



Preserving America's Heritage

November 23, 2016

Ms. Ann F. Miles  
Director  
Office of Energy Projects  
Federal Energy Regulatory Commission  
Washington, D.C. 20426

Ref: *Applicability of Section 110(k)*  
*Rover Pipeline Project (Docket No. CP15-93-000)*  
*West Virginia, Pennsylvania, Ohio, Michigan*

Dear Director Miles:

On November 16, 2016, the Advisory Council on Historic Preservation (ACHP) received your letter requesting guidance from the ACHP regarding Section 110k of the National Historic Preservation Act (NHPA), 54 U.S.C. § 306113 and 36 C.F.R. § 800.9(c). The Federal Energy Regulatory Commission (FERC) is currently engaged in a review of the referenced undertaking to determine whether it is in the public interest and should be issued a Certificate of Public Convenience and Necessity under Section 7(c) of the Natural Gas Act (NGA) and Part 157 of FERC's regulations. As such, FERC is responsible to comply with Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.) and its implementing regulations, "Protection of Historic Properties" (36 C.F.R. Part 800) for the undertaking.

In your letter, you indicate that the project proponent, Rover Pipeline LLC (Rover), demolished an historic property located in the Area of Potential Effects (APE) for the undertaking. You specifically request that ACHP provide guidance regarding a federal agency's consideration of circumstances that may justify continuing its review and possibly granting requested federal assistance or authorization once it has determined that Section 110k applies. In order to assist you, we are providing the following overview of Section 110k and suggestions on the next steps that FERC should consider taking.

Based on the information available to us, the project proponent (Rover) intends to construct and operate a new natural gas pipeline and associated facilities that will extend approximately 510 miles, in West Virginia, Pennsylvania, Ohio, and Michigan. During FERC's licensing review of the undertaking, Rover purchased land which included a National Register eligible property, the Stoneman House in Dennison, Ohio, and subsequently demolished it. The Stoneman House was in the 'visual' APE for the undertaking. As a result FERC is currently considering whether Section 110k of the NHPA applies to this undertaking.

As you know, as relevant to the matter at hand, Section 110(k) of the NHPA prohibits a federal agency from granting a permit, license, or other authorization to an applicant who, with intent to avoid Section 106 of the NHPA, has intentionally significantly adversely affected an historic property to which the

ADVISORY COUNCIL ON HISTORIC PRESERVATION

401 F Street NW, Suite 308 • Washington, DC 20001-2637  
Phone: 202-517-0200 • Fax: 202-517-6381 • [achp@achp.gov](mailto:achp@achp.gov) • [www.achp.gov](http://www.achp.gov)

authorization or assistance would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the ACHP, determines that circumstances justify issuing such an authorization despite the adverse effect created or permitted by the applicant. (36 C.F.R. § 800.9(c)(1)).

In this instance, FERC must first investigate the circumstances and determine whether Section 110(k) is applicable. It is not clear from your letter whether FERC has made this determination. If and when FERC makes such a determination, it must then determine, in consultation with the ACHP, whether or not the circumstances justify granting the authorization. Our regulations at 36 C.F.R. § 800.9(c)(2) explicitly outline the process that FERC would need to follow if and when it has made a determination that Section 110(k) applies. Please note that it would be particularly helpful, for its own records and for the ACHP consideration, if FERC would explain why it believes circumstances justify issuing the approval.

If the federal agency makes a determination that Section 110(k) does not apply, the federal agency should document its position and explain its proposed course of action to complete the Section 106 review process. In either case, the federal agency must then continue its compliance with the steps in the Section 106 review process as set forth in 36 C.F.R. § 800.3 through 36 C.F.R. § 800.6, including the resolution of adverse effects.

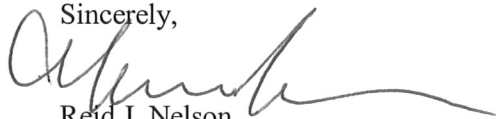
Neither the statute nor the Section 106 regulations specify the nature of circumstances that may justify a federal agency decision to continue consideration of and ultimate granting of authorization for an undertaking in cases where the agency has determined that Section 110k applies. However, such circumstances might reasonably include such factors as the issues considered by federal agencies when they engage in a review to determine if a proposed undertaking is generally in the public interest, and may include the value of the undertaking as it contributes to the economy, employment, public needs and safety, and quality of life at a community, state, regional, or national level. Federal agencies should also consider the actions or commitments of the project proponent to resolve the adverse effects, as well as the significance of the historic properties affected, the nature of the effects, and the degree of disregard for the law that might have been exhibited by the proponent, including prior history of violations of Section 110(k), if any.

It should be noted that Section 110(k) is a statutory requirement in the NHPA like Section 106. The clear intent of Section 110(k) is for agencies to provide oversight of applicants to discourage them from foiling the Section 106 process. In this case, FERC should carry out any additional investigation it believes it needs to make a formal determination whether or not Section 110(k) applies to the actions of the project proponent, and if so, then consider whether there are mitigating circumstances that justify still authorizing the undertaking. If it believes such justification exists, then it would engage the ACHP as provided at 36 C.F.R. § 800.9(c)(2).

The ACHP is aware of the time constraints for the undertaking and the cost repercussions on the proponent due to any delay. Accordingly, we will provide as quick a response as possible once we have received FERC's notification and supporting documentation.

The ACHP looks forward to assisting FERC in complying with the requirements of Section 110(k) of the NHPA. If you wish to discuss this matter further, please have your staff contact John Eddins, PhD, the program analyst assigned to this case review, at 202-517-0211 or by email at [jeddins@achp.gov](mailto:jeddins@achp.gov).

Sincerely,



Reid J. Nelson

Director

Office of Federal Agency Programs

Document Content(s)

wv-pa-oh-mi.ferc.rover pipeline.110k con1.23nov16.PDF.....1-2