

Appendix A

*Memorandum of Agreement Among the U.S. Army Corps of Engineers,
Ohio's State Historic Preservation Office, and the Northeast Ohio Regional Sewer District*

*Regarding Rehabilitations of the Upper Shaker Lake and Green Lake Dams
Shaker Heights and Cleveland Heights, Cuyahoga County, Ohio*

DA 2016-01372 NEORSD Green Lake Dam Rehabilitation
DA 2016-01374 NEORSD Upper Shaker (Horseshoe) Lake Dam Rehabilitation
Ohio's SHPO No. 2016-CUY-35815

**MEMORANDUM OF AGREEMENT
AMONG THE UNITED STATES ARMY CORPS OF ENGINEERS,
OHIO'S STATE HISTORIC PRESERVATION OFFICE, AND
THE NORTHEAST OHIO REGIONAL SEWER DISTRICT,**

**REGARDING THE REHABILITATIONS OF THE UPPER SHAKER LAKE AND GREEN LAKE DAMS
SHAKER HEIGHTS AND CLEVELAND HEIGHTS, CUYAHOGA COUNTY, OHIO**

WHEREAS, in order to meet current dam safety standards and ensure public safety, the Northeast Ohio Regional Sewer District (NEORSD) is rehabilitating three dams at Lower Shaker Lake, Upper Shaker Lake, and Green Lake, located in the Cities of Shaker Heights and Cleveland Heights, Cuyahoga County, Ohio (the Undertaking); as further described in **Attachment A** to this Memorandum of Agreement (MOA), along with documentation of the Section 106 process; and

WHEREAS, the placement of fill material in waters of the United States associated with the Undertaking requires permit authorization from the United States Army Corps of Engineers (USACE) pursuant to Section 404 of the Clean Water Act (33 U.S.C. §1344); and

WHEREAS, USACE is the responsible federal agency pursuant to 36 CFR Part 800, the regulations implementing Section 106 of the National Historic Preservation Act (NHPA) (54 U.S.C. § 306108) (NHPA); and

WHEREAS, USACE has defined the Undertaking's Area of Potential Effect (APE) as defined in 36 CFR Part 800.16(d) and the Permit Area as defined in 33 CFR Part 325, Appendix C is as described in Attachment A of this MOA; and

WHEREAS, USACE has determined that the Undertaking at Upper Shaker Lake will result in an adverse effect to the North Union Shaker Site (NRHP #74001446) and Shaker Village Historic District (NRHP #00001557) both listed in the National Register of Historic Places (NRHP); and,

WHEREAS, USACE has determined that the Undertaking at Green Lake will also result in an adverse effect to the Shaker Village Historic District listed in the NRHP; and

WHEREAS, USACE has consulted with Ohio's State Historic Preservation Office (SHPO) pursuant to 36 CFR Part 800 and 33 CFR Part 325, Appendix C, the regulations implementing Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108); and

WHEREAS, USACE has identified Native American Tribes, and documented both outreach to and responses from the Native American Tribes; and

WHEREAS, USACE has invited the Delaware Nation to sign this MOA, as an Invited Signatory; and

WHEREAS, USACE has identified other consulting parties, and documented both outreach to and responses from the consulting parties; and

WHEREAS, NEORSD, the City of Cleveland Heights, the City of Shaker Heights, Clevelandhistorical.org and the Shaker Historical Society have agreed to participate in the consultation pursuant to 36 C.F.R. § 800.6(a)(1)(iii) and to be Invited Signatories to this MOA, and

WHEREAS, in accordance with 36 CFR Part 800.6(a)(1), USACE has notified the Advisory Council on Historic Preservation (ACHP) of its adverse effect determination with specified documentation and the ACHP has chosen not to participate in the consultation pursuant to 36 C.F.R. § 800.6(a)(1)(iii); and

NOW THEREFORE, USACE, SHPO and the NEORSD, agree that the Undertaking shall be implemented in accordance with the following stipulations in order to take into account the effects of the Undertaking on historic properties.

