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*Docket:* For access to the docket to read background documents or comments received, go to: <https://www.regulations.gov>, and insert the docket number, CPSC-2022-0017, into the “Search” box, and follow the prompts.

**FOR FURTHER INFORMATION CONTACT:** Scott Ayers, U.S. Consumer Product Safety Commission, 5 Research Place, Rockville, MD 20850; telephone: 301-987-2030; email: [sayers@cpsc.gov](mailto:sayers@cpsc.gov).

**SUPPLEMENTARY INFORMATION:** The PFCSA requires the Commission to promulgate a final rule to require flame mitigation devices in portable fuel containers that impede the propagation of flame into the container. 15 U.S.C. 2056d(b)(1)–(2). However, the Commission is not required to promulgate a final rule for a class of portable fuel containers within the scope of the PFCSA if the Commission determines that:

- there is a voluntary standard for flame mitigation devices for those containers that impedes the propagation of flame into the container;
- the voluntary standard is or will be in effect not later than 18 months after the date of enactment of the PFCSA; and
- the voluntary standard is developed by ASTM International or such other standard development organization that the Commission determines to have met the intent of the PFCSA.

15 U.S.C. 2056d(b)(3)(A). After publication of the **Federal Register** notification announcing the Commission’s positive determination, the requirements of such a voluntary standard “shall be treated as a consumer product safety rule.” 15 U.S.C. 2056d(b)(2)(B) and (b)(4). Under this authority, on January 13, 2023, the Commission published a notification determining that three voluntary standards for portable fuel containers meet the requirements of the PFCSA and would be treated as consumer product safety rules: ASTM F3429/F3429M–20 (pre-filled containers); ASTM F3326–21 (containers sold

empty); and section 18 of UL 30:2022 (safety cans). 88 FR 2206.

Portable fuel containers sold pre-filled are within the scope of ASTM F3429/F3429M, *Standard Specification for Performance of Flame Mitigation Devices Installed in Disposable and Pre-Filled Flammable Liquid Containers*. ASTM lists the standard as a dual standard in inch-pound units (F3429 designation) and metric units (F3429M designation). ASTM F3429/F3429M was first published in 2020. ASTM published a revised version of ASTM F3429/F3429M–20 in May 2023, as ASTM F3429/F3429M–23. On August 22, 2023, the Commission determined that the 2023 revisions met the requirements of section 2056d(b)(3)(A) of the PFCSA. Accordingly, ASTM F3429/F3429M–23 is the current mandatory consumer product safety rule for pre-filled-portable fuel containers. On October 31, 2023, the Commission published a direct final rule creating 16 CFR part 1461 for portable fuel containers to incorporate by reference the revised ASTM F3429/F3429M–23, as well as ASTM F3326–21 and section 18 of UL 30:2022.5. 88 FR 74342.

Under section (b)(5) of the PFCSA, if the requirements of a voluntary standard that meet the requirements of section (b)(3) are subsequently revised, the organization that revised the standard shall notify the Commission after the final approval of the revision. 15 U.S.C. 2056d(b)(5). Any such revision to the voluntary standard shall become enforceable as the new consumer product safety rule not later than 180 days after the Commission is notified of a revised voluntary standard that meets the conditions of section (b)(3) (or such later date as the Commission determines appropriate), unless the Commission determines, within 90 days after receiving the notification, that the revised voluntary standard does not meet the requirements described in section (b)(3) of the PFCSA. 15 U.S.C. 2056d(b)(5).

On January 29, 2024, ASTM notified the Commission that it had approved and published ASTM F3429/F3429M–24. CPSC staff is assessing the revised voluntary standard to determine, consistent with section (b)(5) of the PFCSA, whether the revisions in ASTM F3429/F3429M–24 meet the requirements of section (b)(3)(A) of the PFCSA listed above. The Commission invites public comment on that question to inform staff’s assessment and any subsequent Commission consideration

of the revisions in ASTM F3429/F3429M–24.<sup>1</sup>

ASTM F3429/F3429M–24 is available for review in several ways. ASTM has provided on its website (at [www.astm.org/CPSC.htm](http://www.astm.org/CPSC.htm)), at no cost, a read-only copy of ASTM F3429/F3429M–24, including a red-lined version that identifies the changes made to ASTM F3429/F3429M–23. A read-only copy of the existing standard (ASTM F3429/F3429M–23) is available for viewing, at no cost, on the ASTM website at: [www.astm.org/READINGLIBRARY/](http://www.astm.org/READINGLIBRARY/). Interested parties can also download copies of the standards by purchasing them from ASTM International, 100 Barr Harbor Drive, P.O. Box C700, West Conshohocken, PA 19428–2959; phone: 610–832–9500; <https://www.astm.org>. Alternatively, interested parties can schedule an appointment to inspect copies of the standards at CPSC’s Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, telephone: 301–504–7479.

Comments must be received by February 23, 2024. Because of the short statutory time frame Congress established for the Commission to consider revised voluntary standards under section (b)(5) of the PFCSA, CPSC will not consider comments received after this date.

**Alberta E. Mills,**

*Secretary, Consumer Product Safety Commission.*

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## DEPARTMENT OF DEFENSE

### Department of the Army, Corps of Engineers

#### 33 CFR Parts 325 and 330

[Docket ID: COE–2023–0004]

RIN 0710–AB46

#### Processing of Department of the Army Permits; Procedures for the Protection of Historic Properties

**AGENCY:** Army Corps of Engineers, Department of Defense (DoD).

**ACTION:** Proposed rule.

**SUMMARY:** To demonstrate the greatest possible consistency between the procedures used by the U.S. Army Corps of Engineers (Corps) Regulatory Program to comply with the National

<sup>1</sup> The Commission voted 4–0 to publish this notification.

