



DEPARTMENT OF THE ARMY
BUFFALO DISTRICT, CORPS OF ENGINEERS
1776 NIAGARA STREET
BUFFALO, NEW YORK 14207-3199

REPLY TO

June 8, 2007

Regulatory Branch

SUBJECT: Intentional Adverse Effects Determination pursuant to 36 CFR 800.9(c), Application No. 1999-01471(4)

Mr. John Eddins
Advisory Council on Historic Preservation
1100 Pennsylvania Ave. NW, Suite 809
Washington, D.C. 20004

Dear Mr. Eddins:

This is in reference to Cleveland-Cuyahoga County Port Authority's application to perform maintenance dredging in Cleveland Harbor, Lake Erie, adjacent to the Cleveland Bulk Terminal dock face. The project in question is located at 5400 Whiskey Island, in the City of Cleveland, Cuyahoga County, Ohio. The proposed dredging is considered to be part of the expansion plan for the Cleveland Bulk Terminal (CBT), a property listed in the National Register of Historic Places (NRHP) as the Pennsylvania Railway Ore Dock.

The Corps of Engineers issued a permit to the Cleveland-Cuyahoga County Port Authority to conduct maintenance dredging in a 600' x 25' area along the CBT dock face on May 14, 1999 (Department of the Army Authorization No. 1999-01471(0)). The Corps was later required to revoke the permit as a result of a 2001 U.S. District Court ruling (Committee to Save Cleveland's Huletts v. U.S. Army Corps of Engineers, 163 F. Supp. 2d 776 (N.D. Ohio 2001)). The ruling also required the Corps to consider whether the scope of any new permit sought by the Port Authority implicates Section 110(k) of the National Historic Preservation Act (NHPA).

Section 110(k) of the NHPA prohibits a Federal agency from granting a loan, loan guarantee, permit, license, or other assistance to an applicant who, with intent to avoid Section 106 of the NHPA, has intentionally significantly adversely affected an historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur. Further, when an agency official determines, based on the actions of the applicant, that 110(k) is applicable, circumstances may still justify granting the assistance.

Regulatory Branch

SUBJECT: Intentional Adverse Effects Determination pursuant to 36 CFR 800.9(c), Application No. 1999-01471(4)

Background of the permit application: The original proposal submitted by the Port Authority in 1999, requested authorization to dredge along 2000' of CBT dock face. In a telephone conversation on 6 May 1999 (conversation record attached), the Corps informed the Port Authority that the requested 2000' dredge area extended beyond the previously authorized dredge area, and this new dredging proposal would not be considered maintenance. Further, if the Port Authority wanted to dredge the entire 2000' area, the Corps would consider it part of the CBT expansion, and the proposal would be subject to a NHPA review. In this conversation, the Port Authority responded that they did not need to dredge the entire area, and would be reducing their proposal. The Port Authority subsequently reduced the proposed to a 600' x 25' dredge area in a letter dated 13 May 1999 (attached). At that time, the Corps was satisfied that the reduced project consisted of only maintenance dredging, was not part of the CBT expansion plan, and, therefore, did not consider upland portions of the CBT part of the project area.

The Corps officially stated its position regarding the applicability of the NHPA review for the reduced 600' dredging proposal, and any subsequent dredging actions in a letter to the Port Authority dated 13 May 1999 (attached). This letter stated "...the CBT expansion may be within the permit area for dredging or bulkheading work which is required to expand existing dock access. If the existing, previously authorized dredge area is insufficient to accommodate dockage requirements for the proposed expansion and the removal of the Hulett's or other proposed changes to the site would not occur but for the authorization of the expanded dredging...the upland portion of the CBT would be within the permit area as defined in Appendix C. If the CBT is determined to be within the permit area, any proposed work which would have an effect on the property's status or eligibility for listing on the National Register of Historic Places would require full Section 106 review." Further, the letter stated "However, I have determined that the CBT is not part of the permit area for the maintenance dredging proposal..." The Port Authority acknowledged receipt of this letter and its findings in a letter dated 20 May 1999 (attached).

It is clear that, in 1999, when informed that dredging along the entire 2000' CBT dock face would necessitate a Section 106 NHPA review, the Port Authority elected to modify their proposal to one of 600' maintenance dredging in order to avoid the necessity of this review. After securing authorization to dredge this reduced area, the Port Authority removed the historic structures despite being informed of the circumstances under which future dredging permit applications would require a Section 106 NHPA review. Then, in 2005, the Port Authority submitted an application to dredge along the entire 2000' CBT dock face. Included in this application was a report, referenced above, in which the Port Authority's consultant determined that the currently proposed dredging would have no effect on historic properties partially because the historically significant resources have been removed or destroyed.

Regulatory Branch

SUBJECT: Intentional Adverse Effects Determination pursuant to 36 CFR 800.9(c), Application No. 1999-01471(4)

Applicability of Section 110(k) of the NHPA: In consideration of the information presented within this letter, the Corps has determined that the Port Authority segmented its application to conduct dredging at the CBT with the intent to avoid Section 106 of the NHPA; therefore Section 110(k) of the NHPA is applicable.

Specific events under which the adverse effects occurred: The sequence of events regarding the demolition of the historically contributing resources of the NRHP listed property were outlined in the report titled Cleveland Bulk Terminal, Section 106 Review, dated 12 September 2005 (available at <http://www.lrb.usace.army.mil/regulatory/update.htm>). This report was submitted to the Corps on 21 October 2005 as part of the Port Authority's current application to dredge along 2,000 linear feet of CBT dock face. This report stated that since the CBT was designated by the City of Cleveland as a Cleveland Landmark, the Port Authority applied to the Cleveland Landmarks Commission (CLC) for a certificate of appropriateness to demolish the historic structures and Hulett Ore Unloaders on 10 November 1998.

