

Exemptions from CWA and Justifications

October 16, 2007

DARK ELEGY

Federal Law Applicable to Washington DC Area Sites Commemorative Works Act (40 U.S. Code, Section 89)

Commemorative Works Act (40 U.S. Code, Section 89)

The 1986 Commemorative Works Act provides guidance and restrictions on the location and design of new memorials and monuments in Washington, DC and surrounding areas. There are two categories of commemorative works. The first is an event or individual and cannot be memorialized prior to the twenty-fifth anniversary of the event or the death of the individual. The second is Military monuments and memorials which may only commemorate a war or similar major military conflict or a branch of the Armed Forces.

- **Following are descriptions of where Dark Elegy defers/veers from the CWA as written. It is clear that when the CWA was written, it never even considered that a completed work of art by those impacted from a historical event could be presented as a memorial in the Nation's Capitol. Therefore, the exemptions required to authorize Dark Elegy as a memorial to all victims of terrorism are reasonable and necessary.**
- **Exemptions: There have been plenty of exemptions to various requirements of the CWA. I refer you to the Victims of Communism Memorial authorizing legislation as the language/process that DID NOT follow many of the CWA requirements associated with congressional approval of a commemorative work. For example:**
 - **The authorization was passed as an amendment to a large Foreign Affairs bill (1993).**
 - **The authorization language was never referred to the House or Senate committees of jurisdiction.**
 - **The Department of Interior was not offered an opportunity to comment.**
 - **This memorial was dedicated in DC by President Bush in the summer of 2007.**

DEFINITIONS:

Commemorative Works Act: (Section 8902)

(a) Definitions.

(1) **Commemorative work.** - The term "commemorative work" means any statue, monument, **sculpture**, memorial, plaque, inscription, or other structure or landscape feature, including a garden or memorial grove, designed to perpetuate in a permanent manner the memory of an individual, group, event or other significant element of American history, except that the term does not include any such item which is located within the interior of a structure or a structure which is primarily used for other purposes.

- **Definitions for locating a memorial in Area I or Area II are listed under “Specific Conditions Applicable to Area I and Area II (Sec 8908 (b)) listed later in this summary.**
- **The issue of “donating the memorial” comes into play here. John Parsons told us back in April that, by law, “sculptures” are not allowed to be donated to the NPS. Since that time, we have made sure that we refer to Dark Elegy as a memorial since we are not aware of similar restrictions on the “donation of a memorial.”**

(4) **Sponsor.** - The term "sponsor" means a public agency, or an individual, group or organization that is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code, and which is authorized by Congress to establish a commemorative work in the District of Columbia and its environs.

- **HR 3707 mandates that “Suse & Peter Lowenstein” are the sponsors. The Lowenstein’s, as individual citizens, do not meet the current criteria for a sponsor under the CWA. There is no need to set-up a non-profit around Dark Elegy since fundraising will not be a part of this effort (the Lowenstein’s will use the money received from the Libyan government for the costs of construction and perpetual maintenance associated with permanently placing the memorial).**
- **Exemption: Here again, I point to the Victims of Communism Memorial which did not incorporate a non-profit as its “sponsor”. The project began with a “committee” (National Captive Nations Committee) and in the legislation was “encouraged (not mandated) to create an independent entity for purposes of constructing, maintaining, and operating the memorial.”**

Organizations involved in planning and approval of commemorative works:

