

Appendix D

National Historic Preservation Act Review Guidance Procedure

Purpose of Guidance

This guidance accompanies the Programmatic Agreement (PA) for the U.S. Environmental Protection Agency (EPA or the Agency) National Pollutant Discharge Elimination System (NPDES) stormwater Small Municipal Separate Storm Sewer System General Permit (Small MS4 General Permit), in compliance with Section 106 of the National Historic Preservation Act (NHPA), to assist State Historic Preservation Officers (SHPOs) during their involvement with permit applicants seeking coverage under the Small MS4 General Permit. The Small MS4 General Permit authorizes stormwater discharges associated with runoff from separate storm sewer systems within municipal urbanized areas as defined at 40 C.F.R. § 122.32(a)(1).

The scope of potential impacts to historic properties as a result of the issuance of this permit is the construction, installation or alteration of subsurface stormwater discharge controls, generally limited in size to less than one acre of ground disturbing activities. Controls involving ground disturbances of one acre or more require coverage under a different permit, the Construction General Permit (except for mining operations which are covered under the Multi-Sector General Permit for all earth disturbing activities). Stormwater controls, which typically require some subsurface earth disturbance, include catch basins, drainage inlets, pipes, culverts, dikes, ponds, bioretention areas, ditches, trenches, channels, swales, land manipulation: contouring (e.g., sloping and grading), perimeter drains, stormwater injection wells, and manufactured treatment devices (e.g., particle settlers, oil/water separators).

The Small MS4 General Permit includes a screening process that applicants must follow to help determine whether they could have potential adverse effects on historic properties. The screening process must be completed before operators of ongoing public entities or new public entities or operators (hereinafter both old and new operators will be referred to as “applicants”) can establish their eligibility for coverage under the Small MS4 General Permit. Only those applicants that have no potential to adversely affect historic properties or properties eligible for listing in the National Register are eligible for coverage under the Small MS4 General Permit.

Although the coverage of individual public entities under the Small MS4 General Permit does not constitute separate federal undertakings, the screening process provides an appropriate site-specific means of addressing historic property issues in connection with EPA’s issuance of the permit. The purpose of this guidance is to clarify, for SHPOs, the historic properties screening procedures in the Small MS4 General Permit and the PA for the Small MS4 General Permit. The screening procedures, the PA, and this guidance are intended to minimize the workload for SHPOs, Tribal Historic Preservation Offices (THPOs), and tribal representatives during their involvement with Small MS4 General Permit applicants and permittees.

Background on the EPA Small MS4 General Permit for Puerto Rico

EPA's CWA regulations require an NPDES permit for stormwater discharges from large, medium and small municipal separate storm sewer system. This permitting mechanism is designed to prevent stormwater runoff from washing harmful pollutants into local surface waters such as streams, rivers, lakes or coastal waters. Most States are authorized under the CWA and NPDES regulations to issue NPDES permits, but EPA remains the NPDES permitting authority in the Commonwealth of Puerto Rico subject to construction by a municipality, federal facility, and similar public entities. The Small MS4 General Permit will be issued by EPA to cover stormwater discharges from municipal separate storm sewer system in the Commonwealth of Puerto Rico.

To obtain authorization to discharge under EPA's Small MS4 General Permit, applicants must submit a complete and accurate NOI to EPA, which certifies to EPA their eligibility for permit coverage. After a 30-day waiting period, applicants are authorized to discharge stormwater in compliance with the permit, unless EPA provides notification that authorization is delayed or denied.

When issuing a permit for actions with the potential to affect historic properties that are either listed or eligible for listing on the National Register of Historic Places, EPA must comply with the implementing regulations for Section 106 of the NHPA. Section 106 requires federal agencies to take into account the effects of their undertakings on historic properties, and afford the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on such undertakings. The implementing regulations allow federal agencies to develop a PA to establish a process that may differ from the regular Section 106 process (see 36 C.F.R. § 800.14). The PA creates a process to govern the resolution of potential effects from multiple undertakings.

Unlike most other general permits which cover discharges from new entities, the Small MS4 General Permit largely covers repeat permittees. The number of permittees under EPA's Small MS4 General Permit is approximately 82 facilities typically added in a given permit term of five years. Such applicants typically have stormwater controls in place and consequently would not be constructing, installing or altering their subsurface stormwater discharge controls unless pollutant loads in their discharges or other circumstances compelled them to do so (often, necessary changes instituted by a facility would involve pollution prevention measures rather than new subsurface controls). But, because of the nature of general permits, the designation of any new municipal separate storm sewer system, and whether they will potentially impact historic properties as a result of the installation of the subsurface stormwater controls would be unknown by the Agency in advance. These new municipal separate storm sewer systems must follow the same procedures to certify that they would have no adverse effects to historic properties but without the benefit of previous pre-certification investigations.

Summary of the Historic Properties Screening Process in the Small MS4 General Permit

Section 106 of the 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 C.F.R. § 800.16(y). Historic property is 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 C.F.R. § 800.16(1).

