

Appendix D

National Historic Preservation Act Guidance

Section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to take into account the effects of Federal “undertakings” on historic properties that are either listed on, or eligible for listing on, the National Register of Historic Places. The term federal “undertaking” is defined in the NHPA regulations to include a project, activity, or program 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. See 36 CFR 800.16(y). Historic properties are defined in the NHPA regulations to include prehistoric or historic districts, sites, buildings, structures, or objects that are included in, or are eligible for inclusion in, the National Register of Historic Places. This term includes artifacts, records, and remains that are related to and located within such properties. See 36 CFR § 800.16(1). EPA is establishing this procedure, in compliance with Section 106 of the NHPA, to assist applicants seeking coverage under the Massachusetts Small Municipal Separate Storm Sewer System General Permit (MA Small MS4 Permit).

The National Register of Historic Places is the Nation's official list of cultural resources worthy of preservation.¹ Authorized under the NHPA, the National Register is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect our historic and archeological resources. Properties listed in the Register include districts, sites, buildings, structures, and objects that are significant in American history, architecture, archeology, engineering, and culture. The National Register is administered by the National Park Service, which is part of the U.S. Department of the Interior.

I. Activities Authorized Under EPA’s MA Small MS4 General Permit

EPA’s issuance of a National Pollutant Discharge Elimination System (NPDES) General Permit is a federal undertaking within the meaning of the NHPA regulations and the activities to be carried out under the general permit require review and consideration in accordance with the applicable procedures of the NHPA. See 40 CFR § 122.49. Applicants for the Small MS4 General Permit must avoid adverse effects to historic properties, which may occur when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association. See 36 CFR 800.5(a)(1). EPA, in collaboration with the Massachusetts State Historic Preservation Officer (SHPO) and, if applicable, a Tribal Historic Preservation Officer(s) (THPO), will assist and guide applicants on methods of conducting subsurface activities to avoid adverse effects to historic properties. A determination that a federal undertaking has no potential to cause adverse effects on historic properties fulfills EPA’s obligations under Section 106 of the NHPA.

¹ Listings of historic places based on the date they were listed can be found on the National Park Service web site at <https://www.nps.gov/subjects/nationalregister/index.htm>.

EPA's reissuance of the Small MS4 General Permit in Massachusetts authorizes the discharge of stormwater from traditional (e.g., municipally-operated) and non-traditional (e.g., operated on federal or state property) MS4s in urban areas with a population of 50,000 or more. With the possible exception of a small number of new non-traditional MS4s, the discharges covered under this permit will be permittees that are seeking renewal of previous permit authorization. Reissuance of the MS4 Permit carries forward or expands the requirements from the 2016 MA MS4 permit to reduce the discharge of the pollutants from the MS4, including continuing implementation of a stormwater management program, minimum control measures, and targeted water quality-based requirements for water quality limited waters and waters subject to total maximum daily loads. Consistent with its determination for the 2016 MA MS4 permit, EPA determined that the discharge of stormwater from regulated MS4s via existing channels, outfalls or natural drainage areas, and discharge-related activities, in compliance with the requirements and conditions of the Permit does not have the potential to cause effects on historical properties. With respect to the authorization of stormwater discharges, the determination that this undertaking has no potential to have an effect on historic properties fulfills the agency's obligations under NHPA.

In addition to authorizing the discharge of stormwater described above, the MS4 permit requires operation and maintenance of existing systems, including catch basins and similar infrastructure, to ensure the system operates and designed. In some cases, maintenance may require replacement of an existing structure, such as a catch basin. Part 2.3.6.e of the MS4 permit requires all permittees to retrofit a limited number of permittee-owned properties with structural stormwater control measures (SCMs) and Appendix F and H of the MS4 permit requires certain permittees subject to TMDLs or discharging to water quality-limited waters to install SCMs. SCMs may include designs that require infiltration, which could involve subsurface disturbance of less than 1 acre of land.² The disturbance of land during targeted maintenance, or during the construction and installation of SCMs, has potential to affect historic properties. Under the 2016 MA MS4 permit, permittees developed an inventory of permittee-owned properties that could be retrofit with SCMs. In addition, permittees subject to TMDLs or requirements for nutrient-limited waters developed plans and schedules for installing SCMs. In this permit term, permittees will begin to install SCMs on properties identified in the inventory and planning documents, which presents a limited universe of locations where land disturbance could occur.

