Via E-Mail:

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Re: Morgan Shoal Project: FOLLOW UP WITH URGENT ACTION REQUIRED

Dear Assistant Attorney General Kelly:

Thank you for meeting with the leadership of the Advocates for Morgan Shoal (AMS) earlier this month, and the thoughtful discussion regarding issues at Morgan Shoal. As discussed, the presentation of the U.S. Army Corps of Engineers (USACE) in support of its draft Supplemental Environmental Assessment is the product of, and bootstraps itself to, a flawed process procedurally and substantively, one which has ignored the Illinois Historic Preservation Office (SHPO), the Illinois Department of Natural Resources (IDNR) and the public. It is the position of the AMS – and other consulting parties to that process – that proceeding as it is violates existing contractual obligations embodied, as well as federal and state law.

During our discussion, there were questions raised about trigger and enforcement of rights of the SHPO's office which have been ignored. As noted, at a minimum, the existence of the 1993 Memorandum of Agreement (MOA) and its terms represents both the trigger and mechanisms for enforcement which must be exercised here to protect the rights of the SHPO and the public.[1]

The trigger leading to enforcement already exists because the existing MOA evidences the USACE's recognition and commitments to consult with the SHPO (and for public participation) pursuant to Section 106 of the NHPA. *See* 36 C.F.R. § 800.6(c). The SHPO was a mandatory part of this process under federal and state law. *See, e.g.*, 36 C.F.R. § 800.2(c)(1)(i).

The MOA is the product of work of the SHPO and others that was necessitated by compliance with the National Historic Preservation Act of 1966 given the use of federal monies and the USACE being the lead agency in the shoreline erosion project. In that process, USACE consulted with the SHPO (and others) to work on devising a plan to avoid or mitigate adverse effects on historic resources. Consistent with both federal and state law, when the agency (here the USACE) and SHPO agreed upon a general plan – as incorporated by the MOA which both executed – that was provided to the Advisory Council for Historic Preservation and others for signature. *See* 36 C.F.R. § 800.6(a)-(c).

The MOA expressly provides that it was done pursuant to Section 106 and its implementing regulations, as the undertaking here "will have an effect upon historic properties included in and eligible for listing on the National Register of Historic Places," and that the "Corps has consulted

[1] Focus on these issues is not meant to be exclusive of other violations or issues which trigger now or later issues of concern under state law or federal law.

with . . . the Illinois State Historic Preservation Office pursuant to 36 CFR Part 800, regulations implementing Section 106 of the National Historic Preservation Act. . . ." And pursuant to the MOA, there were contractual commitments, reflecting the SHPO's superior knowledge of local historic properties and state law which provided mandatory commitments in the future associated with the MOA, including but not limited to:

A. "agree[ing] to consult with SHPO *during the engineering* of each reach, prior to construction to identify those properties on or eligible for listing on the National Register of Historic Places *and possible project effects on those properties*." (Emphasis supplied).

B. And for example, "where the effect consists of the repair . . . of contributing step stone revetment, the Corps *shall* consult with the SHPO . . . to ensure that the design and construction" will be consistent with the Secretary of Interior guidelines. (Emphasis supplied)

See MOA, attached as Exhibit 1. Pursuant to this MOA, there are two areas under the MOA that have not yet been repaired along the Chicago shoreline: Morgan Shoal and Promontory Point. The federal Advisory Council for Historic Preservation (ACHP), issued a comment letter to USACE stating that the MOA is and remains in effect, and is binding for Morgan Shoal and Promontory Point and prioritizes a preservation outcome at both locations. *See* Exhibit 2 hereto.

