



The Commonwealth of Massachusetts
William Francis Galvin, Secretary of the Commonwealth
Massachusetts Historical Commission

March 29, 2010

Thelma Murphy
Office of Ecosystem Protection
EPA-Region 1
5 Post Office Square – Suite 100 – Mail Code: OEP06-4
Boston, MA 02109-3912

RE: Draft NPDES General Draft Permit for Discharges from Small Municipal Separate Storm Sewer Systems (Small MS4), Appendix E: National Historic Preservation Act Guidance. MHC #RC.48082.

Dear Ms. Murphy:

The Massachusetts Historical Commission (MHC), Office of the State Historic Preservation Officer (SHPO), is taking the opportunity to provide comments on the draft “NPDES General Draft Permit for Discharges from Small Municipal Separate Storm Sewer Systems” (Small MS4) for the Massachusetts North Coastal area. The following comments should also be considered during preparation of guidance documents for Small MS4 permit applicants for other Massachusetts areas.

MHC guidance provided here should also be useful generally for EPA’s applicants for all of EPA’s funding and permitting programs in Massachusetts to be in compliance with Section 106 of the National Historic Preservation Act of 1966 as amended (36 CFR 800).

The MHC has received many inquiries from municipalities, industries, and their consultants for MHC review of various NPDES permitting of existing infrastructure with no proposed construction. It is clear from these inquiries—such as asking the MHC to identify all National Register listed and eligible properties in a town—that applicants for NPDES permitting require additional guidance from EPA.

The draft Appendix E, “National Historic Preservation Act Guidance” does not provide clear and succinct guidance to applicants, and is not consistent with 36 CFR 800. Appendix E has municipal applicants and their consultants make critical decisions and determinations, and requires them to enter into consultations and agreements to mitigate or avoid adverse effects with the SHPO without the participation of the EPA.

Under 36 CFR 800, however, these are EPA’s responsibilities to meet the requirements of Section 106 of the National Historic Preservation Act. While the EPA may formally delegate some initial steps in the process (36 CFR 800.2(a)(3) and 800.2(c)(4)), EPA remains legally responsible for all findings and determinations. The responsibilities to make determinations of adverse effect, to participate in consultation, and to enter into agreement documents cannot be wholly delegated to applicants or their consultants (36 CFR 800.2(a), and 800.3 to 800.6).

The MHC requests that Appendix E be considerably shortened, written in plain language, and made consistent with the steps in 36 CFR 800. MHC suggests that the following text be substituted for Appendix E. This following concise text may also be used for guidance for applicants to EPA’s other permitting and funding programs in Massachusetts:

Section 106 of the National Historic Preservation Act of 1966 as amended (16 USC 470f) requires the EPA to take into account the direct or indirect effects to historic properties from undertakings (projects) for which EPA provides funding or issues permits. The federal regulations that implement Section 106 are "Protection of Historic Properties 36 CFR 800" (available at www.achp.gov). The EPA has determined that activities carried out under this EPA program are projects that require review and consideration to be in compliance with the federal historic preservation law and regulations.

Applicants or their consultant need to answer the question and follow the procedures below to assist EPA in compliance with 36 CFR 800.

Does the project involve new construction, or the demolition or rehabilitation of existing buildings or other structures or facilities?

If **no**, then the applicant should certify that fact in writing and file the statement with the EPA. Based on that statement, EPA will document that the project has "no potential to cause effects" (36 CFR 800.3(a)(1)). EPA has no further obligations under the Section 106 regulations.

If **yes**, then the applicant or their consultant should prepare a complete information submittal to the Massachusetts State Historic Preservation Officer (SHPO) that consists of:

- Completed Project Notification Form available at <http://www.sec.state.ma.us/mhc/mhcform/formidx.htm>;
- USGS map section with the actual project location and boundaries clearly indicated;
- Scaled project plans showing existing and proposed conditions; and
- Current photographs of the project area keyed to the plans.

(1) Mail or deliver your submittal to: State Historic Preservation Officer, Massachusetts Historical Commission, 220 Morrissey Blvd., Boston, MA 02125.

(2) Provide a copy of your submittal to the EPA and to the Massachusetts Department of Environmental Protection **[insert EPA and DEP mailing addresses]**.

(3) Provide a copy of your submittal to your town or city government historical commission, and for projects within "local historic districts" also provide a copy of your submittal to your town or city government local historic district commission. The contact addresses for your local historical and historic district commissions are at your town or city hall.

The Massachusetts SHPO will comment within thirty days of receipt of complete submittals, and may ask for additional information. The EPA will consult with the Massachusetts SHPO and other consulting parties (which includes the applicant) and EPA will proceed with the steps in the federal regulations (36 CFR 800.2 to 800.6, etc.), as may be necessary for the undertaking.

Please feel free to contact Edward L. Bell of my staff if you have any questions concerning these comments.

Sincerely,



Brona Simon
State Historic Preservation Officer
Executive Director
Massachusetts Historical Commission

xc:
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