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DEPARTMENT OF STATE
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HISTORIC PRESERVATION OFFICE
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September 9, 2002

Mr. Louis L. Wheeler
Senior Project Manager
License Renewal and Environmental Impacts Program
Division of Regulatory Improvements Programs
Office of Nuclear Reactor Regulations
Nuclear Regulatory Commission
Washington, DC 20555-0001

Dear Mr. Wheeler:

We received your March 7 letter regarding the Nuclear Regulatory Commission's (NRC) opinion that for compliance with Section 106 of the National Historic Preservation Act, the presence of any historic property along the Keeney Transmission Line are beyond the area of potential effects. We believe this opinion to be inconsistent with the Advisory Council on Historic Preservation's (Council) regulations and with information provided to this Office during the initiation Section 106 consultation for the proposed relicensing of the Peach Bottom Atomic Power Station (PBAPS). In a July 5, 2000 letter sent to Ms. Joan Larrivee, of my staff, from James Hutton, Director of Licensing for PECO Nuclear, Mr. Hutton identified the original undertaking included authorizing the construction in 1974 of the Keeney Transmission Line as the "Only one new transmission corridor [which] was required to integrate PBAPS into PECO Energy's bulk power system when the facility was constructed. This line, from Peach Bottom to the Keeney Substation in Delaware, is the only transmission line/corridor under review during this [current] license renewal process." In this letter initiating consultation with this Office, Mr. Hudson effectively identified reauthorizing of the Keeney Transmission line as an element of the licensing renewal, the undertaking, and as part of the Area of Potential Effect, as per the Council's definition of an *undertaking* (36 CFR 800.16(y)) and the project *Area of Potential Effect* (36 CFR 800.16(d)). Especially important to the definition of undertaking is the notion that it includes "the geographical area or areas within which a undertaking *may directly or indirectly* (my emphasis) cause alterations in the character or use of historic properties, if such properties exist." It is important to note here, there is no discussion of ownership or control which limits the consideration of whether to include any location or property therein within the boundary of the APE. Such limitations would

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hamper the ability to adequately identify and consider to the fullest extent, what types and degrees of impact or effect an undertaking would have on historic properties for any type of undertaking at any possible location. The Council does not set such restrictions on determining a project undertaking and its APE. The reauthorization of the Keeney Transmission Line, as part of this project, even though it is not owned or controlled by the licensee is not pertinent to the identification of historic properties and the evaluation of effects which the undertaking may have on those historic properties which are present within the APE. (See the attached information provided by Laura Dean of the Council as it pertains to determining an undertaking's area of potential effect: Points to remember Item #2; and, Colorado River Indian tribes v. Marsh, 605F. Supp.1425 (C.D. Cal. 1985.) Additionally, in the *Lower Delaware Valley Transmission System Agreement, Schedule 3, Revision No.1*, Page 1 of 2, which you included as an attachment to your March 7 letter, there was an agreement for DP & L (now Conectiv) to construct the Delaware section of the Keeney Transmission Line. Essentially, even while the licensee did not construct this line, it was clearly a contractual arrangement to provide the licensee with the facilities to convey power to its bulk power system, as referenced in Hutton's July 2000 letter. It is part of the undertaking and should be included in the project APE.

The identification of the Chesapeake and Delaware Feeder Canal (Feeder Canal), as an historic property within the project APE, was made by my staff during the consultation process. Comments were provided in an attachment to your March 7 letter, prepared by the licensee, as to their opinion on the non-eligibility of this property. It is important to remember that if there are disagreements between the federal agency and the SHPO as to the eligibility of a particular property, it is the federal agency's responsibility, using 36 CFR Part 61 qualified professionals, to seek a formal determination of eligibility from the Secretary of the Interior, pursuant to 36 CFR 800.4(c)(2) of the Council's regulations. To our knowledge this has not been done.

Finally, it is our contention the Feeder Canal, which we believe may be eligible for listing in the National Register of Historic Places, has been and is continuing to be subjected to destruction due to the lack of adequate maintenance of the transmission line. A bridge which was clearly present in the 1950-1960s which crossed the Feeder Canal was either removed or left to deteriorate. Sometime in the 1970's, the canal was filled in crusher run rock to provide access along this transmission line and to specifically cross this body of water. This in filling has resulted in the loss of the physical features of the Feeder Canal where it is crossed by the transmission line and the subsequent blocking of the flow of water within the Canal. It is our opinion, the lack of maintenance and/or retention of a bridge which spanned the canal and the lack of security to prevent unauthorized use of the access road or any other area along the banks of the Feeder Canal within the transmission right-of-way has caused significant deterioration and alteration of the

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character of this property and therefore constitutes adverse effects due to destruction and neglect under 36 CFR 800.5(b)(2)(i) and (vi) of the Council's regulations. Towards trying to reverse or correct these adverse effects and to prevent further deterioration, the recommendations made in my October 29 , 2001 letter were presented.

