



April 30, 2021

Ms. Tammy R. Turley  
Chief, Regulatory Division  
Corps of Engineers, New England District  
696 Virginia Road  
Concord, MA 01742-2751

Ref: *Eversource / MA DCR Electric Line (Phase I)/Rail Trail (Phase II)*  
*Application No. NAE-2017-01406*  
*Towns of Sudbury, Hudson, Marlborough and Stow, Middlesex County, Massachusetts*  
*ACHP Case Number: 016522*

Dear Ms. Turley:

On February 5, 2021, the Advisory Council on Historic Preservation (ACHP) received notification from the U.S. Army Corps of Engineers, New England District (Corps) regarding the referenced undertaking's potential adverse effect on a property eligible for listing in the National Register of Historic Places. The Corps provided its notification in compliance with Section 106 (54 U.S.C. § 306108) of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.) and its implementing regulations, "Protection of Historic Properties" (36 C.F.R. Part 800). Since that notification, we have also been copied on correspondence and received communications from consulting parties and stakeholders with expressions of concern regarding the Section 106 review being carried out by the Corps. Those concerns focus on the Corps' definition of the undertaking subject to review, its delineation of the Area of Potential Effect (APE), the sufficiency of its effort to identify and consider effects to historic properties that may be affected by the undertaking, and the identification and acknowledgement of important stakeholders to include in the Section 106 review as consulting parties. To assist the Corps in meeting the statutory requirements of Section 106, we offer the following comments pursuant to 36 C.F.R § 800.9(a).

Based on the information provided, it is our understanding that Eversource Energy is proposing to install a new electrical transmission line, approximately nine miles in length, between its Sudbury Substation in the Town of Sudbury and the Town of Hudson. The transmission line will be placed, for the most part, underground along 7.6 miles of an inactive railroad corridor. The project includes the clearing of trees and shrubs in the ROW, construction of a 14-foot-wide access road, excavation for burial of the transmission line, the rehabilitation or replacement of three bridges, and post-construction revegetation in the right-of-way (ROW). The Corps is reviewing a pre-construction notification (PCN) for components of the undertaking requiring authorization under a Nationwide Permit for temporary impacts to wetlands in the ROW. No detailed information was provided for the Rail Trail Phase II cited in the project name, though it is our understanding that it will be sponsored by the Massachusetts Department of Conservation and Recreation (DCR), which was listed as a co-applicant under the PCN for the project.

As noted, consulting parties have expressed concern about the Corps' refusal to consider effects to historic properties in other portions of the ROW beyond the permit areas associated with modification or replacement of several bridges to enable attachment of the transmission line for crossing waterbodies in

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the ROW. Cultural resource surveys carried out along the entire ROW by consultants for the project proponent have identified a number of historic properties that might be affected by the undertaking, and suggested that the project corridor has the potential for unrecorded structures and/or features associated with the 17th through 19th century development of both Sudbury and Hudson, and archaeological sites associated with the railroad as well as the pre-contact period. However, the Corps has declined to consider effects to historic properties beyond those occurring in or adjacent to its permit areas, citing Appendix C (“Procedures for the Protection of Historic Properties”) of 33 C.F.R. 325 (“Processing of Department of the Army Permits”) as the basis for that minimization of its responsibilities.

As you are aware, the ACHP has never approved Appendix C as an alternative to the Section 106 implementing regulations as required by Section 110(a)(2)(E) (now 54 U.S.C. § 306102(b)(5)(A)) of the NHPA, because it differs from the Section 106 regulations in many fundamental ways, including the definition of undertaking, the delineation of the APE, and the nature of consultation during the Section 106 review. Under the Section 106 regulations, the undertaking is not solely the federal issuance of a permit or a grant or the specific activity that requires a permit or grant. Rather, the undertaking is the overall project, parts of which may require the issuance of a permit and/or that benefit from federal assistance. The NHPA specifically and explicitly defines “direct or indirect jurisdiction” in the context of “undertakings” as “projects ... including— (1) those carried out by or on behalf of the federal agency; (2) those carried out with federal financial assistance; (3) those requiring a federal permit, license, or approval ...” (54 U.S.C. § 300320). The “jurisdiction” needed for a project to fall within the scope of a Section 106 review does not entail a high level of federal agency control. Rather, when a federal agency’s involvement in an otherwise non-federal undertaking is limited to an associated approval, as in this case, the entire project is still considered as falling within the federal agency’s “direct or indirect jurisdiction” for Section 106 purposes. The APE is defined as the geographic area or areas within which the undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist” (36 C.F.R. § 800.16(d)).

The ACHP recognizes that a federal agency may face challenges in identifying and resolving adverse effects to historic properties in the portions of an APE that are outside those areas associated with activities requiring federal authorization or assistance. The Section 106 process provides federal agencies the authority to determine, in the context of such challenges, appropriate levels of effort for the identification and consideration of effects to historic properties that can qualify as meeting the reasonable and good faith standard set out in the regulations. In establishing a reasonable and good faith effort to identify and consider effects to historic properties from an undertaking, the federal agency should consider past planning, research and studies, the magnitude and nature of the undertaking and the degree of Federal involvement, the nature and extent of potential effects on historic properties, and the likely nature and location of historic properties within the area of potential effects (36 C.F.R. § 800.4(b)(1)). Thus, in a case such as this, it is appropriate for the Corps to consider the nature of the authorization or assistance it will be providing, the components of the larger undertaking the federal action focuses on, the location of those components, and the relationship of those components to the larger undertaking. In such cases, the federal agency has an obligation to consider not only the effects on historic properties from the components requiring authorization or assistance, but also those aspects of the larger project without which the specifically authorized or assisted activity would not serve a rational need. In situations where the federal agency has a “small federal handle,” the concept of independent utility is useful in determining the extent of a federal agency’s responsibilities to “take into account” the effects of the undertaking on historic properties under Section 106.

