



**National Trust for
Historic Preservation**
Save the past. Enrich the future.

March 23, 2015

BY ELECTRONIC MAIL

Chairman Martin Honigberg
New Hampshire Site Evaluation Committee
N.H. Public Utilities Commission
21 South Fruit Street, Suite 10
Concord, NH 03301

**Re: New Hampshire Site Evaluation Committee Rulemaking,
Docket No. 2014-04**

Dear Chairman Honigberg and Committee Members:

On behalf of the National Trust for Historic Preservation, I am pleased to provide the following comments regarding the proposed amendments to the Site Evaluation Committee (“SEC”) rules that govern energy project siting in New Hampshire. As noted in our previous comments submitted on March 4, 2015, decisions regarding the siting of energy facilities can have profound impacts on historic and cultural resources, and the National Trust appreciates the opportunity to submit comments on the proposed changes to N.H. Administrative Rules, chapters Site 100-300 (the “Initial Proposals”). With the potential impacts to historic resources in mind, the Trust’s review of the Initial Proposals has raised some significant concerns. To aid in review, we have provided a chart showing our proposed language changes in addition to the explanations included in this letter.

As an introductory matter, the Trust would like to highlight the fact that the National Historic Preservation Act will independently apply to many large-scale projects that are subject to the SEC’s jurisdiction. Consistency in review under the state and federal review process, where possible, will benefit developers, agencies, and the public alike. For this reason, many of the suggestions contained in this letter are aimed at aligning SEC review with reviews under Section 106

under the National Historic Preservation Act.

1. Adverse Effects on Historic Sites

Proposed Site 301.14(b), Criteria Relative to Unreasonable Adverse Effect on Historic Sites, states:

In determining whether a proposed energy facility will have an unreasonable adverse effect on historic sites, the committee shall: (1) Consider the nature and significance of the historic and archaeological resources identified by the applicant; (2) Consider the effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on historic and archaeological resources; and (3) Consider the status of the applicant's consultations with the New Hampshire Division of Historical Resources and, if applicable, the federal lead agency.

This language fails to define what an “adverse effect” or an “unreasonable adverse effect” would be as that term is used in NH RSA 162:H-16.IV. The implementing regulations for Section 106 of the National Historic Preservation Act (“NHPA”) define what constitutes an “adverse effect”¹ to a historic resource. Notably, however, the Section 106 regulations do not include the modifier “unreasonable” when discussing adverse effects. Instead, the NHPA seeks to identify adverse effects as a starting point, in order to help reach a decision that will “avoid, minimize or mitigate” those adverse effects.² To ensure that historic resources are

¹ The criteria for assessing adverse effects under the NHPA are outlined in 36 C.F.R. § 800.5(a)(1), which states that:

“An adverse effect is found when an undertaking may alter, directly, or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property’s location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been indentified subsequent to the original evaluation of the property’s eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance, or be cumulative.”

² *Id.* §§ 800.1(a), 800.6(a).

protected and that the SEC review process correlates with Section 106 review when applicable, it would be best to define “unreasonable adverse effect” to be the same as “adverse effect,” as that term is defined under NHPA. However, if it is the intent to set the bar lower for protection of resources under the SEC rules by limiting the requirement for minimizing harm to historic resources to only “*unreasonable* adverse effects,” then it will be necessary to define “adverse effect”³ independently, and establish criteria for what constitutes an “*unreasonable* adverse effect.” Failure to do so will likely lead to subjective arguments over “reasonableness” that are not conducive to a standardized decision-making process.

To effectuate this approach, the Initial Proposal should be amended to first focus on ensuring that the project applicant *identifies* the adverse effects that a project will cause, and then moves on to *applying criteria* to determine whether that effect is *unreasonable*. The SEC should also adopt criteria to define what an “unreasonable” adverse effect would be. Some potential criteria could be: whether the project’s impacts would be permanent, or are reversible; whether the impact would jeopardize a historic site’s listing on or eligibility for the National Register; whether the project would have an adverse effect on a highly significant or unusual property type, such as a National Historic Landmark, or a property listed on or eligible for the National Register at the national level of significance; whether the project would cause substantial impacts on a large number of historic properties; and/or cases with substantial public concern. Additional criteria are included in the chart.

Similarly, the language in the Initial Proposal does not include any definition of the word “significance” as it is used in Site 301.14(b). Failure to define historic significance will likely result in inconsistent application of these rules. The National Trust suggests that the SEC consider defining this term as the equivalent of sites that are listed in or eligible for listing in the National Register of Historic Places. This will avoid inconsistent and subjective determinations of resource “significance.” This change is reflected in the language proposed by the National Trust.