EPA’s issuance of the Small MS4 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.

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 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

Key Terms

Historic property – Prehistoric or historic districts, sites, buildings, structures, or objects that are included in or eligible for inclusion in the National Register of Historic Places, including artifacts, records, and remains that are related to and located within such properties.

ACHP – Advisory Council on Historic Preservation; an independent Federal agency.

SHPO – The State Historic Preservation Officer for a particular state.

Area of Potential Effects (APE) – The geographic area or areas within which an undertaking may directly or indirectly cause changes in the character or use of historic properties, if any such properties exist. The area of potential effects is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.

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 and 2016 Small MS4 General Permits as they were required to certify that they were either not affecting historic properties or they had obtained written agreement from the applicable SHPO 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 and 2016 Small MS4 General Permits or, for that matter, any need for a written agreement. Therefore, to the extent that this permit authorizes renewal of prior coverage without relevant changes in operations, it must have no potential to have an effect on historic properties.

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 ground disturbing activities 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 that outlines all measures you will carry out to mitigate or prevent any adverse effects on historic properties.

Examples of Control Measures Which Involve Ground Disturbing Activities

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, but are not limited to, the following:

- catch basins, drainage inlets
- pipes, culverts
- dikes
- ponds, bioretention areas
- ditches, trenches, channels, swales, berms
- perimeter drains

- stormwater injection wells
- manufactured treatment devices (e.g., particle separators, oil/water separators)

EPA cautions applicants 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.

Historic Properties Eligibility Criteria

Prior to submitting your NOI for permit coverage, you must determine which of the following eligibility criteria (A – D) best applies to your facility (if none of the four criteria apply, you cannot submit an NOI and you must apply for an individual stormwater permit). To help make your criterion selection, you must follow the historic properties screening procedures in this appendix, and then enter the criterion on your NOI.

If you had completed a Historical Properties evaluation/consultation during the previous general permit, and the historical properties listings have not increased, you may use the determination document to answer this section.

After submitting your NOI, and during the 30-day waiting period, the public, the ACHP, or an SHPO authorized representative may request that EPA place a hold on authorization based upon concerns regarding potential adverse effects to historic properties. EPA, in coordination with the ACHP and/or an SHPO authorized representative will evaluate any such request, and notify you whether any additional measures to address potential adverse effects to historic properties are necessary.

- Criterion A: There is no potential of an adverse effect on historic properties because there will be no new ground disturbing control measures (which include stormwater conveyances) constructed or installed.
- Criterion B: There are no historic properties or properties eligible for listing in the National Register of Historic Places within the area of potential effects (APE).
- Criterion C: My subsurface stormwater controls have the potential to cause adverse effects on historic properties. After contacting in writing the EPA Regional office and the appropriate SHPO representative, I have coordinated with the SHPO authorized representative (or EPA in coordination with the SHPO authorized representative), and I received a written conclusion that my subsurface stormwater controls will not cause adverse effects on historic properties; or I have entered into a written agreement with the SHPO authorized representative (or EPA in coordination with the SHPO authorized representative) regarding measures required to mitigate or prevent adverse effects on historic properties.

Criterion D: My subsurface stormwater controls have the potential to cause adverse effects on historic properties. I have contacted both the EPA Regional office and the SHPO authorized representative in writing, and EPA provided the additional measures, if any, required for me to be eligible for permit coverage.

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

Historic Property Screening Process

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?

If you are a municipality previously covered by the 2016 Small MS4 General Permit, you should have already addressed NHPA issues. To gain coverage under the 2016 Small MS4 General Permit you were required to certify that you were either not affecting historic properties or had obtained written agreement from the relevant SHPO regarding methods of mitigating potential impacts. As long as you are not constructing or installing any new stormwater control measures since then, you have met eligibility Criterion A of the Small MS4 General Permit. After you submit your NOI, there is a minimum 30-day public notice period during which the SHPO may review your NOI. The SHPO 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 ground disturbing activities 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 ground disturbing activities 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 ground disturbing activities, 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

Small MS4 General Permit. However, if at any time during the permit term you determine a subsurface control measure is needed and you initially chose eligibility Criterion A, you must ensure your eligibility for continued authorization to discharge is maintained before any subsurface disturbance occurs by performing the procedures in Step Three through Five

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

Step Three: Within your APE determine whether: a) there is a property listed in the National Register of Historic Places; or b) prior earth disturbances, surveys or other activity revealed the existence of a historic property or provided evidence that a historic property may exist?

Under this step you must consider the APE associated with your ground disturbance for both cases of a) and b), below. The APE for your discharge-related activities is limited to the area where you construct, install or alter ground controls to comply with the Small MS4 General Permit. Therefore, you only need consider the location of the actual ground disturbance and the depth of the disturbance (i.e., for a swale that you excavated down to one foot, you only need consider the presence of historic properties down to one foot).

a) Determine whether your APE includes any portion of a property listed in the National Register of Historic Places. Listed properties can be identified via the National Register of Historic Places website at <https://www.nps.gov/subjects/nationalregister/index.htm>. Note the National Register of Historic Places website may not be up-to-date or that the connection between your APE and a listed historic property may not be apparent. For any questions regarding listings in the National Register of Historic Places, you should contact your SHPO or an SHPO authorized representative.