Historic Preservation Act (NHPA) and its implementing regulations, "Protection of Historic Properties" when processing permit applications, the Corps is proposing to amend its Regulatory Program's permitting regulations. The Corps will instead follow the NHPA's implementing regulations, developed and interpreted by the Advisory Council on Historic Preservation (ACHP), relying on the flexibility in those regulations for Federal agency compliance with the steps of review. The Corps will take into account, among other factors, the degree and scope of the Federal involvement in the undertaking and the relationship of Federal actions to the overall proposed activities. Further, the Corps is also proposing to make conforming changes to its nationwide permit program regulations to eliminate references in the regulations.

**DATES:** Comments must be submitted on or before April 9, 2024.

**ADDRESSES:** You may submit comments, identified by docket number COE-2023-0004 and/or RIN 0710-AB46, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the 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.

*Hand Delivery/Courier:* Due to security requirements, we cannot receive comments by hand delivery or courier.

*Instructions:* If submitting comments through the Federal eRulemaking Portal, direct your comments to docket number COE-2023-0004. All comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the commenter indicates that the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through [regulations.gov](http://www.regulations.gov) or email. The [regulations.gov](http://www.regulations.gov) website is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an email directly to the Corps without going through [regulations.gov](http://www.regulations.gov) your email address will be

automatically captured and included as part of the comment that is placed in the public docket and made available on the internet. If you submit an electronic comment, we recommend that you include your name and other contact information in the body of your comment and with any compact disc you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* For access to the docket to read background documents or comments received, go to [regulations.gov](http://www.regulations.gov). All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the internet and will be publicly available only in hard copy form.

**FOR FURTHER INFORMATION CONTACT:** Mr. Joseph McMahan, [historicpropertyreg@usace.army.mil](mailto:historicpropertyreg@usace.army.mil), or 202-236-7547.

**SUPPLEMENTARY INFORMATION:**

**Background**

Under section 106 (54 U.S.C. 306108) of the NHPA (54 U.S.C. 300101 *et seq.*), Federal agencies are required to consider the effects on historic properties from the undertakings they carry out, or non-Federal projects that rely on Federal licenses, permits, approvals, funds, or assistance, and to provide the ACHP a reasonable opportunity to comment on those undertakings. This process is set forth within the section 106 implementing regulations (36 CFR part 800). As required by the statute, the ACHP developed and issued the implementing regulations for this section of the NHPA, and as part of its oversight of the section 106 process, provides general guidance as well as specific comments on section 106 reviews for individual undertakings to ensure consistency with the regulations. The Corps Regulatory Program issues permits for certain activities in waters and wetlands subject to its jurisdictional authorities. The procedures which the Corps' Regulatory Program currently uses for complying with section 106 of the NHPA, as set forth in appendix C of the Corps' permitting regulations, were issued as a final rule in 1990 but did not go through separate approval by the ACHP, as

required by the NHPA and the section 106 implementing regulations. Since that final rule was issued, the NHPA has been amended several times and the ACHP has also amended the section 106 implementing regulations. 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, which specify a consultation process for ACHP review and approval of an agency's proposed alternative procedures (36 CFR 800.14).

The Corps Regulatory Program administers three laws: section 404 of the Clean Water Act, sections 9 and 10 of the Rivers and Harbors Act of 1899, and section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended. Under section 404 of the Clean Water Act, a permit is required to discharge dredged or fill material into waters of the United States. Under Section 9 of the Rivers and Harbors Act of 1899, a permit is required to construct dams or dikes across navigable waters of the United States. The obstruction or alteration of a navigable water of the United States requires a permit under Section 10 of the Rivers and Harbors Act of 1899. Under Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, as amended, a permit is required to transport dredged material for disposal into ocean waters.

Section 106 of the NHPA (54 U.S.C. 306108) requires Federal agencies to consider the effects on historic properties from the undertakings they carry out or provide a Federal license, permit, approval, funding, or assistance to, and to provide the ACHP a reasonable opportunity to comment on the undertaking. Historic properties are properties that are included in, or eligible for inclusion in, the National Register of Historic Places. The consideration and issuance of a Department of the Army (DA) permit by the Corps Regulatory Program is a Federal action that makes a project, activity, or program, which includes activities that can potentially affect historic properties, subject to review by the Corps under section 106 of the NHPA and its implementing regulations, "Protection of Historic Properties" (36 CFR part 800).

Section 211 of the NHPA authorizes the ACHP to promulgate the regulations to govern the implementation of section 106 in its entirety. The regulations thus developed by the ACHP at 36 CFR part 800 define how Federal agencies meet their statutory responsibilities under section 106 the NHPA. Additionally, section 110(a)(2)(E) of the NHPA

requires Federal agency procedures for section 106 of the NHPA to be consistent with the section 106 regulations issued by the ACHP pursuant to section 211 of the Act. Under 36 CFR 800.14, an agency may develop alternate procedures or other program alternatives to implement section 106 and substitute them for 36 CFR part 800 after following a specified consultative process and a consistency determination by ACHP (see 36 CFR 800.14(a)). The ACHP oversees the operation of the section 106 process (36 CFR 800.2(b)). The Army Civil Works programs, other than the Regulatory Program, use the implementing regulations at 36 CFR part 800, for its compliance with section 106 of the NHPA.

