

**Appendix E**  
**National Historic Preservation Act Guidance**

**A. Background**

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’s issuance of the Small Municipal Separate Storm Sewer System General Permit is a federal undertaking within the meaning of the NHPA regulations. To address any issues relating to historic properties in connection with issuance of the permit, EPA has included criteria for applicants to certify that potential impacts of their covered activities on historic properties have been appropriately considered and addressed. Although individual applications for coverage under the general permit do not constitute separate federal undertakings, the screening criteria and certifications provide an appropriate site-specific means of addressing historic property issues in connection with EPA’s issuance of the permit. Municipalities seeking coverage under the Small MS4 general permit are thus required to make certain certifications regarding the potential effects of their stormwater discharge, allowable non-stormwater discharge, and discharge-related activities on properties listed or eligible for listing on the National Register of Historic Places.

**B. The NHPA Eligibility Process**

Before submitting a NOI for coverage under this permit, applicants must determine whether they meet one of the NHPA eligibility criteria in Section C by following the steps in Section F of this Appendix.

**C. The NHPA Eligibility Criteria**

The NHPA eligibility requirements of this permit may be satisfied by documenting that one of more of the following criteria has been met:

Criterion A: Your stormwater discharges and allowable non-stormwater discharges do not have the potential to have an effect on historic properties and you are not constructing or installing stormwater control measures that cause less than 1 acre of subsurface disturbance; or

Criterion B: Your discharge-related activities (i.e., construction and/or installation of stormwater control measures that involve subsurface disturbance) will not affect historic properties; or

- Criterion C: Your stormwater discharges, allowable non-stormwater discharges, and discharge-related activities have the potential to have an effect on historic properties, and you have obtained and are in compliance with a written agreement with the State Historic Preservation Officer (SHPO), Tribal Historic Preservation Officer (THPO), or other tribal representative that outlines all measures you will carry out to mitigate or prevent any adverse effects on historic properties; or
- Criterion D: You have contacted the State Historic Preservation Officer, Tribal Historic Preservation Officer, or other tribal representative and EPA in writing informing them that you have the potential to have an effect on historic properties and you did not receive a response from the SHPO, THPO, or tribal representative within 30 days of receiving your letter.

You are reminded that you must comply with applicable state, Tribal, and local laws concerning protection of historic properties and include documentation supporting your determination of permit eligibility in your Stormwater Management Program.

#### **D. Activities with No Potential to Have an Effect on Historic Properties**

A determination that a federal undertaking has no potential to have an effect on historic properties fulfills an agency's obligations under the NHPA. EPA has reason to believe that the vast majority of activities authorized under the Small MS4 General Permit have no potential to have effects on historic properties. The purpose of this permit is to control pollutants that may be transported in stormwater runoff from municipal separate storm sewer systems. EPA does not anticipate effects on historic properties from the pollutants in the stormwater and allowable non-stormwater discharges. Thus, to the extent EPA's issuance of this general permit authorizes discharges of such constituents, confined to existing stormwater channels or natural drainage areas the permitting action does not have the potential to cause effects on historic properties.

In addition, the overwhelming majority of sources covered under this permit will be facilities that are seeking renewal of previous permit coverage. These existing dischargers should have already addressed NHPA issues in the 2003 Small MS4 General Permit as they were required to certify that they were either not affecting historic properties or they had obtained written agreement from the applicable SHPO or THPO regarding methods of mitigating 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 2003 Small MS4 General Permit or, for that matter, any need for a written agreement. Therefore, to the extent this permit authorizes renewal of discharges covered by the 2003 permit without relevant changes in the discharge, it has no potential to have an effect on historic properties.

#### **E. Activities with Potential to Have an Effect on Historic Properties**

EPA believes this permit may have some potential to have an effect on historic properties where the Small MS4 General Permit authorizes the construction and/or installation of stormwater control measures that involve subsurface disturbance and impact less than 1

acre of land. (Ground disturbances of 1 acre or more require coverage under a different permit, the Construction General Permit.) Where you have to disturb the land through the construction and/or installation of control measures, there is a possibility that artifacts, records, or remains associated with historic properties could be impacted. Therefore, if you are establishing new or altering existing control measures to manage your stormwater that will involve subsurface ground disturbance of less than 1 acre, you will need to ensure (1) that historic properties will not be impacted by your activities or (2) that you are in compliance with a written agreement with the SHPO, THPO, or other tribal representative that outlines all measures you will carry out to mitigate or prevent any adverse effects on historic properties.

***Examples of Control Measures Which Involve Subsurface Disturbance***

EPA 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-inclusive. Other control measures that involve earth disturbing activities that are not on this list must also be examined for the potential to affect historic properties.

