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Docket ID No. COE-2022-0006

August 2, 2022

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

**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. 33,756 (June 3, 2022), Docket ID No. COE-2022-0006**

Dear Ms. Jensen:

The Interstate Natural Gas Association of America (“INGAA”) and the American Gas Association (“AGA”) respectfully submit these comments in response to the U.S. Army Corps of Engineers’ (“Corps”) notice requesting public input on its effort to modernize the Civil Works program, including the Corps Regulatory Program. *See* 87 Fed. Reg. 33,756 (June 3, 2022). In particular, INGAA and AGA offer input on potential (i) changes to the Corps’ tribal consultation policy, (ii) revisions to the Corps’ National Historic Preservation Act (“NHPA”) implementing regulations, and (iii) guidance for the Corps’ regulatory program on environmental justice (“EJ”).

INGAA is a non-profit trade association that advocates for regulatory and legislative positions of importance to the interstate natural gas pipeline industry in the United States. INGAA’s 26 member companies transport the vast majority of the nation’s natural gas through a network of nearly 200,000 miles of pipelines. The interstate pipeline network serves as an indispensable link between natural gas producers and the American homes and businesses that use the fuel for heating, cooking, generating electricity, and manufacturing a wide variety of U.S. goods, ranging from plastics to paint to medicines and fertilizer.

AGA, founded in 1918, represents more than 200 local energy companies that deliver clean natural gas throughout the United States. There are more than 77 million residential, commercial and industrial natural gas customers in the U.S., of which 95 percent — more than 73 million customers — receive their gas from AGA members. AGA is an advocate for natural

gas utility companies and their customers and provides a broad range of programs and services for member natural gas pipelines, marketers, gatherers, international natural gas companies, and industry associates. Today, natural gas meets more than one-third of the United States' energy needs. AGA members rely on interstate natural gas pipelines for the natural gas supply they need in order to provide affordable, reliable natural gas distribution service to homes and businesses.

INGAA and AGA members' pipeline construction and maintenance operations often unavoidably occur in areas containing "waters of the United States" ("WOTUS") and thus require Corps authorization under section 404 of the Clean Water Act ("CWA") and/or section 10 of the Rivers and Harbors Act ("RHA").

Below is a summary of INGAA and AGA's comments in response to the Corps' notice:

- With regard to potential changes to the Corps' Tribal consultation policy, INGAA and AGA:
  - Agree that it would be helpful to clarify how Tribal consultation should be incorporated into the Corps' regulatory program.
  - Believe it would be inappropriate for the Corps to engage in Tribal consultation on approved jurisdictional determinations ("AJDs").
  - Recommend that the Corps include reasonable time limits for Tribal consultation.
- With regard to potential revisions to the Corps' NHPA implementing regulations, INGAA and AGA:
  - Generally support the first option in the Corps' 2004 Advanced Notice of Proposed Rulemaking ("ANPRM"), to revise Appendix C to incorporate the current requirements and procedures in the Advisory Council on Historic Preservation's ("ACHP's") regulations.
  - Urge the Corps to clarify that:
    - The Federal Energy Regulatory Commission ("FERC"), as the lead agency for interstate natural gas pipeline projects, is responsible for fulfilling the federal obligations under the NHPA.
    - District Engineers may authorize portions of a linear project before the entire right-of-way is surveyed or issue a permit conditioned upon FERC completing NHPA section 106 consultation.
    - It is appropriate for the Corps to rely on a Programmatic Agreement to satisfy NHPA section 106 requirements

when the project sponsor is currently unable to access certain tracts of land to complete cultural resource surveys.

- With regard to potential EJ guidance.
  - INGAA and AGA continue to encourage and support the important goals of EJ.
  - The Corps' existing practices and guidance provide for appropriate EJ reviews and community participation.
  - The Corps should consider modifying its outreach practices by including a number of outreach methods (e.g., multi-lingual mailings) to further enhance its processes to identify and notify disadvantaged communities.
  - The Corps should recognize the ongoing efforts across the Administration to address EJ issues and ensure that Corps guidance does not create inconsistencies in the permitting process.
  - The Corps should align how it identifies disadvantaged communities with the Council on Environmental Quality ("CEQ") and EPA's current and future guidance and practices.
  - The Corps should continue to follow existing guidance on evaluation of disproportionate impacts, which provides that adverse impacts themselves do not constitute "EJ" impacts unless they are also disproportionate.
  - The Corps should take care to ensure that EJ considerations do not get conflated with matters purely of opposition to a project.
  - The Corps should make efforts to identify and reconcile EJ goals with requirements to permit the least environmentally damaging practicable alternative, which, for pipeline projects, may be existing rights-of-way.

## **I. Comments on Potential Changes to the Corps' Tribal Consultation Policy**

- A. INGAA and AGA agree that it would be helpful to clarify how Tribal consultation should be incorporated into the processes associated with the Corps' regulatory program.

The Corps' regulatory program relies on regulations primarily from 1986 (33 C.F.R §§ 320-330; 51 Fed. Reg. 41,206 (Nov. 13, 2986) and 1990 (33 C.F.R. § 325, Appendix C at 55 Fed. Reg. 27,003 (June 29, 1990)), which provide very limited references to Tribal consultation. For pipeline projects that are authorized through the Corps' Nationwide Permit ("NWP") program, General Conditions 17 (Tribal Rights), 20 (Historic Properties), and 21 (Discovery of

Previously Unknown Remains and Artifacts) also protect tribal interests. General Condition 17, for example, mandates that no activity authorized by a NWP “may impair reserved tribal rights, including, but not limited to, reserved water rights and treaty fishing and hunting rights.” 86 Fed. Reg. at 2,868.