### Corps Regulatory Program and Appendix C

There are two categories of permits that the Corps Regulatory Program issues under its permitting authorities: individual permits and general permits. Individual permits include standard individual permits and letters of permission. A standard individual permit is an activity-specific permit that is processed through the public interest review procedures, including the issuance of a public notice and receipt of comments, the preparation of activity-specific National Environmental Policy Act documentation (*e.g.*, an environmental assessment or environmental impact statement), and, if the proposed activity involves discharges of dredged or fill material into waters of the United States, an activity-specific Clean Water Act section 404(b)(1) Guidelines analysis to ensure that the discharge of dredged or fill material complies with the environmental criteria in those Guidelines. A letter of permission is an individual permit issued after an abbreviated public interest review procedure and usually involves coordination with Federal and State agencies prior to making a decision on the permit application. Each year, the Corps issues approximately 3,000 individual permits.

General permits include nationwide permits, regional general permits, and programmatic general permits. General permits authorize categories of activities across the country that have no more than minimal individual and cumulative adverse environmental effects. Some general permits require the project proponent to submit a notification to the appropriate Corps district before beginning the authorized activity. Other activities authorized by general permits do not require prior

notification to the Corps district, and the project proponent can proceed with the activity as long as they comply with all terms and conditions of the general permit. Each year, the Corps issues approximately 35,000 written general permit verifications, and thousands of other minor activities are authorized by non-reporting general permits that do not require the project proponent to contact the applicable Corps district office before proceeding with the general permit activity. The Corps Nationwide Permits program provides a list of available nationwide general permits as well as anticipated number of times they would be used within a five-year timeframe.<sup>1</sup>

When a Corps district issues a public notice to solicit comments on a proposed activity that requires a standard individual permit, or for a proposal to issue a regional general permit, the public notice includes a statement of the district engineer's current knowledge on historic properties (see 33 CFR 325.3(a)(10)). A copy of the public notice is provided to the State Historic Preservation Officer (SHPO), appropriate State agencies, appropriate Indian Tribes or Tribal representatives, or Native Hawaiian Organizations, concerned Federal agencies, appropriate city and county officials, as well as all parties who have specifically requested copies of public notices (see 33 CFR 325.3(d)(1)). The Corps Regulatory Program's general policies for evaluating permit applications are found at 33 CFR 320.4. The decision whether to issue a permit will be based on an evaluation of the probable impacts, including cumulative impacts, of the proposed activity and its intended use on the public interest.

The Corps' procedures for the processing of permit applications are provided at 33 CFR part 325. Section 325.1 identifies the information required for permit applications. Section 325.2 describes the standard procedures for processing permit applications, as well as more specific procedures that are needed for various types of regulated activities, such as water quality certification under section 401 of the Clean Water Act, Coastal Zone Management Act consistency determinations, National Historic Preservation Act compliance, and Endangered Species Act compliance. Section 325.2(d) addresses the timing of the processing of permit applications. Section 325.8 discusses which Corps

officials have the authority to issue permits under various circumstances. There are also three appendices to 33 CFR part 325, which are the following: appendix A of 33 CFR to part 325 discusses permit form and special conditions; appendix B to part 325 discusses NEPA implementation procedures for the regulatory program; and appendix C to part 325 discusses procedures for the protection of historic properties.

Appendix C to 33 CFR part 325 was intended to provide a set of definitions and procedures to the Corps and the regulated public for the Corps Regulatory Program's compliance with the requirements of section 106 of the NHPA, which requires Federal agencies to consider the effects of undertakings on historic properties and to provide the ACHP with a reasonable opportunity to comment on those undertakings. However, differences between appendix C and the 36 CFR part 800 regulations have in many cases introduced confusion resulting in debate over the extent and appropriateness of the Corps review. The major differences relate to the scope of the effort to identify and address effects to historic properties from undertakings and the nature of consultation with appropriate stakeholders. The section 106 implementing regulations include a definition of "undertaking" and "area of potential effects" which establish the basis for the scope of a Federal agency's responsibility to identify and address effects to historic properties. 36 CFR 800.16(y) defines the "undertaking" as a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval, while the "area of potential effects" includes 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 historic 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 (36 CFR 800.16(d)). Paragraph 1(f) of appendix C defines the "undertaking" subject to the requirements of section 106 to be the work, structure or discharge that requires a DA permit. Rather than using "area of potential effects," appendix C uses "permit area" which includes the areas consisting of jurisdictional waters, including

<sup>1</sup> <https://www.usace.army.mil/Missions/Civil-Works/Regulatory-Program-and-Permits/Nationwide-Permits/>, last accessed January 17, 2023.

wetlands, under the Corps' statutory authorities to regulate that will be directly affected by the proposed activity requiring DA authorization plus any uplands that would be directly affected by the activities requiring DA authorization. The definition of "permit area" includes a three-part test to identify activities outside of jurisdictional waters, including wetlands, (e.g., activities in uplands) that would be included with the activities subject to the Corps' permitting authorities and the section 106 process. The definition of "permit area" in paragraph 1(g) of appendix C provides three examples to the Corps and the regulated public for applying the concept of "permit area" to a number of potential permitting scenarios.

Under the Corps Regulatory Program's appendix C procedures, after the undertaking and permit area are determined, Corps Regulatory Program staff identify historic properties that could potentially be affected by the undertaking and the activities in the permit area. If the Corps district is processing a standard individual permit for the proposed activity requiring DA authorization, the public notice includes a statement regarding the district engineer's current knowledge of the presence or absence of historic properties and the effects of the proposed activity requiring DA authorization on historic properties. Appendix C includes certain coordination procedures and procedures for assessing effects on historic properties, and for providing the ACHP the opportunity to review and comment on undertakings that require DA authorization.