STIPULATIONS

USACE shall ensure that the following measures are carried out as mitigation for adverse effects to the North Union Shaker Site and Shaker Village Historic District:

I. VIRTUAL EXHIBIT

On or before December 31, 2022, NEORSD will develop online educational content in the form of a virtual exhibit. The virtual exhibit will focus on the roles the dams and lakes played in relation to the North Union community of Shakers. The virtual exhibit will connect thematically with the educational signage (see Stipulation II) at Upper Shaker Lake and Lower Shaker Lake as well; Green Lake will not be covered by the virtual exhibit as it post-dates the North Union settlement. The virtual exhibit will also highlight the use of the Shaker Lakes area by Native peoples prior to the nineteenth century settlement period. The virtual exhibit will be hosted on the Clevelandhistorical.org website and mobile device application, or a similar hosting application for convenient access by the public. A draft version of the content, which will comply with the Cleveland Historical submission guidelines, will be sent to the MOA signatories, invited signatories, and concurring parties for comment. The content will be revised as appropriate based on received comments and submitted to the SHPO for final review and comment. Upon approval, the draft content will be submitted to SHPO for review and comment. Each review period will be thirty (30) days. A final version of the virtual exhibit will be developed based on the review comments. If for unforeseen circumstances the Cleveland Historical site is no longer able to host the virtual exhibit, the MOA will be revisited through the amendment process to determine the proper way to move forward.

II. EDUCATIONAL SIGNAGE

NEORSD will develop three educational signs interpreting the history and significance of Upper Shaker Lake, Lower Shaker Lake, and Green Lake. The signs will be illustrated with historic and current photographs and illustrations and will be placed at prime viewing locations at each lake. Lower Shaker Lake is included as it is also originally a Shaker lake and dam, similar to Upper Shaker Lake, although there is no adverse effect on this dam and lake by this project. On or before December 31, 2022, a draft of the sign text, illustrations, layout, and proposed locations will be provided to the MOA signatories, invited signatories, and concurring parties for review and comment. Upon approval, the draft content will be submitted to SHPO for review and comment. Each review period will be thirty (30) days. A final version of the signage will be developed based on any review comments.

III. DURATION

This MOA will expire if its terms are not carried out by the close of business on December 31, 2022. Prior to such time, USACE may consult with the other signatory parties to reconsider the terms of the MOA and amend it in accordance with Stipulation XII below. The duration of the MOA may be extended only upon approval from all signatory parties. In the event that post review discoveries are made, the term of this MOA will be extended by mutual consent of the signatories for a time commensurate with the suspension period imposed.

IV. POST-REVIEW DISCOVERIES

If previously unidentified archaeological or historic properties or unanticipated effects are discovered after completion of Section 106 review, work in the direct vicinity of the findings will stop immediately until the proper course of action can be coordinated with the SHPO and USACE. No further construction in the area of discovery will proceed until the requirements of 36 CFR Part 800.13 have been satisfied, including consultation with federally recognized Native American tribes that may attach traditional cultural and religious significance to the discovered property. USACE will consult with the SHPO and Native American tribes, as appropriate, to record, document, and evaluate NRHP eligibility of the property and the project's effect on the property, and to design a plan for avoiding, minimizing, or mitigating adverse effects on the eligible property. If neither the SHPO nor a federally recognized Native American tribe files a timely objection to USACE's plan for addressing the discovery, USACE may carry out the requirements of 36 CFR Part 800.13 and the ACHP need not be notified.

V. UNANTICIPATED DISCOVERIES OF HUMAN REMAINS

Historic and Prehistoric human remains are subject to protection under Ohio Revised Code Sections 2909.5 and 2927.11. As such, if previously unidentified human remains are discovered during construction, work within a 50-foot buffer of the findings will stop immediately and will not resume until the proper course of action can be coordinated with the SHPO, USACE, and consulting parties, as appropriate. The remains will be covered and/or protected in place in such a way as to minimize further exposure of, or damage to, the remains as soon as possible. NEORSD will immediately notify local law enforcement and/or the County Coroner and consult with the USACE and the SHPO within one (1) business day regarding the discovery. If the remains are found to be Native American, a treatment plan will be developed by NEORSD and SHPO in consultation with USACE and appropriate federally recognized Native American tribes, including but not limited to the Delaware Nation. USACE and NEORSD will ensure that any treatment and reburial plan is fully implemented. If the remains are not Native American, the appropriate local authority will be consulted to determine final disposition of the remains. Avoidance and preservation in place is the preferred option for treating human remains. A timeline for resumption of construction activities at the identification location shall be determined through consultation within five (5) business days.

