

# Advisory Council On Historic Preservation

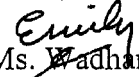
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The Old Post Office Building  
1100 Pennsylvania Avenue, NW, #809  
Washington, DC 20004

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January 25, 2002

Ms. Emily Wadhams  
State Historic Preservation Officer  
Vermont Division for Historic Preservation  
National Life Building, Drawer 20  
Montpelier, VT 05620-0501

Dear Ms.  Wadhams:

I would like to reply to your question about the applicability of the Section 106 process to off-site borrow and disposal areas.

It is our opinion that, if the location of the specific source of fill or disposal site is reasonably foreseeable, the Federal agency must include such location in the Area of Potential Effects (APE). If such location is not reasonably foreseeable prior to the approval of the undertaking or the release of undertaking funds, the Federal agency must still consider the effects to historic properties on such sites either through a previously agreed process or through the other post-review discovery provisions of the Section 106 regulations.

## When the Location of the Borrow or Disposal Sites is Reasonably Foreseeable Prior to Approval of the Undertaking or Release of Funds

The reasoning behind our position, that those reasonably foreseeable borrow and disposal sources must be included in an undertaking's area of potential effects, is grounded in law and regulation. Section 106 of the NHPA broadly calls for Federal agencies to "*take into account the effect of the undertaking on any [historic property].*" 16 U.S.C. § 470f (emphasis added). This statutory language does not place any limits on either the location of the historic property affected, or its physical distance from the main project. There is nothing in the statute or the implementing regulations that exempts historic properties located at off-site areas, or at lands privately owned, from being considered.

Consistent with the cited statutory language, the Section 106 regulations require Federal agencies to make a "*reasonable and good faith effort*" to carry out appropriate identification efforts within the APE, which is defined as the "*geographic area or areas within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.*" 36 C.F.R. §§ 800.4(b) and 800.16(d) (emphasis added). A key phrase in the definition of APE is the undertaking's potential to "*directly or*

*indirectly cause alterations*” to historic properties, based on the professional's judgment about the nature of the undertaking and the kinds of impacts it could have. We also note that this is consistent with the requirement under Section 110(a)(2)(c) of the National Historic Preservation Act (NHPA) that Federal agencies “*ensure that the preservation of properties not under the jurisdiction or control of the agency, but subject to be potentially affected by agency actions are given full consideration in planning.*” 16 U.S.C. § 470h-2(a)(2)(c).

#### When the Location of Borrow or Disposal Sites is Not Reasonably Foreseeable Prior to Approval of the Undertaking or Release of Funds

If the location of such borrow or disposal sites cannot be reasonably foreseen, we believe the Federal agency still must consider the effects to historic properties at such sites. This could most effectively be done in accordance with the post-review discovery provisions of the Section 106 regulations. 36 C.F.R. § 800.13. We note that those post-review discovery provisions allow agencies to address adverse effects to such historic properties through a previously agreed process. 36 C.F.R. § 800.13(a). The Council believes the best approach is for agencies involved in undertakings that will use a borrow or disposal site, to enter into such an agreement. Of course, such a Federal agency could also enter into a Programmatic Agreement for the entire project that may include the insertion of historic property considerations on the ultimate selection of a borrow/disposal bid.

We note that the only case of which we are aware that directly dealt with these issues, reached a similar conclusion regarding the applicability of Section 106 to borrow sites. In The Hopi Tribe v. Federal Highway Administration, et al., (Civ-98-1061), the U.S. District Court for the District of Arizona stated that “*an agency’s responsibilities under Section 106 ... extend to any historic properties that an undertaking could potentially affect, regardless whether the property is located within the right-of-way.*” In that case, the Hopi Tribe sought to enjoin further construction of a Federal-aid highway project because material for the project was being obtained from Woodruff Butte, a historic property of traditional cultural and religious significance to it. Damage to the Butte included the removal of a large amount of aggregate, and the destruction of a number of Hopi shrines and archaeological remains. On July 9, 1998, the Court enjoined the Federal Highway Administration from reimbursing the Arizona Department of Transportation for the \$6 million project without first complying with the requirements of Section 106, despite the fact that the Butte is privately-owned and a commercial operation. The Court found that even where the location of a material source is not reasonably foreseeable at the time the Federal agency approves a project, the agency has a continuing obligation to consider the project’s effects on historic properties under the post-review discovery provisions of the Section 106 regulations.

#### Other Considerations

There are various factors related to specific application of the Council’s regulations regarding borrow and disposal lands including, among others: (a) whether the borrow/disposal lands are privately or publicly owned, (b) whether the undertaking will create a new source of borrow material or a new disposal site, (c) whether the lands will be exclusively used for the

undertaking or will be accommodating various other projects, and (d) the amount of fill or disposed material connected to the undertaking. While these factors may rightfully influence effect determinations and/or how adverse effects are resolved, they still do not eliminate the basic requirements to identify historic properties on the borrow or disposal lands and consider them in the Section 106 process. As stated above, Section 106 requires Federal agencies to take into account direct or indirect effects to historic properties, and does not limit consideration according to location of the sites.

I hope you find this advice helpful in your discussions with Federal agencies about the applicability of Section 106 review to borrow and disposal sites in Vermont. We will be glad to discuss our position with you further at your convenience.

If you have any questions, do not hesitate to call either Dr. Tom McCulloch in Washington (202-606-8505), or Ms. Carol Gleichman in our Denver office (303-969-110).

Sincerely,

A handwritten signature in cursive script, appearing to read "John M. Fowler".

John M. Fowler  
Executive Director