

The State of South Carolina



Office of the Attorney General

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January 22, 1991

Samuel L. Finklea, III, Esquire
Staff Attorney
SC Department of Health &
Environmental Control
2600 Bull Street
Columbia, SC 29201

Re: Compliance with National Historic Preservation Act - NPDES Permit

Dear Sam:

You have requested an opinion concerning what DHEC must do to comply with the National Historic Preservation Act, 16 U.S.C. 470, et seq., when an NPDES permit application (33 U.S.C. §1342) is under review by DHEC. Specifically, you have asked "whether the State Historic Preservation Officer may invoke the authority of Section 106 of the National Historic Preservation Act to effectively veto DHEC permits issued under state law."

The particular fact situation which originally gave rise to this opinion request has been resolved, and I do not understand your current request to involve the other issue there involved, i.e., whether sludge disposal is an integral part of an NPDES permit.

Section 106 of the National Historic Preservation Act, 16 U.S.C. §470f requires that DHEC, as a delegated federal permitting authority under the NPDES program, must, prior to the issuance of the permit

. . . take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register [of Historic Places]. [DHEC] shall afford the Advisory Council on Historic Preservation [i.e., the State Historic Preservation Officer] . . . a reasonable opportunity to comment with regard to such undertaking.

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There is apparently little question that "eligible" property under the above section includes property which meets the National Register criteria, regardless of whether it has been officially determined eligible. See Boyd v. Roland, 789 F.2d 347 (5th Cir. 1986), and cases cited therein. Accordingly, the question presented is whether Section 106 requires DHEC to be bound by the recommendations or comments of the State Historic Preservation Office.

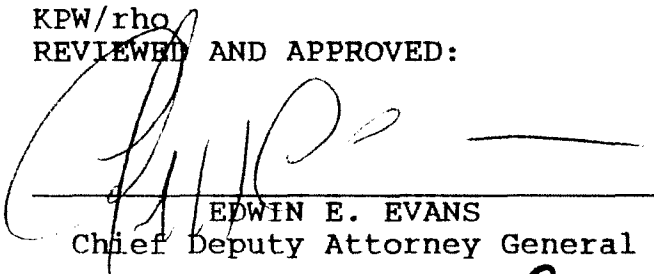
In Connecticut Trust for Historic Preservation v. I.C.C., 841 F.2d 479 (2nd Cir. 1988), apparently the only case to have considered this issue, the Court held that the National Historic Preservation Act, like NEPA ^{1/}, "require[s] only that agencies acquire information before acting. Cf. Baltimore Gas & Electric Co. v. NRDC, 462 U.S. 87, 97-98 (1983) (courts review agency decisions only to ensure adequate consideration and disclosure of environmental effects)." Id. at 484. Such being the case, it is apparent that while DHEC must give adequate consideration to the comments of the SHPO and may in some cases need to hold hearings to address those concerns, Section 106 creates no power in the SHPO or anyone else to "veto" the issuance of a DHEC permit.

Sincerely yours,

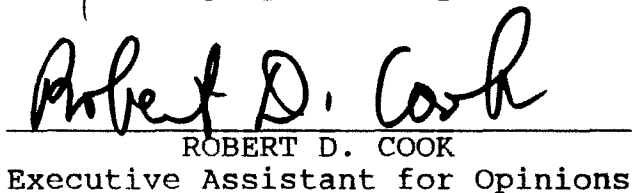


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REVIEWED AND APPROVED:



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^{1/} The National Environmental Policy Act, 42 U.S.C. §4332.