

June 7, 2011

MEMORANDUM TO: Scott Flanders, Director
Division of Site and Environmental Reviews
Office of New Reactors

Larry Camper, Director
Division of Waste Management and Environmental Protection
Office of Federal and State Materials and Environmental Programs

Brian Holian, Director
Division of License Renewal
Office of Nuclear Reactor Regulation

FROM: Jack Cushing, Senior Project Manager/**RA**/
Division of Site and Environmental Reviews
Office of New Reactors

Jennifer Davis, Senior Project Manager/**RA**/
Division of Waste Management and Environmental Protection
Office of Federal and State Materials and Environmental Programs

SUBJECT: STAFF GUIDANCE FOR WITHHOLDING SENSITIVE INFORMATION
ABOUT HISTORIC RESOURCES IN ACCORDANCE WITH THE
NATIONAL HISTORIC PRESERVATION ACT

Enclosed is the guidance for withholding sensitive information about historic and cultural resources in accordance with the National Historic Preservation Act. This guidance supersedes the guidance contained in memorandum dated April 7, 2010, ADAMS accession number: ML100550730.

Enclosure: As stated

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Jennifer Davis, FSME/DWMEP/EPAB, 301-415-3835

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Memo to Scott Flanders, Larry Camper and Brian Holian from Jack Cushing and Jennifer Davis dated June 7, 2011

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Protecting Sensitive Information about Historic Resources

INTRODUCTION

The National Historic Preservation Act (NHPA) requires Federal agencies to take into account the effects of their “undertakings” on historic properties listed in or eligible for listing on the *National Register of Historic Places* (the National Register). NHPA implementing regulations (36 CFR 800.16(y)) defines an 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.” The NRC must therefore consult on the impacts of its “undertakings” on historic properties during its licensing activities.

The terms “Historic Property” and “eligible for inclusion in the National Register” are defined in 36 CFR 800.16 as:

Historic property means any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior. This term includes artifacts, records, and remains that are related to and located within such properties. The term includes properties of traditional religious and cultural importance to an Indian tribe or Native Hawaiian organization and that meet the National Register criteria.

The term *eligible for inclusion in the National Register* includes both properties formally determined as such in accordance with regulations of the Secretary of the Interior and all other properties that meet the National Register criteria.

Historic properties include those resources that are eligible for listing on the *National Register of Historic Places* (National Register). The criteria for eligibility are listed in 36 CFR Part 60.4 and include (i) association with significant events in history; (ii) association with the lives of persons significant in the past; (iii) embodiment of distinctive characteristics of type, period, or construction or display of high artistic value; and (iv) sites or places that have yielded or are likely to yield information important in prehistory or history (ACHP, 2010). Normally a property needs to be at least 50 years old to be eligible for listing. However, there is an exception to the age criterion in 36 CFR 60.4 (g) for properties of exceptional importance. Section 106 of the NHPA (16 USC 470f) establishes a consultation process that seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation among the agency official and other parties with an interest in the effects of the undertaking on historic properties, commencing at the early stages of project planning. The goal of the Section 106 consultation is to identify historic properties potentially affected by the undertaking, assess its effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties.

In the process of complying with Section 106 requirements under the NHPA or with the National Environmental Policy Act of 1969 (NEPA), sensitive information about these resources may become part of the NRC’s official records. The NHPA sets forth criteria under which sensitive cultural information related to a historic property should be withheld from public disclosure. In accordance with those criteria, certain details should be withheld from the public to protect the

historic resources by, for example, withholding location information to prevent looting and desecration.

If an applicant for a license or permit submits a report containing maps or other information of this type then the information may need to be considered sensitive, and distribution should be restricted appropriately.

The purpose of this guidance is to provide instructions on when and how to withhold from the public sensitive information about historic resources. The following sections describe applicable laws and guidance from the Advisory Council on Historic Preservation (ACHP) on withholding sensitive historic resource information.

This guidance applies to NRC staff and NRC's contractors who perform NHPA Section 106 consultation.

NATIONAL HISTORIC PRESERVATION ACT OF 1966, AS AMENDED

NHPA is the principal federal law dealing with historic preservation. As defined in Section 301 of the Act, "historic property" or "historic resource" means "any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion on the National Register, including artifacts, records, and material remains related to such a property or resource."