### Historical Context

Executive Order 11593, "Protection and Enhancement of the Cultural Environment," which was issued on May 13, 1971 (36 FR 8921), directed Federal agencies, in consultation with the ACHP, to institute procedures to ensure that "Federal plans and programs contributed to the preservation and enhancement of non-federally owned sites, structures and objects of historical, architectural or archeological significance." In addition, a Presidential Memorandum on Environmental Quality and Water Resource Management issued on July 12, 1978, directed the ACHP to issue regulations for implementing the NHPA by March 1, 1979. That Presidential Memorandum also directed Federal agencies such as the Corps with consultative responsibilities under the NHPA to publish separate procedures

for implementing the section 106 implementing regulations within three months of ACHP's issuance of them. Furthermore, the Presidential Memorandum required Federal agency NHPA procedures to be reviewed by the ACHP, and if those procedures were consistent with the ACHP's regulations, to also be approved within 60 days by the Chairman of the ACHP.

In a final rule published in the **Federal Register** on January 30, 1979 (44 FR 6068), the ACHP amended its NHPA section 106 regulations at 36 CFR part 800. In response to the direction received in the Presidential Memorandum and the ACHP's amended regulations, the Corps drafted a proposed rule to implement NHPA section 106 for the processing of applications for DA permits. The rule would establish appendix C to 33 CFR part 325. The proposed rule for appendix C was published in the **Federal Register** on April 3, 1980 (45 FR 22112) for a 60-day public comment period. In that proposed rule, the Corps Regulatory Program stated that it would be using the proposed appendix C on an interim basis for the processing of applications for DA permits. The Corps Regulatory Program did not issue a final rule in response to the April 3, 1980, proposed rule.

Changes to the proposed appendix C were made in response to direction provided on May 7, 1982, by the Presidential Task Force on Regulatory Relief. The Task Force directed the Army to take steps to reduce or eliminate delays in the processing of DA permit applications, while fulfilling the Corps Regulatory Program's responsibilities under section 106 of the NHPA. The revised proposed rule was intended to give ACHP a reasonable opportunity to comment on permit applications for proposed activities that may affect historic properties, as well as provide SHPOs and the general public opportunities to provide comments on permit applications. The revised proposed rule for appendix C was published in the **Federal Register** on May 4, 1984 (49 FR 19036) for a 60-day public comment period. The Corps Regulatory Program published its final rule for appendix C to 33 CFR part 325 (June 29, 1990, 55 FR 27000) following the Administrative Procedure Act process. Separate ACHP review and approval was not obtained.

The NHPA was amended in 1992, and some of those amendments have direct relevance to the Corps Regulatory Program's processing of applications for DA permits. One amendment stated that properties of traditional and cultural importance to an Indian Tribe or Native

Hawaiian Organization may be determined to be eligible for inclusion in the National Register of Historic Places. Another amendment requires Federal agencies, as part of their section 106 responsibilities, to consult with any Indian Tribe or Native Hawaiian Organization that attaches religious and cultural significance to historic properties. The 1992 amendments to the NHPA also included a provision that prohibits Federal agencies from granting a license or assistance to applicants who intend to avoid section 106 requirements by significantly adversely affecting historic properties to which the license or assistance would relate (section 110(k)).

Because the NHPA provides the ACHP the authority to issue regulations for section 106 in its entirety, and because the NHPA requires Federal agency section 106 procedures to be consistent with the section 106 regulations issued by the ACHP, the Corps Regulatory Program did not immediately propose any changes to Appendix C to address the 1992 amendments to the NHPA. The Corps Regulatory Program instead waited for the ACHP to make changes to section 106 implementing regulations to address those amendments to the NHPA. In the May 18, 1999, issue of the **Federal Register** (64 FR 27044), the ACHP published a final rule that amended 36 CFR part 800 to address the 1992 amendments to the NHPA. The ACHP subsequently published a revised final rule in the December 12, 2000 issue of the **Federal Register** (65 FR 77698). That final rule went into effect on January 11, 2001.

In the March 8, 2002, issue of the **Federal Register** (67 FR 10822), the Corps Regulatory Program published a notice to solicit comments on how its section 106 procedures should be revised to address the 1992 amendments to the NHPA and the ACHP's changes to the section 106 implementing regulations at 36 CFR part 800. In this notice, the Corps Regulatory Program also announced that it would be developing interim guidance to address the application of appendix C in consideration of the revised 36 CFR part 800 regulations until the rulemaking process was completed. The notice indicated that after the comment period ended, and the comments were fully considered, the Corps Regulatory Program may develop additional guidance, propose modifications to appendix C, develop programmatic agreements, or create other products to update its section 106 procedures.

On June 24, 2002, the Corps issued the interim guidance mentioned in the

previous paragraph. The 2002 interim guidance was intended to be a temporary measure until appendix C could be revised through Administrative Procedure Act rulemaking process, or through other approaches. The 2002 interim guidance discussed the identification of consulting parties for the section 106 process, consultation with Indian Tribes and Native Hawaiian Organizations, the use of memorandums of agreement to resolve adverse effects to historic properties, and the resolution of NHPA section 110(k) violations.

In 2004, the ACHP issued a final rule that made additional changes to 36 CFR part 800. That final rule was published in the July 6, 2004, issue of the **Federal Register** (69 FR 40544) and it went into effect on August 5, 2004. One change to the section 106 regulation confirmed that the ACHP could not require a Federal agency to change its determinations regarding whether its undertaking affected or adversely affected historic properties. Another modification of the ACHP's section 106 regulations reflected a court finding that section 106 does not apply to undertakings that are merely subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency. The ACHP's 2004 final rule also clarified the time period for objections to a Federal agency's "no adverse effect" findings.

