



DEPARTMENT OF THE ARMY  
OFFICE OF THE ASSISTANT SECRETARY  
CIVIL WORKS  
108 ARMY PENTAGON  
WASHINGTON DC 20310-0108

NOV 07 2008

Mr. John Nau  
Chairman  
Advisory Council on Historic Preservation  
1100 Pennsylvania Avenue, Suite 803  
Washington, D.C. 20004

Dear Mr. Nau:

In view of your letter of October 9, 2008, I have instructed the Army Corps of Engineers to stand down its efforts to revise Appendix C, *Historic Properties*, the regulation currently in force for complying with section 106 of the National Historic Preservation Act under the Army's Regulatory Program. It is unfortunate that we continue to disagree on the law and policy regarding the definitions of "undertaking" and "area of potential effect." I regret that our legal and policy staff could not agree on how to address direct and indirect effects in a way that acknowledges that the Corps has limited jurisdiction over waters of the United States, including wetlands, involving private property or land under the jurisdiction of American Indian tribes or other agencies.

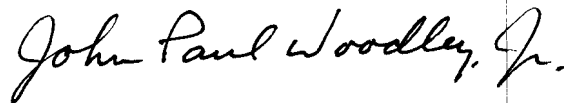
We evaluated most carefully the Federal Communications Commission (FCC) programmatic agreement on several occasions and repeatedly reported to your staff that for a number of reasons, this model would not work for the Army's Regulatory Program. At several points in interagency discussions your staff acknowledged that they understood why the FCC approach would not work. I continue to believe that the most logical and legally defensible approach, as well as the approach with the most flexibility, is to use the Corps' long-standing National Environmental Policy Act (NEPA) regulation (App. B) to help frame a reasonable, workable, balanced, and efficient regulatory scope of analysis. The Corps will therefore continue to use both Appendices B (NEPA) and C (Historic Properties), as these are the regulations that currently carry the force of law.

This office and the Corps teach a 3-day training course, Partnering with Indian Nations, that thoroughly addresses tribal consultation and Section 106 matters. Thus far, we have taught the course at six Corps district offices and trained about 350 staff. Corps Headquarters Regulatory Branch staff routinely assess the adequacy of the tribal and Section 106 aspects of their Regulatory Program training courses and adjust them, if necessary. This office will continue to work with the Corps to evaluate and update, as necessary, two interim guidance documents that were developed to address the amendments to the National Historic Preservation Act and the new 36 FR 800 regulations.

These actions will provide the protection of historic properties intended by Congress, while enabling critical economic development activities to continue moving forward consistent with the Corps regulatory programs. Although it would have been more desirable to update Appendix C, I am optimistic that the Corps will continue to fulfill its historic preservation requirements. The record shows that despite concerns about Appendix C expressed by your staff, since 1996 in cases involving nearly a million written authorizations, there has been only one case where consultation was terminated by the Corps, and less than 6 cases where this office received copies of letters asserting that a Corps District had foreclosed the ACHP's opportunity to comment. I have confidence that the Corps Tribal and State Historic Preservation Officer staff will continue to find ways to resolve nearly all future cases at the local level.

Please do not hesitate to contact me if you wish to discuss this matter further.

Very truly yours,

A handwritten signature in cursive script that reads "John Paul Woodley, Jr." The signature is written in black ink and is positioned above the typed name and title.

John Paul Woodley, Jr.  
Assistant Secretary of the Army  
(Civil Works)