

Appendix C Complying with the National Historic Preservation Act

Background

Section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to take into account the effects of their “undertakings” on historic properties. “Undertaking” is defined in the NHPA regulations 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.” 36 C.F.R. § 800.16(y). Historic properties 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; the term encompasses artifacts, records, and remains related to and located within such properties, and also includes properties meeting the National Register criteria that are of traditional religious and cultural importance to an Indian Tribe. See 36 C.F.R. § 800.16(1).

EPA Region 8’s issuance of the Drinking Water General Permit (DWGP), is a federal undertaking subject to the NHPA. An individual NOI for coverage under the DWGP does not constitute separate undertaking, however, may trigger obligations under the NHPA to identify, assess, and avoid or mitigate any adverse effects to historic properties as a result of the application. The screening criteria and certifications in this Appendix provide an appropriate site-specific means of addressing historic property issues in connection with EPA’s issuance of the DWGP. Applicants seeking coverage under the DWGP are thus required to make certain certifications regarding the potential effects of their wastewater discharge and related activities on historic properties.

The Permittee must meet one or more of the following three criteria (A-C), which are also required under section 1.3.7 in the DWGP, to be eligible for coverage under the DWGP. The Permittee must follow the historic properties screening procedures in this appendix, and then enter the criterion on the Permittee’s NOI. If the Permittee cannot meet any of the certification criteria relating to historic properties, the Permittee must apply for an individual permit.

At various times the NHPA regulations and the DWGP, as described in this Appendix, require communication with the Tribal Historic Preservation Officer (THPO) for the Tribe on whose lands the facility is located. (“Tribal lands” is defined for this purpose at 36 C.F.R. § 800.16(x).) If the Tribe in question does not have an appointed THPO, then these communications should be with the State Historic Preservation Officer (SHPO) *and* a representative designated by the Tribe. In this Appendix, the term Historic Preservation Official (HPO) refers to whichever official(s) may be appropriate to involve under the circumstances.

Historic Properties Eligibility Criteria

- Criterion A. There will be no new ground-disturbing activity on the Permittee’s site and no new discharges. Wastewater discharges and related activities do not have the potential to affect historic properties.
- Criterion B. Wastewater discharges and related activities have the potential to affect historic properties, but there are no historic properties within the area of potential effects (APE).
- Criterion C. The Permittee’s wastewater discharges and related activities have the potential to affect historic properties, and there are historic properties within the APE, and the Permittee has

obtained and is in compliance with a written agreement with the HPO regarding measures to mitigate or prevent any adverse effects on historic properties.

If the Permittee has been unable to reach agreement with the HPO regarding appropriate measures to mitigate or prevent adverse effects, EPA may notify the Permittee of additional measures the Permittee must implement in order to be eligible for coverage under the DWGP.

Historic Properties Screening Procedures: Initial Considerations

Activities with No Potential to Have an Effect on Historic Properties

A determination that a Federal undertaking has no potential to affect historic properties fulfills an agency's obligations under the NHPA. The overwhelming majority of sources covered under the DWGP will be facilities seeking renewal of previous permit coverage. These existing dischargers should have already addressed NHPA issues in the DWGP as they were required to certify that they were either not affecting historic properties or they obtained written agreement from the applicable HPO regarding ways to avoid, minimize, or mitigate potential impacts. Both existing and new dischargers must follow the historic property screening procedures to determine their eligibility. EPA is not aware of any impacts on historic properties from activities covered under the DWGP. Therefore, to the extent the DWGP authorizes renewal of prior coverage without relevant changes in operations, with documented prior compliance with NHPA requirements, it has no potential to affect historic properties.

Activities with Potential to Have an Effect on Historic Properties

EPA believes the DWGP may have some potential to affect historic properties where permittees construct or install wastewater control measures that involve ground disturbance of up to one acre of land to comply with the DWGP. (Ground disturbances of one acre or more require coverage under a different permit, the Construction General Permit.) Where the Permittee has to disturb the land through the construction or installation of control measures, there is a possibility that historic properties could be impacted. Therefore, if the Permittee is establishing new or altering existing control measures to manage the Permittee's wastewater that will involve subsurface ground disturbance of up to one acre, the Permittee will need to ensure that the Permittee has identified any properties on and eligible for inclusion on the National Register of Historic Places and (1) that the Permittee has consulted with the appropriate HPO regarding effects of the Permittee's actions on any historic properties identified and determined that the historic properties will not be impacted by the Permittee's activities or (2) that the Permittee has consulted with the appropriate HPO regarding measures that would mitigate or prevent any adverse effects on historic properties.

Examples of Control Measures That Involve Ground Disturbance

EPA has reviewed typical control measures currently employed to determine which practices involve some level of earth disturbance. The types of control measures that are presumptively expected to cause subsurface ground disturbance include:

- Dikes
- Berms
- Catch Basins
- Ponds
- Ditches
- Trenches
- Culverts

- Land manipulation: contouring, sloping, and grading
- Channels
- Perimeter Drains
- Swales

EPA cautions dischargers that this list is non-exclusive. Other control measures that involve earth-disturbing activities not on this list must also be examined for the potential to affect historic properties.

