



June 8, 2022

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

Ref: *Eversource Electric Line (Phase I) and MA DCR Rail Trail (Phase II)*
Application: NAE-2017-01406
Towns of Sudbury, Hudson, Marlborough and Stow, Middlesex County, Massachusetts
ACHP Case Number: 016522

Dear Ms. Turley:

The Advisory Council on Historic Preservation (ACHP) has recently received copies of correspondence among the Corps of Engineers, New England District (Corps) and consulting parties for the two referenced undertakings, which require compliance with Section 106 (54 U.S.C. § 306108) of the National Historic Preservation Act (NHPA) (54 U.S.C. § 300101 et seq.). In February 2022, the Corps provided the ACHP with updated information regarding its expanded Area of Potential Effects (APE) and consideration of effects to historic properties by the two undertakings, a revised finding of adverse effect, and an updated draft Memorandum of Agreement (MOA) to resolve the undertakings' adverse effects. However, in March and April 2022, consulting parties continued to express concerns to the Corps and to the ACHP regarding the clarity and detail in the description of the two linked undertakings, the reasonable analysis of the range of effects from the two undertakings, and the steps proposed to resolve the adverse effects. In this letter, the ACHP provides general advisory comments pursuant to 36 C.F.R. Part 800, the Section 106 implementing regulations, regarding the Corps' compliance with Section 106, and addresses concerns shared by the consulting parties. The ACHP will not be formally entering the consultation, but provides recommendations for the Corps to consider in appropriately concluding the Section 106 review for the referenced undertakings.

Context

In this Section 106 review the Corps is considering two linked undertakings, characterized as a "joint project" to be carried out in two phases: (1) a roughly 9-mile long 115-kilovolt electric transmission line to be constructed underground by Eversource Energy (Eversource) along 7.6 miles of an unused railroad corridor/right-of-way (ROW) and also along 1.4 miles of community streets; and (2) the 7.6-mile long Mass Central Rail Trail Project to be built by the Massachusetts Department of Conservation and Recreation (DCR) along the transmission line ROW in the unused railroad corridor. As a result of concerns expressed by the Massachusetts State Historic Preservation Officer (SHPO) and consulting parties, as well as the ACHP in our April 30, 2021, correspondence, the Corps notified SHPO and consulting parties in December 2021 that it had expanded the scope of its review to include the area encompassed by the boundaries of the Central Massachusetts Railroad Corridor Historic District

(CMRRCHD), equating the expanded permit area with the APE. The Corps has also determined that the CMRRCHD is eligible for inclusion on the National Register of Historic Places (National Register), and found that the linked undertakings will have an adverse effect on the CMRRCHD. The Corps has worked with Eversource to modify the transmission line project to avoid and minimize adverse effects where possible, and developed a revised draft MOA and an associated Historic Property Avoidance and Preservation Plan (HPAPP), as recommended by SHPO, to document the resolution of adverse effects.

Consulting parties have opined that the Corps' assessment and resolution of adverse effects has focused mostly on the construction of the transmission line. They suggest that the Corps and the DCR have not provided sufficient detail regarding the proposed rail trail and how its construction might separately affect historic properties or might interfere with steps Eversource has proposed in the HPAPP to avoid or minimize adverse effects during construction of the buried transmission line. Consulting parties also continue to express concerns regarding the adequacy of the APE. The variable and inconsistent use of terms such as significant features, significant archaeological sites, cultural resources, contributing resources, and historic properties has created a lack of clarity as to what is being considered within the Section 106 review. They have questioned whether components or features of the abandoned rail line may be individually eligible for the National Register, in addition to being contributing elements of the historic district. They have also requested clarification about how the proposed resolution of adverse effects will address each of the adverse effects to each historic property or to each contributing element of the CMRRCHD.

Advisory Comments

The ACHP does not object to the Corps considering the two linked undertakings in the same Section 106 review. The proposed rail trail is clearly dependent on the work that Eversource will carry out to construct the buried transmission line along the rail corridor. However, considering the difficulties that have arisen in this review, we want to remind the Corps that a federal agency is responsible to clearly describe an undertaking in a way that will inform the consulting parties about the potential for effects to historic properties, the basis for the federal agency's finding of adverse effects, and the ways the federal agency proposes to modify the undertaking to avoid and minimize such effects. This enables the consulting parties to engage in the consultation regarding the resolution of adverse effects in an informed way.

