}

Even if the ACHP did authorize the Corps to promulgate its own regulations, the legality of such a delegation is dubious.\textsuperscript{208} For regulations to carry the force of law, Congress must first delegate regulatory authority to the promulgating agency, either explicitly or implicitly.\textsuperscript{209} Authority to promulgate regulations can only come from an authorizing and empowering statute.\textsuperscript{210} A federal agency does not have independent legislative power.\textsuperscript{211} Thus, the Council cannot grant rulemaking authority, only Congress can.\textsuperscript{212}

It could be argued that by delegating general authority over section 106 to the ACHP, Congress also delegated the authority to further delegate. In that case, a \textit{Chevron} analysis would be required.\textsuperscript{213} \textit{Chevron v. Natural Resources Defense Council} requires deference to agency interpretation of statutes, but only when a two-part test has been satisfied.\textsuperscript{214} First, the provision of the statute interpreted by the agency must be ambiguous, such that the agency is filling in the blanks left by Congress rather than rewriting the law.\textsuperscript{215} If there is ambiguity in the statute, then the question becomes whether the agency’s regulation is a permissible construction of the statute.\textsuperscript{216} Courts defer to an agency’s construction of statutory ambiguity unless the agency’s interpretation is arbitrary and capricious.\textsuperscript{217}

Appendix C that allows the Corps to rely on a lead agency in complying with the NHPA); McGehee v. U.S. Army Corps of Eng’rs, No. 3:11-CV-160-H, 2011 WL 2009969, at *5 (W.D. Ky. May 23, 2011) (holding that the ACHP and Corps definitions of the APE did not conflict under the circumstances).

\textsuperscript{207} See McKinney & Eckert, \textit{supra} note 61, at 13.

\textsuperscript{208} See \textit{2 AM. JUR. 2D Administrative Law} § 132 (2004).

\textsuperscript{209} \textit{Id.} § 131.

\textsuperscript{210} \textit{Id.} § 130.

\textsuperscript{211} \textit{Id.}

\textsuperscript{212} See \textit{id.}

\textsuperscript{213} See \textit{4 CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW \& PRACTICE} § 11:30 (West, Westlaw, 3d ed. 2014).


\textsuperscript{215} \textit{Id.} at 843–45.

\textsuperscript{216} \textit{Id.}

\textsuperscript{217} \textit{Id.} The U.S. Supreme Court recently extended this analysis to the scope of an agency’s regulatory authority. Under \textit{City of Arlington v. FCC}, when a statute delegates general rulemaking authority to an agency, the agency is entitled to \textit{Chevron} deference in determining the scope of its regulations. 133 S. Ct. 1863,
Although the *Chevron* test grants significant deference to agency rulemaking, in practice the outcome of *Chevron* deference is so inconsistent that it has been called a lottery.\textsuperscript{218} Much comes down to step one of the *Chevron* analysis: statutory interpretation.\textsuperscript{219} A textualist is much less likely to find statutory ambiguity than an intentionalist.\textsuperscript{220}

Applying a textualist approach, the NHPA authorizes the Council “to promulgate such rules and regulations as it deems necessary to govern the implementation of section [106] in its entirety.”\textsuperscript{221} This is a broad grant of general authority.\textsuperscript{222} It could be argued that if the Council deems it necessary to delegate rulemaking power, the plain meaning of the statute gives the Council the power to do so.\textsuperscript{223} But applying the ordinary rules of statutory interpretation, delegation to one authority excludes delegation to another.\textsuperscript{224} If Congress intended to delegate authority to other agencies besides the ACHP, it would have done so explicitly.\textsuperscript{225} In fact, Congress *did* specify that the ACHP may delegate authority to tribes under certain circumstances.\textsuperscript{226} The fact that Congress explicitly provided for delegation to tribes indicates

\begin{footnotesize}
\bibitem{1868} (2013). Still, even in *City of Arlington*, Congress has to delegate power to the agency in the first place. See id. at 1874 (emphasizing that Congress granted FCC general authority to administer the statute at issue).
\bibitem{220} Id. at 175–77.
\bibitem{222} See *City of Arlington*, 133 S. Ct. at 1874.
\bibitem{223} See Sebelius v. Cloer, 133 S. Ct. 1886, 1896 (2013) (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)) (holding that when a statute’s language is plain, the court should enforce it according to its terms); 73 Am. Jur. 2d Statutes § 67 (2012).
\bibitem{225} See Jama v. Immigration & Customs Enforcement, 543 U.S. 335, 341 (2005) (“We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply.”).
\end{footnotesize}
that Congress intentionally decided not to delegate authority to other federal agencies.\footnote{227}

