UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1
1 CONGRESS STREET, SUITE 1100
BOSTON, MASSACHUSETTS 02114-2023

September 16, 2008

Ms. Charlene Dwin Vaughn, AICP
Assistant Director
Federal Permitting, Licensing, and Assistance Section
Office of Federal Agency Programs
Advisory Council on Historic Preservation
1100 Pennsylvania Avenue NW, Suite 803
Washington, DC 20004

Dear Ms. Vaughn:

I am writing in response to your July 21, 2008, letter in which you requested a status update on a Warwick, Rhode Island Sewer Project (the Bayside project). In addition, you asked for an update concerning the steps taken by the U.S. EPA and the Rhode Island Department of Environmental Management (RIDEM) State Revolving Fund (SRF) to meet National Historic Preservation Act (NHPA) § 106 requirements for this project.

As you know, in 1990, EPA entered into a Programmatic Agreement (PA) for the Clean Water Act State Revolving Fund (CWSRF) program with the Advisory Council on Historic Preservation and the National Conference of State Historic Preservation Officers. Under this PA, as an initial matter, RIDEM SRF has responsibility for the functions found in 36 CFR Part 800 concerning the identification of historic properties and the assessment and resolution of adverse effects on historic properties. These functions are accomplished under an EPA-approved State Environmental Review Process (SERP), and a grant condition which specifically requires grantees to carry out the requirements of 36 CFR Part 800. The evaluation of these functions is a major component of annual CWSRF program reviews conducted by EPA. The PA also allows interested parties to request that the EPA Regional Office or the Advisory Council participate in the review of federally funded SRF projects or assist in resolving disputes that may arise.

In addition, we note that § 201 of the Clean Water Act require communities to prepare Wastewater Facility Plans (WWFPs) to assess wastewater needs over a 20-year planning period. Rhode Island regulations for the SRF Program require that both WWFPs and WWFP Updates (amendments) funded by the SRF Program are required to meet full federal environmental review requirements, including NHPA requirements, and provide an environmental assessment of all alternatives considered in the plan to address existing and forecasted needs.

The Warwick WWFP (which included the Bayside Phases, one of which is the subject of this issue) was amended in February, 2004, to include the Governor Francis Farms sub-division and underwent extensive review. This review included a public meeting, and an invitation to comment was extended to a broad range of interested parties, including the Rhode Island State Historic Preservation Officer (SHPO), the Narragansett Indian Tribe Tribal Historic Preservation Officer (NITHPO), the Office of State Planning (for intergovernmental review), and others. In response to comments, the WSA made revisions to the WWFP that were protective of tribal

historic resources and included a requirement for an archeological assessment survey in the project areas.

As noted in your letter, EPA loan funding for the Bayside project was for planning and design only, not construction. The project was categorized as an "equivalency project" by RIDEM for purposes of drawing down federal funds for planning and design activities. The planning and design work under this loan ended in December 2006 and RIDEM closed out this loan in February 2007. Although the planning and design phase of the project included no on-the-ground activities that might affect historic properties, RIDEM did conduct an archeological review consistent with their SERP during this phase of the project, and EPA and the project proponent made several good faith attempts to involve relevant parties in consultation, including the NIT.

EPA's involvement in this project has not extended beyond the initial SRF federal funding for the planning and design work, and, as noted above, the loan for that initial work was closed out in February, 2007. Subsequent loans for the construction phases of the Bayside project were not "equivalency projects" and were funded with state or other non-federal monies. No EPA funding has been used for the Bayside project since February 2007, nor will any additional EPA funding be used for the remainder of this project, including any construction activities. The current estimated total construction cost for the Bayside sewer project is more than $12 million. An amount of $694,137 in federal funds has been disbursed to the City of Warwick for the planning and design of the project.