By copy of this letter, we are requesting the Advisory Council to participate in the consultation process and provide guidance on expediting the review for this undertaking, pursuant to Appendix C, Criteria 2 of their regulations. We believe there has been an inconsistent application of their regulations during the Section 106 consultation for the relicensing of the PBAPS and the Keeney Transmission Line.

If you have any questions or desire to discuss this matter further, please contact Faye Stocum at the address above. Thank you.

Sincerely,



Daniel R. Griffith
State Historic Preservation Officer

Enclosures

cc: Don Klima, ACHP
Faye Stocum

ibility and inclusion

OPTIONAL FORM 106 (7-90)

FAX TRANSMITTAL

of pages **6**

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GENERAL SERVICES ADMINISTRATION

If a property meets the criteria for inclusion in the National Register, this doesn't automatically result in its being listed. To be listed, a property must be formally nominated using NPS forms and following NPS procedures. Agencies are not required to nominate properties in order to comply with Section 106, although Section 110(a)(2) of NHPA does require agencies to have programs in place for nominating federally owned or controlled historic properties.

If an owner of private property objects to including his or her eligible property in the National Register, they may block it from being listed. Effects on such a property are not exempt from Section 106 review, however, since the property remains eligible for the Register. Private owners may do as they wish with their historic property, provided that they are not receiving Federal assistance or approvals. If they are, the Federal agency involved must comply with Section 106 before the project can be implemented.

Identifying historic properties

Agencies are required to make a "reasonable and good faith effort to carry out appropriate identification efforts. . . ." [36 CFR § 800.4(b)(1)] This responsibility rests squarely with the Federal agency and cannot be delegated (with the exception of certain HUD programs). The agency can solicit the help of applicants, grantees, or others to carry out this work, but it is up to the agency to see that the work is carried out properly and to make appropriate use of the results.

In consultation with the SHPO/THPO, the agency determines the scope of needed identification efforts and takes action to identify potential historic properties. The agency then evaluates the significance of those properties and decides whether any could be affected by the undertaking.

Determining an undertaking's area of potential effects

The agency's first step in establishing the scope of needed identification efforts is to determine the undertaking's area of potential effects. This is done in consultation with the

SHPO/THPO. [36 CFR §800.4(a)(1)] The area of potential effects (APE) 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. 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)]

If there is disagreement concerning the extent of the APE, the consulting parties may seek guidance and assistance from the Council. Also, the Council can elect to issue an advisory comment to the agency on its APE determination. [36 CFR § 800.9(a)] If this occurs, the agency has to consider the views of the Council in reaching a final decision regarding the boundaries of the APE.

Points to remember. When defining an area of potential effects (APE), agencies need to remember that:

1. The APE is defined before identification begins, when it may not yet be known whether any historic properties actually are within the APE. To determine an APE, it is not necessary to know whether any historic properties exist in the area.
2. An APE is not determined on the basis of land ownership.
3. The APE should include:
 - all alternative locations for all elements of the undertaking;
 - all locations where the undertaking may result in disturbance of the ground;
 - all locations from which elements of the undertaking (e.g., structures or land disturbance) may be visible or audible;
 - all locations where the activity may result in changes in traffic patterns, land use, public access, etc.; and

Court Decisions

project. The Corps prepared the plan and obtained the Council's concurrence in the plan in 1983.

The court rejected plaintiffs' claim that the Corps had not complied with the provision of the MOA that required a treatment plan. First, the court determined that Section 800.6(c)(3) of the Council's regulations, which states that a ratified MOA shall evidence satisfaction of the Federal agency's responsibility under Section 106 of NHPA, creates a "presumption of compliance." 567 F. Supp. at 989-90. Even without this presumption, the court held that the Government's documents demonstrated compliance with the terms of the MOA. *Id.* at 990.

The court dismissed plaintiffs' NHPA claims and held that further action withholding possession of the condemned lands on these grounds would not be warranted. *Id.* The Fifth Circuit affirmed. 733 F.2d at 380.

The district court also found that the Corps' programmatic environmental impact statement (EIS) prepared under the National Environmental Policy Act on the entire waterway project sufficiently addressed the impacts of the project on cultural resources. No site-specific EIS for Cedar Oaks and Barton township was needed. 567 F. Supp. at 991. The appellate court affirmed. 733 F.2d at 381.

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Colorado River Indian Tribes v. Marsh, 605 F. Supp. 1425 (C.D. Cal. 1985).

Plaintiffs, Indian tribes and an environmental organization, sought to enjoin the U.S. Army Corps of Engineers from issuing a permit to a developer for the placement of riprap along the western shore of the Colorado River in California. The purpose of the riprap was to stabilize the riverbank and establish a permanent boundary line for private property that the developer proposed to subdivide and develop into a residential and commercial community. The site of the development,

known as the River City project, was directly across the river from the Colorado River Indian Reservation and directly south of additional portions of the reservation lying on the west side of the river. The land abutting the development site on the west was owned by the United States and administered by the Bureau of Land Management (BLM) of the Department of the Interior. The BLM land, an archeological district, included several significant cultural and archeological sites.