The NRC often uses its NEPA process to facilitate compliance with NHPA Section 106 as provided for in 36 CFR 800.8. Information related to historic resources that is developed through any agency process may need to be withheld from public disclosure under relevant NHPA requirements. NHPA specifically restricts disclosure of sensitive information about historic resources that meets the criteria of Section 304(a) and 36 CFR 800.11(c).

As previously discussed, NHPA Section 106 requires the NRC to "take into account" the effect of its "undertakings" on historic resources. The historic preservation review process (Section 106 of the NHPA) is outlined in 36 CFR Part 800. Section 304 of NHPA (and the ACHP regulations at 10 CFR 800.11(c)) requires the NRC, to "withhold from disclosure to the public, information about the location, character, or ownership of a historic resource if the agency and the Secretary of the Interior determine that disclosure may (1) cause a significant invasion of privacy, (2) risk harm to the historic resource, or (3) impede the use of a traditional religious site by practitioners." For purposes of Section 304 the Secretary of the Interior acts through the Keeper of the National Register of Historic Places, a position within the National Park Service (NPS). Therefore, the NRC, upon determining that the withholding criteria of Section 304 have been met, consults with the Keeper of the Register to make a determination to withhold information from the public. Example letters to the Keeper of the Register are attached to this guidance.

Once a determination to withhold information from the public has been made, the Keeper of the Register, in consultation with the NRC, will determine who (if anyone) may have access to the information. If the information was developed in order to comply with NHPA Section 106, the NPS must consult with the ACHP in making the determinations regarding withholding the information from the public.

FREEDOM OF INFORMATION ACT

The Freedom of Information Act (FOIA) carries a presumption of disclosure; the burden is on the government—not the public—to substantiate why information may not be released. Thus, a written request under FOIA requires the NRC, as a federal agency, to release its records or explain why they cannot be released. FOIA lists, in Section 552(b), nine specific exemptions that allow agencies to withhold either certain information contained in records or entire records from public disclosure. One of the FOIA exemptions allows an agency to withhold records “specifically exempted from disclosure by statute.” This exemption includes two qualifications: the statute must “(A) [require] that the matters be withheld from the public in such a manner as to leave no discretion on the issue or (B) [establish] particular criteria for withholding or [refer] to particular types of matters to be withheld.” This exemption includes cultural resource information (e.g., electronic and hardcopy inventory and evaluation records, maps, raw data, reports) that is exempt from disclosure under the NHPA discussed below. If a FOIA request is received for sensitive historic information, and the Section 304 withholding process has not commenced, be sure to inform the NRC FOIA branch and the NPS that the historic information is subject to a FOIA request.

GUIDANCE FROM THE ADVISORY COUNCIL ON HISTORIC PRESERVATION

The Advisory Council is an independent federal agency that promotes the preservation, enhancement, and productive use of our nation's historic resources. The Advisory Council has prepared non-binding guidance to help federal agencies comply with NHPA Section 106 (www.achp.gov/archguide). The guidance outlines several issues to consider about the use of Section 304 of NHPA to restrict disclosure of information from a FOIA request (<http://www.achp.gov/docs/ACHP%20ARCHAEOLOGY%20GUIDANCE.pdf>).

- Only information about a property’s “location, character, or ownership” is protected from release under FOIA. Not all records, field notes, or data analyses are subject to withholding under Section 304 of the NHPA.
- Only information about a historic resource, as defined in Section 301 of NHPA, may be kept confidential under Section 304; that is, the information must be about a property that is listed on, or eligible for listing on, the National Register (36 CFR 60.4).
- Information about a historical site that is not listed on, or is not eligible for listing on, the National Register may not be withheld from FOIA disclosure under Section 304.
- Information, about which a determination has not been made, should be withheld pending the determination.