On December 10, 1998, following public testimony, the CLC disapproved the application for the Certificate of Appropriateness and imposed a six-month waiting period, during which time it worked with the applicant and interested parties to find a means to preserve the property. A subcommittee of the Commission met monthly during the waiting period to take public testimony, review reports, and conduct investigations on the suitability of alternative sites on the lakefront and the river which had been identified from the hearings. The CLC received a mitigation plan from the Port Authority and a modified application.

The CLC approved a resolution on 8 July 1999, and the Port Authority followed with a complimentary resolution on 16 July 1999. These resolutions provided for the dismantling and storage of two Huletts for five years. As part of the mitigation approved by the CLC, Historic American Building Survey/Historic American Engineering Record (HABS/HAER) documentation of the site was completed.

Degree of damage to the integrity of the property: Subsequent to these resolutions, the Huletts and other historic structures were removed, dismantled, or demolished in 1999 and 2000. As part of the expansion plan, the applicant demolished two Hulett Ore Unloaders, dismantled and stored two Hulett Ore Unloaders on site, demolished two shunt engines, transferred two shunt engines to museums, and demolished the machine shop, storage shed, office, shower/lunchroom, and powerhouse. The applicant demolished or removed all historically contributing resources; therefore, the Corps of Engineers has determined that this project has had an adverse effect on the

Regulatory Branch

SUBJECT: Intentional Adverse Effects Determination pursuant to 36 CFR 800.9(c), Application No. 1999-01471(4)

Cleveland Bulk Terminal.

Other views to be considered:

Applicant: In their letter to the Corps dated 2 June 2006, the applicant indicates that the Port Authority did not act with intent to avoid the Section 106 process. They cite their mitigation in compliance with the requirements placed on them by the CLC as well as the fact that they have continued to store the two dismantled Hulett's beyond the five year period specified in the CLC resolution. In a letter dated 11 April 2007, the applicant objected to applicability of Section 110(k) for this undertaking. With this letter, the applicant also submitted a draft Memorandum of Agreement (MOA) to resolve adverse effects to the historic property. This draft MOA provides for the identification and relocation of the historically significant elements of the two remaining Hulett Ore Unloaders

Matthew Zone, City of Cleveland, Councilman, Ward 17: In a letter dated 12 April 2007, Mr. Zone suggested the development of a MOA that would allow the identification and preservation of the key elements of the Hulett Ore Unloaders. Mr. Zone also supports the issuance of a dredging permit to the applicant.

Oglebay Norton Company: In a letter dated 20 April 2007, the Oglebay Norton Company stated their disappointment in the Corps' Section 110(k) determination. However, Oglebay Norton supports the terms and conditions of the draft MOA submitted by the applicant.

The Corps' draft 110(k) determination was sent to all consulting parties for comment via U.S. Postal Service certified mail. Delivery confirmation notices were received by the Corps from all consulting parties; however, only the parties listed above submitted comments within the requested 15 day comment period.

Despite the applicability of Section 110(k), the Corps has determined that the following circumstances may justify granting the Port Authority a permit for this action:

- The Port Authority acted in accordance with the Cleveland Landmarks Commission resolution to inventory and document the historic property prior to and upon removal of the structures.
- The inventory and documentation measures, outlined in the report titled Cleveland Bulk Terminal, Section 106 Review, likely would have been required as part of any

Regulatory Branch

SUBJECT: Intentional Adverse Effects Determination pursuant to 36 CFR 800.9(c), Application No. 1999-01471(4)

Memorandum of Agreement developed by the Corps to resolve adverse effects to the historic property.

- The Port Authority has a significant economic impact on the greater Cleveland area. A study conducted by Cleveland State University (available at <http://www.lrb.usace.army.mil/regulatory/update.htm>; see summary of study attached) stated that Port Authority industry generated 4,768 jobs, \$427 million in spending in Northeast Ohio, \$151.1 million in personal income for Northeast Ohio, and \$63.8 million in local, state, and federal tax revenue.
- The Port Authority has already accomplished several steps in the resolution of adverse effects with documentation and inventory of the historic property.
- Denying the Port Authority a permit to dredge the CBT would create undue economic hardship on the Cleveland area.

Therefore, circumstances justify continuing the Section 106 consultation process and may justify granting a permit once adverse effects to historic properties are resolved and formalized in a Memorandum of Agreement.

In summary, the purpose of this letter is to notify the Council that the Corps finds that, based on the actions of the applicant, the Cleveland-Cuyahoga County Port Authority, Section 110(k) of the NHPA is applicable and that circumstances may justify granting the assistance requested. We request that you provide us with your opinion as to whether circumstances justify granting assistance to the applicant and any possible mitigation of the adverse effects to be included in a Memorandum of Agreement between the Corps, the Council, and the applicant.

Regulatory Branch

SUBJECT: Intentional Adverse Effects Determination pursuant to 36 CFR 800.9(c), Application No. 1999-01471(4)

Questions pertaining to this matter should be directed to Mark Scalabrino at (716) 879-4327, by writing to the following address: U.S. Army Corps of Engineers, 1776 Niagara Street, Buffalo, New York 14207, or by e-mail at: mark.w.scalabrino@usace.army.mil

Sincerely,

Thomas C. Switala
Chief, Regulatory Branch

Enclosures