

3 March 1998

Re: NEPA Technical Inquiry 0231 - Compliance with NHPA

Dear NEPA Call-In User:

This letter is in response to your January 21, 1998 request for information regarding GSA's obligations under the National Historic Preservation Act (NHPA) for a lease procurement action where resources potentially eligible for inclusion in the National Register of Historic Places (National Register) may be involved. You stated potentially historic resources have been identified on the property of a preferred offeror for the lease acquisition. You understand GSA's obligation to comply with the NHPA by informing the offeror and initiating the Section 106 consultation process with the Advisory Council on Historic Preservation (ACHP) and the State Historic Preservation Officer (SHPO). If the offeror proceeds to demolish the historic resources in order to simplify GSA's acquisition process after GSA's initiation of Section 106 of the NHPA, you would like to know the following: 1) If GSA fails to eliminate the preferred offeror from consideration after anticipatory demolition of the historic resource, would the agency be open to lawsuits from other offerors? and; 2) If GSA eliminates the preferred offeror from competition due to the anticipatory demolition of a historic resource, does the offeror have standing for a lawsuit against GSA? In a follow-up phone call, you requested information on State or local regulations in Virginia which could prevent private property owners from causing adverse effects on historic resources.

#### SUMMARY OF FINDINGS

NEPA Call-In previously researched this subject in Technical Inquiry (TI) 186, "NHPA Noncompliance Consequences," and determined Federal agencies are obligated to comply with Section 110(k) of the NHPA, which may prohibit GSA from providing funds to an offeror who intends to avoid the requirements of Section 106 by causing significant adverse effects on historic resources in anticipation of a lease award. GSA may also be open to lawsuits from preservation groups or other interested parties if the agency does not comply with Section 110(k). If GSA eliminates an offeror from competition who intentionally destroyed historic resources to speed up a lease acquisition, the offeror would have no standing for a lawsuit against GSA. The Commonwealth of Virginia has regulations to protect some, but not all, potentially historic resources on private property. In addition, there may be local or county zoning or other restrictions which may protect historic resources on private lands.

#### DETAILED FINDINGS

NEPA Call-In reviewed previous research performed on this topic in TI 186, which we faxed to you on January 22, 1998. We determined in TI 186 that Federal agencies must comply with the provisions of the NHPA. Section 110(a)(2)(C) of the NHPA states that agency historic preservation programs shall 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." You stated you are familiar with this section and are prepared to notify the offeror if historic resources are identified.

We then reviewed the applicability of Section 110(k) of the NHPA to your

situation. According to the Advisor of Cultural Resource Compliance, GSA, Section 110(k) of the NHPA could greatly complicate, if not make impossible, acquisition of a site where historic resources are knowingly demolished with the intent to avoid the consultation processes of Section 106 of the NHPA. Section 110(k) states:

"Each Federal agency shall ensure that the agency will not grant a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid the requirements of Section 106, has intentionally significantly affected a historic property to which the grant would relate, or having legal power to prevent it, allowed such significant adverse effect to occur, unless the agency, after consultation with the [ACHP], determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant."

The Advisor stated that "assistance" as mentioned in Section 110(k) has been interpreted in the past to include GSA's acquisition of a site.

We then contacted the Assistant General Counsel, Office of General Counsel, ACHP, to obtain additional information about Section 110(k). The Assistant General Counsel stated GSA and the offeror would have to prove to the ACHP that circumstances justify such "assistance," which would be nearly impossible in this type of case. In addition, The Assistant General Counsel stated GSA is prohibited by law from granting assistance to property owners where historic resources are intentionally adversely effected, and that this authority comes from Section 110(k) of the NHPA. According to the Assistant General Counsel, in this case the offeror would have no standing for a lawsuit if eliminated from competition by GSA. Finally, the Assistant General Counsel stated that interested parties like preservation groups or other offerors would likely bring lawsuits against GSA if the agency fails to eliminate the offeror from competition after historic resources are intentionally adversely affected. The outcome of such a suit could stop GSA from proceeding with the project or require further consultation and mitigation.

You stated in a follow-up phone call that the information in TI 186 was sufficient to answer your questions, but you wanted to know if State or local regulations exist that protect historic resources on private property in the Commonwealth of Virginia.

NEPA Call-In then contacted Mr. James Hill, Virginia Department of Historic Resources, (804) 786-6330, to determine if Virginia has State or local regulations that would protect historic resources on private land. According to Mr. Hill, Virginia historic preservation law protects human burial sites and all caves or rock dwellings on private land. These laws include Section 2305 of the Virginia Antiquities Act for graves, and the Cave Protection Act for caves and rock dwellings. State law in Virginia also allows for local zoning ordinances which can protect National or State-designated historic resources on private land. For reasons of confidentiality, you stated you prefer not to divulge the name of the city of the potential site acquisition, but stated you would like to receive a copy of Section 2305 of the Virginia Antiquities Act (enclosed). Because you cannot provide the location of the site acquisition, NEPA Call-In is unable determine if there are specific local zoning ordinances in place to protect historic resources on private land in the area in question.

The materials in this TI have been prepared for use by GSA employees

and contractors and are made available at this site only to permit the general public to learn more about NEPA. The information is not intended to constitute legal advice or substitute for obtaining legal advice from an attorney licensed in your state and may or may not reflect the most current legal developments. Readers should also be aware that this response is based upon laws, regulations, and policies in place at the time it was prepared and that this response will not be updated to reflect changes to those laws, regulations and policies.

Sincerely,

(Original Signed)

NEPA Call-In Researcher