To withhold information from a FOIA request or during the NRC hearing process as part of mandatory disclosure (consult with OGC) the NRC must have made or be in the process of making a determination that its release may result in one of the following: cause a “significant” invasion of privacy, risk harm to the historic resource, or impede use of a traditional religious site by practitioners. Thus, information (including electronic or hard copy records, notes, or analyses, or parts thereof) is not protected under NHPA Section 304 if it does not meet these standards regarding type of information; historic property status; and risk of invasion of privacy, harm, or impediment to use. Indian tribes sometimes provide written information about a sensitive site to the NRC to ensure that it is considered in a NHPA Section 106 review. If the NRC determines that the site is not listed on or eligible for listing on the National Register, the

written information collected about the site, including its location and sensitivity, would not be protected under Section 304 and could be disclosed in response to a FOIA request or during litigation.

RECOMMENDATIONS

In pre-application interactions with the applicant, inform the applicant that it should consider whether its application contains any sensitive historic resource information meeting the criteria described in Section 304 of the NHPA. If so, that information should not be included in the publicly available information in its application. Instead, the application should contain a redacted and non-redacted version of the report, with a statement including the Section 304 reason for withholding the information. The redacted version will be made publicly available, so that it can be cited as a reference in the NUREG or other NRC document. The NUREG or other agency document will generally require the references to be publicly available. The non-redacted version will be withheld from the public while the NRC seeks a determination from the Keeper of the Register.

If the NRC determines that a piece of information meets the withholding criteria, the feedback of the appropriate SHPO, THPO, or Indian Tribe should be solicited and included in the consultation information submitted to the Keeper of the Register. The NRC staff will then send a letter to the Keeper of the Register asking for a determination on withholding the information. If the Keeper of the Register does not agree with the NRC staff determination (or agrees only in part), the NRC staff will continue to withhold only the information the Keeper of the Register agrees meets the withholding criteria. The NRC can share the information with the State or Tribal Historic Preservation Officer (SHPO or THPO) with whom the NRC is consulting under Section 106. Prior to giving the sensitive information to the SHPO or THPO inform them that the information is being withheld from public disclosure in accordance with Section 304 of the NHPA.

If sensitive historic information is requested in a FOIA it can be withheld if the Section 304 process has been or is being followed. Therefore, it is recommended that as soon as the report is received containing sensitive information, the process for withholding be commenced. It is especially important to start the withholding process as soon as possible in projects where a hearing file is being maintained.

PROCESS

1. In pre-application interactions, or when asking a request for additional information (RAI) for potentially sensitive information, inform the applicant how to consider whether the Section 304 criteria for withholding sensitive information are met and how, if the criteria are met, to send in redacted and non-redacted versions of such information .
2. When the NRC staff receives historic resource information from the applicant, review it against the Section 304 criteria. If a redacted version was not submitted then either create one or ask the applicant to send one in.
3. If the NRC staff agrees that the Section 304 criteria are met, call the NPS contact and inform him/her that you will be sending him/her a request for a determination on withholding information. NPS contact is: Erika K. Martin Seibert, Ph.D.

Archeologist, National Register of Historic Places, National Historic Landmarks Program
202/354-2217, erika_seibert@nps.gov

4. Complete letter (see attached examples)

REFERENCES

Statutes:

Freedom of Information Act (FOIA), 5 U.S.C. 552
National Environmental Policy Act (NEPA), 42 U.S.C. 4321
National Historic Preservation Act (NHPA), 16 U.S.C. 470 *et seq.*

Regulations:

NRC's Rules of Practice (10 CFR Part 2)
NRC's NEPA Implementing Procedures (10 CFR Part 51)
National Register of Historic Places (36 CFR Part 60)
Determination of Eligibility for Inclusion in the National Register of Historic Places (36 CFR Part 63)
Protection of Historic Properties (36 CFR Part 800)

Advisory Council Documents:

Advisory Council on Historic Preservation. ACHP Policy Statement: *Archaeology, Heritage Tourism, and Education*. August 15, 2008. *Section 106 Archaeology Guidance: Questions and Answers* (undated) (web based).

<http://www.achp.gov/docs/ACHP%20ARCHAEOLOGY%20GUIDANCE.pdf>

Example letters Requesting Withholding for Both FOIA and Non-FOIA Requests.