An MOA such as the one at issue here is a legal contract binding the parties to its terms. *See, e.g., Tyler v. Cuomo*, 236 F.3d 1124, 1134 (9th Cir. 2000) (holding that a memorandum of agreement entered into by a city "is a contract" and that "the City is bound by its terms" where the city entered into the memorandum of agreement to satisfy its NEPA and NHPA requirements); *see also Mobil Oil Expl. & Producing Southeast, Inc. v. U.S.*, 530 U.S. 604, 607, 120 S. Ct. 2423, 147 L.Ed.2d 528 (2000) (holding that when the United States enters into contractual relations, its rights and duties therein are governed by the law applicable to contracts between private individuals); 36 C.F.R. § 800.14 (stating that parties "may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings" which will govern the project).

Because the MOA is a binding contract of which the SHPO is a signatory between it and USACE, violations of the agreement are subject to the panoply of enforcement mechanisms that any contract is, that includes injunctive and other relief. And there are numerous issues we have identified (and others) that reflect breaches of the MOA and the rights and obligations of the SHPO under law that are being ignored and are properly the subject of enforcement as in any contractual setting, whether it be specific enforcement, mandatory injunction or the like.

First, and consistent with obligations set forth in the MOA, back in 2020, the SHPO's office provided guidance on historic properties and its view on work that was to be performed on an *emergency basis* given flooding that had occurred. *See* Exhibit 3 attached hereto. Such work was to be done consistent with the Secretary of the Interior's Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings, as referred to in the MOA. At that time, the

SHPO's office importantly gave certain conditional approval for work to be done temporarily, as well as future work:

> All historic limestone blocks must remain on site. They must not be broken up or covered . . . Because their positions have shifted over time, the historic blocks may be relocated as needed along the shoreline within Morgan Shoals [sic].

Put differently, the SHPO provided conditional approval and direction for future design and construction whereby SHPO expects the onsite blocks to be relocated for reconstruction of a historic, WPA stepped stone, limestone breakwater block revetment and promenade (historic revetment) on newly constructed lakefill parkland. Experts agree with SHPO (and ACHP's views in this regard). *See* Exhibit 7 attached hereto (WJE Report).

Consistent with the obligations set forth in the MOA, the SHPO's office has been waiting to receive early drafts of plans and consult with the USACE and others involved consistent with the entire goal of the process to "ensure that the Section 106 process is initiated early in the undertaking's planning, so that a broad range of alternatives may be considered during the planning process for the undertaking." 36 CFR § 800.1(c). The alternatives are designed to "seek ways to avoid, minimize or mitigate any adverse effects on historic properties." However, as explained, at least as AMS and other consulting parties understand, USACE, CDOT, CPkD and PCB have not provided SHPO with the plans that they have developed and/or have not consulted with SHPO as required by law so that SHPO can determine whether their plans comply with preservation standards and SHPO's directions for future work. To the contrary, AMS and others have been advised that from the SHPO's view, the Section 106 process has not been re-engaged precisely because those plans have not yet been provided to it by USACE.

And while these plans have been provided in public meetings, they have not been presented to the SHPO for their review and comment. These plans incorporate the demolition of the limestone block revetment and the historic elements of Morgan Shoal and their replacement with new construction in violation of SHPO's prior directives, and preservation processes and standards. This new construction also involves the deposit of seven (7) acres of lakefill extending the parkland 100 feet further into Lake Michigan, the creation of what is termed a 1,000 linear foot "dynamic revetment", an 800 linear foot stepped concrete revetment and 3,700 linear feet of 15-foot-high rubble mound sea wall. The failure to provide consultation on such plans with the SHPO is a violation of the MOA and the Section 106 process right now which can be addressed through immediate intervention to enforce the MOA terms and its underlying regulations.

