

NATIONAL  
TRUST  
FOR  
HISTORIC  
PRESERVATION®

**Western**  
OFFICE

December 24, 2008

VIA E-MAIL (newcomstockwind@blm.gov)

Ms. Jane Peterson  
BLM Energy Projects Liaison  
Bureau of Land Management  
Carson City District Office  
5665 Morgan Mill Road  
Carson City, NV 89701

Re: Scoping Comments on the New Comstock Wind Energy Project (73 Fed. Reg. 72,076)(Nov. 26, 2008)).

Dear Ms. Peterson,

On behalf of the National Trust for Historic Preservation (National Trust), we appreciate the opportunity to submit scoping comments for New Comstock Wind Energy Project (Project). As stated in the Notice of Intent, the Project will require the preparation of an Environmental Impact Statement (EIS). Our scoping comments raise several issues that must be addressed in the EIS. First, BLM must fully consider the visual impacts of the Project on significant cultural and historic resources. The Project would consist of approximately 69 wind turbines including support structures and access roads, some or all of which would be located in the Virginia City National Historic Landmark District (NHLD). A full evaluation of the effects of this Project on historic properties must be conducted.

Second, the National Trust strongly urges BLM to begin the Section 106 process under the National Historic Preservation Act (NHPA), 16 U.S.C. § 470f, because the Project, as currently proposed, has the potential to significantly impact the Virginia City NHLD. The requirements of NHPA are separate from NEPA's requirements, although the Section 106 regulations encourage federal agencies to coordinate the two processes. See 36 C.F.R. § 800.2(a)(4). Proper coordination of the NHPA and NEPA compliance actions is necessary to ensure that adverse effects to historic properties are adequately considered pursuant to the Section 106 regulations, *id.* § 800, *et seq.* Additionally, the National Trust formally requests to participate as a consulting party in the Section 106 process pursuant to *id.* §§ 800.2(c)(5), 800.3(f)(3).

**Western Office**

5 Third Street, Suite 707  
San Francisco, CA 94103  
P 415.947.0692  
F 415.947.0699  
E wro@nthp.org  
Serving: AK, AZ, CA, HI, ID, NV, OR, WA &  
Pacific Island territories

**National Office**

1785 Massachusetts Avenue, NW  
Washington, DC 20036  
P 202.588.6000  
F 202.588.6038  
E info@nthp.org  
[www.PreservationNation.org](http://www.PreservationNation.org)

## Interests of the National Trust

The National Trust is a private, nonprofit organization chartered by Congress in 1949 to promote public participation in the preservation of our nation's heritage, and to further the historic preservation policy of the United States. 16 U.S.C. §§ 461, 468. With the strong support of more than 264,000 members, the National Trust works to protect significant historic sites and to advocate historic preservation as a fundamental value in programs and policies at all levels of government. The National Trust has seven regional offices around the country, including our Western Office in San Francisco, California, which is specifically responsive to preservation concerns in Oregon.

## National Environmental Policy Act Issues

The purpose of the National Environmental Policy Act (NEPA) is to protect against uninformed decision-making by requiring agencies to “the fullest extent possible . . . [to] use all practicable means . . . to avoid or minimize any possible adverse effects of their actions upon the quality of the human environment.” 40 C.F.R. § 1500.2(f). NEPA requires the agency to take a “hard look” at the potential environmental consequences of the proposed action. Northwest Resource Info. Ctr. v. National Marine Fisheries Serv., 56 F.3d 1060, 1066 (9<sup>th</sup> Cir. 1996). The impacts and effects the agency must evaluate include: “ecological...aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.” Id. § 1508.8. The scoping process allows the public to raise significant issues and concerns that BLM should analyze in depth in the EIS. Id. § 1501.7(a).

### 1. BLM Must Consider a Reasonable Range of Alternatives.

The National Trust strongly urges BLM to consider a reasonable range of alternatives in preparing the EIS, including alternatives focused on protecting significant historic properties. The consideration of alternatives to the proposed action is the “heart” of the EIS. Id. § 1502.14. NEPA requires that BLM “rigorously explore and objectively evaluate all reasonable alternatives.” Id. § 1502.14(a). The purpose of this requirement is to prevent the impact statement from becoming a “foreordained formality.” Citizens against Burlington, Inc. v. Busey, 938 F.2d 190, 196 (D.C. Cir. 1991). Whether an alternative is reasonable or not turns on whether it will accomplish the stated purpose for the project. Custer County Action Ass'n v. Garvey, 256 F.3d 1024, 1041 (10<sup>th</sup> Cir. 2001). BLM must base the alternatives on the affected environment and the environmental consequences of the Project. 40 C.F.R. § 1502.14(a).