- **The National Capital Memorial Advisory Commission (NCMAC):**

- Advises the Secretary of the Interior and the Administrator of General Services on policies regarding commemorative works.
- Among those who are members of the NCMC is the Director of the National Park Service, **Mary Bomar and John Parsons**, NPS/NCR.
- **National Capital Planning Commission (NCPC):**
 - Laid the groundwork for the 2003 congressional amendments to the Commemorative Works Act that created the “Reserve” area of the Mall. Their focus for future development in Washington DC is along the major thoroughfares that radiate from the Capitol. This includes: North Capitol Street, South Capitol Street and East Capitol Street.
 - The 2001 Memorials and Museums Master Plan identifies more than 100 sites in Washington, DC for future memorials and museums.
 - On August 3, 2006, the National Capital Planning Commission adopted an amendment to the Memorials and Museums Master Plan which deletes four sites in the Reserve from the list of sites appropriate for memorials, museums, and commemorative works. These four deleted sites are:
 - Site 10: Constitution Gardens south of Constitution Avenue
 - Site 18: South of Ash Road at the National Park Service horse stables, West Potomac Park
 - Site 43: Along the Potomac River shoreline in West Potomac Park (south of the Lincoln Memorial)
 - Site 70: Along the Potomac River shoreline in West Potomac Park (west of the FDR Memorial)
- **I highlight this area for those who want to quickly be brought up to speed on the care that has been taken both by Congress and agencies to limit memorials on the Mall and carefully plan for the future. The Dark Elegy authorizing legislation in no way impedes on the preservation goals of the Mall.**
- **We reviewed the 100 sites listed for future memorials and museums and visited over a dozen that were of interest to the Lowenstein’s. Initially, we found 3-4 of interest for Dark Elegy both as a result of their appropriate size and their location.**
- **Commission of Fine Arts (CFA)**
 - Site & Design Approval
- **Please note that the May 25th letter from John Parsons to Suse Lowenstein was copied to Thomas Luebke at the Commission on Fine Arts.**
- **Department of Interior – National Park Service (NPS)**

- Site & Design Approval (If NPS land)
 - General Services Administration (GSA)
 - Site & Design Approval (if GSA land)
 - U.S. Congress:
 - A sponsor of a memorial must be authorized by law to establish a commemorative work in the District of Columbia and its environs.
 - Any authorized commemorative work that is subsequently sited in Area I is deemed to be authorized only if the recommendation is approved by law not later than 150 calendar days after the notification to Congress by either the Secretary of Interior or the Administrator of GSA.
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ISSUE #1:

25th Anniversary Criteria as Requirement for Congressional Authorization:

The Act states, in Section 8903 that “a commemorative work commemorating an event, individual, or group of individuals, other than a military commemorative work as described in subsection (b) of this section, shall not be authorized until after the 25th anniversary of the event, death of the individual, or death of the last surviving member of the group.”

Also:

Section 10(b) of the Commemorative Works Act provides that legislative authority is good for 7 years with an additional 3 years allowed under special conditions (10 (b) (1) & (2)(A)(B)).

- **In a meeting with John Parson, he stated that Dark Elegy would be perceived as a memorial to victims of Pan Am 103 and that a memorial already exists in Arlington Cemetery. He stated in its letter to Suse Lowenstein on May 25th: “The Commemorative Works Act further provides that memorials to groups cannot be authorized until 25 years after the death of the last surviving member of the group. Unfortunately, the current level of tension worldwide will continue for the foreseeable future and result in additional victims of terrorism. It is for this reason that Congress has declined to authorize other proposed memorials to victims of contemporary terrorism.” Two major points here:**

- Dedication of Dark Elegy to all victims of terrorism:
 - Suse Lowenstein stated on September 11, 1991 that “Dark Elegy is dedicated with deep love to all victims of terrorism.”
 - It is without question that Dark Elegy has long been a memorial to all victims of terrorism and not just recently stated as such in order to comply with the federal CWA as has been implied.
 - Exemptions to the 25-Year waiting period “after the death of the last surviving member” speak loud and clear as to the unreasonableness of this provision. If this were to be applied, there would NEVER be recognition in the form of a memorial for victims of terrorism. Under the CWA, it was recognized that memorials to the following major events were indeed worthy as commemorative works/memorials despite the fact that the 25-year waiting period was not applied:
 - World War II Memorial
 - Victims of Communism Memorial
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ISSUE #2:

Locating Commemorative Works in the Washington DC Environ:

Title 40 USC Section 8908 outlines the parameters for locating new commemorative works in the Washington DC environ. It reads as follows:

CHAPTER 89 - NATIONAL CAPITAL MEMORIALS AND COMMEMORATIVE WORKS
Sec. 8908. Areas I and II

(a) Availability of Map. - The Secretary of the Interior or the Administrator of General Services (as appropriate) shall make available, for public inspection at appropriate offices of the National Park Service and the General Services Administration, the **map** entitled "Commemorative Areas Washington, DC and Environs", numbered 869/86501 B, and **dated June 24, 2003**.