The developer applied to the Corps for the riprap permit in April 1978. The following fall, the Corps prepared an environmental assessment under the National Environmental Policy Act (NEPA) and concluded that, because significant impact upon the environment would result from the developer's proposed project, an environmental impact statement (EIS) should be prepared. The draft EIS was prepared and published in September 1979. In January 1981, the Corps informed the developer that a thorough cultural resources survey of resources on and near the proposed development site was needed before the Corps could complete the final EIS.

In June 1981, however, before the survey was begun, the Corps retracted the draft EIS as a result of changes in Corps policy regarding its jurisdictional authority and announced that no EIS and no further cultural resource evaluation were required. The Corps' decision to retract the draft EIS was apparently made in conformity with its proposed cultural resource regulations published in 1980, regulations that had never been adopted in final form or incorporated into the Code of Federal Regulations.

Under the proposed regulations, the Corps was required to assess both direct and indirect effects of its permits on properties listed or officially determined eligible for listing in the National Register of Historic Places. This review requirement extended beyond the area in which the permit would have direct physical effects to the "affected area," that area within which direct and indirect effects could be reasonably expected to occur.

Federal Historic Preservation Case Law

For properties that were not listed or officially determined eligible for listing in the Register, but that might be eligible for the Register, the proposed regulations limited the Corps' review to the area within the Corps' jurisdiction—the "permit area," defined as that area which would be physically affected by the proposed work.

The Corps issued the riprap permit to the developer on May 21, 1982. Plaintiffs then filed this action, alleging that the Corps failed to comply with NEPA and the National Historic Preservation Act (NHPA).

After discussing the factors that must be present for a preliminary injunction to be granted, the court addressed the likelihood of plaintiffs' success on the merits of their case. Defendants first contended that no EIS was necessary under NEPA because Federal involvement in the River City project was minimal and "major Federal action" was therefore lacking. The court disagreed, finding that NEPA requires assessment of both direct and indirect effects of a proposed Federal action on both "on site" and "off site" locations 605 F. Supp. At 1433. That there was minimal Federal involvement in the project did not excuse defendants from compliance with NEPA, for "it is not the degree of Federal involvement that influences the standard of living of our society, but is instead the potential and degree of impact from development that bears upon the overall welfare and enjoyment of our society." *Id.* at 1432. "Major Federal action" does not have a meaning under NEPA independent of "significantly affecting the quality of the human environment." *Id.* at 1431.

The Corps' limitation of the scope of its environmental assessment of the bank stabilization activities and its resulting conclusion that there would be no impact on cultural resources were improper and contrary to the mandate of NEPA. *Id.* at 1433.

The court next addressed plaintiff's claim that the Corps had violated NHPA by distinguishing between properties actually listed in or determined

eligible for the National Register and properties that might be eligible for the Register and by affixing different historic review responsibilities to each. The court held that this distinction between properties and different scopes of responsibility was at odds with NHPA and the regulations of the Advisory Council on Historic Preservation implementing Section 106 of NHPA. *Id.* at 1438. Using the Council's definition of "eligible property" in Section 800.2 of its regulations as encompassing all properties that meet the criteria for inclusion in the Register, the court concluded that, in enacting NHPA, Congress intended to protect all properties that are of inherent historic and cultural significance and not just those that have been "officially recognized" by the Secretary of the Interior. *Id.* The court cited Executive Order No. 11593 and Section 110(a) of NHPA as support, finding that Federal agencies must exercise caution to ensure the physical integrity of those properties that appear to qualify for inclusion in the National Register. *Id.* at 1435.

The Corps' action in assessing the effects on properties that might qualify for inclusion in the National Register solely within the "permit area" and its failure to survey and consider the effects on like properties in the broader "affected area" was a breach of its responsibilities under NHPA. *Id.* at 1438.

Finally, the Court granted a preliminary injunction, finding that irreparable harm to cultural and archeological resources as a result of the development was possible. *Id.* at 1434-39.

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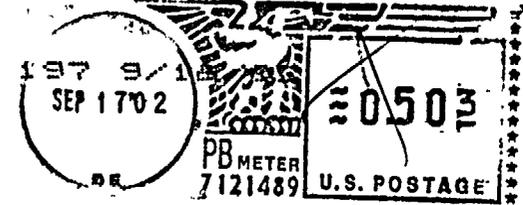
Sierra Club v. Watt, No. CV-83-5878 AWT (C.D. Cal. Nov. 18, 1983), *aff'd sub nom. Sierra Club v. Clark*, 774 F.2d 1406 (9th Cir. 1985).

Plaintiffs challenged both the Bureau of Land Management's (BLM) California Desert Conservation Management Plan, which designated a

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