



Pacific PEER

Public Employees for Environmental Responsibility

October 1, 2020

Joy Beasley
Keeper of the National Register of Historic Places
National Park Service
Department of Interior
1849 C Street NW, MS 7228
Washington, DC 20240

by email to National_Register_Submissions@nps.gov

Re: *Nomination of "Burro Flats Cultural District," Ventura County, California,*
SG1000005678

Dear Keeper of the Register Beasley:

Public Employees for Environmental Responsibility (PEER) would like to thank the Keeper of the Register for the opportunity to comment on the proposed nomination. As outlined below, PEER believes that this nomination fails to disclose many material facts and is contrary to the specifications of the National Historic Preservation Act (NHPA). Further, PEER believes that that the designation of this site represents a significant threat to public health and safety, as well as violating several laws. For these reasons, PEER urges the National Park Service to reject this nomination.

Federal Register Notice Is Deceptively Deficient

The *Federal Register* notice the Keeper posted for this nomination has not in fact provided genuine notice or the opportunity to provide meaningful comment on the proposed action. All the Keeper has provided notice of is the nomination of what it calls the "Burro Flats Cultural District,"¹ the location of which it fails to identify, except to say, incongruously, that it is in Ventura County and "in the vicinity of Canoga Park." Canoga Park, however, is not even in Ventura County, and is some distance from the site in question.

Nor does the notice mention the Santa Susana Field Laboratory, or the implications of the inclusion of this site on the National Register of Historic Places.

Failure to Disclose Proposal Is to List the Santa Susana Field Laboratory (SSFL) – One of the Most Contaminated Places in the Nation. SSFL is a former nuclear reactor and rocket testing facility, home to a partial nuclear meltdown and numerous other radioactive accidents and toxic chemical releases. The site had ten "experimental" nuclear reactors. At least four of the nuclear reactors had accidents during their operation involving significant releases, including one with a partial meltdown in 1959. The reactors were considered experimental and therefore had no containment structures.

¹ Vol. 85, No. 181 / Thursday, September 17, 2020 / at 58073



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The site also has un-remediated burn pits used to incinerate radioactive and chemical wastes, among other issues. In short, the entire site is highly contaminated

Furthermore, the Keeper has failed to disclose that the nomination is part of an effort to breach a legally binding cleanup agreement between the federal and state governments requiring full cleanup of the site (see below).

Indeed, the Keeper has failed to make public any information about the nomination beyond the 64 words in the *Federal Register*. The Keeper has not made available the nomination document itself,² the referenced communication from the State Historic Preservation Officer, or any information about the contamination history of the site.

Multiple Statutory Violations

The proposed action would violate numerous laws. By mischaracterizing the proposal merely as “Burro Flats” and omitting that the actual proposal is to list the entire 2,850 acres of polluted SSFL, the vast majority of the public would not be on notice as to what is in fact proposed and thus unable to meaningfully comment, in violation of the Administrative Procedure Act (APA).³

By failing to conduct any environmental review whatsoever, despite the major environmental impacts flowing from this significant federal action, the proposed action by the Keeper would violate the National Environmental Policy Act (NEPA).⁴

By proceeding with the proposed action on the purported basis that the state supports the listing, when in fact the County of Ventura opposes the listing and therefore the state is barred by the NHPA⁵ from acting, any approval by the Keeper based on purported state support is barred.

Moreover, even were the Keeper to have followed APA and NEPA, and even had the state action not been barred by NHPA because of county opposition to the proposed listing, the nomination does not meet listing requirements. It fails to meet the prerequisites of completeness and accuracy in the nomination proposal document, integrity of the site, and defensible boundary justification. We discuss these matters in more detail below.

The Proposed Listing Is Veiled Attempt to Escape Cleanup Obligations with Significant Unanalyzed Environmental Impacts

² There are, we understand, two versions of the nomination registration form. One includes some information about precisely where on the SSFL property individual artifacts are located. The second, a public version, includes all but that location information. The Keeper has failed to make public even the public version of the nomination. It is neither referenced in the Federal Register notice nor posted on the Keeper’s website. We have separately obtained a copy of the public nomination filing, but most people who would see the Federal Register notice on this matter would not have access to it.

³ 5 U.S. Code § 553.

⁴ 42 U.S.C. § 4321 et seq.

⁵ 54 U.S.C. 300101 et seq.



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Although not disclosed in the Keeper’s *Federal Register* Notice, SSFL was the site of ten nuclear reactors (of which at least four suffered accidents), a plutonium fuel fabrication facility (plutonium being arguably the most dangerous substance on earth), and a “hot lab” for handling highly irradiated nuclear fuel from the Department of Energy’s national nuclear complex. Additionally, tens of thousands of rocket and missile tests were conducted, often with very toxic fuels. The result has been widespread radioactive and toxic chemical contamination, and significant offsite migration.

Half a million people reside within ten miles of SSFL, located some 30 miles northwest of downtown Los Angeles.

