



New Hampshire Coastal Program: Program Change Request December 2021



The New Hampshire Coastal Program (NHCP) is proposing a change to its federally-approved coastal management program. The Program Change request pertains to the NHCP's federal consistency review process for the siting of energy projects in New Hampshire's coastal zone that require a federal license or permit. Details of the Program Change are provided below.

Background:

Section 923.13 (Energy facility planning process) of the Coastal Zone Management Program Regulations states *"The management program must contain a planning process for energy facilities likely to be located in or which may significantly affect the coastal zone, including a process for anticipating the management of the impacts resulting from such facilities. This process must contain the following elements:*

- (a) Identification of energy facilities which are likely to locate in, or which may significantly affect, a State's coastal zone;*
- (b) Procedures for assessing the suitability of sites for such facilities designed to evaluate, to the extent practicable, the costs and benefits of proposed and alternative sites in terms of State and national interests as well as local concerns;*
- (c) Articulation and identification of enforceable State policies, authorities and techniques for managing energy facilities and their impacts; and*
- (d) Identification of how interested and affected public and private parties will be involved in the planning process.*

The NHCP addressed this section, in part, through the development of procedures for assessing the suitability of sites for energy facilities and the establishment of an energy enforceable policy. The procedures and the enforceable policy were founded on two state laws: RSA 162-F (Decommissioning of Nuclear Electric Generating Facilities; formerly Electric Power Plant, Transmission Siting and Construction Procedure) and RSA 162-H (Energy Facility Evaluation, Siting, Construction and Operation). RSA 162-F was enacted in 1971 and RSA 162-H was enacted in 1974, both before the creation of the NHCP. NHCP's NOAA-approved Program Document (*New Hampshire Coastal Program and Final Environmental Impact Statement, July 1988*) identifies both statutes as "enforcement" authorities that form the basis for NHCP's federal consistency review process. Much of RSA 162-F was repealed in 1991 and rewritten to focus on decommissioning of nuclear power facilities. In addition, several sections of RSA 162-F were incorporated into RSA 162-H. In June 1996, NOAA's Office of Ocean and Coastal Resource Management approved NHCP's Routine Program Implementation (RPI) that included, in part,

removal of RSA 162-F as an enforcement authority and the addition of RSA 162-H in its entirety. NHCP Enforceable Policy #12 (Energy Facilities Siting), which is derived almost entirely from RSA 162-H, IV subparagraphs (b) & (c), reads *“Ensure that the siting of any proposed energy facility in the coast will consider the national interest and will not unduly interfere with the orderly development of the region and will not have an unreasonable adverse impact on aesthetics, historic sites, coastal and estuarine waters, air and water quality, the natural environment, public health and safety, and existing uses.”*

RSA Chapter 162-H establishes procedures for the review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities in New Hampshire. The site evaluation committee (SEC), established by RSA 162-H:3, is comprised of nine-members, including the Commissioner of the Department of Environmental Services (which administers the NHCP) who serves as the committee’s vice-chairperson. The SEC is charged with implementing the statute. Applicants proposing to site, construct, or operate an energy facility, as defined in RSA 162-H:2, VII, in New Hampshire must submit an application for a certificate of site and facility to the SEC. The application to the SEC is in lieu of separate applications that may be required by any other state agencies. Application requirements are described in RSA 162-H:7 and include, in part, public hearings and public information sessions, pursuant to RSA 162-H:10. State agencies having jurisdiction, under state or federal law, to regulate any aspect of the construction or operation of the proposed energy facility, participate in SEC proceedings. State agencies submit findings to the SEC on the parts of the application that relate to their permitting and other regulatory authority. The SEC must incorporate in its certificate of site and facility any terms and conditions specified by any of these state agencies. And, pursuant to RSA 162-H:16, I, the SEC cannot issue a certificate of site and facility if any of the state agencies denies authorization for the proposed energy facility.

The NHCP’s federal consistency review procedures for proposed energy facilities in New Hampshire’s coastal zone requiring a federal license or permit are described in Chapter 8 (Special Requirements), Section C (Energy Facility Planning Process) of NHCP’s NOAA-approved Program Document. Among other things, this established the SEC decision as NHCP’s federal consistency decision. With respect to timing, it states as follows:

“For purposes of the federal consistency review under both energy facility siting laws, the data and information obtained at the statutorily required public hearings is considered as “necessary to assess the consistency of federal licenses and permit activities” for purposes of 15 CFR Part 930.56(b). Consequently, the time period for concurring with a consistency certification starts at the conclusion of the last public hearing. The final decision on a project by the site evaluation committee will be made within 120 days of the hearing and will constitute the federal consistency decision under the New Hampshire Coastal Program. Therefore, New Hampshire will conduct its consistency review for energy facilities within a four-month review period.”