The existing Corps policy from 2012 is very general and there is no consolidated, comprehensive guidance specific to the Corps’ regulatory program for Tribal consultation. These multiple references often lead to inconsistency and a lack of clarity for project proponents, Tribes, and Corps staff as to how Tribal consultation should be conducted during the permitting process.

INGAA and AGA have recent experience with the Corps’ tribal policies. For example, one member company, using EPA screening tools, identified several Tribes as potentially interested in a natural gas distribution project. As a result, the company created a targeted communication plan to keep the communities informed, which included sending informational letters providing resources for legal assistance and briefing the leaders of state-recognized tribes.

Many member pipeline companies employ tribal liaisons on large projects to facilitate communications with federally- and state-recognized Tribes. Often, the company coordinates with tribal representatives to conduct a comprehensive cultural resources survey, involving field visits, consultation meetings, and interviews with tribal elders. In one case, after engaging in this extensive process, which included input and participation from dozens of tribes, the company committed to an implementation plan. Under that plan, tribal monitors were onsite during construction and had authority to stop work to allow for the evaluation of any previously unidentified cultural site that might be discovered. For this project, the Corps also completed 86 Tribal consultation conference calls over the span of four years and requested that the Tribes provide comments concerning areas of concern that should be considered as part of the Corps’ review. In another case, the company sent letters to federally- and state-recognized tribes in the project area, as well as tribes that had historically been located nearby, seeking input on a proposed plan to abandon part of an interstate natural gas pipeline.

Given our members’ experience with this important issue, INGAA and AGA encourage the Corps to clarify how project proponents and Corps staff should engage with Tribal Nations during the CWA section 404/RHA section 10 permitting processes.

B. INGAA and AGA members believe it would be inappropriate for the Corps to engage in Tribal consultation on AJDs.

The Corps solicits input on conducting Tribal consultations on AJDs as a policy matter, including consideration of indigenous traditional ecological knowledge (“ITEK”). *See* 87 Fed. Reg. at 33,758/3.

The regulations implementing the CWA and RHA authorize “district engineers to issue formal determinations of the applicability of the [CWA or RHA] to ... tracts of land.” 33 C.F.R. § 320.1(a)(6). This is the regulatory basis for an AJD, which the Corps describes as “[a]

definitive, official determination that there are, or that there are not, jurisdictional aquatic resources<sup>1</sup> on a parcel.” RGL 16-01. AJDs are not subject to public comment or review.

1. The consequences of an AJD are not relevant to the factual and legal analysis required to make a jurisdictional determination.

Because the U.S. Supreme Court found in 2016 that AJDs are “final agency actions” under the Administrative Procedure Act (“APA”),<sup>2</sup> some Tribes and Corps officials have suggested that AJDs should be subject to government-to-government consultation. 87 Fed. Reg. at 33,758/2.<sup>3</sup> However, what makes an AJD “final,” is not relevant to the Corps’ analysis as to whether a particular aquatic feature is jurisdictional. In *Hawkes*, the Court held that AJDs constitute “final agency action” and are therefore subject to judicial review. In general, two conditions must be satisfied for an agency action to be “final” under the APA: “First, the action must mark the consummation of the agency’s decision-making process,” and “second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. 154, 178 (1997). As to the second prong, the *Hawkes* court found that the definitive nature of an AJD gives rise to “direct and appreciable legal consequences.” 136 S. Ct. at 1814. This is because an AJD that states a property does not contain jurisdictional waters creates a five-year safe harbor from enforcement, and an AJD that finds jurisdiction deprives property owners of this safe harbor. *Id.* “Each of those effects is a legal consequence.” *Id.* Thus, if any party believes that the AJD is wrong and it impacts them, the determination can be challenged.

While *Hawkes* concluded that AJDs have direct and appreciable legal consequences on property owners, those effects are irrelevant to the Corps’ determination as to whether a parcel contains WOTUS. Identifying jurisdictional waters involves a two-part inquiry – (1) whether the area in question meets the *physical* criteria to be a wetland or non-wetland water (*e.g.*, a tributary) within the meaning of applicable regulations, guidance, and policy, and (2) whether the wetland or non-wetland water meets the *legal* criteria to be a “navigable water.” The first part of the inquiry is a technical determination based on the technical characteristics of the aquatic feature, and the second part of the inquiry involves a legal determination as to whether the criteria of the rule defining jurisdictional “waters of the United States” is satisfied. This analysis does not consider the consequences of the Corps’ determination, nor should it.

2. Considering factors beyond the established two-part inquiry could lead to unintended consequences.

When preparing an AJD, the Corps lacks discretion to consider factors other than the factual and legal criteria set forth in the rule defining WOTUS. Where agencies lack discretion to consider certain factors, courts have held that consultation to address those factors is not required. For example, in the Endangered Species Act (“ESA”) context, the U.S. Supreme Court held that ESA section 7 consultation is not required when the agency lacks discretion to consider impacts to federally-listed species. *See, e.g., National Ass’n of Home Builders v. Defenders of*

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<sup>1</sup> The terms for jurisdictional aquatic resources in the CWA are “navigable waters” or WOTUS. 33 U.S.C. § 1362(7).

