

February 6, 2024

Ms. Jaime Loichinger
Director
Office of Federal Agency Programs
Advisory Council on Historic Preservation
401 F Street, Ste. 308
Washington, DC 20001

Subject: Request for Review from the Advisory Council on Historic Preservation Pursuant to 36 CFR § 800.5(c)(2) of the Department of Energy's Finding of No Historic Properties Affected by Project Apex (Ascend Elements Inc.)

Dear Ms. Loichinger,

The U.S. Department of Energy (DOE) respectfully requests that the Advisory Council on Historic Preservation (ACHP) review DOE's finding of "no historic properties affected" under Section 106 of the National Historic Preservation Act (NHPA) regarding Project Apex, a battery facility that will be built by Ascend Elements Inc., utilizing partial Federal financial assistance. DOE submits this request in accordance with 36 CFR § 800.5(c)(2)(i) in response to objections from the Kentucky Heritage Council (State Historic Preservation Officer) to DOE's finding. DOE is concurrently notifying all consulting parties about this request and will make the request documentation available to the public at: <https://netl.doe.gov/node/6939>

Enclosed is the correspondence sent to, and received from, consulting parties throughout the consultation process (see Exhibits 1 through 12). In particular, Exhibit 10 contains the agency's finding of effect letter, which meets the requirements of 36 CFR § 800.11(e). The finding of effect letter and other attached consultation letters describe the undertaking, the Area of Potential Effects (APE), the steps taken to identify historic properties, and why DOE did not identify any historic properties within the APE. The correspondence also describes the Section 106 consultation process.

Included in Exhibits 11 and 12 are the consulting parties' responses to DOE's July 20, 2023, letter explaining its finding. As further detailed in the Consulting Party Objections section below, DOE was unable to resolve the SHPO's objection through continued consultation and is now requesting ACHP's review of its finding.

This request includes background about the Funding Opportunity Announcement (FOA) to which Ascend applied, describes the undertaking, provides an overview of the Section 106 consultation process for the undertaking, addresses a consulting party's objection, and provides DOE's response. At ACHP's request, the letter also includes DOE's finding as it relates to Section 110(k) of the National Historic Preservation Act.

Project Background

The Office of Manufacturing and Energy Supply Chains (MESCC) and Office of Energy Efficiency and Renewable Energy (EERE) within DOE issued Funding Opportunity Announcement (FOA) DE-FOA-0002678, Bipartisan Infrastructure Law (BIL) Battery Materials Processing and Battery Manufacturing, pursuant to the BIL, Public Law 111-58 Sections 40207 (b) & (c). These sections support the U.S. government's goal of upgrading and modernizing infrastructure by strengthening critical domestic manufacturing and supply chains to maximize the benefits of the clean energy transition as the nation works to curb the climate crisis and advance environmental justice.

Ascend applied for DOE's competitive financial assistance award with its project entitled "Apex – Integrated Sustainable Battery Active Material Production Plant." After a comprehensive review of the applications, DOE announced that it had selected Ascend for negotiations and intended to provide a federal financial assistance award to Ascend for the Apex-Integrated Sustainable Battery Active Material and Precursor Production Plant Project, subject to successful negotiations. This financial assistance award will partially fund Ascend's Apex project.

Because Ascend's project will be carried out with Federal financial assistance, it is considered an "Undertaking" for purposes of Section 106 of the NHPA.¹

The Undertaking

Project Apex – Integrated Sustainable Battery Active Material and Precursor Production Plant involves the construction of a manufacturing facility producing lithium-ion battery materials in Hopkinsville, Kentucky that is capable of establishing industrial scale U.S. production capacity of sustainable, low-cost precursor cathode materials by integrating the separation of critical cathode materials from spent lithium-ion batteries with the production of both precursor cathode materials and metal salts to support domestic production of cathode active materials. To achieve its purpose, the facility will consist of manufacturing buildings, office space and a warehouse, as well as support infrastructure, including a rail spur, unloading/loading stations, and holding tanks. See, Exhibit 13 (Facility Site Plan).

