

DEPARTMENT OF THE ARMY
LOUISVILLE DISTRICT, CORPS OF ENGINEERS
P. O. BOX 59
LOUISVILLE, KENTUCKY 40201

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ORLOC

6 November 1978

David K. Martin, Esq.
Assistant Attorney General
Division of Natural Resources
and Environmental Law
Office of the Attorney General
Frankfort, KY

Dear Mr. Martin:

I have your comments on behalf of the Attorney General on the application of the Public Service Indiana for the construction of a pumphouse intake and discharge structure at the proposed Marble Hill Nuclear Generating Station. This response was made to my Public Notice ORLOP-FP 78-IN-098, dated 19 September 1978.

In your first comment you make the point that the permit may not be issued until Public Service Indiana obtains a water quality certification from Kentucky under Section 401 of the Federal Water Pollution Control Act Amendments of 1972. In your view the water quality certification obtained from Indiana is insufficient "..... because the area disturbed is in Kentucky and the waters affected are in Kentucky." This will advise that the procedures contemplated by Section 401 have been satisfied by this office. Notification of the application and receipt of Indiana's water quality certification were delivered to the EPA by letter of 10 October 1978. This action was taken in keeping with Section 401(a)(2), since the discharge arising from the construction action covered by the Corps of Engineers permit could affect the waters of the Commonwealth of Kentucky. We acknowledge your contentions that Kentucky "owns" the Ohio River to the point of normal pool elevation. However, acknowledgment of your contention in no way constitutes an agreement that such claim is valid.

Your second point questions the right of Public Service Indiana to dredge property belonging to the Commonwealth of Kentucky. Obviously, this point is based upon your claim of ownership to the present elevation of

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David K. Martin, Esq.

the river at that point. Again acknowledging this claim, without agreeing to its validity, permits issued by this office do not convey property rights in any case. If your claim of ownership is valid, we would presume that any work riverward of your ownership would require PSI to obtain your permission for such work. The third point you make is that the interest of Kentucky includes the protection of aquatic life and water resources pertaining to the Commonwealth's ownership of the Ohio River. We certainly recognize Kentucky's interest in this regard without commenting further on the extent of ownership of the Ohio River.

Your fourth comment points out that the public notice is inaccurate with respect to its reference to the "National Register of Historic Places." We agree with this comment and regret this error. As you point out, the Federal Register of 5 September 1978, some 14 days before our Public Notice, referenced an archaeological site on the flood plain at the site of Marble Hill. However, we disagree with your point that the Corps should not make any decisions until the archaeological field work is completed and the final report is underway. In this regard, you misunderstand the Corps' role in issuing permits as a "non-lead" agency. The Nuclear Regulatory Commission is lead agency for the Marble Hill Installation and such agency has the total responsibility for securing compliance with applicable law in connection with cultural resources at the site. The permit, if issued by the Corps, will be granted to the same entity (PSI) as the permit issued by NRC, and our permit, if issued, will be conditioned in such fashion as to assure compliance by PSI with the overall facility, cultural resource plan established between NRC and PSI.

Your fifth point was that the District Engineer should have mailed Public Notice No. 78-IN-098 to each person on the NRC service list for the proposed facility. We disagree with this comment, and believe that the limited scope of this proposed permit should also limit the area of interest or notification.

Your last point stated that a new public notice should be issued since the instant notice was misleading in failing to mention the archaeological resources in the area. Again, we disagree. As we have stated above, responsibility for facility cultural resources is with the lead Federal agency. It is our understanding that NRC is discharging this responsibility, and that PSI will be required under the NRC permit to take all steps necessary to protect or mitigate these resources. The instant permit, if issued by the Corps, will be made subject to PSI's obligation under the lead agency permit.

ORLOC
David K. Martin, Esq.

6 November 1978

Your comments on this public notice are appreciated. A copy of your comment and this response have been forwarded to NRC for their information.

Sincerely yours,

W. N. WHITLOCK
Chief, Operations Division

✓CF:
Dr. Stanley Kirslis
Environmental Project Manager
Division of Site Safety and
Environmental Management
Office of Nuclear Reactor Regulation
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL
FRANKFORT

ROBERT F. STEPHENS
ATTORNEY GENERAL

DIVISION OF NATURAL RESOURCES
AND ENVIRONMENTAL LAW

October 16, 1978

Mr. W. N. Whitlock
Chief, Operations Division
Louisville Corps of Engineers
Post Office Box 59
Louisville, Kentucky 40201

Re: ORLOP-FP78-IN-098, Public Notice on dredge and fill
application of Public Service Company of Indiana, Inc.