<sup>2</sup> *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016).

<sup>3</sup> *See also* Letter from Commander, Los Angeles District, Corps to Earthjustice (Dec. 17, 2020).

*Wildlife*, 551 U.S. 644, 671 (2007) (“The regulation’s focus on ‘discretionary’ actions accords with the commonsense conclusion that, when an agency is *required* to do something by statute, it simply lacks the power to ‘insure’ that such action will not jeopardize endangered species.”); *Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1225 (9th Cir. 2015) (“[D]etermining *whether* the statutory criteria have been achieved does not trigger ESA’s consultation requirement”) (emphasis in original).

If the Corps determines it has discretion to consider effects on Tribes as part of a jurisdictional determination, then that could open the door for the argument that the Corps has discretion to consider other factors, such as effects on federally-listed species and other environmental resources, triggering ESA section 7 consultation or environmental analysis under the National Environmental Policy Act (“NEPA”). The Corps should avoid the suggestion that it may consider factors beyond the elements of the two-part test.

3. The appropriate time for Tribes to provide information as to which waters should be jurisdictional under the CWA is during the WOTUS rulemakings.

Under Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, (November 6, 2000), consultation and coordination with Tribal Governments occurs during the development of Federal policy. “Policies” that have tribal implications which trigger such requirements include “regulations, legislative comments or proposed legislation, 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.” Executive Order 13175, § 1(b). While AJDs provide an official confirmation of whether WOTUS exists on a property, the legal status of the property (i.e., “the distribution of power and responsibilities”) had already been determined by the CWA and the Agencies’ WOTUS definition. That is why the Agencies consulted with Tribes during the WOTUS rulemakings, a more appropriate and efficient part of the process to engage with Tribes. Engaging in Tribal consultation on AJDs would significantly delay a process that is supposed to occur quickly and would be inconsistent with Corps policy. See 33 C.F.R. § 320.1(a)(4) (“the Corps believes that applicants are due a timely decision. Reducing unnecessary paperwork and delays is a continuing Corps goal.”).

Finally, the AJD process does not allow for public input or comments from third parties, even adjacent landowners. Therefore, it would be inappropriate for the Corps to grant Tribes greater access to the AJD process than parties who may be subject to more direct effects.

C. The Corps should include reasonable time limits for Tribal consultation.

The Corps also seeks input on ways in which the existing policy has or has not worked, and specific procedures that should/could be identified to ensure that consultation is regular, meaningful, and robust. See 87 Fed. Reg. at 33,758/3.

We recognize that Tribes have historically raised issues about the lack of meaningful engagement early in the application process, including archaeological investigations. We have

attempted to improve our processes to improve Tribal outreach and have found that one of the barriers to meaningful Tribal consultation is the Tribes' lack of response (or delay in response) to communications regarding a proposed project. We think there is an opportunity here to address both of these issues by establishing a clear consultation process that starts early but contains real milestones and deadlines.

INGAA and AGA members devote significant time and resources to outreach to Tribes during the planning process, but often receive no response from Tribes or will receive a response much further along in the planning process making it difficult to adapt to Tribal concerns. For example, one company reached out to Tribes that may have an interest in an interstate natural gas pipeline project by sending letters inviting the Tribes to participate in FERC's environmental review and NHPA section 106 consultation process. Two years later, FERC completed NHPA section 106 consultation by signing a Programmatic Agreement with numerous agencies, including the Corps. Four years after the letters were distributed to tribes, and two years after consultation was complete, one tribe sent a letter to FERC requesting consultation and amendments to the Programmatic Agreement, ultimately resulting in litigation.

To address these concerns the Corps should include, in any Tribal consultation policy, reasonable time limits for Tribes to respond to consultation requests. In addition, we acknowledge the Tribes' concerns about the lack of meaningful engagement early in the application process and some Tribes' limited resources to evaluate and respond to notices from project proponents or the Corps. Therefore, we view this notice as an opportunity for the Corps to provide a clear process for how project proponents should engage in Tribal consultation early in the permitting process and provide reasonable timelines for the process to conclude.

## **II. Comments on Potential Revisions to the Corps' NHPA Implementing Regulations**

### **A. INGAA and AGA support revising Appendix C.**

The Corps seeks input on revising its regulations governing section 106 of the NHPA. NHPA section 106 requires federal agencies to consider the effects on historic properties of projects they carry out, assist, fund, permit, license, or approve (i.e., "undertakings"). On June 29, 1990, the Corps issued regulations at 33 C.F.R. Part 325, Appendix C that established procedures consistent with the requirements of the NHPA and other historic preservation laws applicable to the Corps' regulatory program.

Since the Corps issued Appendix C, however, Congress has amended the NHPA and the ACHP has revised its regulations. For example, the 1992 amendments to the NHPA recognized and expanded the role of Indian Tribes and Native Hawaiian organizations in the national preservation program. In response, the Corps has issued multiple guidance documents. (*See* 2002, 2005, and 2007 interim guidance). The Corps' reliance on Appendix C and multiple guidance documents can result in inconsistency and confusion among project proponents and Corps staff.