Sample Letter to the Keeper of the National Register/ Requesting Consultation for Redacting Information under Section 304 or 36 CFR 800

[Ms. Carol Shull]
[Interim] Keeper of the National Register of Historic Places
National Park Service
1201 "I" (Eye) St., NW; 6th Floor
Washington, D.C. 20005

Attn: Archeologist, National Register of Historic Places

Dear [Ms. Shull]:

FIRST PARAGRAPH, NON-FOIA REQUEST

We are consulting with you pursuant to Section 304 of the National Historic Preservation Act of 1966, as amended, [; AND/OR 36 CFR 800] about our intention to withhold from release [INSERT WHAT YOU INTEND TO WITHHOLD HERE; IE, THE NAMES OF SPECIFIC REPORTS, FOR INSTANCE, AND/OR SPECIFY WHAT TYPE OF INFORMATION WITHIN THE DOCUMENT YOU ARE WITHHOLDING. FOR EXAMPLE, “. . . INFORMATION ABOUT THE NATURE AND LOCATION OF TWO SITES, THE PALEOINDIAN SITE AND THE HISTORIC HOUSE SITE”] This archaeological information was collected as part of the National Historic Preservation Act Section 106 consultation process for the [INSERT NAME OF PROJECT]. This request is being made to withhold the information from public access.

FIRST PARAGRAPH, FOIA REQUEST [DELETE IF NOT A FOIA REQUEST]

We are consulting with you pursuant to Section 304 of the National Historic Preservation Act of 1966, as amended, [AND;OR 36 CFR 800] about a Freedom of Information Act Request (FOIA), for [INSERT WHAT YOU INTEND TO WITHHOLD HERE; IE, THE NAMES OF SPECIFIC REPORTS, FOR INSTANCE, AND/OR SPECIFY WHAT TYPE OF INFORMATION WITHIN THE DOCUMENT YOU ARE WITHHOLDING. FOR EXAMPLE, “. . . INFORMATION ABOUT THE NATURE AND LOCATION OF TWO SITES, THE PALEOINDIAN SITE AND THE HISTORIC HOUSE SITE”]. [AND/OR, THIS INFORMATION WAS COLLECTED AS PART OF SECTION 106 OF THE NATIONAL HISTORIC PRESERVATION ACT;, ETC] The request was made by [INSERT WHO THE FOIA REQUESTOR IS AND WHY THEY ARE REQUESTING THE INFORMATION, IF IT IS KNOWN]

Based on the determination of [insert name and credentials of the contractor archaeologist], the NRC intends to withhold this information [OR IF AN ENTIRE REPORT, “THIS REPORT(S)”] from disclosure to the public because release of this information [OR REPORT(S)] may risk harm to the resource.

[THE NEXT PARAGRAPH SHOULD INCLUDE AT LEAST ONE OF THE FOLLOWING AS JUSTIFICATION: 1) cause a significant invasion of privacy; (2) risk harm to the historic resources; or (3) impede the use of a traditional religious site by practitioners. SELECT THE ONE(S) THAT APPLY] The risk of

harm to historic resource(s) is a reasonable result of information release, based on impacts at known [PREHISTORIC, HISTORIC, ROCK ART, OR OTHER TYPE] sites within [THE PROJECT AREA, ETC]

[AND/OR] We believe the release of this information will promote looting of the site(s).

[IF YOU INTEND TO WITHHOLD AN ENTIRE REPORT, FURTHER JUSTIFICATION IS REQUIRED] We intend to withhold the entire report from release because we believe that sensitive information cannot reasonably be segregated within the report.

[AND/OR] We intend to withhold the entire report, including background sections because those sections provide an explicit discussion of the potential for encountering the remains of archaeological sites in various environmental and geomorphological settings. This information, if released, can be used to locate archaeological and historic sites within [THE CURRENT PROJECT AREA, ETC]

Three copies of the unredacted and redacted reports are enclosed. Please provide a withholding determination by [MONTH, DAY, YEAR], so that we may respond to the FOIA request in a timely manner. Should you have any questions, or need any additional information, please contact our [insert name of our environmental project manager] Ms.XXX, at (301) 415-XXX or by e-mail at [insert email address]; [if a FOIA and our FOIA Officer, Mr./Ms. FOIA Officer at 301-XXX-XXXX or through e-mail at XXX.XXX@nrc.gov] .

Sincerely,

[NAME], Branch Chief
[Environmental and Technical Support Branch
Division of Site and Environmental Reviews
Office of New Reactors]