Dear Sir:

The Attorney General of the Commonwealth of Kentucky offers the following comments on the application for a DA permit pursuant to the River and Harbor Act of 1899 and Section 404 of the Clean Water Act for the proposed Marble Hill Nuclear Generating Station intake and discharge structure construction:

(1) The Department of the Army may not issue a permit for the proposed activities until the applicant obtains a water quality certification from the Commonwealth of Kentucky pursuant to Section 401 of the Clean Water Act, 42 U.S.C. §1341 (1976). The water quality certification from Indiana mentioned in the public notice dated September 19, 1978, is insufficient because the area disturbed is in Kentucky and the waters affected are in Kentucky. In Handly's Lessee v. Anthony, 18 U.S. 374 (1820), the United States Supreme Court determined that Kentucky owned the Ohio River to the low water mark on the north and west shore and that the boundary would follow changes in the river. In the vicinity of the proposed construction, Kentucky claims title to the level of the normal pool, which is at least elevation 420 O.R.D., if not higher.

(2) Public Service Company of Indiana, Inc. has no right to dredge material from land it does not own. The plan attached to the September 19, 1978, public notice indicates that PSI plans to dredge into the river beyond its property and into the Commonwealth of Kentucky.

(3) The interests of the Commonwealth affected by the proposed activities include the protection of aquatic life and water resources and all other interests pertaining to the Commonwealth's ownership of the Ohio River.

(4) The September 19, 1978, public notice is inaccurate with respect to the National Register of Historic Places. The Corps stated in its public notice that "The National Register of Historic Places has been consulted and it has been determined that there are no properties currently listed on the Register which would be directly affected by the proposed work." This statement by the Corps is clearly in error; contrary to the Corps' assertion, there is an affected site, located on the flood plain of the Ohio River. This property is the archaeological site, 12JE 119/120, which was determined to be "eligible for inclusion in the National Register" by the Keeper of the National Register on July 24, 1978. See 43 Federal Register 39452 (Sept. 5, 1978). The site contains undisturbed cultural deposits that may contribute significantly to the understanding of the prehistory of the Marble Hill region.

Properties eligible for inclusion in the National Register are treated in the same way as properties already included for the purpose of actions which a federal agency must take when it finds such properties for which there may be an environmental impact. 36 CFR §800.4.

In the situation here, the Nuclear Regulatory Commission, the lead federal agency, is required to follow the requirements of the regulations pertaining to properties eligible for inclusion on the National Register. (36 CFR, Ch. VIII, 16 U.S.C. §470, promulgated pursuant to P.L. 89-665, The National Historic Preservation Act of 1966). The Nuclear Regulatory Commission, in consultation with the Indiana State Historic Preservation Officer, has made the determination of adverse effect on 12JE 119/120 by the construction of Marble Hill.

At this point in time, the Nuclear Regulatory Commission has requested the Advisory Council on Historic Preservation to consider the proposed mitigation plan for 12JE 119/120 and memorandum of agreement,

both of which were drawn up by the Public Service Company of Indiana, the licensee. (Letter from Nuclear Regulatory Commission to Advisory Council, September 22, 1978). The Indiana State Historic Preservation Officer, who has reviewed the preliminary case report and mitigation plan, stated, "On the whole, the plan appears to adequately mitigate the archaeological resources. We believe that the excavation should be based on a minimum 5% sample. As long as this alteration is made in the mitigation plan, we believe that there will be no adverse impact and that the archaeological resources will be adequately mitigated." In addition, "we suggest that the Nuclear Regulatory Commission include a statement as to why in-place preservation of the site was rejected in favor of excavation." (Letter from State Historic Preservation Officer to Nuclear Regulatory Commission, September 11, 1978). The Nuclear Regulatory Commission accepted the minimum 5% sample size change. (Letter from Nuclear Regulatory Commission to Advisory Council, September 22, 1978).

The task now is for the Advisory Council to rule on the preliminary case report and mitigation plan. If the plan is accepted, then the Phase III Mitigation Plan goes into effect. This includes excavations of at least a 5% sample of the archaeological site. There are no time restraints within which the field work needs to be done written into either the preliminary case report or the mitigation plan. The Army Corps of Engineers should not make any decisions as to granting or denying the construction permit until the archaeological field work is completed and the final report on it is well underway. Because the excavations may turn up significant materials which would require further field work, it would be premature for the Corps of Engineers to consider the granting of a permit which would allow these cultural resources to be destroyed. Finally, the Corps should be more careful when making assessments of the existence or nonexistence of affected properties listed on the National Register and to actually check the Register to see what is there.

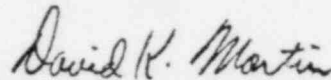
(5) The Nuclear Regulatory Commission, as lead federal agency, has a service list containing many names of persons interested in the environmental impacts of the proposed facility including the impacts of the intake and discharge structures. In the interest of full public participation and informed decision making, the District Engineer should have mailed the public notice to each person on the Nuclear Regulatory Commission service list for the proposed facility.

October 16, 1978

(6) Since the public notice issued on September 19, 1978, was misleading in that it failed to mention the archaeological resources on the proposed construction site, a new public notice should be issued containing accurate and up-to-date information on the archaeological site.

Sincerely,

ROBERT F. STEPHENS
ATTORNEY GENERAL



BY: David K. Martin
Assistant Attorney General
- Director

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Attachments.

DIVISION OF NATURAL RESOURCES
AND ENVIRONMENTAL LAW