The key differences between Appendix C and the ACHP regulations include the following:

- Appendix C defines “undertaking” as “the work, structure or discharge *that requires a Department of the Army permit* pursuant to the Corps regulations.” (emphasis added). ACHP regulations define 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...requiring a Federal permit, license or approval.” 36 C.F.R. § 800.16(y) (emphasis added). Thus, the scope of an undertaking under the ACHP regulations could be interpreted more broadly than the Appendix C definition.
- The Corps uses “permit area” to describe the activities subject to review, whereas the ACHP defines these activities as the “area of potential effect.” For example, the Corps provides three tests that must all be satisfied for an activity undertaken outside WOTUS to be included within the “permit area.” *See* App. C, § 1(g)(1)(i)-(iii).
- Under the regulations promulgated by ACHP, the resolution of adverse effects can be accomplished via a Memorandum of Agreement or, for certain complex projects or programs, a Programmatic Agreement, while Appendix C allows for resolution through a Memorandum of Agreement or permit conditioning.
- Appendix C and the ACHP regulations include different timelines within the review process.

The Corps issued an ANPRM in 2004, 69 Fed. Reg. 57,662 (Sept. 24, 2004), to gather input on a potential update to its implementing regulations but never proceeded with the rulemaking. Specifically, the Corps requested comments on the appropriateness and feasibility of the following options:

1. Revise Appendix C to incorporate the current requirements and procedures in the ACHP regulations found at 36 C.F.R. Part 800 (Protection of Historic Properties),
2. Revoke Appendix C and use 36 C.F.R. Part 800, Subpart B (the NHPA section 106 process regarding the effects of Federal agency actions on historic properties) when reviewing individual permit applications and utilize Federal agency program alternatives at 36 C.F.R. Section 800.14 for general permits,
3. Revoke Appendix C and use 36 C.F.R. Part 800, Subpart B for all individual permits and general permits, or
4. Revoke Appendix C and develop non-regulation alternative procedures in accordance with 36 C.F.R. Section 800.14.

In the Corps’ 2022 notice, the agency solicits input on the best approach to modernize Appendix C, including consideration of the options noted above. INGAA and AGA generally



support the first option in the Corps' 2004 ANPRM – to revise Appendix C to incorporate the current requirements and procedures in the ACHP regulations.

This option would allow the Corps to maintain the regulatory approach that most directly and effectively addresses the situations presented to the Corps in carrying out its mission, specifically the regulation of dredge and fill activities. Revoking Appendix C, called for by Options 2-4, would move the Corps into the more generally drafted ACHP regulations. These broadly written regulations do not provide the regulated public with the Corps-specific provisions included within Appendix C and would likely to lead to additional confusion. The ACHP regulations also cannot be as effective as Appendix C in guiding Corps personnel in administering the Corps' regulatory program.

Revoking Appendix C also would have an adverse ripple effect on other aspects of Corps regulatory programs and procedures that rely on Appendix C for compliance with the NHPA. For example, NWP General Condition 20 (Historic Properties) prevents the Corps from permitting under a NWP any activity which may affect a historic property until the District Engineer has complied with Appendix C. *See* 86 Fed. Reg. at 2869-70 (Jan. 13, 2021).

While the notice emphasizes that the Army “wants to best ensure compliance with” the ACHP regulations and “best reflect the policy priorities of the Administration,” the Corps should also ensure that any revisions comply with the CWA. Appendix C reaffirms the scope of Corps jurisdiction and authority by focusing on the discharges of dredged or fill material into WOTUS. For example, Appendix C provides helpful instruction regarding what parts of a pipeline the Corps might consider to be within the “permit area.” The “permit area” is the WOTUS, plus any uplands affected by the jurisdictional discharge of dredged or fill material and which satisfy a three-part test involving a “but for,” “integrally related,” and “directly associated” inquiry. *See* App. C, § 1(g)(1)(i)-(iii). Nevertheless, we think that the “permit area” for linear utility projects could benefit from more specificity in Appendix C or at least include examples clarifying how the definition should be applied in practice.

Several other aspects of Appendix C also provide useful and particularized guidance on this and other issues raised by the Corps regulatory program. *See, e.g.*, App. C, § 5(f) (describing Corps' responsibilities for review within the permit area); App. C, § 3(b)(1)-(3) (describing treatment of areas of extensive modification, areas created in modern times, and de minimis projects). In contrast, the ACHP regulations more generally define the “area of potential effects” 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.” 36 C.F.R. § 800.16(d). The ACHP regulations also generally define an “undertaking” as “a project, activity or program ... requiring a Federal permit, license or approval.” *Id.* § 800.16(y). The ACHP regulations' general description is not a helpful guide for regulated entities or Corps personnel in deciding which area of a pipeline the Corps must examine for historic properties.

Should the Corps rescind or revoke Appendix C, it would need to re-establish, through guidance and other non-regulatory methods, the appropriate scope for the Corps' review. This would result in less regulatory certainty for project proponents. By making changes to Appendix C, which may be necessary in light of statutory and regulatory changes, the Corps can ensure that

Appendix C remains consistent with the NHPA and the CWA. In addition, retaining and updating Appendix C would allow the Corps to incorporate many of the procedural aspects of the ACHP regulations that are not as effectively addressed in Appendix C, including clear steps throughout the process, clear deadlines for responding to opportunities to consult at each step, and a clear statement that once a step is complete that the process will move forward (no backsliding). This approach is preferable to abandoning 32 years of operating under Appendix C.

