



Town of Sudbury

Historical Commission

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April 25, 2022

To: Town of Sudbury Select Board

From: Sudbury Historical Commission

Re: NHPA Section 106: US Army Corps of Engineers
Sudbury-Hudson Transmission Reliability – MCRT Projects
USACE Case No. NAE-2017-01406
MHC #RC.62384
ACHP Case 016522

Historical Commission Request Memo

The Sudbury Historical Commission (SHC) respectfully requests, as discussed informally on April 12th, that the Select Board immediately intervene with the US Army Corps of Engineers (Corps) and among other potential actions outlined below, request that the Corps resume its Section 106 consultation with the SHC regarding the Eversource Transmission Line project to seek solutions to preserve and protect certain irreplaceable Town historical resources from being lost forever.

Background

When a proponent of a project needs a federal permit, in this situation Eversource, and its project will harm – “adversely affect” – historic resources that are eligible for listing in the National Register of Historic Places (NR) the project must be reviewed under the National Historic Preservation Act Section 106 regulations. **The whole purpose of the Section 106 review process is to find solutions that change or modify the project’s design to avoid harming or destroying NR historic and/or archaeological resources.**

The last permit Eversource appears to need to begin construction is a federal Clean Water Act Section 404 General Permit (CWAGP), but the Corps cannot issue this General Permit until it ends the Section 106 process, and a Section 106 Memorandum of Agreement (MOA) has been executed. The Corps appears to be signaling its readiness to sign an MOA with Eversource/DCR and issue the CWAGP.

The Town’s historical resources at risk are the more than sixty-six identified features of the Central Massachusetts Railroad Corridor, eligible for listing in the National Register of Historic Places (NR) as a historic district, which includes the 1890 Section Tool House and rails, and 1881 Hop Brook Bridges 127 and 128 (unique rare plate-girder RR bridge 127 to be demolished and 128 to be significantly modified).

Archaeological resources are also at risk. For example, the Walker Garrison farmstead foundation and recently discovered barn foundation, and an Archaic Period (2500-3000 years old) tool-making site just East of Bridge 127 (behind Mill Village).

Our town's heritage, historic and prehistoric, is eminently threatened by the actions and inaction of the Corps and the project proponents, Eversource and DCR. At the SHC April 5th meeting, the Corps, setting aside SHC requests, announced that it had all the information it needed from consulting parties and thus, was ready to issue a final draft Section 106 Memorandum of Agreement

The SHC believes it is premature to execute an MOA as the Corps' consultation with the SHC is still incomplete and non-compliant in significant part because the Corps has not sought to develop alternatives to avoid harming historic resources and to negotiate solutions to resolve adverse effects of the project despite the SHC's numerous comments and requests over the past two years.

Request

The SHC offers the following suggestions for your consideration and potential action:

- 1) Write the Corps to express the Town's objection to the end of the consultation, and to request the Corps resume consultation on specific unresolved issues that remain in order to reach an MOA that would contain stipulations for the protection of Sudbury's historical resources.
- 2) Contact the Advisory Council on Historic Preservation (ACHP), the Massachusetts Historical Commission (MHC), and our local and federal governmental representatives including US Senator Edward Markey to:
 - a. make them aware that the Corps' New England District Regulatory Chief informed the SHC that it was ending the Corps' consultation with the SHC,
 - b. ask that they advocate for the resumption of the consultation to assure that Sudbury's requests are taken into account and acted upon to develop alternatives or modifications to avoid harming or demolishing Sudbury's historic resources, and
 - c. for the ACHP and MHC to continue to urge the Corps to apply Section 106 regulations, 36 CFR 800, rather than apply its own 33 CR 325 regulations, known as Appendix C. (See the attached ACHP April 30, 2021 letter to the Corps.) Appendix C limits review of adverse impacts to the Corps' defined "Permit Area" rather than the larger surrounding "Area of Potential Effects" (APE) required under 36 CFR 800.
- 3) Consider potential legal action by consulting with Town Counsel with the Historical Commission's participation as a pro-active step should advocacy not change the course of the Corps' current handling of this Section 106 case, as a result of:
 - a. The Corps applying its self-promulgated regulations, Appendix C (33 CFR 325), instead of those of the Advisory Council on Historic Preservation regulations (36 CFR 800), despite MHC comments, and comment in the ACHP April 30, 2021 letter (attached) that states: "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 Section 106 regulations in many fundamental ways...”, “...the ACHP is the only federal agency authorized to promulgate regulations to implement Section 106 in its entirety”, and that the Corps’ “...relying on Appendix C...will leave the Corps’ compliance with Section 106 subject to challenge due to fundamental inconsistencies between Appendix C and the Section 106 implementing regulations ...”

- b. The Corps not fully complying with the procedural requirements of Section 106 (36 CFR 800):
 - i. It has likely not identified all historic resources.
 - ii. It appears the Corps has limited the scope of the Section 106 review to its Appendix C defined “Permit Area” and construction limit of work area, rather than the larger “Area of Potential Effects” as required under 36 CFR 800.
 - iii. It appears the Corps has not “...developed and evaluated alternatives or modifications to the undertaking...” (36 CFR 800.6(a)) to resolve adverse effects to historical resources.
 - iv. It has not negotiated with the SHC.
 - c. Corps has not maintained neutrality as demonstrated in its support of the project in its January 2021 e106 Filing Form (attached) submitted to the ACHP.
- 4) File a Freedom of Information Act request with the Corps for the total Section 106 record to enable the Town and SHC to adequately assess the project and evaluate alternatives to resolve the adverse effects of the project on historic resources.

The request before the Select Board is to assist the SHC in obtaining the Corps’ cooperation to consult and negotiate with the SHC in order to secure an MOA that will protect Sudbury’s historical resources. If the Corps refuses to engage in consultation and negotiation with the SHC, we believe the Town will be unable to sign on to the MOA due to its lack of stipulations to protect historic resources. This will leave the Town with little recourse but to appeal the Corps’ decisions under Section 106 if it wishes to protect and preserve Sudbury’s historical resources. This is why last week you were urged to consult with Town Counsel.

The Historical Commission thanks the Select Board for considering this urgent request and welcomes discussing and working on this matter with the Board, perhaps appropriately in Executive Session.