



Preserving America's Heritage

May 19, 2016

Lieutenant General Thomas P. Bostick
Commanding General and Chief of Engineers
Headquarters
U.S. Army Corps of Engineers
441 G Street NW
Washington, DC 20314-1000

Ref: Dakota Access Pipeline Project

Dear General Bostick:

The Advisory Council on Historic Preservation (ACHP) objects to the effect determinations made by the Corps of Engineers (Corps) for the referenced undertaking. In a letter dated April 22, 2016, and received on April 26, 2016, the Oahe Project Office of the Omaha District (Lake Oahe) made determinations of eligibility and a finding of "No Historic Properties Affected" for the Lake Oahe Project crossing location. In a letter dated May 13, 2016, the Omaha District made a finding of "No Historic Properties Affected" for ten of eleven crossings of waters of the U. S. (WOUS) subject to Department of the Army (DA) authorization under the Regulatory Program and requiring Pre-Construction Notifications (PCNs) in South Dakota. It is the ACHP's opinion that the Corps has not delineated the undertaking and Area of Potential Effects (APE) correctly and has not carried out the steps of the Section 106 process as set forth in 36 C.F.R. Part 800, "Protection of Historic Properties", the regulations implementing Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.). Given the history of procedural problems in the way the Corps has handled Section 106 consultation for this undertaking and the decision by the Corps not to designate a single lead on behalf of the Corps, we are providing this opinion to you as the head of the agency in accordance with 36 C.F.R. § 800.4(d)(1)(iv)(A).

Accordingly, we believe that the effect findings made by the Corps are premature, based on an incomplete identification effort, which was not sufficiently informed by the knowledge and perspective of consulting parties, including federally recognized Indian tribes who ascribe religious and cultural significance to properties in the APE that may be affected. In our letters to the Corps dated February 3, March 15, and May 6, 2016, the ACHP addressed flaws in the Corps compliance with Section 106 for the Dakota Access Pipeline Project (DAPL). In the following, we reference those flaws in order to clarify the reasons for our objection to the effect findings.

Undertaking and Area of Potential Effects

As we noted in our previous letters, the Section 106 regulations define the undertaking as the larger project, portions of which may require federal authorization or assistance. The Area of Potential Effects (APE) is the area within which the larger undertaking may affect historic properties, if any may be present.

In this case, the undertaking consists of construction of a 1,168-mile crude oil pipeline that will originate in the Bakken and Three Forks production areas of North Dakota, extend through South Dakota and Iowa, and terminate near Patoka, Illinois. The APE for the undertaking should include all areas where historic properties may be affected by the undertaking, directly and indirectly, if any are present.

Corps Regulatory in three districts (Omaha, Rock Island, and St. Louis) and a Corps Civil Works facility (Lake Oahe) have actions related to the undertaking. The pipeline crosses navigable waters at the Missouri, James, Big Sioux, Des Moines, Mississippi, and Illinois Rivers. It crosses the Missouri River twice. The pipeline right-of-way (ROW) includes 209 crossings of Waters of the United States (WOUS) that trigger PCNs and unnumbered crossings of the WOUS that do not. These are spread throughout the undertaking, and subject to the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act (33 U.S.C. 401 et seq.) and Section 404 of the Clean Water Act (33 U.S.C. 1344). The Corps also must carry out a review under Section 408 for the West Levee portion of the Illinois River.

The Corps is treating the reviews of each of the water crossings and each of its other actions as separate undertakings. The Corps is not differentiating appropriately between federal action and the undertaking, as defined in the Section 106 regulations. Further, its minimization of its responsibility to take into account the effects of the larger undertaking on historic properties has resulted in a failure to carry out appropriately the four-step Section 106 process for this undertaking in a consistent and proper sequence, and in consultation with the consulting parties. The ACHP has acknowledged that at times, a federal agency may have limited jurisdiction over a small portion of a larger undertaking. However, in such a case, the federal agency remains responsible for considering effects of the larger undertaking on historic properties beyond areas of its specific jurisdiction. Given the sheer number of water crossings and the unlikelihood that the pipeline could be constructed “but for” the issuance of these numerous permits, we cannot agree with the Corps that its responsibilities to assess effects to historic properties from the broader undertaking are limited only to the 209 PCN crossings.