As noted above, EPA has no ongoing funding or other involvement in this project, and there is thus no equivalency project under the CWSRF program (and the relevant PA) and no undertaking for NHPA Section 106 purposes. EPA has no authority or control over this project, and there is no requirement for the project proponent or any State agency to report to EPA regarding the ongoing conduct of this project. We have been made aware, however, that before commencement of project construction, the WSA is funding (with non-federal money) an archeological survey of the site by the Public Archeology Laboratory (PAL), a respected archeological firm that is affiliated with Brown University in Providence, Rhode Island. This survey was scheduled to begin in the Spring of 2008. On April 3, 2008, the NIT contacted EPA regarding their concern that this survey could have the potential to affect historic properties. Although EPA has no involvement in, or control over, this non-federal project and no authority to affect how the archaeological survey (or any other aspect of the project) is conducted, after learning of the THPO's (John Brown and Doug Harris) concerns, between April 4th and May 12th, 2008, EPA initiated and conducted several conference calls with the NIT, WSA, and RIDEM SRF, and attempted to arrange meetings among all of the involved parties. As described above, neither this archeological survey nor any additional work at this site was or will be funded with federal monies. Regardless, in a show of good faith, the WSA, in May 2008, agreed to suspend the survey while EPA arranged a meeting between the Agency, NIT, WSA, and RIDEM SRF to discuss the Tribe's concerns. In the process of setting up the meeting, it became apparent that the THPO was also principally concerned with an unrelated City of Warwick/Tribal disagreement involving compensation for services allegedly provided by the THPO in connection with a separate project. During our discussions with the THPO, we stated our belief that a meeting to discuss concerns relative to the archaeological survey for the Bayside project could have a positive result, but that we did not believe it would be helpful or appropriate to include the resolution of a separate issue as a predicate to the agenda of this meeting. The THPO was unwilling to proceed with the meeting under this approach and the meeting was called off.

We understand that the archeological survey for the Bayside project has since resumed. In mid-July, the WSA informed EPA as a courtesy that the archeologist made and protected findings underneath a roadway at the site. As a result, the road was re-sealed pending consultation between WSA the NITHPO. Although EPA has no involvement in the project, as a matter of good government and in the interest of our ongoing government-to-government relationship with the NIT, EPA is scheduling a meeting between the aforementioned parties to discuss the archeological work. We are hopeful that this meeting will assist the WSA and NIT in reaching agreement on the most appropriate means of proceeding. We also understand that the WSA is now in the preliminary stages of archeological review in other areas of the project, and has stated that they may redesign the project based on, among other things, the results of their coordination with the NIT.

Your letter also referred to a January 14, 2002 letter regarding what you believed was the Bayside project. We have no record of this letter and believe that a letter of this date would have preceded the Bayside project at issue.

As a final note, after conclusion of the litigation for a previous project (West Shore Road), the NIT and WSA entered into a nine page Memorandum of Agreement for Consultation and Monitoring of Off Reservation Properties Regarding Adverse Effects to Cultural, Spiritual and Religious Resources. EPA understands that this MOA is the source and subject of disagreement between WSA and the NITHPO.

Please let me know if I can be of additional assistance. I can be reached at (617) 918-1591.

Sincerely,

Lois K. Adams, Chief
Grants, Tribal and Municipal Assistance Branch

cc: Robert Hargrove, EPA Office of Federal Activities
Tod Siegal, EPA Office of General Counsel

We understand that the archeological survey for the Bayside project has since resumed. In mid-July, the WSA informed EPA as a courtesy that the archeologist made and protected findings underneath a roadway at the site. As a result, the road was re-sealed pending consultation between WSA the NITHPO. Although EPA has no involvement in the project, as a matter of good government and in the interest of our ongoing government-to-government relationship with the NIT, EPA is scheduling a meeting between the aforementioned parties to discuss the archeological work. We are hopeful that this meeting will assist the WSA and NIT in reaching agreement on the most appropriate means of proceeding. We also understand that the WSA is now in the preliminary stages of archeological review in other areas of the project, and has stated that they may redesign the project based on, among other things, the results of their coordination with the NIT.

Your letter also referred to a January 14, 2002 letter regarding what you believed was the Bayside project. We have no record of this letter and believe that a letter of this date would have preceded the Bayside project at issue.

As a final note, after conclusion of the litigation for a previous project (West Shore Road), the NIT and WSA entered into a nine page Memorandum of Agreement for Consultation and Monitoring of Off Reservation Properties Regarding Adverse Effects to Cultural, Spiritual and Religious Resources. EPA understands that this MOA is the source and subject of disagreement between WSA and the NITHPO.

Please let me know if I can be of additional assistance. I can be reached at (617) 918-1591.

Sincerely,

Lois K. Adams, Chief
Grants, Tribal and Municipal Assistance Branch

cc: Robert Hargrove, EPA Office of Federal Activities
Ted Siegal, EPA Office of General Counsel