In this case, we are concerned that the visual impact of the proposed turbines could have severe impacts on the viewsheds for historic landscapes within its corridor, particularly those viewsheds associated with the Virginia City NHL. While we recognize the siting of

wind turbines can be complicated, we stress that the location of the turbines is a very significant factor in defining a reasonable range of alternatives. The BLM should prepare a visual impact analysis to enable the public to understand these impacts, and alternative siting should focus on the impacts to historic resources and sensitive cultural landscapes. Additionally, BLM must examine alternatives in the context of associated infrastructure, e.g., right-of-ways, powerlines, and access roads associated with the proposed Project.

2. **BLM Must Provide Sufficient Baseline Data and Discussion of the Affected Environment.**

BLM must provide adequate baseline data, information, and a description about current historic resource conditions in the EIS documentation, including the current impacts to historic resources. NEPA requires BLM to “describe the environment of the area(s) to be affected or created by the alternatives under consideration.” 40 C.F.R. § 1502.15. Establishing baseline conditions of the affected environment is an essential requirement of the NEPA process. See Half Moon Bay Fisherman’s Marketing Ass’n v. Carlucci, 857 F.2d 505, 510 (9<sup>th</sup> Cir. 1988) (“without establishing . . . baseline conditions . . . there is simply no way to determine what effect [an action] will have on the environment, and consequently, no way to comply with NEPA”). The NEPA process mandates a “coherent and comprehensive up-front environmental analysis to ensure informed decision making to the end that ‘the agency will not act on incomplete information, only to regret its decision after it is too late to correct.’” Blue Mts. Biodiversity Project v. Blackwood, 161 F.3d 1208 (9<sup>th</sup> Cir., 1998) (citing Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 371 (1989)).

Based on the information provided in BLM’s Notice of Intent, the Project could result in significant development in the cultural landscape of the Virginia City NHL. The significance of this historic landmark cannot be understated. One of the earliest NHLs, Virginia City retains exceptional integrity as the prototype for frontier mining boom towns. Wind turbines on the ridge above the historic mining towns within the District could have a substantial adverse effect if sited improperly. We worry that the turbines could also have a deleterious financial effect on the region as heritage tourism is an important source of revenue in and around Virginia City.

3. **BLM Must Adequately Evaluate the Environmental Consequences of the Proposed Wind Turbine Project on Historic Resources.**

Adequate evaluation of the environmental consequences of the proposed Wind Turbine Project on historic resources means that BLM must take a “hard look” at the direct, indirect, and cumulative impacts before taking action. 40 C.F.R. § 1508.8; Oregon Natural Desert Ass’n v. BLM, 531 F.3d 1114, 1121 (9<sup>th</sup> Cir. 2008). The NEPA regulations define indirect impacts as those that are “caused by the action and are later in time or farther

removed in distance, but are still reasonably foreseeable. . . .” 40 C.F.R. § 1508.8(b). The National Trust urges BLM to examine the direct and indirect impacts of the Project and compare those impacts with the broad alternatives. An examination of direct impacts should include the physical alterations to significant viewsheds associated with the Virginia City NHL. Such an examination requires BLM to take a “hard look” at the direct impact of each alternative on other historic and archaeological sites.

Additionally, BLM should also discuss a broad range of cumulative impacts, i.e., the compounding impacts of the proposed construction with other reasonably foreseeable activities. Cumulative impacts are the compounding of an action on “other past, present, and reasonably foreseeable future actions regardless of what agency [Federal or non-Federal] or person undertakes such actions.” *Id.* § 1508.7. The connection between such projects and the collective impact on historic properties must be considered in the context of the EIS. In light of the proposed Project and its proximity to Virginia City NHL, this examination will be a critical aspect of the EIS.

#### **4. BLM Must Examine Measures to Mitigate the Potential Adverse Impacts to Historic Properties.**

Finally, BLM must examine ways to mitigate adverse impacts to significant historic properties. NEPA requires BLM to “[i]nclude [in the EIS] appropriate mitigation measures not already included in the proposed action or alternatives.” *Id.* § 1502.14. The analysis should include “a discussion of possible mitigation measures to avoid adverse environmental impacts . . . and must be reasonably complete in order to properly evaluate the severity of the adverse effects of a proposed project prior to making the final decision.” *Colorado Env'tl. Coalition v. Dombeck*, 185 F.3d 1162, 1173 (10th Cir. 1999) (internal citations omitted). “It is not enough to merely list possible mitigation measures.” *Id.* For this proposal, BLM should especially focus on the visual impacts and the potential alteration to the Virginia City NHL, examining in detail how these impacts could be mitigated.