Additionally, the proposed language should be amended to require more specific determinations by the SEC. Instead of *considering* whether a project applicant

³ The federal regulations define “effect” for purposes of the National Historic Preservation Act as an “alteration to the characteristics of a historic property qualifying it for inclusion in or eligibility for the National Register.” *Id.* § 800.16(i).

has satisfied its obligations under the rules, the SEC should *determine* whether each of the criteria have been met. This language change will emphasize the importance of the SEC's role in reviewing application materials, and will promote consistency and facilitate judicial review by providing a more detailed outline for the SEC to follow in articulating the basis for its determinations.

Based on the foregoing, the National Trust has included language in the attached chart suggesting substitute language to address these issues.

2. Project Application Contents

The proposed language in Site 301.06 and 301.03 outlines what project proponents must include in their project application materials. This application process is the best opportunity to ensure that all information that is relevant to the decision-making process is presented in comprehensive package to the SEC for consideration. The application process also presents a good opportunity to align application materials requested by the SEC with those that are required under Section 106 of the NHPA. For example, application materials under both procedures should include information regarding all historic resources, including historic landscapes, within the proposed project's area of potential effects. The project applicants should be required to submit materials outlining the reasonably foreseeable cumulative effects, including landscape level effects,⁴ on historic, environmental and aesthetic resources for consideration by the SEC. Language incorporating these suggestions is included in the enclosed chart.

3. Cumulative Impacts

Site 301.16(a) requires the SEC to consider cumulative impacts. However, the Initial Proposal fails to include any requirements for the project applicants to include information and an assessment of cumulative impacts in their application materials. Without requiring project applicants to include cumulative effects information, it is not clear how the SEC would gather information independently or use information that is provided to make a decision on this issue.

⁴ For additional context and information regarding the importance of landscape level planning strategies to improve conservation and preservation outcomes, *see also* "Secretary Jewell Releases Landscape-Scale Mitigation Strategy to Encourage Dual Objectives of Smart Development and Conservation," Apr. 10, 2014, available at: www.doi.gov/news/pressreleases/secretary-jewell-releases-landscape-scale-mitigation-strategy-to-encourage-dual-objectives-of-smart-development-and-conservation.cfm.

Based upon federal regulations, the National Trust further recommends adopting a definition of cumulative effects that includes “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”⁵

Taking into account the project’s potential impacts at the landscape scale should also be included in the consideration of cumulative effects. In addition to specific historic structures, a project’s potential adverse effects on landscape features and the settings for historic sites, including historic landscape features, vistas to and from historic properties, scenic byways, and recreational hiking trails should also be evaluated. Historic properties throughout New Hampshire include the specific environmental context of rural historic landscapes and the cohesive character of the built environment that shapes them. These landscape characteristics are key to understanding and interpreting the centuries of human use of the land in this region, such as agricultural development patterns, land use patterns and hiking trails.⁶ Also, natural landscapes can hold deep cultural significance to Native American tribes and other communities.⁷ To ensure that impacts to historic landscapes are considered, the Committee should include historic resources within its definition of landscape.

4. Public Interest

NH RSA 162-H:16.IV(e) requires the SEC to make a public interest finding, and Site 301.03(h)(6) of the Initial Proposal requires that the application include “information describing how the proposed facility will be consistent with the

⁵ 40 C.F.R. § 1508.7.

⁶ For purposes of the National Register, a rural historic landscape is defined as a geographical area that historically has been used by people, or shaped or modified by human activity, occupancy, or intervention, and that possesses a significant concentration, linkage, or continuity of areas of land use, vegetation, buildings and structures, roads and waterways, and natural features. See NPS Bulletin 30: *Guidelines for Evaluating and Documenting Rural Historic Landscapes*.

⁷ See NPS Bulletin 38: *Guidelines for Evaluating and Documenting Traditional Cultural Properties*.

public interest.” The rules as currently proposed do not include criteria for the SEC to use to make this finding. Criteria should be developed to define “public interest” so that consistency in decision-making can be reached.⁸

We understand that, given the range of variables inherent in each project proposal, it may not be practical to set an absolute standard that all projects must meet. Nonetheless, we strongly believe that specific factors to consider in reaching decisions on the public interest should be included. We further believe that this is required by the New Hampshire Legislature in enacting R.S.A. 162-H, under which this rule review process is being undertaken. To this end, we echo the request submitted by the Appalachian Mountain Club, New Hampshire Audubon, Conservation Law Foundation, Society for the Protection of New Hampshire Forests, and the Nature Conservancy that the SEC consider including specific criteria to define the public interest.

5. Aesthetics

Aesthetic concerns are an important and often overlooked area for regulatory focus in making land use decisions. While aesthetics are not necessarily a component of a site’s historic significance – for example, a rural landscape can be beautiful but not necessarily historic – often there is a direct nexus between aesthetic and historic resources.⁹ Beautiful surroundings, such as topographical features, vegetation, and manmade features, may or may not be contributing features to a historic site’s significance, but there can be no argument that beautiful settings contribute to the public’s experience and enjoyment of historic resources. For this reason, the National Trust fully supports the Committee’s efforts to take impacts on aesthetic resources into account in its decision-making.

