

August 2, 2022

Ms. Stacey M. Jensen
Office of the Assistant Secretary of the Army (Civil Works)
108 Army Pentagon
Washington, DC 20310-0108

Submitted to the Federal eRulemaking Portal, www.regulations.gov

Re: 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 Fed. Reg. 33756 (June 3, 2022); Docket ID No. COE-2022-0006

Dear Ms. Jensen:

The National Rural Electric Cooperative Association (NRECA) respectfully submits these comments in response to the Department of the Army, Civil Works and the U.S. Army Corps of Engineers' (Corps) Notice of Virtual and Tribal Meetings Regarding Modernization of Army Civil Works Policy Priorities, Establishment of a Public Docket, and Request for Input (Notice) to inform several non-rulemaking and rulemaking policy initiatives.¹ NRECA appreciates the opportunity to provide comment on potential changes the Corps is considering. NRECA is a member of the Utility Water Act Group and the Energy and Wildlife Action Coalition and endorses the comments submitted by those organizations, incorporating them herein by reference.

I. NRECA and Its Electric Cooperative Members

NRECA is the national trade association representing nearly 900 electric cooperatives that are owned by the people that they serve and comprise a unique sector of the electric industry. From growing regions to remote farming communities, electric cooperatives deliver power to 42 million people and serve 92 percent of the nation's persistent poverty counties. NRECA members include 63 generation and transmission (G&T) cooperatives and 831 distribution cooperatives. All but three of these cooperatives are "small entities" under the Regulatory Flexibility Act, 5 U.S.C. §§ 601-612, as amended by the Small Business Regulatory Enforcement Fairness Act.

The G&T cooperatives generate and transmit power to distribution cooperatives that provide it to the end of line cooperative consumer members. Collectively, G&T cooperatives generate and transmit power to nearly 80 percent of the distribution cooperatives in the nation. The remaining distribution cooperatives receive power directly from other generation sources within the electric utility sector. Both distribution and G&T cooperatives share an obligation to serve their members by providing safe, reliable, and affordable electric service.

¹ 87 Fed. Reg. 33,756 (June 3, 2022).

Electric cooperatives operate at cost and without a profit incentive. Cooperatives do not have stockholders, and all costs are borne by the local cooperative consumer members. Therefore, cost-effective federal regulations and policies that minimize unnecessary burdens are very important to cooperatives' ability to provide affordable and reliable electricity to their members.

NRECA members own and maintain electric power lines servicing 56 percent of the nation's landmass, including 2.7 million miles of the nation's electric distribution lines. From 2010 to 2021, cooperatives have more than tripled their renewable power capacity, and they continue to plan projects to increase renewable generation. Cooperatives must build, maintain, repair, and replace electric transmission and distribution lines and affiliated structures, such as electric substations, to ensure the lights stay on for over 21 million businesses, homes, schools, and farms. In some instances, those projects and activities cross waters of the United States and require authorization from the Corps under Section 404 of the Clean Water Act, 33 U.S.C. § 1344, or Section 10 of the Rivers and Harbors Appropriation Act of 1899, 33 U.S.C. § 403.

Cooperatives depend on Corps permits to construct new power lines, including those connecting renewable power generation to the grid; improve the current transmission system; conduct routine line maintenance and repair; and manage vegetation to prevent trees and other vegetation from bringing down power lines or contributing to wildfires. Whenever and wherever possible, electric cooperatives seek to conform their construction, maintenance, and repair activities to Nationwide Permit (NWP) requirements. NWPs provide timelier and streamlined authorizations for projects and activities that have only minimal adverse environmental impacts. Cooperatives also seek individual permits when necessary. For those reasons, the Corps' administration of its Civil Works Program, particularly the CWA Section 404 program, is of utmost importance to NRECA members.

The Corps' Notice describes several related policy initiatives that have overlapping content and seeks input on potential changes to its existing policies which could have significant effects on electric cooperatives. Through its comments below, NRECA provides input on potential revisions to the Corps' National Historic Preservation Act (NHPA) regulations found at 33 C.F.R. Part 325, Appendix C.

II. The Corps Should Not Rescind Appendix C in Favor of the More General ACHP Regulations

Section 106 of the NHPA requires federal agencies to consider the effects on historic properties of undertakings that they carry out, permit, license, fund or approve. The Corps complies with Section 106 of the NHPA and other cultural resource laws and executive orders as they relate to the Corps' Regulatory Program through its regulations at 33 C.F.R. Part 325, Appendix C. In the Notice, the Corps describes statutory amendments to the NHPA that have occurred and notes that the Advisory Council on Historic Preservation (ACHP) has further amended its NHPA regulations at 36 C.F.R. Part 800 (ACHP regulations). It also notes some differences between Appendix C and the ACHP regulations. Additionally, the Corps states that rulemaking on Appendix C is a priority policy initiative and solicits input on the best approach to modernize its regulations. The Corps references options provided in an Advance Notice of Proposed Rulemaking issued by the Corps' Regulatory Program in 2004 (69 Fed. Reg. 57,662 (Sept. 27, 2004)) to gather input on updating Appendix C and specifically asks whether the Corps should rely on the ACHP regulations and rescind Appendix C.