Contact information

Addresses for State Historic Preservation Officers and Tribal Historic Preservation Officers may be found on the Advisory Council on Historic Preservation's website (www.achp.gov/programs.html). In instances where a Tribe does not have a Tribal Historic Preservation Officer, the Permittee should contact the appropriate Tribal government office to obtain contact information for their designated representative.

Historic Properties Screening Procedures: Steps for Assessing Eligibility

The Permittee should follow the following process to assess and certify the Permittee's compliance with historic property eligibility requirements under the DWGP (see section 1.3.7). Note that after the Permittee submits the Permittee's NOI, there is a 30-day waiting period during which the HPO may review the Permittee's NOI and may request that EPA pause authorization based on concerns about potential adverse impacts to historic properties. EPA will evaluate any such request and notify the Permittee if any additional measures to address adverse impacts to historic properties are necessary.

Step One: Is the Permittee an existing facility reapplying for certification under the DWGP?

If the Permittee is an existing facility the Permittee should have already addressed NHPA issues, unless the Permittee is seeking to commence new ground disturbing activities. To gain coverage under an NPDES permit the Permittee was required to certify that the Permittee was either not affecting historic properties or had obtained written agreement from the relevant HPO regarding methods of addressing potential impacts. As long as the Permittee is not constructing or installing any new wastewater treatment facility modifications or otherwise conducting ground disturbing activities in connection with the permit then the Permittee has met eligibility Criterion A.

If the Permittee is a new facility, or an existing facility without documented NHPA compliance, then proceed to Step Two.

Step Two: Is the Permittee constructing or installing a new wastewater treatment facility that requires ground disturbance of up to one acre?

If the Permittee's compliance with the DWGP will not involve any ground disturbance, then the Permittee may select eligibility Criterion A on the Permittee's NOI form and the Permittee has no further obligations relating to historic properties. However, if at any time during the DWGP term the Permittee determines that ground disturbance is needed and the Permittee initially chose eligibility Criterion A, then the Permittee must follow the procedures in Steps Three through Five to ensure that the Permittee's eligibility for continued authorization to discharge is maintained before any ground disturbance occurs.

If the Permittee is building or installing wastewater treatment facilities on the Permittee's site that cause up to one acre of ground disturbance, or if the Permittee has no documentation of NHPA compliance for the Permittee's facility, then proceed to Step Three.

Step Three: *Within the Permittee's APE, determine whether (a) there is a property listed in, or eligible for listing in, the National Register of Historic Places; or (b) prior earth disturbances, surveys or other activity have revealed the existence of a historic property or provided evidence that a historic property may exist.*

Under this step the Permittee must consider the APE associated with the Permittee's facility as described in (a) and (b) below. The APE includes each wastewater facility covered by the DWGP and any locations that may be affected (for instance, as a result of downstream scouring) by facility discharges. See 36 C.F.R. §§ 800.4(a)(1), 800.16(d).

(a) *Determine whether the Permittee's APE includes any portion of a property listed in the National Register of Historic Places.* Listed properties can be identified by consulting the National Register of Historic Places website at www.nps.gov/nr/. Note that this website may not be up to date, and that the connection between the Permittee's APE and a listed historic property may not be obvious. For any questions regarding listings in the National Register of Historic Places the Permittee should contact the Permittee's HPO.

If the result of the Permittee's inquiry is yes then proceed to Step Five. If no, consider part (b).

b) *Determine whether any prior ground disturbance, survey of historic resources, or other activity has revealed the presence of historic properties or provided other evidence that a National Register-eligible historic property may exist within the Permittee's APE.* Evidence that a National Register-eligible historic property may exist includes any artifacts, records or remains that may have been found indicating the presence of a potential historic property even if such evidence or property has not yet been evaluated for eligibility for listing in the National Register of Historic Places. Be aware that discovery of human remains may trigger separate requirements under state law or the federal Native American Graves Protection and Repatriation Act (NAGPRA), but any such requirements are not associated with DWGP eligibility.

If a prior ground disturbance, survey, or other activity has not conclusively revealed the existence of historic properties or other evidence that a National Register-eligible historic property may exist within the Permittee's APE, or if there has been no prior earth disturbance, survey, or other activity with which to make this assessment, then proceed to Step Four.

If a prior ground disturbance, survey, or other activity has revealed the presence of historic properties or other evidence that a National Register-eligible historic property may exist within the Permittee's APE, proceed to Step Five.

Alternatively, if the Permittee substitutes or modifies the Permittee's activities to eliminate any ground disturbance, the Permittee may select eligibility Criterion A on the Permittee's NOI form and the Permittee has no further obligations relating to historic properties, unless unforeseen historic properties are discovered during the course of construction and operations.