B. If the Corps decides to revise Appendix C, INGAA and AGA will provide more specific comments at that time. For now, INGAA and AGA urge the Corps to clarify the following points:

1. FERC, as the lead agency for interstate natural gas pipeline projects, is responsible for fulfilling the federal obligations under the NHPA.

Under the Natural Gas Act (“NGA”),<sup>4</sup> proponents of interstate natural gas pipeline projects must secure a Certificate of Public Convenience and Necessity (“Certificate”) from FERC authorizing the construction of the pipeline. Congress, recognizing that a project proponent will have to secure permits from numerous other agencies, including the Corps, sought to streamline the entire process. Pursuant to section 313 of the Energy Policy Act of 2005,<sup>5</sup> FERC is designated as the lead agency for the purposes of coordinating all applicable federal authorizations, including review under the NEPA, associated with the overall project. 15 U.S.C. § 717n(b)(1). FERC is further required to establish a schedule for all federal authorizations for the project, and other federal agencies exercising authority over the project, to ensure an expeditious review process. *Id.* § 717n(c). In addition to FERC’s statutory authority, Corps guidance and the Corps’ 2005 Memorandum of Understanding (“MOU”) with FERC set forth procedures for the Corps to coordinate its processing of CWA section 404 permits with FERC. The MOU states that the Corps will “use the FERC record to the maximum extent practicable and as allowed by law,”<sup>6</sup> and the accompanying Corps memorandum states that “[t]he Corps should be responsive to FERC timelines.”<sup>7</sup>

The Corps should similarly defer to FERC’s consultation under NHPA section 106. Corps guidance states that “Districts should not be undertaking section 106 compliance for other Federal agencies with greater jurisdiction,” and “Districts should make sure they are the lead agency before undertaking the Section 106 process.” 2005 Guidance,<sup>8</sup> § 6(b). Also, “Section 106 compliance should not be duplicated by agencies.” *Id.* But, Appendix C states that “[i]n processing a permit application, the district engineer will *generally* accept for Federal or Federally assisted projects the Federal agency’s or Federal lead agency’s compliance with the requirements of the NHPA.” *See* App. C, § 2(c) (emphasis added). And Corps NWP regulations

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<sup>4</sup> 15 U.S.C. § 717 et seq.

<sup>5</sup> Pub. L. 109-58, 119 Stat. 594 (2005).

<sup>6</sup> MOU Supplementing the Interagency Agreement on Early Coordination, ¶ 7 (June 30, 2005).

<sup>7</sup> Memorandum for Dir. of Civil Works, MOU between Corps and FERC for Interstate Natural Gas Pipeline Projects, at 2 (July 11, 2005).

<sup>8</sup> Corps Directorate of Civil Works, *Revised Interim Guidance for Implementing Appendix C of 33 CFR Part 325 with the Revised Advisory Council on Historic Preservation (ACHP) Regulations at 36 CFR Part 800* (Apr. 25, 2005) (“2005 Guidance”).

plainly state that “[n]o activity which may affect properties listed or properties eligible for listing in the National Register of Historic Places, is authorized until the DE has complied with the provisions of 33 CFR part 325, appendix C.” 33 C.F.R. § 330.4(g). It is unclear whether this responsibility can be delegated to another agency.

Also, ACHP regulations state “[i]f more than one Federal agency is involved in an undertaking, some or all the agencies *may designate a lead Federal agency*, which shall identify the appropriate official to serve as the agency official who shall act on their behalf, fulfilling their collective responsibilities under section 106.” 36 C.F.R. § 800.2(a)(2). This suggests that the Corps is not obligated to designate FERC as the lead agency for purposes of NHPA compliance and may choose to conduct its own consultation process.

Thus, given the ambiguity in Corps regulations and guidance and the ACHP regulations, the Corps should clarify that where an interstate natural gas pipeline project requires FERC authorization, the Corps may rely on FERC’s compliance with NHPA section 106 to satisfy the Corp’s NHPA obligations.

Also, where FERC is the lead agency for interstate natural gas pipeline projects, the Corps should clarify that FERC is responsible for complying with NHPA and considering the areas within which the project may directly or indirectly cause alterations in the character or use of historic properties, including those areas that fall outside the Corps’ stated NHPA responsibility.

Under ACHP regulations, “[i]n consultation with the [SHPO], the agency official shall ...[d]etermine and document the area of potential effects [and] [r]eview existing information on historic properties within the area of potential effects....” 36 C.F.R. § 800.4(a). The “area of potential effects” is defined 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....” 36 C.F.R. § 800.16(d). FERC’s “undertaking,” thus, extends the entire length of an interstate natural gas pipeline, for purposes of assessing effects on historical properties. It is therefore appropriate for FERC, as the agency with greater jurisdiction and the designated lead agency, to fulfill the agencies’ collective responsibilities under NHPA section 106.

2. District Engineers may authorize portions of a linear project before the entire right-of-way is surveyed or issue a permit conditioned upon FERC completing NHPA section 106 consultation.

In some circumstances, projects may be unable to perform historic resource surveys along the entire right-of-way due to landowner restrictions. Access may be restricted for surveying purposes because project sponsors do not receive eminent domain authority until after FERC issues a Certificate of Public Convenience and Necessity.<sup>9</sup> The Corps should clarify that a 100 percent field survey is not required to complete consultation.