To obtain authorization under the MA Small MS4 Permit, applicants must submit a Notice of Intent (NOI) to EPA, which certifies to EPA their eligibility for permit coverage. After a 30-day review period, applicants are authorized to discharge stormwater in compliance with the permit unless EPA provides notification that the authorization is placed on hold, delayed, or denied. EPA developed the screening process described below to assist MS4 operators in considering the potential impacts, if any, of planned maintenance activities and SCM

² Disturbances of more than 1 acre of land would be subject to EPA's Construction General Permit (CGP) and must satisfy the CGP NHPA screening process for permit authorization.

installations on historic properties for the purpose of determining eligibility and completing the NOI. Although individual submissions for authorization under the general permit do not constitute separate federal undertakings, the screening process provides an appropriate, site-specific means of addressing historic property issues in connection with EPA's reissuance of the MS4 permit. The requirements and screening process are of an ongoing nature – if an applicant later decides to undertake subsurface earth disturbance work that was not planned at the time of the NOI, it must comply with the requirements and procedures in Appendix D prior to performing the activity.

II. Screening Instructions for MS4 Operators

All applicants seeking authorization under this general permit must comply with the historic property requirements and screening procedures described below to be eligible for coverage. In certain cases, applicants may be required to contact the State Historic Preservation Officer (SHPO) and/or Tribal Historic Preservation Officer (THPO) and other Tribal representatives for further information on the effects of the activity on historic properties. See 36 CFR § 800.2(c)(4); 40 CFR § 122.49(b). **A permittee may not submit a Notice of Intent (NOI) until it has completed this screening process.**

Step 1: Do you plan to install SCMs that require subsurface earth disturbance during this permit term?

The first step of the screening process is to determine if the applicant plans to conduct maintenance activities and/or install SCMs that will cause subsurface earth disturbance, including, but not limited to:

- Dikes
- Berms
- Catch basins
- Ponds, bioretention areas
- Ditches, trenches, channels, swales
- Culverts, pipes
- Perimeter Drains
- Proprietary treatment devices

Beyond those SCMs listed above, any maintenance activity or planned SCM that involves earth disturbing activities must be examined for the potential to affect historic properties and applicants must proceed to Step 2 of the screening process. If the planned activity is not listed, and will not require earth disturbance, the applicant may indicate this on the NOI and no further screening is necessary. During the 30-day notice period for the NOI, the SHPO, THPO, or other Tribal representative may request that EPA hold permit authorization based on concerns about potential adverse effects to historic properties. EPA will evaluate any such request and notify the applicant if any additional controls to address adverse effects to historic properties are necessary.

Step 2: Have prior professional cultural resource surveys or other evaluations determined that historic properties do not exist, or have prior disturbances precluded the existence of historic properties?

If planned maintenance activity and/or SCMs will require subsurface earth disturbance based on Step 1 of the screening process, the applicant must determine if no historic properties exist on the site based on prior professional cultural resource surveys or other evaluations, or if the existence of historic properties has been precluded because of prior earth disturbances. This assessment should be limited to areas of planned maintenance activities, the permittee-owned properties identified as potentially suitable for retrofit of SCMs under the 2016 MA MS4 permit, and any properties identified as suitable for SCM installation over the next permit term during development of Phosphorus Control Plans and nutrient source identification reports.

If it has already been determined that no historic properties exist at the sites for maintenance activities and/or planned SCMs based on available information, including information that may be provided by the applicable SHPO, THPO, or other Tribal representative, the applicant may indicate this on the NOI and no further screening is necessary. Similarly, if prior earth disturbances have eliminated the possibility that historic properties exist on the sites for maintenance activities and/or planned SCMs, the applicant may indicate this on the NOI and no further screening is necessary. Documentation must include a description of the undertaking and area of potential effects, a description of the steps taken to identify historic properties, and basis for determining that no properties are present. During the 30-day notice period for the NOI, the SHPO, THPO, or other Tribal representative may request that EPA hold permit authorization based on concerns about potential adverse effects to historic properties. EPA will evaluate any such request and notify the applicant if any additional controls to address adverse effects to historic properties are necessary. If the applicant cannot eliminate the potential that there may be historic properties on the sites for planned activities based on available information or prior earth disturbances, the applicant must proceed to Step 3.

Step 3: Will the installation of SCMs that require subsurface earth disturbance have an effect on historic properties?

If the presence of historic properties cannot be eliminated based on Step 2, the applicant must assess whether the earth disturbing activities related to the installation of planned SCMs during the permit term will adversely affect historic properties.³ This evaluation may include review of historical sources, knowledge of the area, an assessment of the earth-disturbing activities that will occur, considerations of any controls or management practices that will be adopted to

³ An adverse effect occurs when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association. Examples include physical destruction or damage, alteration, removal, change of character of use or physical features that contribute to historical significance, introduction of visual, atmospheric or audible elements that diminish the integrity of historical features, neglect which causes deterioration, transfer, lease, or sale. See 36 CFR § 800.5(a).

ensure that earth-disturbing activities will have no effect on historic properties, and any other relevant factors.