Second, despite the mandatory obligations under the MOA and under the law (*see* 36 C.F.R. § 800.4(b)) to consult on the area of potential effect, that too has fallen by the curbside. The SHPO's office has previously determined that because Morgan Shoal is in Burnham Park and Burnham Park is designated eligible for listing in the National Register of Historic Places, this eligibility makes it a historic resource under the Illinois Historic Resources Act, as well as under Section 106. *See* Exhibit 4 hereto. USACE had agreed with that determination. But now, as affirmed in the public meeting of March 5, 2026, the USACE is backtracking from that agreement, and even suggesting that SHPO agrees that Morgan Shoal is not a historic resource, which is

inaccurate. USACE, CDOT, CPkD and PCB disregard such determinations precisely in order to proceed without taking the SHPO's concerns and consultation efforts into account in order to proceed as they wish. However, the facts, the law and notions of estoppel preclude USACE from what it appears to be doing. At a minimum, if there is an actual disagreement on such issues, ACHP must be involved. 36 C.F.R. § 800.4(d). This issue does not even take into account the lack of public input on such issues – it should be noted that during the Section 106 process that was done involving the Obama Presidential Center, that process involved solicitation of public input on the issue, which has not been done here (making the SHPO's involvement and considerations all the more important). Here too, immediate action to protect the SHPO's rights and involvement on these issues is another proper form of enforcement.

Third, and related to the flaws discussed above, the SHPO's office has expressed that this process must slow down so that a programmatic agreement implementing the MOA can be completed, as seen by its July 2025 correspondence:

> We concur with the ACHP and Consulting Parties that the Corps revise the amendment to reflect a preservation-based approach to work at both Promontory Point and Morgan Shoal. In addition, we prefer that Morgan Shoal continue to be part of the draft Programmatic Agreement to ensure that it is treated as sensitively as we hope the Corps will treat Promontory Point.

See Exhibit 5 hereto.

So, with concerns over USACE's ignoring SHPO's responsibilities here and other failures in the process, ACHP warned USACE that proceeding forward, the proposed plan and process will be subject to arguments of illegal foreclosure which would require that the entire process start again. *See* Exhibit 6. Under these circumstances, contractual remedies involving a stay of current activities and ordering a mandatory injunction/specific performance by USACE, CDOT, CPkD and PCB for compliance with the MOA, as well as other obligations under Section 106, will allow SHPO (and the public) to play meaningful roles, including discussion and creation of a programmatic agreement as SHPO has directed.

The failure to provide plans and consult with SHPO and IDPR about those plans -- itself a violation of the MOA and the Section 106 process -- is also a separate violation of Illinois Rivers, Lakes and Streams Act (615 ILCS 5/) which states expressly that:

> Sec. 18. ***It is unlawful to make any fill or deposit of rock, earth, sand, or other material, or any refuse matter of any kind or description*** or build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, causeway, harbor, or mooring facilities for watercraft, or build or commence the building of any other structure, or do any work of any kind whatsoever in any of the public bodies of water within the State of Illinois, ***without first submitting the plans, profiles, and specifications therefor, and such other data and information as may be required, to the Department of Natural***

> ***Resources of the State and receiving a permit therefor signed by the Director of the Department and authenticated by the seal thereof.***

(615 ILCS 5/18; emphasis supplied).

The "plans, profiles, and specifications" are necessary because the USACE plan involves seven (7) acres of lakefill being deposited in and along the lakefront to extend the park shoreline 100 feet further out into Lake Michigan and 3,700 linear feet of 15-foot-high rubble mound sea wall. The failure to submit those plans represents a violation of that IDNR right which to this point has been ignored.

Finally, while AMS is not aware of exactly which division addresses issues associated with rights of the SHPO and Illinois Historic Preservation Agency which sits in the IDNR, it is aware of other circumstances where the Illinois Attorney General's office has represented that agency in generally similar fashion. *See, e.g., People ex rel. Illinois Historic Preservation Agency v. Zych,* 186 Ill.2d 267 (1999) (Assistant Illinois Attorney General John P. Schmidt representing plaintiff in action where state claimed ownership of shipwreck). Given the public access concerns, the environmental justice communities impacted, and important procedural and substantive issues raised, we ask that your office become more involved to ensure that the rights of the SHPO, the IDNR, other agencies and the public are not trampled upon.

AMS and others would be happy to meet further and discuss the issues but hope that this assists in an explanation of both the triggers associated with the rights being exercised by the SHPO and IDNR, and the right to have such matters remedied.

Respectfully submitted,

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