In the September 27, 2004, issue of the **Federal Register** (69 FR 57662), the Corps published an advance notice of proposed rulemaking (ANPRM) to obtain public comment on issues related to Corps Regulatory Program's fulfillment of the requirements of NHPA section 106. The Corps solicited comments on how its permit application processing procedures should be revised in response to the 1992 amendments to the NHPA and the ACHP's 2000 and 2004 revisions to the section 106 implementing regulations at 36 CFR part 800. The Corps also asked for suggestions for facilitating government-to-government consultation with American Indian and Alaska Native governments, as well as consultation with SHPOs, Tribal Historic Preservation Officers (THPOs), Native Hawaiian Organizations, interested organizations, the regulated public, and other interested parties during a potential future rulemaking process.

In the 2004 ANPRM, the Corps Regulatory Program also invited comments on specific options for updating the Corps' permit application processing procedures to address the 1992 amendments to the NHPA and the revised 36 CFR part 800. Those options included: (1) revising appendix C to

incorporate the current requirements and procedures at 36 CFR part 800; (2) revoking appendix C and using 36 CFR part 800 when reviewing individual permit applications, and utilizing Federal agency program alternatives at 36 CFR 800.14 for general permits; (3) revoking appendix C and using 36 CFR part 800 for all individual permits and general permits; and (4) revoking appendix C and developing non-regulation alternative procedures in accordance with 36 CFR 800.14. The Corps also invited suggestions for other options that were not identified in the ANPRM.

On April 24, 2005, the Corps issued revised interim guidance<sup>2</sup> to address the changes to the section 106 implementing regulations that were finalized in 2000 and 2004. The 2005 revised interim guidance replaced the Corps Regulatory Program's interim guidance that was issued on June 24, 2002.

The Corps Regulatory Program issued additional interim guidance on January 31, 2007,<sup>3</sup> to supplement the interim guidance issued on April 25, 2005. The January 31, 2007, guidance clarified that when evaluating proposed activities that may be eligible for authorization by general permits, the Corps district is responsible for providing the SHPO/THPO with the opportunity to comment on "no effect" and "no adverse effect" determinations. The January 31, 2007, guidance also provided that Corps districts must complete the section 106 process before making a decision on whether to issue an individual permit or general permit verification.

In the June 3, 2022, issue of the **Federal Register** (87 FR 33756), the Assistant Secretary of the Army (Civil Works) published a notice to announce an effort to modernize the Civil Works program of the Corps through a number of related policy initiatives. In this notice, the Army stated that rulemaking on the Corps' Regulatory Program's procedures for complying with section 106 of the NHPA at 33 CFR part 325 appendix C is a priority policy initiative that would help modernize the Corps Regulatory Program with respect to section 106 of the NHPA. The Army acknowledged there has been longstanding disagreement between the Corps and ACHP regarding differences between the Corps' Regulatory Program appendix C and the regulations promulgated by ACHP governing the

section 106 process. These differences have resulted in lengthy and challenging consultations involving, for example, disputes about the scope of the undertaking subject to review, the Corps' "permit area," and the area of potential effects as defined in the section 106 implementing regulations. Further, under the regulations promulgated by ACHP, if an adverse effect cannot be avoided by modifying the undertaking, the resolution of adverse effects can be accomplished via the development of a Memorandum of Agreement or, for certain complex projects or programs, a Programmatic Agreement, while the Corps' regulations allow for resolution through a Memorandum of Agreement or permit conditioning, which is the equivalent of modifying the undertaking to avoid adverse effects. There are also timeline differences between the section 106 regulations and Appendix C, and the latter does not include Tribal or Native Hawaiian Organization consultation requirements. The June 3, 2022, notice also stated that the Corps Regulatory Program's reliance on appendix C and multiple guidance documents can result in inconsistency and confusion among the Federal agencies, the regulated public, SHPOs and THPOs, Tribes, Native Hawaiian Organizations, and others. In addition, Tribal Nations have also stated that the lack of updated and consistent implementing regulations reflecting the current NHPA language for the Corps' Regulatory Program indicates that the Corps is not meeting their statutory and Tribal trust responsibilities.

The Army asked for input in the June 2022 **Federal Register** notice on the best approach to modernizing the Corps Regulatory Program's procedures for the protection of historic properties. More specifically, the Army sought input on whether the Corps Regulatory Program should rely on the section 106 implementing regulations at 36 CFR part 800 promulgated by ACHP and remove appendix C from 33 CFR part 325, and whether any clarifying guidance is needed on the scope of the area of potential effects for the Corps Regulatory Program. The Army also asked whether development of a Program Alternative under 36 CFR 800.14 would provide clear and consistent NHPA section 106 implementation procedures for the Corps Regulatory Program, as well as improved Tribal and Native Hawaiian Organization consultation. Four virtual engagements were held with approximately 300 attendees in total, and the written docket received 127

<sup>2</sup> <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll11/id/2478> (accessed April 3, 2022).

<sup>3</sup> <https://usace.contentdm.oclc.org/utills/getfile/collection/p16021coll11/id/4042> (accessed April 3, 2022).

written letters on the appendix C topic, including from 29 Tribal Nations. A summary of the comments received from this effort can be found on the Army Civil Works web page.<sup>4</sup> Over 95% of commenters recommended the removal of appendix C from 33 CFR part 325 and the requirement that the Corps follow the section 106 implementing regulations (36 CFR part 800) in order to comply with section 106 of the NHPA. The primary comments received stated: appendix C is not compliant with section 106 of the NHPA and is not consistent with 36 CFR part 800; appendix C is not legally valid due to lack of ACHP approval; there is a lack of consistency across Corps districts in implementing section 106 of the NHPA and between the Regulatory Program and the rest of Corps Civil Works which complies with section 106 of the NHPA through 36 CFR part 800; the definition of undertaking used in appendix C results in an inappropriately narrow scope of review with inappropriate assessment of direct and indirect effects; and that appendix C does not adequately address consultation requirements.