The Area of Potential Effect

In addition to the following explanation, please see the attachments for visual descriptions of the area of potential effect (APE).

This project is located within the Hopkinsville Commerce Industrial Park II, in Hopkinsville, Kentucky. See, Exhibit 14 (Christian County, Kentucky & Hopkinsville, Kentucky) and Exhibit 15 (Project Location). Commerce Industrial Park II is located in Christian County, Kentucky, along US Route 41. The location is 10 miles from both Interstate 24 and Interstate 169 and one hour from Nashville International Airport and is serviced by a CSX rail line. Commerce Industrial Park II is adjacent to Hopkinsville

¹ See 36 CFR 800.1(a) ("Section 106 of the National Historic Preservation Act requires Federal agencies to take into account the effects of their undertakings on historic properties and afford the Council a reasonable opportunity to comment on such undertakings."); 36 CFR 800.16(y) ("Undertaking means a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those carried out with Federal financial assistance.")

Commerce Industrial Park I. The land that comprises the industrial park is currently zoned as heavy industrial, with a Tennessee Valley Authority (TVA) 161 kV transmission line running through the western side of the Industrial Park.

The Trail of Tears National Historic Trail crosses through the town of Hopkinsville, running along U.S. Route 41, which is a four-lane divided highway at the point it is closest (approximately 2/3 mile) to the project site. The project site is separated from the National Historic Trail by a railyard and Commerce Industrial Park I. Additionally, the project site is approximately seven miles from the Trail of Tears Commemorative Park.

DOE determined that the APE of the project encompasses two adjacent lots in the northwestern corner of Commerce Industrial Park II: Lot 3 and Lot 4. Lot 3 is approximately 80 acres (southern lot shown in yellow), and Lot 4 is approximately 64 acres (northern lot shown in blue/white) as presented in Exhibit 16 (Project Site). Prior to being converted to an industrial park, the project site was used for many years for commercial agricultural crop production. As such, the land was regularly plowed, planted, and harvested using industrial mechanized farming equipment.

DOE's Efforts to Identify Historic Properties within the APE

To start, DOE identified the APE as Lots 3 and 4 where the site of the project would be located and started researching whether historic properties could be located on Lots 3 and 4. During this process, DOE learned that Ascend had begun site preparation on Lot 4 before DOE could begin the National Environmental Policy Act (NEPA) and Section 106 process. DOE informed Ascend that continuing earthmoving activities would put Ascend's potential Federal financial assistance at risk, so Ascend stopped construction until DOE's assessments are complete. The Cherokee Nation of Oklahoma also asked Ascend to halt construction when it learned of these events, as well.

Although Ascend's site preparation work hindered DOE's Section 106 analysis, DOE began its good faith effort in attempting to identify whether historic properties may be or have been present within the APE. To start, DOE collected prior surveys of the area to learn whether properties with historic significance had been identified within or near the APE in the past.

1979 Survey of Historic Properties in Kentucky

DOE learned that in 1979, the Kentucky Heritage Commission conducted a Commonwealth-wide Survey of Historic Sites in Kentucky. See, Exhibit 17 (Survey of Historic Sites in Kentucky). Christian County, the location of this project, was included as part of the Pennyryle Area Development District, and 13 historic sites were identified within the County. None of the sites are within or adjacent to the project site.

2017 Cultural Resources Reconnaissance Survey

DOE learned that in 2017, the Hopkinsville Industrial Foundation, Inc. commissioned Greenhouse Consultants Incorporated to complete a Cultural Resources Reconnaissance Survey for a 705-acre section of Commerce Industrial Park II, including Lots 3 & 4 (Survey). See, Exhibit 18 (2017 Cultural Resources Reconnaissance Survey). In the course of completing the Survey, Greenhouse consulted Kentucky Archaeological Survey and Kentucky Heritage Council records and determined there were no resources within or immediately adjacent to the 705-acre area listed on the National Register of Historic Places. Survey, at p. 32.