In 2010, the U.S. Department of Energy (DOE) and NASA executed agreements with the California Department of Toxic Substances Control requiring the cleanup of contamination to background—in other words, restoring the site to the condition it was in before it was polluted. The agreements are called Administrative Orders on Consent (AOCs) and have very narrow exemptions. One is for “Native American artifacts that are formally recognized as Cultural Resources.” The operative term is “artifacts.” It was intended to protect features such as cave painting and grinding stones.

NASA, however, has been eager to breach the AOC and leave the great majority of the contaminated soil not cleaned up. Its strategy was made clear in a Senate Appropriations Committee report,⁶ which stated:

Preservation of Tribal Artifacts at Santa Susana Field Laboratory.—
As NASA works to meet the requirements of the 2010 Administrative Order on Consent for Remedial Action, along with preceding agreements and court orders, the agency is encouraged to protect the unique and historically significant Native American sites on the property, including but not limited to the Burro Flats Painted Cave. To the maximum extent practicable, NASA shall include all Traditional Cultural Properties and Traditional Cultural Landscapes (as defined by 30 CFR 60.4 and National Park Service Bulletin 38) as “Native American artifacts that are formally recognized as Cultural Resources,” for the purposes of the Administrative Order.

Significantly, the language quoted from the Administrative Order is precisely the language of a possible *exemption* to cleanup. Thus, what NASA has proposed—the listing of the entire SSFL site as a Cultural District—appears directly aimed at declaring all 2,850 acres of soil, much of it contaminated, exempt from cleanup as a purported “Native American artifact.” The result of the proposed listing thus, is reasonably foreseeable as a breach of cleanup commitments, continued

⁶ Senate Appropriations Committee, Report to Accompany S. 2837, Departments of Commerce and Justice, Science, and Related Agencies, Appropriations Bill, 2017. [Note that no appropriations bill passed that year and instead a Continuing Resolution was issued.]



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presence of radioactive and toxic chemical contamination, and their migration to nearby communities and ecological receptors.

Yet the Keeper has performed no environment review. Understandably, most other actions by the Keeper probably do not rise to the threshold of NEPA action. However, this proposed action is unique. It can result in hundreds of acres of contaminated land not getting remediated. (The NASA proposal is to list on the National Register of Historic Places (NRHP) not merely the land it controls, but all the rest of SSFL, controlled by DOE and the Boeing Company.) Failing to conduct a NEPA analysis prior to acting on this proposal would be a violation of NEPA by the Keeper.

The Nomination Registration Form is Grossly Incomplete, in Violation of Listing Requirements
10 CFR §60.3 requires an NRHP nomination to be adequately documented and technically and professionally correct and sufficient. The nomination form requires the nominator to “describe the historic and current physical appearance and condition of the property.” Yet, in the 70 or more pages of the nomination registration form, there is essentially no disclosure of the past and present extensive radioactive and chemical contamination. There is not a word about the partial nuclear meltdown or other reactor accidents at the site. There is not a word about the illegal burning of toxic and radioactive wastes in open-air pits. The tens of thousands of rocket tests go virtually unacknowledged.

While a case could perhaps be put forward that the site should be listed despite these tremendous impacts to the site, no such case can be weighed if there is a failure to acknowledge and describe those impacts. Simply on the basis of the incompleteness of the nomination document, the nomination must be rejected.

The Nomination Proposal Inaccuracies Violate Listing Requirements

The nomination document asserts that the site retains “excellent” integrity. It goes so far as to assert –

“The use of SSFL by the government and Boeing resulting in keeping the area in a state similar to when the consultants’ ancestors used and occupied the area.”

This is completely false.

Contrary to the misrepresentation in the nomination form, the site is not in a state similar to that of hundreds of years ago. Native Americans did not operate reactors at the site, nor did they test tens of thousands of rockets there. Native Americans did not contaminate the site with plutonium-239, strontium-90, cesium-137, PCBs, dioxins, chromium-6, mercury, perchlorate, volatile organic compounds like TCE, etc.



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These false statements in the nomination form raise questions as to whether NASA violated the federal criminal statute barring false official statements.⁷ Moreover, the Keeper should be concerned about the validity of a designation based on these false statements, including whether the nomination form itself violates the requirements for listing.

The Nomination Should Be Rejected at This Time Because the Site Does Not Retain Integrity and Intactness; It Can Be Reconsidered Once Promised Site Restoration/Cleanup is Complete
As indicated above, NASA falsely claims that the area within the SSFL boundaries is essentially unimpacted, whereas the area outside, it asserts, is heavily impacted. In fact, the opposite is the case. The area outside the SSFL border contains several protected open space areas and parks, whereas the area inside, particularly in the operational areas – Areas I, II, III, and IV—are heavily impacted by intense earthmoving, construction, industrial operations, and subsequent pollution.

The cleanup agreements require restoration of the site to the condition it was in before those activities occurred, particularly removal or treatment of contaminants followed by revegetation with native plants. The site currently does not exhibit the required integrity and intactness. The listing proposal should be denied at this time without prejudice to reapplying once site restoration/cleanup has been completed. At that point, the site would indeed have integrity and intactness.