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<sup>9</sup> See FERC, *Draft Guidelines for Reporting on Cultural Resources Investigations for Natural Gas Projects*, at § 2.2.2 (Jan. 2017).

ACHP regulations only require agencies to make a “reasonable and good faith effort” to identify historic properties. 36 C.F.R. § 800.4(b)(1). A reasonable and good faith review effort may consist of or include “background research, consultation, oral history interviews, sample field investigation, and field survey.” *Id.* Courts have held that there is no requirement for an agency to use all these methods. *See, e.g., Summit Lake Paiute Tribe of Nevada v. U.S. Bureau of Land Mgmt.*, 496 Fed. App’x 712 (9th Cir. 2012). ACHP guidance also states that an effort may consist of one or more methodologies, and that the regulations do not require identification of all historic properties. ACHP Guidance, *Meeting the “Reasonable and Good Faith” Identification Standard in Section 106 Review*, at 2 (“ACHP Guidance”).

A reasonable and good faith identification effort does not require (i) identification of every historic property within the area of potential effects and (ii) ground verification of the entire area of potential effects. ACHP Guidance at 3. Courts have recognized this principle and held that 100% field survey is not required to complete consultation. *See, e.g. Wilson v. Block*, 708 F. 2d 735 (D.C. Cir. 1983) (35% of survey of area found to be sufficient; “a complete survey is not required where both the partial survey, and all other evidence, indicates that a complete survey would be fruitless”). *See also S. Utah Wilderness All. v. Norton*, 326 F. Supp. 2d 102, 114–15 (D.D.C. 2004) (holding agency fulfilled its NHPA obligations even though the project sponsor agreed to conduct additional surveys following authorization). Moreover, the areas that have yet to be surveyed are often beyond the Corps’ NHPA jurisdiction, which is limited to the “permit area” as defined in 33 C.F.R. § 325, Appendix C. Therefore, it would be appropriate for the Corps to clarify that District Engineers may authorize portions of a pipeline prior to completion of NHPA section 106 consultation for the entire pipeline.

3. It is appropriate for the Corps to rely on a Programmatic Agreement to satisfy section 106 requirements when the project sponsor is currently unable to access certain tracts of land to complete cultural resource surveys.

The Corps should clarify that District Engineers may satisfy NHPA section 106 requirements via a Programmatic Agreement addressing areas where cultural resource surveys have yet to occur. Under ACHP regulations, an agreement may be used “when effects on historic properties cannot be fully determined prior to approval of an undertaking.” 36 C.F.R. § 800.14(b)(1). “[W]here access to properties is restricted, the agency official may use a phased process to conduct identification and evaluation efforts. The agency official may also defer final identification and evaluation of historic properties if it is specifically provided for in a ... Programmatic Agreement executed pursuant to § 800.14(b).” 36 C.F.R. § 800.4(b)(2).<sup>10</sup> Thus, the Corps should clarify that Programmatic Agreements are appropriate where pipeline sponsors may be unable to conduct historic resource surveys along the entire right-of-way due to landowner restrictions. Once the project sponsor has authorization to access previously restricted properties, historic resource surveys would be performed and potential affects to

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<sup>10</sup> “The regulations allow an agency to pursue a ‘project [Programmatic Agreement (PA)]’ ... under certain circumstances. The most common situation where a project PA may be appropriate is when, prior to approving the undertaking, the federal agency cannot fully determine how a particular undertaking may affect historic properties or the location of historic properties and their significance and character.” ACHP, Guidance on Agreement Documents, available at: [https://www.achp.gov/do\\_you\\_need\\_a\\_Section\\_106\\_agreement](https://www.achp.gov/do_you_need_a_Section_106_agreement).

historic resources, if identified, would be addressed in accordance with the Programmatic Agreement.

### III. Comments on Potential Environmental Justice Guidance

#### A. INGAA and AGA encourage and support the important goals of EJ.

According to EPA, EJ is “the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income, with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”<sup>11</sup> The Corps seeks comment on how to incorporate EJ into its regulatory program. On March 15, 2022, the Assistant Secretary of the Army for Civil Works issued a memorandum to the Corps providing interim guidance on EJ titled, *Implementation of Environmental Justice and the Justice40 Initiative* (“Interim Guidance”). The Interim Guidance does not address, however, the Corps’ regulatory program. The Corps intends to issue guidance specific to the regulatory program but seeks input on how best to incorporate consideration of EJ into the regulatory program.

INGAA and AGA members work to establish an open dialogue with disadvantaged communities affected by a project to understand their concerns and to address those concerns, to the extent possible. For example, the public outreach for one 15-mile intrastate natural gas transmission pipeline conducted by one of our members included:

- hosting a community workshop at a local school, providing residents and property owners with an opportunity to learn more about the project, view maps, and ask questions;
- developing a project website that includes a project overview fact sheet, project maps, a community questionnaire, project FAQs, and a project phone number and email;
- distributing a community questionnaire to neighbors of the project to collect public feedback;
- sending project update letters to affected property owners; and
- briefing local elected officials and legislative representatives.

As a result of this type of open dialogue, members often make commitments to landowners affected by their projects to address their concerns or to mitigate any potential adverse impacts.<sup>12</sup> Specifically, as a result of public outreach listed above, a concern was raised about access to a wastewater treatment facility during construction. The company met with local

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<sup>11</sup> EPA, Learn About Environmental Justice (last updated Sept. 22, 2021), available at: <https://www.epa.gov/environmentaljustice/learn-about-environmental-justice>.