The Corps should also consider the overall level of federal involvement in and relationship to this undertaking. The Fish and Wildlife Service (FWS) is considering Special Use Permits (SUPs) to allow DAPL to cross five FWS wetland easements and one grassland easement in North Dakota and 109 wetland and three grassland easements in South Dakota. The Farm Service Agency (FSA) may also be considering actions related to the undertaking. Together, the involvement of the Corps, FWS, and the FSA provides the basis for the federal agencies to consider further their obligation to take into account the affects of the larger undertaking on historic properties. Further, the coordination of the federal agencies should result in a more comprehensive approach to complying with the requirements of Section 106.

Tribal Consultation and Incomplete Identification Effort

As we noted in our letter of May 6, 2016, the ACHP is concerned that the Corps’ focus on individual PCN crossings as separate undertakings, and the segmented oversight by three Corps districts and a Corps Civil Works facility has resulted in disjointed and inadequate consultation with Indian tribes who may ascribe religious and cultural significance to historic properties that may be affected by the undertaking. The Corps does not appear to have consulted with tribes in the development of the scope of the effort to identify and evaluate historic properties that may be affected by the undertaking. Based on the

documentation available to us, the Corps does not appear to have adequately consulted with the tribes regarding the identification and assessment of eligibility and effects on properties of religious and cultural significance to them that may be affected by the undertaking in PCN areas, in the vicinity of water crossings within the project ROW that the applicant assumes will not require PCNs under General Conditions 20 and 31 of the Nationwide Permit protocols, and in the larger undertaking between water crossings. Only very late in the Section 106 review did the Corps move to provide tribes with access to PCN permit areas in order that they could assist in the identification of such properties. Further, the Corps appears to have focused only on archaeological sites in PCN areas and consideration of their eligibility for inclusion on the National Register of Historic Places under Criterion D.

In a letter from the Tribal Historic Preservation Officer (THPO) of the Standing Rock Sioux Tribe (SRST) to the ACHP, dated May 2, 2016, the tribe asserts that the location of the water crossing at Lake Oahe is a ceremonial and sacred site of the Tribe. It is not clear how the Corps has considered or responded to this information. According to the tribe, the Corps has not engaged appropriately with the tribes in order to identify Traditional Cultural Properties (TCPs) such as this and other properties of religious and cultural significance to tribes and properly assessed the eligibility of and effects to such properties. The SRST letter also indicates that the Corps has suggested that it has carried out appropriate consultation as specified in the Programmatic Agreement for The Operation And Management Of The Missouri River Main Stem System. We remind the Corps that a federal agency is obligated to consult with federally recognized tribes regarding the potential presence of and effects to properties of religious and cultural significance to them regardless of whether they are signatories or concurring parties on or have participated in the development of a Section 106 agreement that may, in part, relate to a portion of the APE covered in the agreement.

Procedural Issues

In reviewing the documentation available to us, there appear to have been multiple findings regarding the presence or absence of eligible properties and findings of effect for various portions of the larger undertaking. There have been multiple sets of eligibility and effect determinations sent out by different districts, to different sets of consulting parties, that collapse steps 2 and 3 of the Section 106 review process, confuse the effect findings under 36 C.F.R. § 800.4(d) and under 36 C.F.R. § 800.5, and do not clearly trigger the consulting party review and response periods as specified in the Section 106 regulations. The Rock Island District appears to have issued partial findings regarding eligibility of properties and effects for various PCN locations under its review in Iowa and Illinois, including one in December 2015 and four in March 2016. These communications included determinations of eligibility and findings of No Historic Properties Affected, No Adverse Effect, and No Adverse Effect due to Avoidance. In a letter dated April 22, 2016, the Lake Oahe Project made a determination of No Historic Properties Affected for the crossing associated with that Civil Works facility due to reliance on horizontal directional drilling. In a letter dated May 13, 2016, the Omaha District made a determination of No Historic Properties Affected for ten of the eleven PCN crossing areas in South Dakota, noting it would use permit conditions to ensure that tribes could monitor during construction for PCN areas where they have previously been denied access.