#### **Description of Proposed Action for the Corps Regulatory Program's Adherence to the Section 106 Implementing Regulations at 36 CFR 800**

This proposed rule takes the next step in the Assistant Secretary of the Army (Civil Works)'s efforts to modernize the Corps Regulatory Program's procedures for the protection of historic properties pursuant to section 106 of the NHPA. In this proposed rule, the Corps is soliciting public input on removing appendix C from 33 CFR part 325. With appendix C removed from part 325, the Corps would utilize and follow the section 106 implementing regulations at 36 CFR part 800, including its requirements regarding consulting with Tribes and Native Hawaiian Organizations during the section 106 review process. As a supplement, the Corps would also work with the ACHP to draft and disseminate guidance for the Corps' Regulatory Program to include illustrative examples regarding how to apply the 36 CFR part 800 regulations to potential permitting scenarios. This would ensure clarity and consistency for the Corps as well as transparency for the regulated public as to how the Corps Regulatory Program would comply with section 106 of the NHPA through its implementing regulations at 36 CFR 800. In a separate

but parallel effort, the Corps would work with the ACHP, Tribal Nations, Native Hawaiian Organizations, SHPOs, THPOs, and other consulting parties to develop an appropriate program alternative under 36 CFR 800.14 to establish a more efficient and effective process for Corps compliance with section 106 for undertakings that rely on authorizations available through the Nationwide Permits program with a target of completion to align with the next issuance cycle for the Nationwide Permits (March 2026).

Under this proposed rule, the Corps Regulatory Program would amend its regulations for the processing of DA permit applications at 33 CFR part 325 by removing appendix C ("Procedures for the Protection of Historic Properties") from those regulations. If Appendix C is removed from 33 CFR part 325, the Corps Regulatory Program will instead follow the section 106 implementing regulations at 36 CFR part 800 in order to take into account effects on historic properties from undertakings requiring DA authorization, including the processing of individual permit applications and general permit verification requests. To provide clarity regarding the applicable procedures for compliance with section 106 of the NHPA during the processing of applications for DA authorization, the Corps is also proposing to revise paragraph (b)(3) to 33 CFR 325.2, which references proposed activities involving historic properties. The Corps is proposing to modify this paragraph by removing the reference to the "Corps National Historic Preservation Act implementing regulations." The Corps notes that the information provided in a public notice is preliminary information and comments gathered through the public notice process along with other information would be used to inform the section 106 review conducted by the Corps. The information in the public notice is only intended for disclosure and transparency purposes and is not intended to demonstrate or substitute for compliance with section 106. The Corps is proposing to revise section 325.2(b)(3) to state that when reviewing applications for DA permits, the Corps Regulatory Program will follow the section 106 implementing regulations at 36 CFR part 800 to comply with the requirements of section 106 of the NHPA. The Corps is also proposing to make conforming changes to its nationwide permit program regulations at 33 CFR 330.4(g) to remove references to appendix C and cite the regulations at 36 CFR part 800 instead.

#### **Proposed Conforming Changes to the Corps' Nationwide Permit Regulations**

The Corps Regulatory Program's regulations for implementing its nationwide general permit program are provided in part 330 of Title 33 of the Code of Federal Regulations. Section 330.4(g) addresses the Nationwide Permit Program's compliance with section 106 of the NHPA. Section 330.4(g) contains references to appendix C to 33 CFR part 325, and the Corps is 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. The Corps is also proposing to remove the remaining subparagraphs of paragraph (g) in the regulation because they are superseded by the current Nationwide Permits regulation and permits with general conditions issued on January 13, 2021 (86 FR 2744). The Corps would continue to utilize the January 2021 regulation regarding General Condition 18 for historic properties while the Corps and ACHP focus on developing a program alternative regarding the Nationwide Permits compliance with section 106 of the NHPA to align with issuance of the next cycle of Nationwide Permits in 2026. To be clear, once notification occurs under General Condition 18 of the Nationwide Permits, the Corps would then proceed in using 36 CFR part 800 under this proposed rule as Appendix C would be removed from the CFR.

#### **Expected Impact of This Rule**

This proposed rule would primarily impact the Corps, applicants for Corps authorizations, Tribal Nations, Native Hawaiian Organizations, Tribal and State Historic Preservation Officers, and the general public, including groups interested in historic and cultural resource preservation. The Corps will be impacted through an implementation change from appendix C to 36 CFR part 800 for implementing section 106 of the NHPA. This will require additional training as the Corps follows a new process for compliance. The remaining impacted groups, including Tribal Nations, will have the benefit of improved clarity and consistency for implementation of section 106 of the NHPA as applied to the Corps' Regulatory Program. This will include consistency within the Corps and consistency with the rest of the Federal government, including the Corps' own Civil Works programs. Note that this proposed change to the regulations cannot modify the Corps' existing statutory authorities.

<sup>4</sup> <https://api.army.mil/e2/c/downloads/2022/12/08/7e19d5a2/modernize-civil-works-frn-comments-on-appendix-c.pdf> (accessed April 19, 2023).

Army considered both a no action alternative as well as an alternative that would revise appendix C. The no action alternative would result in continued use of appendix C, which has not been updated to align with changes in section 106 of the NHPA and its implementing regulations at 36 CFR part 800, and therefore is not a viable alternative. The alternative to revise appendix C would essentially result in the same language found in 36 CFR part 800, rendering the revision inefficient and duplicative.