<sup>12</sup> See, e.g., INGAA, Commitments to Landowners (providing a 3-day response time to landowner concerns), available at <https://www.ingaa.org/File.aspx?id=6849&v=fb123717>.

officials and coordinated a solution, incorporating access to the facility into its construction plans.

INGAA and AGA believe there is substantial value in the Corps' consideration of potential impacts from its programs, policies, and activities on disadvantaged communities. Accordingly, INGAA and AGA appreciate the opportunity to provide the following comments on the Corps' continued efforts to meaningfully evaluate potential EJ impacts.

B. The Corps' existing practices and guidance provide for appropriate EJ reviews and community participation.

While not specifically required by the CWA or NEPA, it is appropriate for the Corps to consider EJ in the disposition of its NEPA obligations, consistent with Executive Order 13985 and the March 15, 2022 interim guidance.<sup>13</sup> Because NEPA is a procedural statute, which does not mandate a specific substantive outcome, the Corps is “not required to select the course of action that best serves environmental justice, only to take a ‘hard look’ at environmental justice issues.”<sup>14</sup> As a general matter, INGAA and AGA believe the Corps' existing practices, guidance, and tools, including the Climate and Economic Justice Screening Tool and EPA's EJScreen Tool, allow for adequate stakeholder input and appropriate EJ reviews.

For example, using Esri's USA Demographics 2020 and EPA EJScreen 2020 datasets, one company's EJ review for its proposed natural gas pipeline project found census block groups that contain minority populations and low income populations. The report also identified a number of churches within the vicinity of the proposed project route. As a result, the company created a targeted communication plan to keep the communities informed, which included sending informational letters to potential heirs of properties and providing them with resources for legal assistance and providing project information to church leaders.

The Corps specifically seeks input on what forms of outreach are best to engage disadvantaged and underserved communities. 87 Fed. Reg. at 33,761/3. The Corps should consider including the following outreach methods to further enhance its processes to review EJ matters, which INGAA and AGA members have successfully deployed for recent projects: (i) multi-lingual mailings on project and public awareness, (ii) informational posters, (iii) newspaper ads, and (iv) project updates for local officials.

INGAA and AGA recommend that, prior to developing any new procedures or guidance, the Corps inventory its existing practices and, where necessary, codify those practices. However, NEPA does not change or enlarge the Corps' substantive jurisdiction; whatever the appropriate scope of the Corps' procedural NEPA analysis may be, as dictated by the CWA and RHA, NEPA does not provide a vehicle for the Corps to go beyond the boundaries of its regulatory authority.

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<sup>13</sup> See Memorandum from Michael L. Connor, Assistant Secretary of the Army (Civil Works), *Implementation of Environmental Justice and the Justice40 Initiative* (March 15, 2022).

<sup>14</sup> *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) (“*Sabal Trail*”); *Latin Ams. for Social & Econ. Dev. v. Fed. Highway Admin.*, 756 F.3d 447, 475-77 (6th Cir. 2014).

- C. The Corps should recognize the ongoing efforts across the Administration to address EJ issues and ensure that Corps guidance does not create inconsistencies in the permitting process.

Currently, there are a number of initiatives underway by federal agencies to develop and establish guidance for how to address EJ matters. To avoid getting too far ahead of these key federal interagency initiatives and avoid inconsistencies across agencies, INGAA and AGA encourage the Corps to defer any major changes to its EJ practices until the expert agencies (e.g., EPA and CEQ) and interagency work groups provide additional guidance for federal agencies to inform their respective EJ processes and protocols.<sup>15</sup>

Indeed, Executive Order 14008 (86 Fed. Reg. 7619, 7622-7623 (January 27, 2021)), directs the establishment of both a White House Office of Domestic Climate Policy, a White House Environmental Justice Interagency Council (“Interagency Council”), which is to be chaired by the Chair of CEQ and comprised of members from other federal agencies, a White House Environmental Justice Advisory Council (“Advisory Council”), which is comprised of members of the public with EJ knowledge and experience, and a National Climate Task Force, consisting of membership from the leadership of 21 federal agencies. The efforts of the Interagency Council, Advisory Council, and the National Climate Task Force are in conjunction with and follow the ongoing work of the Interagency Working Group on Environmental Justice, which was established by and facilitates the implementation of Executive Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations*. 59 Fed. Reg. 7629 (Feb. 16, 1994).

The Corps should let the Interagency Council and expert agencies take the lead on these issues to avoid administrative inconsistencies or uncertainty, which would not serve any of stakeholders involved in the Corps’ regulatory program.

The Corps should also defer to FERC on EJ matters, when it is the lead agency for interstate natural gas pipeline projects. A recent example of FERC’s extensive analysis of potential impacts to disadvantaged communities was included in the NEPA analysis for an interstate natural gas pipeline project. FERC performed an extensive analysis in which it evaluated whether effects of the project and associated compressor stations would fall disproportionately on EJ populations through a detailed comparison of the percentage of EJ populations affected by the project to the percentage of EJ populations that would be affected by the land-based major route alternatives that were proposed and evaluated. In addition, the pipeline developer and FERC paid particular care and analysis to the location of proposed above-ground pipeline facilities of the project, including the location of a proposed compressor station, and the final route was decided upon based on the substantial comments FERC received from the communities located in or around the project and other interested stakeholders. As a result of this input, the company agreed to relocate the station to a non-EJ census tract.<sup>16</sup> For interstate natural gas pipeline projects, given FERC’s existing processes to assess impacts to

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<sup>15</sup> The Corps should also consider state EJ initiatives (e.g., New York, Pennsylvania, California, etc.) and the potential for overlap between the state and federal permitting processes.