The Proposed Site Boundary is Not Justified and Impermissibly is Primarily Based on Ownership Lines

The actual proposal – not disclosed by the Keeper in its *Federal Register* notice – is to artificially increase *by a factor of more than 200* the size of the existing Burro Flats site currently on the NRHP, to coincidentally precisely match the boundaries of the 2,850-acre SSFL site.

NRHP guidance states “a district “is seldom defined . . . by the limits of current parcels of ownership, management, or planning boundaries. The boundaries must be based upon a shared relationship among the properties constituting the district.”⁸

Here, however, the nomination proposes boundaries for the proposed Cultural District that are solely based on the ownership lines of SSFL. Since the areas outside of those lines are actually relatively pristine and the areas within it are heavily impacted, there is further irrationality to the proposed boundaries.

In addition, no rationale is given for including the heavily contaminated Areas I, II, III and IV of SSFL instead of proposing for listing the lesser impacted northern and southern buffer zones. The boundary justification does not meet listing criteria and is therefore another reason why the proposal should be rejected.

⁷ 5 U.S.C. §1001

⁸ National Park Service, How to Apply the National Register Criteria for Evaluation, at 6 (1997)
https://www.nps.gov/subjects/nationalregister/upload/NRB-15_web508.pdf.



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Ventura County, the Certified Local Government in Which the Property is Located, Opposes the Nomination, and Thus the State is Barred From Acting, and Thereby the Keeper Cannot Approve the Nomination

According to 54 U.S. Code § 302504, “Participation of certified local governments in National Register nominations”:

(c)(2) Property not nominated to national register.—

If both the [local historical preservation] commission and the chief local elected official recommend that a property not be nominated to the National Register, the State Historic Preservation Officer shall take no further action, unless, within 30 days of the receipt of the recommendation by the State Historic Preservation Officer, an appeal is filed with the State. If an appeal is filed, the State shall follow the procedures for making a nomination pursuant to section 302104 of this title. Any report and recommendations made under this section shall be included with any nomination submitted by the State to the Secretary.
(emphasis added)

Here, both the Ventura County Board of Supervisors (the chief local elected official for Ventura County) and the Ventura County Cultural Resources Board (the local historical preservation commission) recommended that the proposed Burro Flats Cultural District not be nominated to the NRHP. In response to a written question from the State Historical Preservation Office, the Ventura County Board of Supervisors expressly stated on August 13, 2020, as follows:

2. Please clarify whether the Chief Local Elected Official recommends that the property not be nominated to the National Register.

VC Answer: Correct, the Chief Local Elected Official for the County recommends that the property not be nominated to the National Register.

The Board of Supervisors, responsible for transmitting the recommendations of the Cultural Heritage Commission, in its letter of July 29, 2020, stated that the property should not be nominated because the nomination “is not technically and professionally correct and sufficient, nor is it adequately documented to support the entirety of the proposed 2,850 acres to be listed.”

The Cultural Heritage Board found that portions of the site met listing criteria, but could not affirm that the entire site did, as proposed by the proposed Cultural District nomination. It further opposed the nomination because it could impair public health, in violation of the County ordinance under which the CHB operated.

As noted, the State Historic Preservation Office is statutorily barred from acting on a nomination if the County in which the land is located opposes it. Here, the County has opposed the nomination. No appeal has been filed during the time period specified in the act. Any action by



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SHPO to subsequently support the nomination is thus *ultra vires*.

Further, since the nomination is for land that is partially federally owned and partially private, the nomination must be a concurrent state-federal nomination. Since the state is barred by the NHPA from acting, given Ventura's opposition, there can be no concurrent nomination, and the Keeper cannot approve the proposal.

Significantly, the *Federal Register* notice indicates that the Keeper is relying on the assertion by SHPO that it supports the nomination. Since SHPO is barred by the NHPA from acting, given Ventura's opposition, reliance by the Keeper on the claimed state support cannot be supported. The Keeper must reject the nomination.

Conclusion

The Keeper must reject the nomination under the present circumstances. It fails to meet listing requirements in that it is incomplete and inaccurate. It also fails to justify adequately the proposed boundary. Because of the failure to perform a NEPA environmental analysis, no listing decision can be made at this time. The notice and opportunity for comment violate APA requirements to put the public on notice of what is proposed and make available the necessary supporting documentation.

Because the County has opposed listing, NHPA bars state action, and without state concurrence, the concurrent nomination cannot go forward. The site does not maintain integrity and intactness and is nowhere near the condition it was in at the time of proposed historic significance in that it is heavily impacted and contaminated.

PEER recommends that the Keeper deny the nomination at this time, without prejudice to it being resubmitted when cleanup is completed, and the site restored to its prior condition. If an affirmative decision to deny the nomination is not made, at minimum the Keeper must defer it until NEPA is complied with, a new notice-and-comment opportunity provided with genuine public notice of what is proposed, and other laws complied with. A great deal is at stake, as the nomination if approved could interfere with a desperately needed cleanup of one of the most contaminated sites in the nation and may thereby prolong serious danger to public health and safety.

Sincerely,

Jeff Ruch
Pacific Director