The legislative history behind NHPA and its 1992 amendments also show that ACHP’s delegation of its own rulemaking authority violates legislative intent.\footnote{228} The Council was created for the express and sole purpose of overseeing implementation of the National Historic Preservation Act.\footnote{229} The statutory language of the 1992 amendments reaffirmed the ACHP’s authority over the section 106 process.\footnote{230} The amendments were added to “clarif[y] that it is the responsibility of the Advisory Council to promulgate such rules and regulations it deems necessary to govern the implementation of section 106 of NHPA in its entirety.”\footnote{231} The congressional record emphasizes that “the ACHP has the authority to define . . . how agencies should take effects on historic properties into account in their planning.”\footnote{232} Thus, both the text of the statute and its legislative history show that Congress intended to delegate authority to the ACHP and the ACHP only.

VI. SOLUTIONS

A. Regulatory Fix

The most straightforward solution to the problem of contradictory regulations is to change the regulations themselves. Some commentators, including the Society for American Archaeology, have recommended repealing Appendix C

\begin{footnotes}
228. See \textit{73 Am. Jur. 2d Statutes} § 83 for a discussion of the role of legislative history in statutory interpretation.
229. See \textit{H.R. Rep. No. 89-1916 (1966), reprinted in 1966 U.S.C.C.A.N. 3307, 3307} (listing creation of the ACHP as part of the three-fold purpose of the NHPA, along with creation of the National Register and the encouragement of local, regional, state, and national interest in protecting historic properties); \textit{see also 73 Am. Jur. 2d Statutes} § 87 (discussing the persuasiveness of committee reports in statutory interpretation).
\end{footnotes}
altogether. Because there are many points of inconsistency, a repeal would be the simplest and most comprehensive fix. A less desirable solution would be to amend Appendix C, a course of action the Corps has been considering since at least 2005. Amendments should eliminate the Corps’ definition of “area of potential effect” and incorporate the ACHP’s definition. The Corps should also eliminate the exceptions that allow the district engineer to determine that historic properties are unlikely to be present and the exceptions to what may be considered an “adverse effect.” There need to be stronger provisions for confidentiality, and tribal consultation should be integrated throughout the section 106 process. At minimum, the Corps should promulgate regulations that would make enforceable the consultation provisions already laid out in guidance documents.

Another alternative would be to repeal Appendix C and negotiate a prototype programmatic agreement with the ACHP in consultation with other stakeholders, including SHPOs, THPOs, tribes, and the public. Prototype programmatic agreements are meant to streamline the section 106 process to fit the needs of

234. See id.
236. Compare 36 C.F.R. § 800.16(y) (2013) (“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.”), with 33 C.F.R. § 325 app. C(1)(e) (2013) (“[A]n ‘effect’ on a ‘designated historic property’ occurs when the undertaking may alter the characteristics of the property that qualified the property for inclusion in the National Register. Consideration of effects on ‘designated historic properties’ includes indirect effects of the undertaking. The criteria for effect and adverse effect are described in Paragraph 15 of this appendix.”).
237. Compare 33 C.F.R. § 325 app. C(15)(b)(3) (describing exceptions when impacts otherwise considered adverse may be found not adverse), with 36 C.F.R. § 800.5(a)(1) (containing no exceptions to the criteria for adverse effect).
238. See supra Part IV.D–E.
239. See 1 Koch & Murphy, supra note 192, § 4:63.
particular programs. \(^{241}\) Once the ACHP authorizes the prototype, the Corps can use its procedures to implement section 106 for individual projects. \(^{212}\)

**B. Legislative Fix**

The National Trust on Historic Preservation has published a report that suggests the organic act of a federal agency affects its implementation of section 106. \(^{243}\) The report points out that the organic act of the Forest Service, which has a poor track record under the NHPA, contains no mention at all of protecting historic places. \(^{244}\) On the other hand, the organic act of the Bureau of Land Management, an agency with a better reputation for protecting historic properties, explicitly includes protection of historic sites. \(^{245}\)