6. Conclusion

The National Trust appreciates the opportunity to comment and we thank you for focusing on this important policy issue. We trust that you will carefully consider

⁸ For discussions of the public interest in historic preservation, *see generally* Rose, “Preservation and Community: New Directions in the Law of Historic Preservation,” 33 STAN. L. REV. 473 (1981); Stipe, “Why Preserve?,” Preservation News, July 1972, at 5, col. 2, reprinted in 11 N.C. CENT. L.J. 211 (1980).

⁹ Tom Mayes, “Why Do Old Places Matter? Beauty,” Preservation Leadership Forum, Feb. 2014, available at: <http://blog.preservationleadershipforum.org/2014/02/07/old-places-matter-beauty/#.VQ2JauGulz9>.

all public comments in reaching a decision that will ensure the protection of New Hampshire's historic resources for future generations.

Sincerely,

A handwritten signature in black ink, appearing to read "Sharee Williamson". The signature is fluid and cursive, with a long horizontal stroke at the end.

Sharee Williamson
Associate General Counsel

Enclosure

cc: David K. Wiesner, Staff Attorney
Jennifer Goodman, Executive Director, New Hampshire Preservation Alliance
Richard A. Boisver, Deputy SHPO, New Hampshire
Maggie Stier, New Hampshire Preservation Alliance

**NATIONAL TRUST FOR HISTORIC PRESERVATION
SEC RULE RECOMMENDATIONS**

1. Adverse Effects on Historic Sites

| <u>Current Draft Language</u> | <u>Revised Language</u> |
|---|---|
| <p>Determining Adverse Effects Section 301.14(b): In determining whether a proposed energy facility will have an unreasonable adverse effect on historic sites, the committee shall: (1) Consider the nature and significance of the historic and archaeological properties identified by the applicant; (2) Consider the effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on historic properties and archaeological resources; and (3) Consider the status of the applicant’s consultations with the New Hampshire Division of Historical Resources and, if applicable, the federal lead agency.</p> | <p>Determining Adverse Effects Section 301.14(b): In determining whether a proposed energy facility will have an unreasonable adverse effect on historic sites, the committee shall:</p> <ul style="list-style-type: none"> (1) Determine that the project applicant has identified all adverse effects that may be caused by the proposal; (2) Determine that the project applicant has applied the criteria for unreasonable adverse effects; (3) Determine whether the applicant has fully explored project alternatives that would avoid, minimize, or mitigate unreasonable adverse effects; and (4) Determine whether the applicant is using the best practical measures to avoid, minimize, or mitigate unreasonable adverse effects on historic properties and archaeological resources, as determined in consultation with the New Hampshire Division of Historical Resources and, if applicable, the federal lead agency. |
| <p>Adverse Effect No current language.</p> | <p>Adverse Effect An adverse effect is found when a proposed project may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the</p> |

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| | <p>property's location, design, setting, materials, workmanship, feeling, or association. Consideration shall be given to all qualifying characteristics of a historic property, including those that may have been identified subsequent to the original evaluation of the property's eligibility for the National Register. Adverse effects may include reasonably foreseeable effects caused by the undertaking that may occur later in time, be farther removed in distance or be cumulative.</p> |
| <p>Unreasonable Adverse Effect No current language.</p> | <p>Unreasonable Adverse Effect A proposed project has an unreasonable adverse effect on Historic Sites if any one or more of the following conditions is present: (1) the project could cause the physical destruction of or damage to all or part of the historic site; or (2) the project will result in significant alteration of a historic site that is not consistent with the Secretary's Standards for the Treatment of Historic Properties (36 C.F.R. Part 68) and applicable guidelines; or (3) the project would result in removal of the historic site from its historic location; or (4) the project would result in change to the character of the historic site's use or of physical features within the property's setting that contribute to its historic significance; or (5) the project would introduce visual, atmospheric or audible elements that diminish the integrity of the site's significant historic features; or (6) the project would lead to neglect of a</p> |