[REDACTED]

2023 Phase I Archeological Survey and Cultural Historic Survey

As mentioned above, Ascend began site preparation work on Lot 4 before DOE could begin its NEPA/Section 106 assessment. However, after selection, Ascend retained a firm led by a Secretary of the Interior-qualified professional to conduct both a Phase I Archeological Survey and a Cultural Historic Survey for the portion of the Project Site where ground clearing had not occurred (approximately 55% of the total acres of the Project Site). The 2023 survey found that no sites listed in or eligible for listing in the National Register of Historic Places (NRHP) lie within the current project area of potential effects and that the project as planned will have no effect on NRHP eligible archaeological resources. See, Exhibits 24 A-C (2023 Phase 1 Archeological Survey and Cultural Historic Survey). Furthermore, the nearest site listed on the NRHP is approximately 14 miles from the project site.

Public Comments

In April 2023, when DOE posted its draft Environmental Assessment, it received no public comments related to historic properties that may be or have been located within the APE.

Section 106 Consultation Summary

Consultation Initiation

In February 2023, staff from NETL’s NEPA Compliance Division for this project contacted the Kentucky Heritage Council (SHPO), the Cherokee Nation of Oklahoma, and Eastern Band of Cherokee Indians, inviting them to participate in Section 106 consultation and requesting their expertise regarding historic properties, including properties of cultural significance to the two identified tribes, that may be located within the APE. The SHPO and the Cherokee Nation of Oklahoma were responsive, but the Eastern Band of Cherokee Indians was not. These consultation invitations also included information about the project, APE, and initial research regarding whether any historic properties could be or could have been located within the APE.

During the early stages of these consultations, the Cherokee Nation of Oklahoma requested that a cultural resources survey be completed of the APE, which DOE provided once the survey was complete. Also, the SHPO requested clarifying information regarding the project site and whether the two lots would be developed simultaneously or as separate projects, and DOE clarified that the two lots will be developed together for the project. DOE regularly communicated with the consulting parties, including nonresponsive ones, as detailed in Exhibit 25 (DOE Consultation Timeline).

Finding of No Historic Properties Affected

Although Ascend’s site preparation work hindered DOE’s Section 106 assessment because a current archaeological survey could only be completed on Lot 3, DOE utilized a variety of other methods to attempt to identify whether historic properties may be or have been present within the APE, including reviews of prior cultural resource and historic property surveys of the site (before Ascend purchased the land), consultations with the SHPO and Cherokee Nation of Oklahoma, and review of any public comments after posting the draft Environmental Assessment pursuant to NEPA. After a review of this information, DOE determined that there was no evidence that historic properties were or are present within the APE. Thus, on July 20, 2023, DOE issued a finding of “no historic properties affected” to the consulting parties.

Because Ascend performed earthmoving activities on Lot 4 before DOE completed its Section 106 assessment, Ascend, on its own accord, planned to make a \$50,000 donation to the Trail of Tears Commission, in an attempt to improve relationships and “mitigate” any damage that it might have inadvertently caused. This contribution was mentioned in DOE’s consultation letters. Although Ascend planned to make this contribution, it was in no way tied to a finding of an adversely affected historic property or cultural resources and was only to function as a benefit to the community.

Objection to DOE’s Section 106 Finding

When DOE provided its finding of “no historic properties affected” and supporting evidence to the SHPO, the SHPO responded on July 31, 2023, that it “cannot concur with that determination” and wanted to enter a “Memorandum of Agreement (MOA) that

includes adequate, inclusive mitigation measures and an acceptable Inadvertent Discoveries Plan.” In addition, the Cherokee Nation of Oklahoma responded on August 4, 2023, stating that it “could neither concur nor address” DOE’s finding and invited ACHP to review the consultation record for the Undertaking given the \$50,000 Trail of Tears Commission donation it understood as “mitigation.” DOE is not aware of any response from ACHP related to the Cherokee Nation of Oklahoma’s invitation, so DOE continued consultations.