If the applicant finds that earth disturbances related to the installation of planned SCMs over the permit term will have no adverse effect on historic properties, the applicant may indicate this on the NOI, document the basis for this determination, and no further screening steps are necessary. Documentation of a finding of no adverse effect shall include a description of the undertaking and its potential effects, a description of the steps taken to identify historic properties, a description of the potentially affected properties, including the characteristics that qualify them for listing, and an explanation of why potential effects will not be adverse, and copies or summaries of any views provided by any consulting parties. The permittee shall also include documentation of the basis for its determination in the Stormwater Management Plan (SWMP). During the 30-day notice period, the SHPO, THPO, or other Tribal representative may request that EPA hold permit authorization based on concerns about potential adverse effects to historic properties. EPA will evaluate any such request and notify the applicant if further action is warranted, including whether any additional measures to address adverse effects to historic properties are necessary. If the applicant finds that earth disturbing activities associated with planned activities and/or installation of planned SCMs during the permit term have the potential to adversely affect historic properties, it must proceed to Step 4.

Step 4: If you are installing any stormwater controls that require subsurface earth disturbance and you have not satisfied the conditions in Steps 1 - 3, you must contact and consult with the appropriate historic preservation authorities.

If the applicant plans to install SCMs that require subsurface earth disturbance and cannot eliminate the potential for adverse effects to historic properties in either Step 2 or Step 3 of the screening process, the applicant must contact the relevant SHPO, THPO, or other Tribal representative to request their views as to the likelihood that historic properties are potentially present on the sites for planned maintenance activities and/or SCMs and may be adversely impacted by these activities. In Massachusetts, the appropriate contact information can be found at:

Massachusetts Historical Commission State Historic Preservation Office (SHPO)

mhc@sec.state.ma.us

<https://www.sec.state.ma.us/divisions/mhc/mhc.htm>

Tribal Historic Preservation Officer (THPO) Contacts

Mashpee Wampanoag Tribe

THPO David Weeden, 508-477-0208 ex 102;

david.weeden@mwtribe-nsn.gov

Wampanoag Tribe of Gay Head (Aquinnah)

THPO Bettina Washington, 508-645-9265 x175

thpo@wampanoagtribe-nsn.gov

Narragansett Indian Tribe

THPO John Brown, 401-491-9459

tashtesook@aol.com

Stockbridge Munsee Band of Mohican Indians

THPO Jeff Bendremer, 413-884-6029

thpo@mohican-nsn.gov

Mashantucket Pequot Tribal Nation

THPO Michael E. Johnson, 860-396-6572

MEJohnson@mptn-nsn.gov

Mohegan Tribe

THPO James Quinn, 860-367-1573,

iquinn@moheganmail.com

Note: If a Tribe does not have a THPO, you should contact the appropriate Tribal government office designated by the Tribe for this purpose.

You must submit the following minimum information to the SHPO or THPO in order to properly initiate a request for information:

1. Name of MS4 (i.e., municipality or name of non-traditional MS4);
2. A brief, narrative description of each property where installation of an SCM is planned for the permit term which has the potential to affect historic properties;
3. Name, address, phone number, and email address of the MS4 point of contact;
4. Most recent U.S. Geological Survey (USGS) map section (7.5 minute quadrangle) showing actual project location and boundaries clearly indicated; and
5. A map that show locations of planned properties with SCMs that will cause subsurface earth disturbance (see Step 1).

Without submitting this minimum information, you will not have been considered to have properly initiated your request. You will need to provide the SHPO, THPO, or other Tribal representative **a minimum of 15 calendar days** after they receive these materials to respond to your request for information about your project. If you do not receive a response within 15 calendar days after receipt by the SHPO, THPO, or other Tribal representative of your request, the applicant shall indicate this on the NOI, and no further screening steps are necessary. Alternatively, if the applicable SHPO, THPO, or other Tribal representative responds to the request with an indication that no historic properties will be adversely affected by the activities at the properties identified, the applicant shall indicate this on the NOI and no further screening steps are necessary.

