

November 20, 2008

Col. David C. Press
Commander
Corps of Engineers, Omaha District
1616 Capitol Ave.
Omaha, NE 68102

NATIONAL
TRUST
FOR
HISTORIC
PRESERVATION®

Mountains/Plains
OFFICE

Re: Failure to Comply With Section 106 for Highwood Generating Station
Adversely Affecting the Great Falls Portage National Historic Landmark

Dear Col. Press:

On behalf of the National Trust for Historic Preservation, we are writing to express our serious concern regarding the US Army Corps' of Engineers failure to comply with Section 106 in connection with a permit application for the Highwood Generating Station project near Great Falls, Montana. We learned recently that the applicant has begun earth moving activities at the site. This action is foreclosing the consideration of alternatives and modifications to the project that might avoid, minimize, and mitigate harm to historic properties. The applicant's actions also constitute anticipatory demolition under Section 110(k) of the National Historic Preservation Act (NHPA), 16 U.S.C. § 470h-2(k), which will require the Army Corps to deny the permit. We strongly urge the Army Corps to take immediate steps to require the applicant to stop all on-site work relating to the project, and to ensure that Section 106 review is completed prior to any further action or ground disturbance on-site. Failure to take these steps will leave both the Army Corps and the applicant vulnerable to litigation under the NHPA.

1. Background.

As you know, the Southern Montana Electric Generation & Transmission Cooperative (SME) proposes to build a coal-fired power plant and wind turbines outside of Great Falls, Montana (called the Highwood Generating Station). The project as proposed would be partially sited within the Great Falls Portage National Historic Landmark (NHL) and would have both direct and indirect adverse effects on the NHL, including visual intrusion that would severely diminish the integrity of setting, feeling and association. The NHL is significant because this is the place where, in 1805, the Lewis and Clark

Mountains/Plains Office

535 16th Street, Suite 750
Denver, CO 80202,
P 303.623.1504
F 303.623.1508.
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National Office

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P 202.588.6000
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www.PreservationNation.org

Expedition left the river to portage around the Great Falls of the Missouri. In a special 2007 report to the Advisory Council on Historic Preservation (ACHP), issued pursuant to Section 213 of the NHPA, the Secretary of the Interior concluded that the Highwood Generating Station would have “wide-spread, profound, and adverse impacts” on the NHL and “significant and adverse” impacts to the Lewis and Clark National Historic Trail as well. For these reasons, the Great Falls Portage site was included on the National Trust’s 2008 List of America’s 11 Most Endangered Historic Places.

2. Section 106 Review Process.

Section 106 review for this project was originally begun by the USDA Rural Utilities Service (RUS), which was slated to provide a loan guarantee to SME. However, Section 106 review was never completed, because the RUS decided to withdraw its participation in the financing for the project. In any event, the Army Corps was never a participant or a consulting party in the Section 106 review initiated by the RUS. Accordingly, the Army Corps is required to reinstate Section 106 consultation.

In a letter from the Army Corps to SME dated April 28, 2008, the Corps authorized the use of Nationwide Permit 12 for this project, but expressly prohibited work on the water intake and power line until Section 106 consultation with RUS was completed. However, in a subsequent letter to SME dated July 11, 2008, the Corps stated that the historic preservation permit condition “cannot be met,” due to RUS’ decision to cease participation in the project. The July 11 letter also stated that the Corps would conduct an internal review to decide how to proceed. Yet, four months later, the Army Corps has failed to issue any further correspondence regarding how the Corps proposes to comply with Section 106.

We are aware that the Advisory Council on Historic Preservation wrote to the Army Corps on October 20, 2008 inquiring about the Corps’ intentions with regard to Section 106 compliance. The ACHP has advised us that the Corps has not yet responded to this inquiry. Additionally, the Army Corps as not satisfactorily responded to the National Trust’s informal inquiries regarding the Corps’ failure to comply with Section 106.

RUS recognized the National Trust as a consulting party in its Section 106 review. Therefore, we formally request the opportunity to participate as a

consulting party in connection with the Army Corps' Section 106 review, pursuant to 36 C.F.R. § 800.2(c)(5) and 800.3(f)(3). As you may know, the Chairman of the National Trust has been designated by Congress as a member of the Advisory Council on Historic Preservation, 16 U.S.C. § 470i(a)(8), and we participate frequently in Section 106 consultation in order to promote compliance with the NHPA.

3. The Applicant is Engaging in Unlawful Anticipatory Demolition, Which Prohibits the Army Corps from Issuing a Permit Unless Stringent Conditions Are Met.

The Army Corps has not initiated or completed Section 106 consultation, and yet the applicant has begun construction work on the project, including ground disturbance directly within the National Historic Landmark, which the Army Corps was previously notified about. These actions constitute unlawful anticipatory demolition, because the applicant, "with the intent to avoid the requirements of section 106 of this Act, has intentionally significantly adversely affected a historic property to which the [Corps permit] would relate." 16 U.S.C. § 470h-2(k); 36 C.F.R. § 800.9(c)(1). As a result, Section 110(k) of the NHPA prohibits the Army Corps from authorizing the permit altogether, unless the Corps first engages in a consultation process with the ACHP, and concludes that special circumstances justify issuing the permit despite the applicant's unlawful actions. *Id.* In our view, the "circumstances" do not remotely justify issuing the permit.