These mixed notifications are extremely confusing to consulting parties, including us, as they segment consultation on one single undertaking into pieces that fail to adequately account for the potential effects of the broader undertaking to historic properties. A federal agency should make one effect finding under 36 C.F.R. § 800.4(d) for the entire undertaking, which communicates one of the following conclusions: 1) there are no historic properties in the APE; 2) there are historic properties in the APE but the undertaking will not affect them; or 3) the undertaking will have effects on historic properties in the APE. This determination triggers a review and response period for SHPO/THPO and consulting parties. If the federal agency determines that historic properties may be affected by the undertaking, it proceeds to

assess whether any effects will be adverse pursuant to 36 C.F.R. § 800.5, in consultation with consulting parties. At the end of that review process, the federal agency makes a single determination as to whether the undertaking will adversely affect historic properties or not. As context for that determination, the federal agency should specify how/why the undertaking does, or does not, adversely effect specific historic properties so that the consulting parties can make an informed evaluation of the finding. These findings and determinations should be provided to all consulting parties who are participating in the Section 106 consultation for the larger undertaking, and they should be afforded an opportunity to express their concerns about the determinations and raise objections. Based on the documentation we have received, we are uncertain whether the Corps has received any objections to the varied findings and determinations that it has issued, and, if necessary, at what point it intends to comply with the dispute procedures set forth in the Section 106 regulations. The Corps focus on each water crossing as a separate undertaking essentially results in an artificial segmentation of the undertaking which is prohibited in the NHPA, which limits the ability of the agency and consulting parties to consider alternatives to the undertaking that may avoid or minimize effects to historic properties.

Summary of ACHP Objections to Findings of Effect

Based on the inadequacies of the tribal consultation and the limited scope for identification of historic properties that may be affected, the ACHP questions the sufficiency of the Corps' identification effort, its determinations of eligibility, and assessments of effect. The Corps' effect determinations, thus far, fail to consider the potential for effects from the larger undertaking on historic properties, including those of religious and cultural significance to Indian tribes. The Corps' identification effort did not adequately facilitate the use of tribal expertise to assist in the identification of historic properties and assessment of effects. The tribes have had extremely limited access to some PCN areas, thwarting their ability to provide input to the Corps. There does not appear to have been any coordination with tribes regarding non-PCN crossings under Corps jurisdiction, and no coordination has occurred regarding historic properties in upland areas outside Corps PCN crossing permit areas. Finally, there does not appear to have been adequate consultation with tribes about the presence of TCPs and other properties of religious and cultural significance to tribes located in or beyond the Corps' jurisdictional areas, that may be affected by the undertaking. The Corps' effect determinations also fail to adequately consider long term and cumulative effects, including reasonably foreseeable effects from oil spills.

Next Steps

Pursuant to 36 C.F.R. § 800.4(d)(1)(iv)(B) and (C) and 36 C.F.R. § 800.5(c)(3)(ii) the Corps must take into account the ACHP's comments in reaching a final decision on the findings discussed in this letter. Per our regulations, as the head of the agency, you or the agency's Senior Policy Official if you so delegate, must prepare a summary of the decision that contains the rationale for the Corps' decision and evidence of consideration of the Council's opinion, and provide it to the Council, the SHPO/THPO, and the other consulting parties, including Indian tribes.

It is our recommendation that the Corps and the FWS coordinate with consulting parties to develop a comprehensive PA to address varying federal jurisdiction and authority over components of the DAPL Project, expansion and completion of an appropriate identification effort, phasing of the steps of the Section 106 process that will facilitate tribal assistance in identification of properties of concern to the tribes, and responsibility for effects to historic properties in portions of the undertaking outside FWS easements and in uplands between crossings of the WOUS under Corps jurisdiction.

Should you have any questions or wish to discuss this matter further, please contact John T. Eddins, PhD at 202-517-0211, or by e-mail at jeddins@achp.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Reid J. Nelson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Reid J. Nelson
Director
Office of Federal Agency Programs