NRECA recommends that the Corps maintain Appendix C and only make modifications that are needed to increase clarity and reduce direct conflicts with the ACHP regulations. While there may be some differences between Appendix C and the ACHP regulations, Appendix C is tailored to the Corps' Regulatory Program

and its authorities to issue permits pursuant to its regulations at 33 C.F.R. Parts 320–334. Appendix C sets out the procedures for the Corps and its district engineers to follow in order to fulfill the requirements of the NHPA. As the regulations state, “[the] appendix is intended to provide for the maximum consideration of historic properties within the time and jurisdictional constraints of the Corps regulatory program.”² It includes specificity and examples that are helpful to Corps personnel, State and Tribal Historic Preservation Offices, Tribes, interested members of the public, and permit applicants, such as cooperatives. These regulations are organized to align with its standard permit process.

Appendix C provides a specific definition of “permit area” that is tailored to the Corps’ permitting authorities³ and provides helpful examples, that explain the scope of Corps jurisdiction over an area, and by extension, the scope of the Section 106 review. For example, in the case of linear crossings of the waters of the United States, the Corps acknowledges that these projects “almost always *can* be undertaken without Corps authorization, if they are designed to avoid affecting the waters of the United States.”⁴ The Corps further explains that, as a result, “in the case of [a] linear crossing, the permit area shall extend in either direction from the [jurisdictional] crossing to that point at which alternative alignments leading to reasonable alternative locations for the crossing can be considered and evaluated.”⁵ This kind of specific regulatory language, tailored to the Corps’ authorities and permitting program, is vital for project proponents, including cooperatives, that build and maintain electric transmission and distribution lines and associated structures, and should be preserved.

Rescinding procedures tailored to the Corps’ Regulatory Program and permitting authorities in favor of the general ACHP regulations is likely to cause confusion and uncertainty for project proponents and agencies alike. It also could create inefficiencies and inconsistencies, and further increase workloads across Civil Works District Offices. Any such delays in the Corps’ permitting process could detrimentally impact project schedules.

Cooperatives and other applicants must coordinate their project planning activities to meet other deadlines, regulatory requirements, and time constraints, such as Federal Emergency Management Agency mitigation grant timelines, scheduled outages with independent system operators, and requirements to conduct work during certain seasons to avoid disturbing wildlife. Additional delays resulting from regulatory uncertainty could be detrimental to initiating and completing projects in an efficient and timely manner. Importantly, delays in project permitting and completion could have broader ramifications on the reliability and safety of our electric grid, as cooperatives undertake projects that ensure the continued provision of safe, reliable, and affordable electric service to their millions of members across the nation.

² Procedures for the Protection of Historic Properties, 33 C.F.R. pt. 325 App. C ¶ 2(f).

³ The “permit area” is the waters of the United States that will be affected, plus any structures and uplands affected by the jurisdictional discharge of dredged or fill material. For activity undertaken outside of the waters of the United States to be included within the “permit area,” a three-part test involving a “but for,” “integrally related,” and “directly associated” inquiry must be satisfied. *Id.* ¶ 1(g)(1).

⁴ *Id.* ¶ 1(g)(4)(ii) (emphasis in the original).

⁵ *Id.*

III. The Corps Should Only Make Modifications to Appendix C to Align with Statutory Amendments, Incorporate Corps Guidance, and Increase Clarity

Rather than rescinding its long-established, tailored regulations, the Corps should only make changes to Appendix C that are necessary to align with amendments to the NHPA, to incorporate existing Corps guidance on Appendix C, and to clarify regulatory uncertainty and inconsistency. NRECA urges the Corps to refrain from revising Appendix C where the differences between the Corps' regulations and the ACHP regulations are a matter of slight differences in terminology or are the result of tailoring Appendix C to the Corps' Regulatory Program.

IV. Conclusion

NRECA encourages the Corps to carefully consider the ramifications of any potential changes to Appendix C on its permitting processes and ensure that any modifications do not increase uncertainty or delay electric utility projects that are needed to continue to provide safe, reliable, and affordable energy to millions of Americans. NRECA appreciates the opportunity to comment on the Corps' Notice. Should you have any questions, please contact me at viktoria.seale@nreca.coop or (703) 907-5805.

Sincerely,



Viktoria Z. Seale
Regulatory Affairs Director