**F. Steps to Determine NHPA Eligibility**

You should follow the following screening process in order to certify your compliance with historic property eligibility requirements under this permit. The following four steps describe how applicants can meet the permit eligibility criteria for protection of historic properties under this permit:

**Step One:** *Are you a municipality that is reapplying for certification under the 2008 Small MS4?*

If you are a municipality previously covered by the 2003 Small MS4, you should have already addressed NHPA issues. To gain coverage under the 2003 Small MS4 you were required to certify that you were either not affecting historic properties or had obtained

## Appendix E – Small MS4 – MASSACHUSETTS

written agreement from the relevant SHPO or THPO regarding methods of mitigating potential impacts.

*As long as you are not constructing or installing any new stormwater control measures then you have met eligibility Criterion A of the Small MS4.*

After you submit your NOI, there is a minimum 30-day public notice period during which the SHPO, THPO, or other tribal representative may review your NOI. The SHPO, THPO, or other tribal representative may request that EPA hold authorization based on concerns about potential adverse impacts to historic properties.

*If you are an existing municipality and will construct or install stormwater control measures that require subsurface disturbance of less than 1 acre then you should proceed to Step Two.*

(Note: Construction activities disturbing 1 acre or more are not eligible for coverage under this permit.)

*If you are a municipality not covered by the previous permit, then you should proceed to Step Two.*

**Step Two:** *Are you constructing or installing any stormwater control measures that require subsurface disturbance of less than 1 acre?*

If, as part of your coverage under this permit, you are not building or installing control measures on your site that cause less than 1 acre of subsurface disturbance, then your discharge-related activities do not have the potential to have an effect on historic properties.

*You have no further obligations relating to historic properties. You have met eligibility Criterion A of the permit.*

After you submit your NOI, there is a minimum 30-day public notice period during which the SHPO, THPO, or other tribal representative may review your NOI. The SHPO, THPO, or other tribal representative may request that EPA hold authorization based on concerns about potential adverse impacts to historic properties.

*If the answer to the Step Two question is yes, then you should proceed to Step Three.*

**Step Three:** *Have prior earth disturbances determined that historic properties do not exist, or have prior disturbances precluded the existence of historic properties?*

If previous construction either revealed the absence of historic properties or prior disturbances preclude the existence of historic properties, then you have no further obligations relating to historic properties.

*You have met eligibility Criterion B of the Small MS4 General Permit.*

After you submit your NOI, there is a minimum 30-day public comment period during which the SHPO, THPO, or other tribal representative may review your NOI. The SHPO, THPO, or other tribal representative may request that EPA hold authorization based on concerns about potential adverse impacts to historic properties.

*If the answer to the Step Three question is no, then you should proceed to Step Four.*

**Step Four: *Contact the appropriate historic preservation authorities***

Where you are building and/or installing control measures affecting less than 1 acre of land to control stormwater or allowable non-stormwater discharges associated with this permit, and the answer to Step Three is no, then you should contact the relevant SHPO, THPO, or other tribal representative to determine the likelihood that artifacts, records, or remains are potentially present on your site. This may involve examining local records to determine if historic artifacts have been found in nearby areas, as well as limited surface and subsurface examination carried out by qualified professionals.

If through this process it is determined that such historic properties potentially exist and may be impacted by your construction or installation of control measures, you should contact the relevant SHPO, THPO, or tribal representative in writing and request to discuss mitigation or prevention of any adverse effects. You should also send a copy of this letter to the appropriate state agency and EPA. The letter should describe 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 SHPO, THPO, or tribal representative does not respond within 30 days of receiving your letter, you may submit your NOI. EPA encourages applicants to contact the appropriate authorities as soon as possible in the event of a potential adverse effect to a historic property.

*If the SHPO, THPO, or tribal representative sent you a response within 30 days of receiving your letter and you enter into, and comply with, a written agreement with the SHPO, THPO, or other tribal representative regarding how to address any adverse impacts on historic properties, you have met eligibility Criterion C.*

After you submit your NOI, there is a minimum 30-day public comment period during which the SHPO, THPO, or other tribal representative may review your NOI. The SHPO, THPO, or other tribal representative may request that EPA hold authorization based on concerns about potential adverse impacts to historic properties.

*If you receive a response within 30 days after the SHPO, THPO, or tribal representative received your letter but an agreement cannot be reached between you and the SHPO, THPO, or other tribal representative, you should contact EPA.*

*If you have contacted the SHPO, THPO, or tribal representative and EPA in writing regarding your potential to have an effect on historic properties and the SHPO, THPO, or tribal representative did not respond within 30 days of receiving your letter, you have met eligibility Criterion D.*

After you submit your NOI, there is a minimum 30-day public comment period during which the SHPO, THPO, or other tribal representative may review your NOI. The SHPO, THPO, or other tribal representative may request that EPA hold authorization based on concerns about potential adverse impacts to historic properties.

**G. Addresses for SHPO and THPO**

Addresses for State Historic Preservation Officers and Tribal Historic Preservation Officers may be found on the Advisory Council on Historic Preservation's website (<http://www.achp.gov/programs.html>). In instances where a Tribe does not have a Tribal

## Appendix E – Small MS4 – MASSACHUSETTS

Historic Preservation Officer, you should contact the appropriate Tribal government office when responding to this permit eligibility condition.