<sup>16</sup> See Final Environmental Impact Statement at 4-50-51, *Florida Southeast Connection, LLC*, FERC Docket No. CP14-554 (Dec. 18, 2015).

disadvantaged communities and its broader jurisdiction, the Corps should defer to FERC on this issue.

FERC has also established an Office of Public Participation to perform outreach with disadvantaged communities and landowners to improve their participation in FERC proceedings, such as pipeline certificate applications.

- D. The Corps should align how it identifies disadvantaged communities with CEQ and EPA’s current guidance and practices.

The processes and guidance established by CEQ and EPA have generally been effective and have resulted in appropriate reviews as they pertain to disadvantaged communities. The Corps’ standards and definitions should align with this approach to ensure consistency across agencies. This is particularly important given that many INGAA and AGA member projects involve multiple federal reviews and authorizations, including consultation under NHPA section 106 and the CWA’s public interest review, which may also involve consideration of EJ issues. In addition, the Corps should continue to rely on CEQ’s Climate and Economic Justice Screening Tool and EPA’s EJScreen tool to help identify disadvantaged communities. The Corps should not move to advance standards that may differ from those of the expert agencies and councils tasked with developing new EJ tools and guidance.

- E. The Corps should continue to follow existing guidance on evaluation of disproportionate impacts, including Executive Order 12898 and relevant EPA and NEPA guidance, which provide that adverse impacts themselves do not constitute EJ impacts unless they are also disproportionate.

The Corps should continue to focus its EJ analyses on impacts which are both disproportionately high and adverse. Executive Order 12898 directs federal agencies to identify and address, as appropriate, disproportionately high adverse effects from federal actions on minority populations and low-income populations. Since the Executive Order was signed in 1994, federal agencies have taken various steps to implement Executive Order 12898 and address EJ issues. CEQ and EPA, in particular, have issued guidance on how to (i) appropriately identify disadvantaged communities, e.g., using online tools, census data, and demographic statistics, (ii) evaluate resource-specific impacts on those communities, (iii) identify disproportionately high and adverse impacts, and (iv) propose mitigation measures.<sup>17</sup> “[T]he identification of a disproportionately high and adverse impact on minority and low income populations does not preclude a proposed agency action from going forward, nor does it necessarily compel a conclusion that a proposed action is environmentally unsatisfactory.” EPA Guidance at 38. Instead, an agency “may wish to consider heightening its focus on meaningful public engagement regarding community preferences, considering an appropriate range of

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<sup>17</sup> See Executive Order 14008 (Feb. 1, 2021); CEQ, Climate and Economic Justice Screening Tool (beta), available at <https://screeningtool.geoplatform.gov/>; CEQ, *Environmental Justice: Guidance Under the National Environmental Policy Act* (1997); EPA, *Promising Practices for EJ Methodologies in NEPA Reviews* (Mar. 2016) (“EPA Guidance”), available at [https://www.epa.gov/sites/production/files/2016-08/documents/nepa\\_promising\\_practices\\_document\\_2016.pdf](https://www.epa.gov/sites/production/files/2016-08/documents/nepa_promising_practices_document_2016.pdf).



alternatives (including alternative sites), and mitigation and monitoring measures.” *Id.* If the Corps issues separate EJ guidance, it should incorporate similar principles.

The Corps should also take care to ensure that EJ considerations do not get conflated with matters purely of opposition to a project, such as legal challenges brought by large national environmental non-governmental organizations reflecting a general policy of opposition to any new natural gas or oil infrastructure project.

- F. The Corps should make efforts to identify and reconcile the tensions between its policies on environmental harm and evaluation of potential adverse impacts on disadvantaged communities.

Given the section 404(b)(1) guidelines’ requirements to authorize only the least environmentally damaging practicable alternative, *see* 40 C.F.R. § 230.10(a), Corps practice is often to encourage the siting of pipeline projects in areas of already established infrastructure of similar types, such as existing pipeline rights of way. The Corps should acknowledge that this approach may sometimes create competing demands, particularly because disadvantaged communities may more likely be located in and around areas with existing energy infrastructure. This tension can sometimes put the applicant in a difficult position.

The Corps should carefully address these considerations in its comparison of alternatives under NEPA and the section 404(b)(1) guidelines. There could be some limited scenarios in which a practicable alternative has significantly fewer adverse impacts on the aquatic ecosystem but disproportionate impacts on a disadvantaged community as compared to a different pipeline route. It would be helpful for the Corps to clarify in future guidance for staff and applicants how to address such scenarios.

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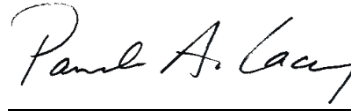
INGAA and AGA appreciate your consideration of these comments, and we welcome additional dialogue.

Sincerely,



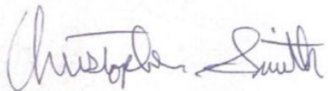
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