(b) Specific Conditions Applicable to Area I and Area II. -

(1) **Area i.** - After seeking the advice of the National Capital Memorial Commission, the Secretary or Administrator, as appropriate, may recommend the location of a commemorative work in Area I **only if the Secretary or Administrator decides that the subject of the commemorative work is of preeminent historical and lasting significance to the United States.** The Secretary or Administrator shall notify the Commission, the Committee on House Administration of the House of Representatives, and the Committee on Energy and Natural Resources of the Senate of the recommendation that a commemorative work should be located in Area I. The location of

a commemorative work in Area I is deemed to be authorized only if the recommendation is approved by law not later than 150 calendar days after the notification.

(2) **Area ii.** - Commemorative works of **subjects of lasting historical significance to the American people** may be located in Area II.

(c) **Reserve.** - After the date of enactment of the Commemorative Works Clarification and Revision Act of 2003, **no commemorative work or visitor center shall be located within the Reserve.**

- **Dark Elegy could fit the definition required to place a commemorative work in either area:**
 - **Area i: “the subject of the commemorative work is of preeminent historical and lasting significance to the United States.”**
 - **Area ii: “subjects of lasting historical significance to the American people.”**

ISSUE #3:

Process for Authorizing and Permanently Placing a Memorial in the Washington, DC area

Congressional Authorization:

As noted above (under organizations), the U.S. Congress must pass a law authorizing a sponsor to establish a commemorative work in the District of Columbia and its environs.

The average amount of time for the site selection and design process for a major memorial is 4-6 years after authorizing legislation is enacted.

Following are the statutory directives that follow the congressional authorization of a commemorative work.

Site and Design Approval (Sec. 8905)

- **Dark Elegy will comply with the site approval process.**
- **Dark Elegy will be exempt from the design process since it is an already completed work of art. The CWA only addresses the concept and design of commemorative works as though they are future works of art. There doesn't seem to be any consideration given to completed works of art such as Dark Elegy.**

(a) Consultation on, and Submission of, Proposals. - A sponsor authorized by law to establish a commemorative work in the District of Columbia and its environs may request a permit for construction of the commemorative work only after the following requirements are met:

(1) Consultation. - The sponsor must consult with the National Capital Memorial Advisory Commission regarding the selection of alternative sites and design concepts for the commemorative work.

(2) Submittal. - Following consultation in accordance with clause (1), the Secretary of the Interior or the Administrator of General Services, as appropriate, must submit, on behalf of the sponsor, site and design proposals to the Commission of Fine Arts and the National Capital Planning Commission for their approval.

(b) Decision Criteria. - In considering site and design proposals, the Commission of Fine Arts, National Capital Planning Commission, and the Secretary or Administrator (as appropriate) shall be guided by, but not limited by, the following criteria:

(1) Surroundings. - To the maximum extent possible, a commemorative work shall be located in surroundings that are relevant to the subject of the work.

(2) Location. - A commemorative work shall be located so that -

(A) it does not interfere with, or encroach on, an existing commemorative work; and

(B) to the maximum extent practicable, it protects open space, existing public use, and cultural and natural resources.

(3) Material. - A commemorative work shall be constructed of durable material suitable to the outdoor environment.

(4) Landscape features. - Landscape features of commemorative works shall be compatible with the climate.