#### **National Historic Preservation Act Issues**

BLM must comply with the procedural requirements of Section 106 of the NHPA “prior to” making a final decision on the Project. Section 106 requires federal agencies to “take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register,” and to provide the Advisory Council on Historic Preservation (ACHP) a reasonable opportunity to comment on the undertaking. 16 U.S.C. § 470f. Approval of the proposed Wind Farm constitutes an “undertaking” with the potential to adversely affect historic properties.

The Section 106 regulations establish mandatory procedural requirements for compliance with Section 106, which are binding on all federal agencies. Id. § 470s; see 36 C.F.R. Part 800. The Section 106 process includes: (1) making a “reasonable and good faith effort” to identify historic properties within a defined Area of Potential Effects (APE), 36 C.F.R. § 800.4(b)(1); (2) determining the eligibility of historic properties for the National Register, Id. § 800.4(c); (3) assessing any effects the undertaking may have on historic properties, Id. § 800.5; and (4) if the effects are adverse, developing and evaluating alternatives or modifications to the project to avoid, minimize, or mitigate those effects based on consultation with the State Historic Preservation Officer (SHPO), Indian tribes, the ACHP, and other consulting parties, Id. § 800.6(a).

Significantly, the regulations encourage agencies to initiate the Section 106 process “early in the undertaking’s planning, so that a broad range of alternatives may be considered during the planning process for the undertaking.” Id. § 800.1(c). Timely initiation of Section 106 consultation will ensure that BLM considers a broad range of alternatives as a means of avoiding, minimizing, or mitigating the likely adverse effects of the transmission line project as proposed. Id. Additionally, early planning is essential in this case because construction of turbines within the NHLD is likely to cause significant “adverse effect” under NHPA. An adverse effect occurs:

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.

Id. § 800.5(a)(1) (emphasis added). Types of adverse effects include “[i]ntroduction of visual, atmospheric or audible elements that diminish the integrity of the property’s significant historic features. . . .” Id. § 800.5(a)(2)(v) (emphasis added).

As stated above, the National Trust formally requests to participate as a consulting party in the Section 106 process for the Project pursuant to 36 C.F.R. § 800.2. Consultation with consulting parties is essential element in the Section 106 process, assisting the agency in identifying alternative that will avoid, minimize, or mitigate impacts to historic resources. See id. § 800.1(a). The National Trust has been designated by Congress as a member of the federal Advisory Council on Historic Preservation, which gives the Trust a unique place in the Section 106 process. 16 U.S.C. § 470i(a)(8). We have also participated as a consulting party in a wide variety of Section 106 reviews with many different federal agencies, including undertakings involving BLM-managed lands and historic properties. We believe our experience in the Section 106 process will provide a valuable perspective, helping to identify and resolve issues as the Section 106 process continues and as the proposal moves forward.

Please include the National Trust in any distribution of public notices of meetings, and for the circulation of any documents for comment. We would appreciate receiving two separate copies of notices at the following addresses:

Brian Turner  
Law Fellow  
Western Office  
National Trust for Historic Preservation  
5 Third Street, Suite 707  
San Francisco, CA 94103  
Brian\_Turner@nthp.org

Ti Hays  
Public Lands Counsel  
Mountains/Plains Office  
National Trust for Historic Preservation  
535 16th Street, Suite 750  
Denver, CO 80202  
Alexander\_Hays@nthp.org

In closing, we hope that you will consider our scoping comments for the Project. Additionally, we strongly encourage BLM to initiate the Section 106 process in accordance with the Section 106 regulations. We believe Section 106 is most productive when it occurs early in the planning process and in coordination with the timeline for NEPA. Section 106 of the NHPA, as well as the NEPA review process, are especially critical given the potential impacts to the Virginia City NHL.

The National Trust looks forward to reviewing the Draft EIS and participating in the Section 106 process. If you have any questions regarding our comments, please feel free to contact me directly at (415) 947-0692.

Respectfully submitted,



Brian Turner, Esq.  
Law Fellow

Cc: Nancy Brown, ACHP  
Robin Burgess, BLM FPO  
Elaine Jackson-Retondo, NPS  
Alice Baldrice, SHPO  
Barbara Pahl, NTHP  
Alexander Hays, NTHP