### Invitation for Public Comment

The Corps of Engineers is inviting public comment on all aspects of the proposal to remove appendix C from its regulations for the processing of applications for DA authorization at 33 CFR part 325 and its possible effects. If appendix C is removed, the Corps Regulatory Program would comply with section 106 of the NHPA by following and using the section 106 implementing regulations at 36 CFR part 800 for the processing of those permit applications (supplemented by a guidance document to be developed and disseminated jointly by the Corps and ACHP using existing regulations and ACHP guidance and providing illustrative examples). When a Corps district determines that a type of undertaking requiring DA authorization has the potential to cause effects to historic properties, it would use the section 106 implementing regulations at 36 CFR part 800 during the processing of the permit application. The Corps is also soliciting public comment on the proposal to modify paragraph (b)(3) of CFR 325.2 to identify the section 106 implementing regulations at 36 CFR part 800 as the regulations the Corps Regulatory Program would follow to comply with section 106 of the NHPA. Interested parties are also invited to provide comments on the Corps' proposed conforming changes to its Nationwide Permit regulations at 33 CFR 330.4(g), which addresses the requirements of section 106 of the NHPA for the Nationwide Permit program.

### Administrative Requirements

#### Plain Language

In compliance with the principles in the President's Memorandum of June 1, 1998 (63 FR 31885, June 10, 1998), regarding plain language, this preamble is written using plain language.

#### Paperwork Reduction Act

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid

Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under section 10 of the Rivers and Harbors Act of 1899, section 404 of the Clean Water Act, and section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements is maintained by the Corps of Engineers (OMB approval number 0710-0003, Application for a Department of Army Permit).

This proposed rule would not impose any additional information collection requirements or require the Corps Regulatory Program to propose changes to its current information collection requirements for activities that require DA authorization.

#### Executive Orders 12866, 13563, and 14094

This action is a significant regulatory action under Executive Order 12866 (58 FR 51735, October 4, 1993), Executive Order 13563 (76 FR 3821, January 21, 2011), and Executive Order 14094 (88 FR 21879, April 11, 2023) that was submitted to the OMB for review. It also followed the principles of section 2 of Executive Order 14094 through early engagement during the Modernize Civil Works effort (Notice of Virtual Public and Tribal Meetings Regarding the Modernization of Army Civil Works Policy Priorities; Establishment of a Public Docket; Request for Input; 87 FR 33756, June 3, 2022). A summary of comments received can be found on the Army Civil Works web page.<sup>5</sup>

#### Executive Order 13132

Executive Order 13132, "Federalism" (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." The proposal to remove Appendix C from the Corps' regulations at 33 CFR part 325 and use the regulations at 36 CFR part 800 during the Corps Regulatory Program's processing of individual permit applications and general permit verification requests does not have federalism implications. We do not believe that the proposed change in the Corps Regulatory Program's procedures for compliance with section 106 of the NHPA will have substantial direct effects on the states, on the relationship between the Federal government and

the states, or on the distribution of power and responsibilities among the various levels of government. The proposal will not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to this proposal.

#### Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of the proposed removal of appendix C from 33 CFR part 325, the use of the regulations at 36 CFR part 800 to comply with section 106 of the NHPA during the processing of applications for DA authorizations, and the proposed conforming changes to the Corps' nationwide permit program regulations at 33 CFR 330.4(g) on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of the proposed rule on small entities, I certify that this action will not have a significant impact on a substantial number of small entities. The Corps Regulatory Program's proposed procedures for compliance with section 106 of the NHPA would follow the section 106 implementing regulations at 36 CFR part 800. Small entities that need to obtain required DA authorizations through individual permits or general permits would have to support compliance with section 106 of the NHPA through the existing section 106 procedures at 36 CFR part 800. All other Federal agencies, unless they have an approved program alternative, use the 36 CFR 800 regulations and as such the small entities who apply for permits or work with the Federal government would be

<sup>5</sup> <https://api.army.mil/e2/c/downloads/2022/12/08/7e19d5a2/modernize-civil-works-frn-comments-on-appendix-c.pdf>, last accessed on April 19, 2023.

familiar with the procedures outlined in 36 CFR part 800. This familiarity would eliminate confusion and reduce any burdens on the part of the small entities under implementation of any finalized rule. In addition, the rest of the Corps Civil Works programs use the 36 CFR part 800 regulations so any small entity working with the Corps Civil Works programs would also already be familiar with implementation. Following appendix C under its current form can actually cause delays and expenditure of additional resources for small entities when multiple authorizations and Federal agencies are involved in addition to any required Corps Regulatory Program review as the small entity must comply with and understand two sets of implementing regulations. In addition, as appendix C has not been updated to align with changes in the NHPA, this proposed rule is a matter of bringing the Corps Regulatory Program into alignment with the NHPA.

#### *Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “Federal mandates” that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating a rule for which a written statement is needed, section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed, under section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling

officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The Corps has determined that the proposed removal of appendix C from its permit processing regulations at 33 CFR part 325 and the proposed conforming changes to 33 CFR 330.4(g) do not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. The proposed rule does not impose new substantive requirements and therefore does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year. Therefore, this proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. For the same reasons, we have determined that the proposed removal of appendix C from 33 CFR part 325 and the proposed conforming changes to 33 CFR 330.4(g) do not contain regulatory requirements that might significantly or uniquely affect small governments. Therefore, this proposed rule is not subject to the requirements of section 203 of UMRA.

#### *Executive Order 13045*

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), applies to any rule that: (1) is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The proposal to remove appendix C from 33 CFR part 325 and to make conforming changes to 33 CFR part 330 is not subject to this Executive Order because the proposed rule is not economically significant as defined in Executive Orders 12866 and 14094. In addition, the proposed removal of appendix C from 33 CFR part 325 does not concern an environmental health or safety risk that the Corps has reason to believe may have a disproportionate effect on children.

#### *Executive Order 13175*

Executive Order 13175, “Consultation and Coordination with Indian Tribal Governments” (published at 65 FR 67249 on November 9, 2000), requires agencies to develop an accountable process to ensure “meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications.” The phrase “policies that have Tribal implications” is defined in the Executive Order to include regulations and other policy statements or actions that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.”