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| | <p>historic site which causes its deterioration; or (7) the project would have an adverse effect on a National Historic Landmark property, or other highly unusual or nationally significant historic site; or (8) the project would cause substantial impacts on a large number of historic sites; or (9) the project generates substantial public interest or concern; or (10) the project's impacts to historic sites would be permanent, or irreversible; or (11) the impact would jeopardize a historic site's listing on or eligibility for the National Register; or (12) the impact could lead to a change in use or ownership that would jeopardize the long-term future of the historic site.</p> |
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2. Project Application Contents

| <u>Current Draft Language</u> | <u>Revised Language</u> |
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| <p>Application Contents Site 301.06: Effects on Historic Sites Sites. Each application shall include the following information regarding the effects of the, and plans for avoiding, minimizing, or mitigating any unreasonable adverse effects of, the proposed facility on historic sites: (a) Demonstrate that project review of the proposed facility has been initiated for purposes of compliance with Section 106 of the National Historic Preservation Act, 16 U.S.C. §470, or RSA 227-C:9, as applicable; (b) Identify all areas of potential archaeological sensitivity located in the proposed facility area; (c) Identify all historic resources located in the proposed facility area or within the area of potential effects as defined in 36 C.F.R. §800.16(d);</p> | <p>Application Contents Site 301.06: Effects on Historic Sites Sites. Each application shall include the following information regarding the identification of historic sites, and the anticipated adverse effects, including cumulative impacts and landscape level impacts, of, and plans for, avoiding, minimizing, or mitigating any unreasonable adverse effects of, the proposed facility on historic sites: (a) Demonstrate that project review of the proposed facility has been initiated for purposes of compliance with Section 106 of the National Historic Preservation Act, 54 U.S.C. § 306108, or RSA 227-C:9, as applicable; (b) Identify all historic properties and areas of potential</p> |

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| <p>(d) Identify the best practical measures planned to avoid, minimize, or mitigate potential adverse effects on archaeological and historic resources;</p> <p>(e) Describe the applicant’s plans to implement any measures identified pursuant to (d) above; and</p> <p>(f) Describe the status of the applicant’s consultations with the New Hampshire Division of Historical Resources, and, if applicable, with the lead federal agency.</p> | <p>archaeological sensitivity located within the area of potential effects as defined in 36 C.F.R. § 800.16(d);</p> <p>(c) Provide a finding by the N.H. Division of Historical Resources and, if applicable, by the lead federal agency, of no historic properties affected, no adverse effect, or adverse effect.</p> <p>(d) Develop and evaluate alternatives or modifications to the undertaking that could avoid, minimize or mitigate potential adverse effects on historic sites.</p> <p>(e) Describe the applicant’s plans to implement any measures identified pursuant to (d) above; and</p> <p>(f) Describe the status of the applicant’s consultations with the New Hampshire Division of Historical Resources, and, if applicable, with the lead federal agency.</p> |
| <p>Requirements for Applications for Certificates Site: 301.03(c)(5): Identification of natural and other resources at or within or adjacent to the site.</p> | <p>Requirements for Applications for Certificates Site: 301.03(c)(5): Identification of natural, historic, and other resources at or within or adjacent to the site.</p> |

3. Cumulative Impacts

| <u>Current Draft Language</u> | <u>Revised Language</u> |
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| <p>Cumulative Impacts Site 102.14: “Cumulative impacts” means the totality of effects resulting from the proposed facility, all existing energy facilities, all energy facilities for which a certificate of site and facility has been granted, and all proposed energy facilities for which an application has been accepted.</p> | <p>Cumulative Impacts Site 102.14: “Cumulative impacts” means the totality of effects resulting from the proposed facility, all existing energy facilities, all energy facilities for which a certificate of site and facility has been granted, and all proposed energy facilities for which an application has been accepted. Cumulative impacts include the impacts on the environment which result from the incremental impact of the project proposal when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or</p> |

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| | person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. |
| Landscape Definition Site 102.19: “Landscape” means the characteristic, visible features of an area including landforms, water forms, vegetation, cultural features and all other objects and aspects of natural and human origin. | Landscape Definition Site 102.19: “Landscape” means the characteristic, visible features of an area including landforms, water forms, vegetation, historic and cultural features and all other objects and aspects of natural and human origin. |

4. Public Interest

| Current Draft Language | Revised Language |
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| <p>Public Interest</p> <p>No current language.</p> | <p>Public Interest</p> <p>To determine whether a proposed project is in the public interest, the following criteria, at a minimum, should be considered:</p> <p>(1) Whether the net effects to environmental resources, historic properties, and cultural resources caused by the facility, considering both beneficial and adverse effects, serve the public interest.</p> <p>(2) Whether the net economic effects of the facility, including but not limited to costs and benefits to energy consumers, property owners, state and local tax revenues, employment opportunities, and local and regional economies, serve the public interest.</p> <p>(3) Whether construction and operation of the facility will be consistent with federal, regional, state, and local policies.</p> |

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| | <p>(4) Whether the facility as proposed is consistent with municipal master plans and land use regulations pertaining to (i) natural, historic, and scenic cultural resources and (ii) public health and safety, air quality, economic development, and energy resources.</p> <p>(5) Such additional public interest criteria as may be deemed pertinent by the committee.</p> |
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