To the extent that any applicable state law or provisions in this MOA are contrary to, inconsistent with, or would frustrate the purposes of the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3001 *et seq.*, such state law or provisions are preempted by federal law.

VI. MONITORING AND REPORTING

- A. On or before June 30 of each year until USACE and the SHPO agree in writing that the terms of this MOA have been fulfilled, NEORSD shall prepare and provide an annual report updating the status of the mitigation activities to USACE, SHPO, City of Cleveland Heights, the City of Shaker Heights, Clevelandhistorical.org, the Shaker Historical Society, and the Delaware Nation.
- B. NEORSD shall ensure that its annual report is made available for public inspection, that potentially interested members of the public are made aware of its availability, and that interested members of the public are invited to provide comments to the USACE, as well as to NEORSD.
- C. The signatories to this MOA shall review the annual report and provide comments to USACE. Non-signatory parties to this MOA may review and comment on the annual report at their discretion. Review and comment shall occur within 30 days of receipt of the annual report.

VII. SELF-INSURANCE AND LIABILITY

The state of Ohio is self-insured for the indemnification of its officers and employees in the maximum aggregate amount of one million dollars per occurrence in accordance with Section 9.87 of the Ohio Revised Code. Each party to this MOA must seek its own legal representation and bear its own costs, attorney fees and expenses, in any litigation that may arise from the performance of this MOA. It is specifically understood and agreed that no party to this MOA indemnifies another. Nothing in this MOA shall be construed to be a waiver of either the sovereign immunity of the State of Ohio, recreational use immunity if applicable, or the immunity of any of its employees or agents for any purpose. In no event shall the State be liable for indirect, consequential, incidental, special, liquidated, or punitive damages or lost profits even if it has been advised of the possibility of such loss or damage.

VIII. GOVERNING LAW

- A. With the exception of the federal laws and regulations governing Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, and its implementing regulations in 36 CFR Part 800, NEORSD participation in this MOA shall be governed in accordance with the laws of the State of Ohio.
- B. The parties recognize that a federal agency may have to comply with multiple federal and state laws in planning and implementing this MOA and resolve those matters to the satisfaction of those legal requirements.

IX. SEVERABILITY

This MOA is intended to comply with all applicable laws, rules, regulations, ordinances and governmental orders. If any provision of this MOA is held by a court of competent jurisdiction to be invalid, void, or unenforceable, the remaining provisions shall survive and continue in full force and effect to the maximum extent allowed by law. If a court of competent jurisdiction holds any provision of this MOA invalid, void, or unenforceable under applicable law, the court shall give the provision the greatest effect possible under the law and modify the provision so as to conform to applicable law if that can be done in a manner which does not frustrate the purpose of this MOA.

X. COUNTERPARTS

This MOA may be executed in one or more counterparts, each of which will be deemed to be an original copy of this MOA and all of which, when taken together, will be deemed to constitute one and the same agreement.

XI. PROFESSIONAL STANDARDS

Pursuant to 36 CFR Part § 800.2(a)1., each Federal agency responsible for the protection of historic resources, including archeological resources, to ensure that all actions taken by employees or contractors of the agency shall meet professional standards under regulations developed by the Secretary of the Interior.