(5) Museums. - No commemorative work primarily designed as a museum may be located on lands under the jurisdiction of the Secretary in Area I or in East Potomac Park as depicted on the map referenced in section 8902(2).(11)

(6) Site-specific guidelines. - The National Capital Planning Commission and the Commission of Fine Arts may develop such criteria or guidelines specific to each site that are mutually agreed upon to ensure that the design of the commemorative work carries out the purposes of this chapter.

(7) Donor contributions. - Donor contributions to commemorative works shall not be acknowledged in any manner as part of the commemorative work or its site.

Criteria for Issuance of Construction Permit (Sec. 8906)

(a) Criteria for Issuing Permit. - Before issuing a permit for the construction of a commemorative work in the District of Columbia and its environs, the Secretary of the Interior or Administrator of General Services, as appropriate, shall determine that -

(1) the site and design have been approved by the Secretary or Administrator, the National Capital Planning Commission and the Commission of Fine Arts;

(2) knowledgeable individuals qualified in the field of preservation and maintenance have been consulted to determine structural soundness and

durability of the commemorative work and to ensure that the commemorative work meets high professional standards;

(3) the sponsor authorized to construct the commemorative work has submitted contract documents for construction of the commemorative work to the Secretary or Administrator; and

(4) the sponsor authorized to construct the commemorative work has available sufficient amounts to complete construction of the project.

ISSUE #4:

Additional Construction Permit Requirements Added by the 2003 Amendments for: “Perpetual Maintenance Requirement”

(b) **Donation for Perpetual Maintenance and Preservation. -**

(1) In addition to the criteria described above in subsection

(a), no construction permit shall be issued **unless the sponsor authorized to construct the commemorative work has donated an amount equal to 10 percent of the total estimated cost of construction to offset the costs of perpetual maintenance and preservation of the commemorative work.** All such amounts shall be available for those purposes pursuant to the provisions of this subsection. The provisions of this subsection shall not apply in instances when the commemorative work is constructed by a Department or agency of the Federal Government and less than 50 percent of the funding for such work is provided by private sources.

(2) Notwithstanding any other provision of law, money on deposit in the Treasury on the date of enactment of the Commemorative Works Clarification and Revision Act of 2003 provided by a sponsor for maintenance pursuant to this subsection shall be credited to a separate account in the Treasury.

(3) Money provided by a sponsor pursuant to the provisions of this subsection after the date of enactment of the Commemorative Works Clarification and Revision Act of 2003 shall be credited to a separate account with the National Park Foundation.

(4) Upon request of the Secretary or Administrator (as appropriate), the Secretary of the Treasury or the National Park Foundation shall make all or a portion of such moneys available to the Secretary or the Administrator (as appropriate) for the maintenance of a commemorative work. Under no circumstances may the Secretary or Administrator request funds from a separate account exceeding the total money in the account established under paragraph (2) or (3). The Secretary and the Administrator shall maintain an inventory of funds available for such purposes. Funds provided under this paragraph shall be available without further appropriation and shall remain available until expended.

- **The Lowenstein’s assume responsibility for the perpetual maintenance of Dark Elegy (using the funds from the Libyan government).**
- **The issue of perpetual maintenance applies not only to the requirements for a Washington, DC site but has come up in regard to**

sites in New York City (comments from Mayor Bloomberg staff) and to sites associated with museums (through Senator Clinton's office).

HR 3707 Modifications:

- Confirm that all the statutory references are accurate.
 - Confirm that the language conforms to the needs of Dark Elegy as an already completed work of art that will be donated by the Lowenstein family.
 - This includes making sure that Congress mandates Dark Elegy as the memorial to all victims of terrorism rather than giving the decision making authority to a federal agency/commission.
 - Incorporate a provision that mandates the NPS to accept the donation of Dark Elegy as the memorial to all victims of terrorism at the appropriate point in the process.
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Attachments:

- John Parsons Letter of May 25, 2006
- Victims of Communism Memorial authorizing legislation (1993).