This rulemaking action will have Tribal implications. This rulemaking action will have direct effects on Tribal governments, on the relationship between the Federal government and the Indian Tribes, or on the distribution of power and responsibilities between the Federal government and Indian Tribes. The 1992 amendments to the NHPA and the current regulations at 36 CFR part 800 require consultation with Indian Tribes when undertakings have the potential to cause effects to historic properties on Tribal lands or to historic properties of religious and cultural significance to Indian Tribes located off Tribal lands. Therefore, revising the Corps Regulatory Program’s procedures for the protection of historic properties by removing appendix C to 33 CFR part 325 and using the section 106 implementing regulations at 36 CFR part 800 for the processing of applications for DA permits, will have Tribal implications. In addition, a nationwide rulemaking action on procedures for compliance with section 106 of the NHPA inherently has Tribal implications.

Tribal Nations are encouraged to submit comments on the proposal to remove appendix C from 33 CFR part 325 (“Procedures for the Protection of Historic Properties”), the proposal to modify § 325.2(b)(3), and the proposed conforming changes to section 330.4(g) of the Corps’ Nationwide Permit Program regulations. A letter has also been disseminated to all federally recognized Tribes, Alaska Native Corporations, and Native Hawaiian Organizations notifying them of this proposed rule action and offering Nation-to-Nation consultation. In addition, a virtual meeting on this proposed rule action has also been scheduled to solicit input from Tribal Nations, Alaska Native Corporations,

and Native Hawaiian Organizations to provide multiple opportunities for meaningful engagement on this action. Comments are also encouraged from Indigenous peoples and communities who may not be federally recognized.

*Environmental Documentation*

The Corps has prepared a draft Environmental Assessment (EA) for this proposed rule. The draft EA is available for public comment in the [www.regulations.gov](http://www.regulations.gov) docket for this proposed rule (docket number COE–2023–0004).

*Congressional Review Act*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. We will submit a report containing the final rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The proposed removal of appendix C from the Corps Regulatory Program’s permit processing regulations at 33 CFR part 325 is not a “major rule” as defined by 5 U.S.C. 804(2), because it is not likely to result in: (1) an annual effect on the economy of \$100,000,000 or more; (2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

*Executive Orders 12898 and 14096*

Executive Order 14096, Revitalizing Our Nation’s Commitment to Environmental Justice for All, makes clear that the pursuit of environmental justice is a duty of all executive branch agencies and should be incorporated into their missions. Executive Order 14096 includes a whole-of-government definition of environmental justice.<sup>6</sup> Under Executive Order 14096, agencies must, as appropriate and consistent

with applicable law, identify, analyze, and address the disproportionate and adverse human health and environmental effects (including risks) and hazards of rulemaking actions and other Federal activities on communities with environmental justice concerns. Executive Order 14096 supplements the foundational efforts of Executive Order 12898 to address environmental justice. The proposed removal of appendix C and the use of 36 CFR part 800 to comply with the requirements of section 106 of the NHPA and the proposed additional conforming amendments to the Corps Regulatory Program’s regulations is not expected to negatively impact any communities (including to cause any disproportionate adverse impacts).

*Executive Order 13211*

The proposed removal of appendix C and the use of 36 CFR part 800 to comply with the requirements of section 106 of the NHPA is not a “significant energy action” as defined in Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

**Authority**

The Corps is issuing this proposed rule under the authority of section 404 of the Clean Water Act (33 U.S.C. 1344), sections 9 and 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. 401 *et seq.*) and section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended (33 U.S.C. 1413).

**List of Subjects**

*33 CFR Part 325*

Administrative practice and procedure, Dams, Environmental protection, Intergovernmental relations, Navigation (water), Water pollution control, Waterways.

*33 CFR Part 330*

Administrative practice and procedure, Intergovernmental relations, Navigation (water), Water pollution control, Waterways.

For the reasons stated in the preamble, the Corps proposes to amend 33 CFR chapter II as set forth below:

**PART 325—PROCESSING OF DEPARTMENT OF THE ARMY PERMITS**

- 1. The authority citation for part 325 continues to read as follows:

**Authority:** 33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; 33 U.S.C. 1413.

- 2. Amend § 325.2 by revising paragraph (b)(3) to read as follows:

**§ 325.2 Processing of applications.**

\* \* \* \* \*

(b) \* \* \*

(3) *Historic properties.* 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 paragraph (a)(2) of this section). 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.

\* \* \* \* \*

**Appendix C to Part 325—[Removed]**

- 3. Remove Appendix C to part 325.

**PART 330—NATIONWIDE PERMIT PROGRAM**

- 4. The authority citation for part 330 continues to read as follows:

**Authority:** 33 U.S.C. 401 *et seq.*; 33 U.S.C. 1344; 33 U.S.C. 1413.

- 5. Amend § 330.4 by revising paragraph (g) to read as follows:

**§ 330.4 Conditions, limitations, and restrictions.**

\* \* \* \* \*

(g) *Historic properties.* No activity which has the potential to cause effects to properties listed or properties eligible for listing in the National Register of Historic Places, is authorized until the district engineer has complied with the applicable provisions of 36 CFR part 800.

Approved by:  
**Michael L. Connor,**  
*Assistant Secretary of the Army (Civil Works).*  
 [FR Doc. 2024–02580 Filed 2–8–24; 8:45 am]  
**BILLING CODE 3720–58–P**

<sup>6</sup> See E.O. 14096, Section 2, 88 FR 25,251 (Apr. 26, 2023); *see also* E.O. 12898, 59 FR 7629 (Feb. 16, 1994).