XII. DISPUTE RESOLUTION

Should any signatory or concurring party to this MOA object at any time to any actions proposed or the manner in which the terms of this MOA are implemented, USACE shall consult with such party to resolve the objection. If USACE determines that such objection cannot be resolved, USACE will:

- A. Forward all documentation relevant to the dispute, including the USACE's proposed resolution, to the ACHP. The ACHP shall provide USACE with its advice on the resolution of the objection within thirty (30) days of receiving adequate documentation. Prior to reaching a final decision on the dispute, USACE shall prepare a written response that takes into account any timely advice or comments regarding the dispute from the ACHP, signatories and concurring parties, and provide them with a copy of this written response. USACE will then proceed according to its final decision.
- B. If the ACHP does not provide its advice regarding the dispute within the thirty (30) day time period, USACE may make a final decision on the dispute and proceed accordingly. Prior to reaching such a final decision, USACE shall prepare a written response that takes into account any timely comments regarding the dispute from the signatories and concurring parties to the MOA, and provide them and the ACHP with a copy of such written response.
- C. USACE's responsibility to carry out all other actions subject to the terms of this MOA that are not the subject of the dispute remain unchanged.

XIII. AMENDMENTS

This MOA may be amended when such an amendment is agreed to in writing by all signatories. The amendment will be effective on the date a copy signed by all of the signatories is filed with USACE.

XIV. TERMINATION

- A. If any signatory to this MOA determines that its terms will not or cannot be carried out, that party shall immediately consult with the other parties to attempt to develop an amendment per Stipulation XVI, above. If within thirty (30) days an amendment cannot be reached, any signatory may terminate the MOA upon written notification to the other signatories.
- B. Once the MOA is terminated, and prior to work continuing on the Undertaking, USACE must either (a) execute an MOA pursuant to 36 CFR Part 800.6 or (b) request, take into account, and respond to the comments of the ACHP under 36 CFR Part 800.7. USACE shall notify the signatories as to the course of action it will pursue.

Execution of this MOA by USACE and the SHPO and implementation of its terms are evidence that USACE has taken into account the effects of this Undertaking on historic properties and afforded the ACHP an opportunity to comment.

SIGNATORY:

UNITED STATES ARMY CORPS OF ENGINEERS

Mark W. Scalapour

Date: 29 DEC 2017

for Diane Kozlowski, Chief, Regulatory Branch

SIGNATORY:

DELAWARE NATION

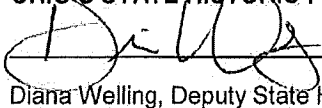
Kimberly Penrod

Kim Penrod, Director of Cultural Resources/106

Date: January 8, 2018

SIGNATORY:

OHIO'S STATE HISTORIC PRESERVATION OFFICE

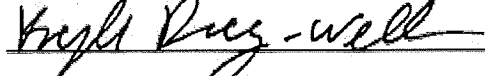


Date: 12/20/2017

Diana Welling, Deputy State Historic Preservation Officer for Resource Protection & Review

INVITED SIGNATORY:

NORTHEAST OHIO REGIONAL SEWER DISTRICT



Kyle Dreyfuss-Wells, Chief Executive Officer

Date: 1/2/2018

INVITED SIGNATORY:

CITY OF SHAKER HEIGHTS

Earl M. Leiken

Date: 1-8-18

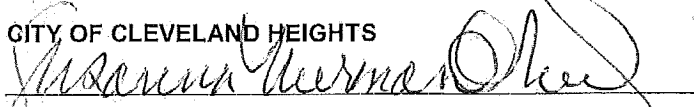
Earl M. Leiken, Mayor

**APPROVED AS TO FORM
CITY OF SHAKER HEIGHTS**

William M. O'Neil
TITLE: Director of Law
DATE: 1-2-18

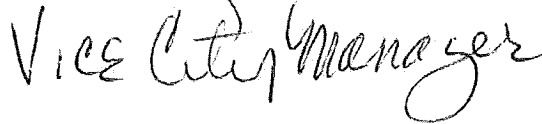
INVITED SIGNATORY:

CITY OF CLEVELAND HEIGHTS



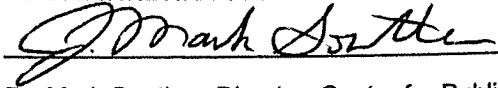
Tanisha Briley, City Manager

Date: 28 Dec 2017


Vice City Manager

INVITED SIGNATORY:

CLEVELANDHISTORICAL.ORG

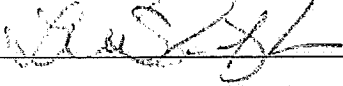
_____

Date: 1/2/18

Dr. Mark Souther, Director, Center for Public History + Digital Humanities

INVITED SIGNATORY:

SHAKER HISTORICAL SOCIETY



Dr. Ware Petznick, Executive Director

Date: Jun 2, 2018

**ATTACHMENT A
PROJECT INFORMATION**

REHABILITATIONS OF THE UPPER SHAKER LAKE AND GREEN LAKE DAMS PROJECT

NORTHEAST OHIO REGIONAL SEWER DISTRICT

SHAKER HEIGHTS, CUYAHOGA COUNTY, OHIO

A description of the Undertaking, specifying the Federal involvement, and its area of potential effects, including photographs, maps, and drawings, as necessary:

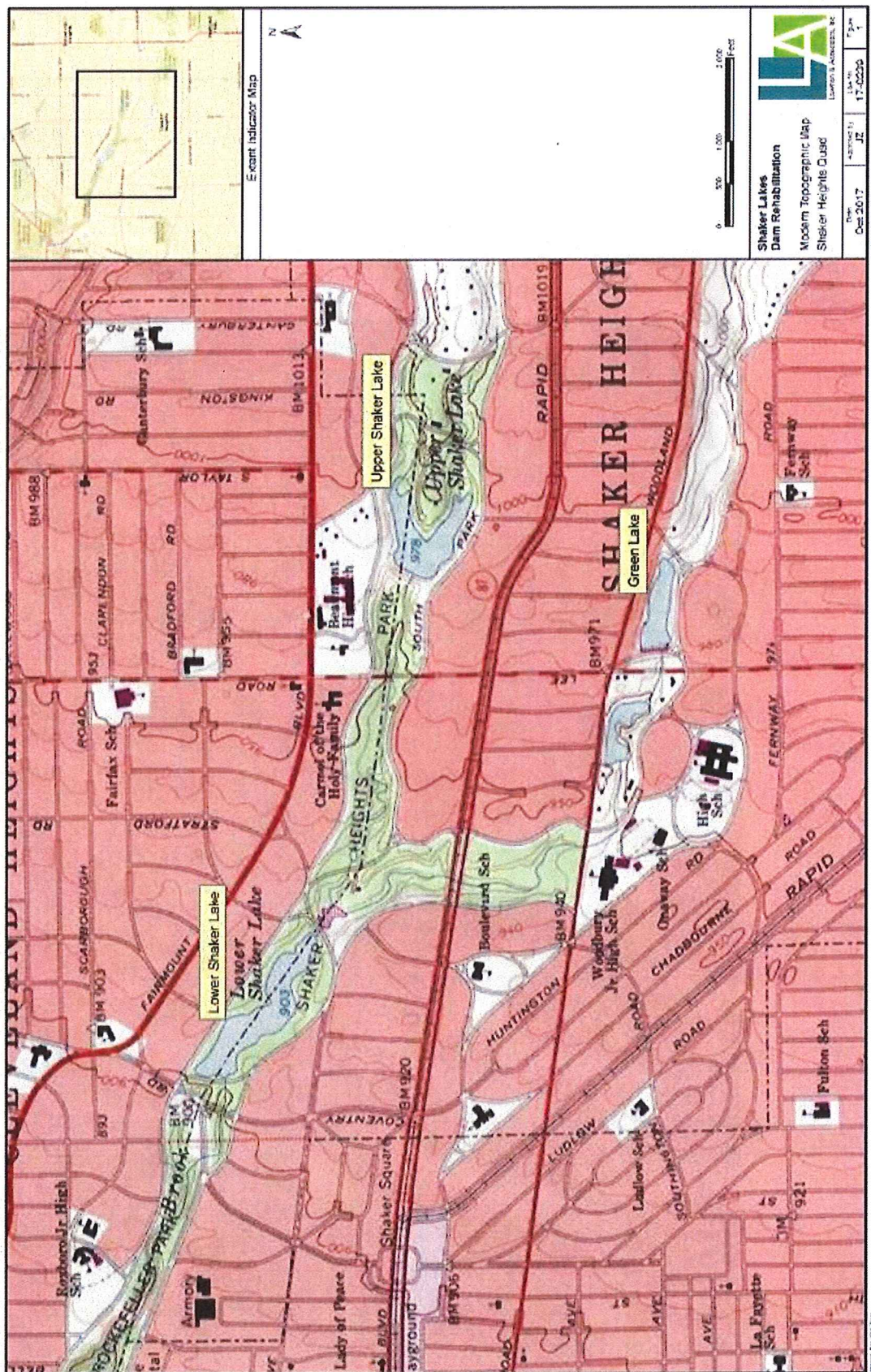
The Northeast Ohio Regional Sewer District (NEORSR or the District) is proposing to implement improvements to the Upper Shaker Lakes Dam and the Green Lake Dam in Shaker Heights, Cuyahoga County, Ohio. The project location is shown on the U.S. Geological Survey (USGS) Shaker Heights, Ohio, 7.5' topographic quadrangle and the APE for each dam is shown on the aerial photographs.