If the result of your inquiry is yes, then proceed to Step Five. If no, you must still consider whether part b), below, applies to your site.

b) Determine whether any prior earth disturbance (disturbances do not need to be related to compliance with a stormwater permit), prior survey of historic resources, or other activity has revealed the presence of historic properties (which includes properties eligible for listing in the National Register of Historic Places) or provided other evidence that a National Register-eligible historic property may exist within your APE. Evidence that a National Register-eligible historic property may exist includes any artifacts, records or remains that may have been found indicating the presence of a potential historic property even though such evidence or property has not yet been evaluated for eligibility listing in the National Register of Historic Places.

If a prior earth disturbance, survey, or other activity has revealed the presence of historic properties or other evidence that a National Register-eligible historic property may exist within your APE proceed to Step Five.

Alternatively, if you substitute or modify your activities to eliminate any controls involving subsurface disturbance, you may select eligibility Criterion A on your NOI form, and you have no further obligations relating to historic properties.

If a prior earth disturbance, survey, or other activity has not conclusively revealed the existence of historic properties or other evidence that a National Register-eligible historic property may exist within your APE, or if there has been no prior earth disturbance, survey, or other activity with which to make this assessment, then proceed to Step Four.

Step Four: Determine whether any historic properties identified in Step Three may be located within your APE in coordination with your SHPO or SHPO authorized representative, or by retaining a qualified consultant in the historical or archaeological fields.

Step Four assumes that the APE for your intended ground control measures does not include any site listed in the National Register of Historic Places, and that a prior earth disturbance, survey, or other activity has not revealed the presence of historic properties or other evidence that a National Register-eligible historic property may exist within your APE. In these circumstances, you must still determine, in coordination with the relevant SHPO or SHPO authorized representative, or a qualified professional consultant, whether any properties eligible for listing in the National Register of Historic Places exist within your APE.

You may contact your appropriate SHPO or SHPO authorized representative to request their help in determining the presence of historic properties, or alternatively, you may opt to contact a qualified consultant in the historical or archaeological fields without first contacting the SHPO or SHPO authorized representative. If the SHPO or SHPO authorized representative contacts you, within thirty (30) calendar days after your contact with them, that they are unable to provide you assistance, then you must engage the services of a qualified professional consultant. If the SHPO or SHPO authorized representative does not respond within thirty (30) calendar days after your contact with them, you may assume there are no historic properties or National Register of Historic Places-eligible property within your APE, and you may certify your eligibility under Criterion B on your NOI form, and you have no further obligations relating to historic properties.

The SHPO or SHPO authorized representative, and/or a qualified professional consultant can assist your analysis and determination in many ways, including, but not limited to, examining local records to determine whether historic artifacts have been found in nearby areas, conducting surveys of your APE, and performing limited surface and subsurface examinations. Your historic resource survey assistance provider's results must be documented and retained per Part 1.10 of the Small MS4 General Permit.

If, after completion of a historic resource survey, you determine there are no historic properties within your APE, you may select eligibility Criterion B. If you determine there are, or may be, historic properties within your APE, continue to Step Five.

Alternatively, if you substitute or modify your activities to eliminate any controls involving ground disturbance, you may select eligibility Criterion A on your NOI form and you have no further obligations relating to historic properties.

Step Five: Contact the EPA and appropriate historic preservation authorities.

If you intend to build, install and/or alter ground 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 or SHPO authorized 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 in writing EPA and also the relevant SHPO, and request to discuss mitigation or prevention of any adverse effects. The letter should describe the nature and location of ground disturbing 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 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 sent you a response within 30 calendar days of receiving your letter and you enter into, and comply with, a written agreement with the SHPO 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 may review your NOI. The SHPO 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 received your letter, but an agreement cannot be reached between you and the SHPO, you should contact EPA.

If you have contacted the SHPO and EPA in writing regarding your potential to have an effect on historic properties, and the SHPO did not respond within 30 calendar 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 or other representative may review your NOI. The SHPO may request that EPA hold authorization based on concerns about potential adverse impacts to historic properties.

Addresses for State Historic Preservation Officers may be found on the Advisory Council on Historic Preservation's website (<https://ncshpo.org/directory/puerto-rico/>).

Puerto Rico - State Historic Preservation Office is located at:
End of Norzagaray Street, corner of Morovis Street
Cuartel de Ballajá, 3er Floor
Old San Juan, Puerto Rico

National websites for historical preservation Information home page: <https://www.oech.pr.gov>.

Mailing address:
State Historic Preservation Office
P.O. Box 9023935
San Juan, Puerto Rico 00902-3935

Telephone: (787) 721-3737

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