4. The Corps has Unlawfully Allowed the Applicant to Proceed, Foreclosing the ACHP's Opportunity to Comment.

The fact that SME has already started construction indicates that the Corps has "failed to complete the requirements of section 106 in accordance with the procedures in this part prior to the approval of any undertaking," which forecloses the ACHP's opportunity to comment. 36 C.F.R. § 800.9(b). While the applicant is engaging in anticipatory demolition, the Army Corps is directly at fault for conveying tacit approval of the applicant's actions. Even the Corps' July 11, 2008 letter, which prohibits work on the water intake and transmission line, fails to prohibit *all* work on the project, and clearly suggests by implication that *other* work on the project may proceed – including bulldozing within a "known" National Historic Landmark.

5. The Army Corps Has Violated Section 110(f) of the NHPA.

Furthermore, when a National Historic Landmark will be directly affected by a proposed project, as is the case here, the federal agency must, “to the maximum extent possible, undertake such planning and actions as may be necessary to minimize harm” to the site. 16 U.S.C. § 470h-2(f); 36 C.F.R. § 800.10. The Army Corps has not even begun to address its higher responsibilities under Section 110(f) of the NHPA.

6. The Army Corps Has Violated Even Its Own Regulations, by Allowing the Applicant to Proceed With Actions that are Directly Harming a Known National Historic Landmark.

The National Trust and the Advisory Council on Historic Preservation have long contended that the Army Corps’ Appendix C regulations, 33 C.F.R. Part 325, App. C, violate the National Historic Preservation Act, because they are not consistent with the Section 106 regulations. 16 U.S.C. § 470h-2(a)(2)(E)(i). The courts have agreed.¹ In this case, however, even the Corps’ own regulations have been violated. Appendix C specifically requires the Corps to “consider the effects of undertakings on any *known* historic properties that may occur outside the permit area.” 33 C.F.R. Part 325, Appendix C, § 5.f. (emphasis added). The Great Falls Portage National Historic Landmark has already been identified as an historic property. Accordingly, because the Portage Site is “known” to be a National Historic Landmark, and will be directly adversely affected by the project, as has the Lewis & Clark National Historical Trail, these historic resources must be included within the scope of the Corps’ review under Section 106, even under the Army Corps’ own historic preservation regulations.

¹ See, e.g., *National Trust for Historic Preservation v. U.S. Army Corps of Eng’rs*, No. 1:01-cv-287 (E.D. Va., filed Mar. 17, 2004) (case settled Oct. 4, 2004 through Section 106 review of off-site visual impacts to NHL); *Saylor Park Village Council v. U.S. Army Corps of Eng’rs*, No. C-1-02-832, 2002 WL 32191511 (S.D. Ohio Dec. 30, 2002), 2003 WL 22423202 (S.D. Ohio Jan. 13, 2003); *Pye v. U.S. Army Corps of Eng’rs*, 269 F.3d 459, 469-70 (4th Cir. 2001) (Corps ultimately revoked permit); *Committee to Save Cleveland’s Huletts v. U.S. Army Corps of Eng’rs*, 163 F. Supp. 2d 776 (N.D. Ohio 2001) (Corps later concluded anticipatory demolition occurred); *Vieux Carré Prop. Owners, Residents & Assoc’s, Inc. v. Brown*, 875 F.2d 453 (5th Cir. 1989), cert. denied, 493 U.S. 1020 (1990); *National Trust for Historic Preservation v. U.S. Army Corps of Eng’rs*, 552 F. Supp. 784, 790-91 (S.D. Ohio 1982).

7. Theoretical Projects That Are Not Part of the Applicant's Plans Cannot be Used to Reduce the Scope of the Section 106 Consultation.

We are concerned that Army Corps staff members have in previous informal conversations described the scope of the Corps' Section 106 responsibilities in a manner that is simply not consistent with the NHPA. Apparently, the applicant claims that it does not *need* a Corps permit because the project *could* be accomplished using water from other sources, but that getting the permit is the most economical way to proceed. The theoretical possibility that the applicant *could* redesign the project in a way to avoid Army Corps jurisdiction provides no basis for narrowing the scope of review, unless the applicant actually *does* redesign the project. This argument lacks any merit whatsoever, and has no bearing on the facts at hand. The Corps must consider the impacts of the actual project as planned by the applicant, and must comply with all requirements of Section 106.

Because of the fact that the SME project will adversely affect a National Historic Landmark, we urge the Army Corps to take immediate action. The Corps has been aware of this project since at least April 2008, and time is of the essence in resolving this significant legal violation. Failure to comply with the NHPA will leave both the Army Corps and the applicant vulnerable to litigation.

Thank you for your consideration and we look forward to hearing from the Army Corps promptly.

Sincerely,



Elizabeth S. Merritt
Deputy General Counsel



Amy Cole
Sr. Program Officer & Regional Atty.

cc: John Eddins, Advisory Council on Historic Preservation
Mark Baumler, MT State Historic Preservation Officer

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Rebecca Shipman & Allan Steinle, USACE
Dan Wiley, National Park Service
Chere Jiusto, Montana Preservation Alliance
Wendy Raney, Lewis & Clark National Historic Trail Foundation
Tim Gregori,
Southern Montana Electric Generation & Transmission Cooperative, Inc.