Step Four: *In coordination with the Permittee's HPO, or by retaining a qualified historical or archaeological consultant, determine whether there are any historic properties within the APE not already identified in Step Three.*

This step assumes that the Permittee is disturbing up to one acre of land in connection with the DWGP, and that the APE for the Permittee's project does not include any site listed in the National Register of Historic Places, and that no prior earth disturbance, survey, or other activity has revealed the presence of historic properties or other evidence that a National Register-eligible historic property may exist within the

Permittee's APE. In these circumstances, the Permittee must still determine, in coordination with the relevant HPO, whether any properties eligible for listing in the National Register of Historic Places exist within the Permittee's APE. The HPO and/or a qualified professional consultant can assist the Permittee's analysis and determination in many ways, including examining local records to determine whether historic artifacts have been found in nearby areas, conducting surveys of the Permittee's APE, and performing limited surface and subsurface examinations. The Permittee's historic resource survey assistance provider and results must be documented and retained.

The Permittee may contact the appropriate HPO to request their help in determining the presence of historic properties. Alternatively, the Permittee may opt to contact a qualified historical or archaeological consultant without first contacting the HPO. If the HPO indicates to the Permittee within 30 calendar days after the Permittee's contact that they are unable to assist the Permittee, then the Permittee must engage the services of a qualified professional consultant. If the HPO does not respond within 30 days after the Permittee's contact, and if the Permittee does not otherwise have information that there are historic properties in the APE, the Permittee may assume there are no historic properties or National Register of Historic Places-eligible property within the Permittee's APE, and the Permittee may certify the Permittee's eligibility under Criterion B on the Permittee's NOI form, and the Permittee has no further obligations relating to historic properties, unless unforeseen historic properties are discovered during the course of construction and operations..

The HPO and/or a qualified professional consultant can assist the Permittee's analysis and determination in many ways, including examining local records to determine whether historic artifacts have been found in nearby areas, conducting surveys of the Permittee's APE, and performing limited surface and subsurface examinations. The Permittee's historic resource survey assistance provider and results must be documented and retained. Alternatively, the Permittee may opt to contact a qualified historical and/or archaeological consultant without first contacting the HPO. If the Permittee, after reviewing the information provided by its qualified historical and/or archaeological consultant, determines there are no historic properties within the Permittee's APE, the Permittee must inform the appropriate HPO of that finding in writing. If the HPO provides written concurrence or does not respond within 30 days after the Permittee's contact, the Permittee may assume there are no historic properties or National Register of Historic Places-eligible property within the Permittee's APE, and the Permittee may certify the Permittee's eligibility under Criterion B on the Permittee's NOI form, and the Permittee has no further obligations relating to historic properties, unless unforeseen historic properties are discovered during the course of construction and operations.

If the Permittee determines that there are or may be historic properties within the Permittee's APE, continue to Step Five.

Alternatively, if the Permittee substitutes or modifies the Permittee's activities to eliminate any actions involving ground disturbance, the Permittee may select eligibility Criterion A on the Permittee's NOI form and the Permittee has no further obligations relating to historic properties, unless unforeseen historic properties are discovered during the course of construction and operations.

Step Five: *Contact the EPA and appropriate historic preservation authorities.*

This step assumes that the Permittee is constructing treatment facilities affecting up to one acre of land to control wastewater discharges associated with the DWGP, and that the Permittee has determined that there are or may be historic properties within the Permittee's APE. In that case, the Permittee must contact the EPA and the relevant HPO in writing and request to discuss mitigation or prevention of any adverse effects from the Permittee's activities on the historic properties. The letter should state that the Permittee is seeking coverage under the DWGP, and that historic properties may be present within the APE. It should also describe the Permittee's facility, the nature and location of subsurface disturbance activities that are contemplated,

any known or suspected historic properties in the area, and any anticipated effects on such properties. The letter should state that if the HPO does not respond within 30 days of receiving the Permittee's letter, the Permittee may submit the Permittee's NOI without further consultation. EPA encourages applicants to contact the appropriate authorities as soon as possible in the event of a potential adverse effect to an historic property. Contact with all parties should be made as soon as possible, but in no event less than 30 days before the Permittee submits the Permittee's NOI.

If the Permittee enters into, and complies with, a written agreement with the HPO regarding how to address any adverse impacts on historic properties, the Permittee has met eligibility Criterion C. In this case, the Permittee should retain a copy of the written agreement and retain documentation of the Permittee's compliance with its terms consistent with section 5.7 of the DWGP. As noted above, the HPO may request that EPA delay authorization based on concerns about potential adverse impacts to historic properties.

If the Permittee does not receive a response from the Permittee's HPO within 30 days after making contact in this step, or if the Permittee consults with the HPO regarding adverse impacts to historic properties and measures to mitigate them but an agreement cannot be reached, EPA may require the Permittee to obtain coverage under an individual permit. Alternatively, EPA may determine what additional measures, if any, are required for the Permittee to become eligible for DWGP coverage.