The Upper Shaker Lake was originally constructed in 1852 by the Shaker community of North Union to supply motive power for a new wool mill, and was altered in the late nineteenth and early twentieth centuries. Green Lake was created in 1911 for recreational purposes. The Upper Shaker Lake Dam is currently considered a Class I high hazard dam by the Ohio Department of Natural Resources (ODNR), and several deficiencies have been identified that could lead to dam failure and potential loss of human life. Green Lake Dam is classified as a Class II moderate hazard dam by ODNR, and is deemed to have insufficient spillway capacity to pass the probable maximum flood for which it was designed. The proposed rehabilitations for both structures will bring them both back into compliance with ODNR regulations. In addition, the portion of Andover Road that crosses over the berm of the Green Lake Dam will be reconfigured to limit it to pedestrian traffic only, altering its historic function as a vehicular traffic artery.

Previous consultations with the Ohio State Historic Preservation Office (SHPO) and the USACE - Buffalo District, have resulted in a finding that the proposed rehabilitations will construe an Adverse Effect on the Upper Shaker Lake Dam and the portion of Andover Road that crosses Green Lake Dam.

The USACE, in consultation with Ohio's State Historic Preservation Office (SHPO), established the Undertaking's Area of Potential Effects (APE), as defined at 36 CFR Part 800.16(d) and the Permit Area as defined in 33 CFR Part 325, Appendix C. After initial consultation with the responsible agency, USACE, and the SHPO in July of 2016, Phase I cultural resources surveys were conducted for compliance with Section 106 of the National Historic Preservation Act. The results of the Phase I cultural resource surveys have been presented in separate documents. In March of 2017, the USACE determined that there would be adverse effects to two National Register-listed resources: the North Union Shaker Site and the Shaker Village Historic District. SHPO concurred with the adverse effects finding. To mitigate the adverse effects on these resources, USACE and SHPO agreed that the following actions would be performed, as carried out by NEORSR:

1. Virtual Exhibit
2. Education Signage at Upper Shaker Lake, Lower Shaker Lake, and Green Lake





A description of the affected historic properties, including information on the characteristics that qualify them for the National Register:

Upper Shaker Lake and Dam:

The Upper Shaker Lake was originally constructed in 1852 by the Shaker community of North Union to supply motive power for a new wool mill, and was altered in the late nineteenth and early twentieth centuries. The Upper Shaker Lake Dam still contains Shaker stonework and is considered a contributing element of the National Register of Historic Places (NRHP)-listed North Union Shaker Site. In addition, the later decorative stonework additions of the dam contribute to the NRHP-listed Shaker Village Historic District.

Green Lake

Green Lake was created in 1911 for recreational purposes. The Green Lake Dam carries Andover Road over the spillway of the dam. Andover Road is considered a contributing element of the Shaker Village Historic District.

A description of the Undertaking's effects on historic properties:

Due to concerns for public safety, the rehabilitation project will directly affect the historical material of the dams of both Upper Shaker Lake and Green Lake. In addition, Andover Road, as it crosses the dam, will be altered in both form and general function.

Therefore, the proposed Rehabilitation of the Upper Shaker Lake and Green Lake Dams Project constitutes an **adverse effect** to components of the North Union Shaker Site and Shaker Heights Historical District.