Like the Forest Service, the Corps lacks any mandate in its founding legislation to protect historic sites. \(^{246}\) Protection of historic places was not on Congress’s radar when it enacted legislation to permanently establish an Army Corps of Engineers in 1802. \(^{247}\) The current mission of the Corps is “to strengthen our Nation’s security, energize the economy and reduce risks from disasters.” \(^{248}\) This mission emphasizes economic development, which is perhaps the impetus for the Corps’ stated regulatory policy “to avoid unnecessary regulatory controls.” \(^{249}\) The general permit program, which Appendix C is attached to, “is the primary method of eliminating unnecessary federal control.” \(^{250}\)

If the Corps’ lack of compliance is rooted in its core mission, then the solution should extend beyond Appendix C. Indeed, the Corps has a track record of noncompliance that extends beyond

\(^{241}\) ADVISORY COUNCIL ON HISTORIC PRES., supra note 240.

\(^{242}\) See 36 C.F.R. § 800.14(b)(4); ADVISORY COUNCIL ON HISTORIC PRES., supra note 240.


\(^{244}\) NAT’L TRUST FOR HISTORIC PRES., supra note 243, at 11.

\(^{245}\) Id.

\(^{246}\) See Act of Mar. 16, 1802, ch. 9, 2 Stat. 132.

\(^{247}\) See id.


\(^{250}\) Id.
reliance on its own regulations. But when it comes to protection of traditional cultural properties, the issue goes beyond noncompliance with the NHPA. Even when following the ACHP’s regulations, the agency official has discretion in whether to approve or deny a permit. This ultimate decision may be influenced by the mission of the agency. Thus, one component of a comprehensive solution would be to enact legislation incorporating historic preservation into the Corps’ core mission.

VII. CONCLUSION

The National Historic Preservation Act is the cornerstone of historic resource protection in American law. In particular, it is an important source of recognition for culturally significant places. The Advisory Council on Historic Preservation was created to oversee the implementation of this mandate. Thus, Congress gave the ACHP broad authority over the section 106 process. By promulgating and utilizing regulations that narrow its section 106 responsibilities, the Corps of Engineers has violated both the intent and the letter of the law. Not only does Appendix C allow the Corps to avoid the section 106 review process, but it may have the effect of excluding analysis of traditional cultural properties as mandated by Congress. The inconsistent

251. See, e.g., Lucas Ritchie, The Failure of the National Historic Preservation Act in the Missouri River Basin and a Proposed Solution, 9 GREAT PLAINS NAT. RESOURCES J., Spring 2005, at 1, 8–11 (describing the Corps of Engineer’s failure to comply with a section 106 programmatic agreement, resulting in harm to several historic properties, including exposure of a grave site).

252. See Nat’l Mining Ass’n v. Fowler, 324 F.3d 752, 755 (D.C. Cir. 2003) (“[S]ection 106 imposes no substantive standards on agencies, but it does require them to solicit the Council’s comments . . . .”).

253. See NAT’L TRUST FOR HISTORIC PRES., supra note 243.

254. See id.


257. See id. §§ 470i, 470j.

258. Id.

259. See supra Part IV.

260. Id.

regulations also cause uncertainty for project developers.\textsuperscript{262} The Corps’ authority to follow its own regulations may be successfully challenged in court, further delaying a project.\textsuperscript{263}

The Corps’ regulations for section 106 may internally make sense because they reflect the Corps’ own mission to promote economic development.\textsuperscript{264} The Corps’ mission and authorizing statutes do not integrate historic preservation into the agency’s mandate.\textsuperscript{265} This is exactly the reason that the ACHP should be the agency with sole authority to implement the NHPA—when other agencies have conflicting missions, they are likely to prioritize other values over historic preservation.\textsuperscript{266} Therefore, the best solution for the problems created by these incongruent regulations is to repeal Appendix C.\textsuperscript{267}

\begin{itemize}
\item[262.] McKinney & Eckert, supra note 61, at 12.
\item[264.] See Mission and Vision, supra note 248.
\item[265.] Id.
\item[266.] See Nat’l Trust for Historic Pres., supra note 243.
\item[267.] See Soc’y for Am. Archeology, supra note 141.
\end{itemize}