Nevertheless, ACHP believes the Corps and Eversource have made a reasonable effort to detail the components of the transmission line project and the effects from the construction of the transmission line to a number of archaeological sites and to railroad-related features that are considered contributing elements to the CMRRCHD. The HPAPP and associated spreadsheet set forth a listing of the steps intended to avoid or minimize impacts. However, it is not clear from documentation shared with ACHP that the Corps has clearly addressed how the components of DCR's rail trail project further compound the adverse effect on historic properties, or interfere with the steps proposed by Eversource in the HPAPP to avoid and minimize effects to the CMRRCHD from the transmission line project. The Corps should clarify its consideration of these questions for the consulting parties, and if appropriate, require that it be specifically addressed in the HPAPP.

Consulting parties have also consistently expressed concerns about the delineation of the APE and the scope of the effort to identify historic properties that may be affected by the linked undertakings. It appears these concerns and other issues have resulted in part from the initial stages of the consultation as carried out according to Appendix C ("Procedures for the Protection of Historic Properties") of 33 C.F.R. 325 ("Processing of Department of the Army Permits"). As previously noted, the Corps expanded its

consideration of effects on historic properties from the permit area focused on work associated with repair or replacement of several bridges along the transmission line ROW to now include an APE defined by the boundary of the CMRRCHD. As clearly established in the Section 106 implementing regulations, and referenced in the ACHP's letter of April 30, 2021, the APE is the area within which the undertaking may affect historic properties, if any were present. The APE is not delineated based on the presence or boundaries of historic properties but rather on the area where the undertaking may have a physical effect on an historic property or an effect on the setting and context of historic properties. If a federal agency finds that an undertaking under review has an adverse effect on an historic property whose boundaries overlap with the APE, the APE does not automatically expand to encompass the entire boundary of that historic property unless the boundary of that historic property encompasses all areas where the undertaking may affect historic properties. The flawed delineation of the APE has contributed to the concerns of consulting parties about the sufficiency of the effort to identify historic properties that may be affected by the two linked undertakings.

In spite of the Corps' challenges in delineating an appropriate APE for the two undertakings, the identification effort that was sponsored by the proponent may have been sufficient in spite of the Corps' minimized focus. We defer to SHPO in this case on that assessment. We note that the archaeological surveys carried out included the portion of the Eversource Transmission line that follows the 1.4 miles of community streets outside the railroad corridor and therefore outside the associated CMRRCHD. The identification and consideration of effects to the setting and context of historic properties beyond the limit of work for both linked undertakings, as sponsored by the proponents, may also have addressed an appropriately delineated APE. It is the Corps' responsibility to clarify to the consulting parties how it believes the identification efforts meet the reasonable and good faith effort required by the Section 106 regulations. At the same time, the ACHP wants to stress that the Section 106 regulations do not require that the federal agency identify every historic property and every adverse effect that may occur as a result of an undertaking. Rather, under the Section 106 regulations, the federal agency is responsible for making a reasonable and good faith effort to identify historic properties in a properly delineated APE, and then consider the direct, indirect, and cumulative effects of the undertaking on those historic properties.

As a reminder regarding terminology to be used within a Section 106 review, the regulations require federal agencies to identify and resolve the adverse effects of an undertaking on *historic properties*, defined as properties that are listed on or determined eligible for inclusion on the NRHP. It is important for the Corps to consistently use this language to minimize confusion among consulting parties. In this Section 106 review, a number of features of the abandoned railroad line were identified as contributing elements of the CMRRCHD. While some of those features might be considered individual historic properties, some may not have sufficient integrity or significance, and would therefore not be considered individual historic properties. Consulting parties have questioned why these features have not been evaluated and considered as individually eligible for inclusion on the NRHP, in addition to being contributing elements of the historic district. However, an adverse effect to a contributing element of an historic district is, under Section 106, considered an adverse effect to the entire historic district. Accordingly, there may not be a need for the Corps to conduct such additional reviews if there is already an identified adverse effect and sufficient information to understand how the property's integrity will be affected.