During the 30-day notice period for the NOI, the SHPO, THPO, or other Tribal representative may request that EPA hold permit authorization based on concerns about potential adverse effects to historic properties. EPA will evaluate any such request and notify the applicant if any further action is warranted including whether any additional measures to address adverse effects to historic properties are necessary. If within 15 calendar days of receipt of your request the applicable SHPO, THPO, or other Tribal representative responds with a request for additional information or for further consultation regarding appropriate measures for treatment or mitigation of effects on historic properties caused by the installation of SCMs, the applicant must comply with this request and proceed to Step 5.

Step 5: Consultation with applicable consulting parties.

If, following discussion with the appropriate historic preservation authorities in Step 4, the applicable SHPO, THPO, Tribal representative, or any other consulting party requests additional information or further consultation, the applicant must respond with such information or consult to determine impacts to historic properties that may be caused by the planned activities and/or installation of SCMs at the planned sites and appropriate measures for treatment or mitigation of such impacts. If, as a result of your discussions with the applicable SHPO, THPO, Tribal representative, or any other consulting party, the applicant enters into, and complies with, a written agreement regarding treatment and/or mitigation of impacts on the site, then the applicant shall indicate this on the NOI, attach the appropriate documentation described below, and no further screening steps are necessary. The applicant shall also update its SWMP with the appropriate documentation.

If, however, agreement on an appropriate treatment or mitigation plan cannot be reached between the applicant and the SHPO, THPO, Tribal representative, or any other consulting party within 30 days of your response to the SHPO, THPO, Tribal representative, or any other consulting party's request for additional information or further consultation, the applicant may submit a NOI, but must indicate that you have not negotiated measures to avoid or mitigate such effects.

Applicants must include in your NOI (and updated SWMP) the following documentation:

1. Copies of any written correspondence between you and the SHPO, THPO, Tribal representative, or any other consulting party; and
2. A description of any significant remaining disagreements as to mitigation measures between you and the SHPO, THPO, Tribal representative, or any other consulting party.

During the 30-day notice period for the NOI, the SHPO, THPO, ACHP, Tribal representative, or any other consulting party may request that EPA hold permit authorization based upon concerns regarding potential adverse effects to historic properties. EPA, in coordination with the ACHP, will evaluate any such request and notify you if any further action is warranted including whether any additional measures to address adverse effects to historic properties are necessary.

III. Permit Eligibility Criteria

Upon completion of this screening process the applicant shall certify eligibility for this permit using one of the following criteria on their Notice of Intent for permit coverage:

- Criterion A:** No activity or installation of SCMs will result in subsurface earth disturbance during the permit term (i.e., the applicant eliminated the potential for effects on historic properties in Step 1).
- Criterion B:** Activities and/or installation of SCMs will result in subsurface earth disturbance during the permit term but no historic properties exist on the sites and/or prior earth disturbances have eliminated the possibility that historic properties exist on the sites (i.e., the applicant eliminated the potential for effects on historic properties in Step 2).
- Criterion C:** Activities and/or installation of SCMs will result in subsurface earth disturbance during the permit term but will have no adverse effect historic properties (i.e., the applicant determined there will be no adverse effects on historic properties in Step 3).
- Criterion D:** Activities and/or installation of SCMs will result in subsurface earth disturbance during the permit term and the SHPO, THPO, or other Tribal representative has determined there is no potential to adversely affect historic properties (i.e., the applicant provided the appropriate materials to the SHPO, THPO, or other Tribal representative, who has either indicated that there will be no adverse effect or did not respond to the request for information in Step 4).
- Criterion E:** Activities and/or installation of SCMs will result in subsurface earth disturbance during the permit term and EPA, together with the applicant, completed consultation with the SHPO, THPO, or other Tribal representative to determine if there is potential to adversely affect historic properties is complete (i.e., EPA initiated consultation with the SHPO, THPO, or other Tribal representative, which resulted in a written agreement regarding treatment and/or mitigation of impacts to historic properties in Step 5).
- Criterion F:** Activities and/or installation of SCMs will result in subsurface earth disturbance during the permit term and EPA, together with the applicant, are continuing consultation with the SHPO, THPO, or other Tribal representative to determine if there is potential to adversely affect historic properties (i.e., EPA initiated consultation with the SHPO, THPO, or other Tribal representative, but the parties have not reached agreement regarding treatment and/or mitigation of impacts to historic properties in Step 5). The applicant must attach copies of any written correspondence with the SHPO, THPO, Tribal representative, or

other consulting party and a description of any significant remaining disagreements as to mitigation measures to the NOI.

Authorization under the general permit is available only if the applicant certifies and documents permit eligibility using one of the eligibility criteria listed above. Small MS4s that cannot meet any of the eligibility criteria in above must apply for an individual permit.