Attempts to Resolve the Disagreement

Because the SHPO “could not concur” with DOE’s finding, DOE and the SHPO attempted to resolve this disagreement pursuant to 36 CFR 800.4(d)(1)(ii). After multiple meetings, DOE and the SHPO were unable to come to an agreement regarding the finding.

The SHPO’s position is that because site preparation on Lot 4 began prior to the phase 1 archaeological survey in April 2023, DOE must presume that there were historic properties within the APE. Therefore, the SHPO contends that the appropriate finding is “historic properties affected.” The SHPO has not provided any guidance as to why DOE must make this presumption, and DOE is unaware of such policy guidance, as well.

DOE’s position is that given the circumstances and the degree of federal involvement, DOE made a reasonable and good faith effort to carry out appropriate identification efforts, including background research, consultation, and a field survey, and there was no evidence that there are or were historic properties located within the APE. Thus, the appropriate finding is “no historic properties affected.” Because DOE did not identify any adverse effects to historic properties, it did not find it appropriate to enter into a Memorandum of Agreement under Section 106 to address adverse effects to historic properties.

Finding of No Intentional Adverse Effects by Applicant

Section 110(k) of the National Historic Preservation Act “prohibits a Federal agency from granting 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 adversely affected a historic property to which the grant would relate, or having legal power to prevent it, has allowed such significant adverse effect to occur, unless the agency, after consultation with the Council, determines that circumstances justify granting such assistance despite the adverse effect created or permitted by the applicant.” 36 CFR 800.9(c)(1).

Here, no surveys or research of the area before or after Ascend’s earthmoving activities identified any historic properties that could have been adversely affected. Further, Ascend has confirmed that although Ascend submitted an application for a Federal financial assistance award, it planned to proceed with Project Apex, regardless of whether Ascend was ultimately selected. Because DOE has not identified any information indicating that Ascend intentionally significantly adversely affected a historic property for purposes of avoiding Section 106 requirements, DOE has determined that there has been no violation of Section 110(k) of the National Historic Preservation Act.

Request for Review and Concurrence

For the reasons stated in the finding of effect letter and as stated above, DOE has proposed a finding of no historic properties affected. DOE respectfully requests ACHP's review of its proposed finding in accordance with 36 CFR § 800.5(c)(3).

If you have any questions concerning the project, please contact me at the following address, phone or email below:

U.S. Department of Energy
National Energy Technology Laboratory
3610 Collins Ferry Road
Morgantown, WV 26505
Telephone: (304) 285-5219
Email: Fred.Pozzuto@netl.doe.gov

Thank you for your attention to this request, and I look forward to working with you.

Sincerely,



Fred Pozzuto
Director, NEPA Policy & Compliance Division
National Energy Technology Laboratory

Attachments:

- Exhibits 1-12: Consultation Letters
- Exhibit 13: Facility Site Plan
- Exhibit 14: Christian County & Hopkinsville, Kentucky
- Exhibit 15: Project Location
- Exhibit 16: Project Site
- Exhibit 17: 1979 Survey of Historic Properties in Kentucky
- Exhibit 18: 2017 Cultural Resources Reconnaissance Survey
- Exhibit 19: Resources Identified During 2017 Field Work
- Exhibit 20: Resources Identified During 2017 Field Work with Facility Site Plan Overlay
- Exhibit 21: Resource Area P-1
- Exhibit 22: Resource Area P-2
- Exhibit 23: Resource Areas H-2 and H-3
- Exhibit 24A-C: 2023 Phase I Archeological Survey and Cultural Historic Survey
- Exhibit 25: DOE Consultation Timeline

cc:

Rachael Magnum, Advisory Council on Historic Preservation
Chris Potts, Kentucky Heritage Council
Sarah Cronan, Kentucky Heritage Council
Elizabeth Toombs, Cherokee Nation of Oklahoma
Stephan Yerka, Eastern Band of Cherokee Indians

Russell Townsend, Eastern Band of Cherokee Indians
Roger Lin, Ascend Elements Inc.
James Peace, Ascend Elements Inc.
Doug Arnold, Alston & Bird LLP
Kevin Minoli, Alston & Bird LLP