While consideration of adverse effects to multiple contributing elements of an historic district can help a federal agency and consulting parties understand the nature and degree of such effects on the historic district, the resolution of adverse effects is not defined as or required to be a quantitative process. The Section 106 implementing regulations do not specify an outcome, nor do they require that there be a

specific resolution of the adverse effects to each historic property that is adversely affected. Rather, the regulations anticipate that the federal agency will attempt to achieve a consensus with the consulting parties about reasonable steps to resolve the adverse effects. That may include steps addressing the adverse effects to each individual historic property that may be affected by the undertaking, but that is not necessary or appropriate in every Section 106 consultation. Finally, while consensus regarding the resolution of adverse effects is a goal of Section 106, there may be times when such agreement cannot be achieved with all consulting parties. The federal agency is ultimately responsible for determining a reasonable resolution of adverse effects, which is informed by the concerns and recommendations of consulting parties and serves the overall public interest.

With that in mind, the ACHP also takes the opportunity to provide comments on the revised draft MOA.

- The preamble language describing the undertaking, APE, and permit area is inconsistent and at times contradictory. It lends to the continued confusion about the Corps' responsibilities under Section 106 and the sufficiency of the Corps' efforts to identify and assess effects to historic properties. The undertaking is incorrectly referenced as the discharge of fill material in order to install a new electric transmission line and construct a rail trail, and also incorrectly referenced as the Corps issuance of a Section 404 permit. A whereas clause references 33 CFR Part 325, Appendix C, alongside 36 CFR 800, as the regulations implementing Section 106, which is not the case. Appendix C is a set of protocols developed and used by the Corps which has never been approved by the ACHP as an alternative because it is inconsistent with core aspects of the Section 106 implementing regulations. These whereas clauses should be revised to corrected to accurately define the undertaking and the regulatory authorities.
- The majority of the stipulations will be challenging to implement as they are written in the passive voice, and provide no specifics regarding review, comment, and finalizing the required documentation, recordation, or activities. The Corps should revise each of the stipulations to use active voice, and in each one, to specify: who will do what and by when; who will have the opportunity to review and comment and for how long; how long the Corps will consider timely comments prior to requiring revisions; who besides the Corps will be given approval authority; and how the Corps will indicate final approval.
- The post-review discovery stipulation should specifically reference the Post Review Discoveries Plan instead of referring to the requirements of 36 CFR 800.13 and 33 CFR 325, Appendix C.
- The dispute resolution stipulation should be replaced with the standard dispute resolution clause provided in ACHP's *Guidance on Agreement Documents*.

Finally, ACHP recommends that the Corps revise the HPAPP to address concerns regarding the construction of the rail trail impacting or undoing avoidance and protection measures committed to by Eversource. The Corps should also consider whether the HPAPP should include monitoring in locations along portions of the rail ROW where a sample of expected features associated with the CMRRCHD have the potential to be located below the depths of shovel tests, as well as in any higher probability areas of the transmission line ROW, if any, along the 1.4 miles of community streets outside the rail line corridor. The Corps should also modify the Post Review Discovery Plan (PRDP) to include unexpected adverse effects to historic properties that have already been identified and situations where proposed avoidance measures are not successfully implemented. The PRDP does indicate that if human remains are encountered, the proponent will ensure that the state unmarked burial law is followed. Further, the Corps should consider inclusion of specific protocols regarding consultation with tribes who may have concerns regarding discovery of Native American human remains.

The ACHP provides these comments to assist the Corps in addressing the concerns expressed by the consulting parties and concluding its Section 106 review for the two linked undertakings. As we noted above, despite the updated finding of effect, the ACHP will not be formally entering the consultation. Pursuant to Section 800.6(b)(1)(iv), you will need to file the executed MOA with the ACHP at the conclusion of the consultation process. The filing of the MOA, and any supporting documentation not previously supplied, with the ACHP is required in order to complete the requirements of Section 106 of the NHPA. If you have any questions or require our further assistance, please contact John T. Eddins, PhD at (202) 517-0211 or by email at jeddins@achp.gov and reference the ACHP Case Number above.

Sincerely,



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