As noted, stakeholders have also expressed concerns about the Corps efforts to identify and invite appropriate stakeholders to be consulting parties in the Section 106 review and provide them with the documentation and information necessary to inform their participation in the Section 106 review.

According to the Corps' submission, in 2019, it notified and invited comment from the Mashpee Wampanoag Tribe and the Wampanoag Tribe of Gay Head (Aquinnah), two federally recognized tribes that ascribe significance to properties in the project area. However, we understand that the Corps did not notify the Narragansett Indian Tribe (Narragansett Tribe) in Rhode Island, a federally recognized tribe that also ascribes religious and cultural significance to properties in Massachusetts. The Corps was subsequently contacted by the Tribal Historic Preservation Officer (THPO) of the Narragansett Tribe who expressed concerns regarding the potential for effects to archaeological sites and possibly associated burials, which could be encountered and disturbed along the project ROW. By letter dated March 31, 2021, the Corps acknowledged the Narragansett THPO's notification and invited comment on a draft Memorandum of Agreement (MOA). The Corps is aware that Section 101(d)(6)(B) (now 54 U.S.C. § 302706(b)) of the NHPA as well as the Section 106 implementing regulations require that federal agencies consult with any federally recognized Indian tribe or Native Hawaiian organization that attaches religious and cultural significance to historic properties that may be affected by an undertaking. This requirement applies regardless of the location of the historic property. It is important for federal agencies to make a good faith effort to identify such tribes and initiate consultation early in the review process.

We also understand that the Sudbury Historical Commission had initially been corresponding with the Corps and requesting information about the undertaking and then formally requested to participate as a consulting party in the Corps' Section 106 review in September 2020. Though continuing to communicate with the Corps, the Historical Commission did not receive formal recognition of its consulting party status for some time. The ACHP wishes to remind the Corps that local governments with jurisdiction over the area where an undertaking is proposed or where it will affect historic properties are by-right consulting parties in the 106 review. To the extent that such commissions represent the views of the local government and the community, they are important consulting parties. Further, the Section 800.2(c)(5) of the Section 106 implementing regulations clarifies that "Certain individuals and organizations with a demonstrated interest in the undertaking may participate as consulting parties due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertaking's effects on historic properties". The Historical Commission has a well-informed interest in the effects of the undertaking on historic properties. The Section 106 regulations direct the federal agency to carry out the effort to identify historic properties in a way that is informed by the information gathered from tribes, consulting parties, and other individuals and organizations likely to have knowledge of, or concerns with, historic properties in the project area (36 CFR § 800.4(b)). Further, the Section 106 consultation process is intended to enable members of communities and other knowledgeable and concerned stakeholders to participate actively in the federal decision making process as it relates to effects on historic properties. By denying or delaying consulting party status to organizations like the Historical Commission, the Corps would be failing to avail itself of the established expertise in the community to address issues of importance to the Section 106 review.

Therefore, it is the ACHP's advisory opinion that the Corps should fully engage with the Massachusetts State Historic Preservation Officer, the federally recognized tribes, and other appropriate consulting parties, including the Historic Commission, to consider the effects of the entire undertaking on historic properties. As the transmission line ROW is less than ten miles in length, it appears the transmission line could not be built along the selected railroad corridor without the modification or replacement of the bridges to enable passage of the transmission line across waterbodies in the corridor. Work on several of the bridges will include activities requiring Corps permits. Thus, it appears that the undertaking as designed, planned, funded, and scheduled could not be built but for the activities requiring a Corps permit. The ACHP believes that, in this case, the activity requiring Corps authorization represents a sufficient level of federal involvement that the Corps is obligated to actively take into account effects to historic properties throughout the entire ROW for the project. This is reinforced by the fact that the components of the project associated with the Corps authorization, the rehabilitation and modification or replacement of bridges to facilitate passage of the transmission line across waterbodies, have no

independent utility separate from the larger undertaking. The Corps should consider the results and recommendations of the cultural resource surveys carried out by consultants for the proponent, in consultation with the consulting parties, and require additional identification work as necessary to complete the identification of historic properties and the assessment of effects and adverse effects.

The ACHP also wishes to remind the Corps that the ACHP, in accordance with 54 U.S.C. § 304108(a), is the only federal agency authorized to promulgate regulations to implement Section 106 in its entirety. As previously noted, the ACHP has never approved Appendix C as an alternative to the Section 106 implementing regulations as required by 54 U.S.C. § 306102(b)(5)(A)). Therefore, relying on Appendix C as a basis for making findings and determinations in the Section 106 review will leave the Corps' compliance with Section 106 subject to challenge due to fundamental inconsistencies between Appendix C and the Section 106 implementing regulations.

We have provided these advisory comments to assist the Corps in concluding the Section 106 review for the referenced undertaking. If you have any questions or require further assistance, please contact Dr. John Eddins at (202) 517-0211 or via email at [jeddins@achp.gov](mailto:jeddins@achp.gov).

Sincerely,



Jaime Loichinger  
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Office of Federal Agency Programs  
Federal Permitting, Licensing and Assistance Section