As previously noted, much of RSA 162-F was repealed in 1991, after NOAA's approval of NHCP's Program Document in 1988. In addition, there have been numerous legislative revisions to RSA 162-H since NOAA approved NHCP's Program Document. For example, the language above from the NHCP Program Document states that the timeline for a final decision from the SEC is "...within 120 days of the hearing and will constitute the federal consistency decision..." yet RSA 162-H:7, VI-d, states that the SEC must issue or deny a certificate for an energy facility "within 365 days of the acceptance of an application." While language requiring issuance of an SEC certificate within a specified period of time after the statutorily required public hearing(s) presumably existed when NOAA approved NHCP's Program Document, such language no longer exists in the statute.

Furthermore, the NHCP has determined that updating its federal consistency review procedures solely by incorporating the revisions to RSA 162-H will be inconsistent with the federal consistency regulations for coastal management programs (15 CFR Part 930). For example, RSA 162-H:7, VI-c states "All state agencies having permitting or other regulatory authority shall make and submit to the committee a final decision on the parts of the application that relate to its permitting and other regulatory authority, no later than 240 days after the application has been accepted." This 240-day (8-month) timeline for agencies to provide final decisions to the SEC is longer than the timeline established in § 930.62(a), which states "Concurrence by the state agency shall be conclusively presumed if the state agency's response is not received within 6 months following commencement of state agency review." Moreover, pursuant to RSA 162-H:7, VI-d, the SEC must issue or deny a certificate for an energy facility "within 365 days of the acceptance of an application." This 365-day timeline for issuance of an SEC decision exceeds the 6-month decision timeline established in § 930.62(a). As a result, the SEC decision can no longer constitute the NHCP's federal consistency decision. Refer to [RSA 162-H](#) for additional details.

Proposal:

Based on the information presented above, the NHCP proposes to change its federal consistency review process for the siting of energy projects in New Hampshire's coastal zone that require a federal license or permit. The final decision by the SEC, pursuant to the requirements of RSA 162-H, will no longer constitute the NHCP's federal consistency decision. Instead, the NHCP will adhere to the procedures established in Part 930, Subpart D (Consistency for Activities Requiring a Federal License or Permit) of the federal consistency regulations. All applicants proposing the siting of energy facilities in New Hampshire's coastal zone that require federal licenses or permits subject to NHCP review shall ensure that a federal consistency certification and necessary data and information are provided to the NHCP, consistent with § 930.57 (Consistency certifications) and § 930.58 (Necessary data and information). Although it may be included if available, necessary data and information will no longer include "the data and information obtained at the statutorily required public hearings" as described in the NHCP Program Document. NHCP's review of the federal consistency certification and necessary data and information will be conducted in accordance with the procedures established in § 930.60 (Commencement of state agency review). In addition, the NHCP will ensure that the public notice requirements of § 930.61 (Public participation) are met. The NHCP currently posts

federal consistency public notices with 14-day comment periods in both the Portsmouth Herald, the largest daily newspaper serving the New Hampshire seacoast, and on NHCP's website. NHCP's decision regarding the federal consistency certification will be made in accordance with the procedures established in § 930.62 (State agency concurrence with a consistency certification) and § 930.63 (State agency objection to a consistency certification). The NHCP will ensure that the SEC is kept abreast of NHCP actions, including, but not limited to, its final decisions (e.g., concurrences and objections).

It should be noted that the NHCP has requested and received an opinion from the New Hampshire Office of the Attorney General regarding NHCP's proposed Program Change. The Office of the Attorney General has determined that RSA 162-H does not prevent the NHCP from fulfilling its obligations under the federal consistency regulations (15 CFR Part 930). The opinion from the Office of the Attorney General is attached.

The NHCP finds that the proposed Program Change constitutes a change to the Uses Subject to Management (Subpart B) and Authorities and Organization (Subpart E) program approval areas of the Coastal Zone Management Program Regulations (15 CFR Part 923). In addition, the NHCP finds that the proposed Program Change meets each of the program change decision criteria identified in § 923.84. Furthermore, it should be noted that the proposed Program Change was not developed as a necessary action pursuant to section 312 of the Coastal Zone Management Act (Review of performance).

NHCP has determined that the proposed Program Change will not impact the following:

- 1) Resources or interests of any federally-recognized Indian Tribes. It should be noted that there are no federally-recognized tribes in New Hampshire;
- 2) Threatened or endangered species listed under the Federal Endangered Species Act;
- 3) Historic properties designated under the National Historic Preservation Act;
- 4) Essential fish habitat designated under the Magnuson-Stevens Fishery Conservation and Management Act; and
- 5) Marine mammals managed under the Marine Mammal Protection Act.

If approved, the proposed Program Change will necessitate a minor revision to Appendix D (Specific Consistency Procedures), Section II (Federal License or Permit Activities) of the NHCP's *Guide to Federal Consistency*, which was approved by NOAA's Office of Ocean and Coastal Resource Management on January 16, 2009. Specifically, page D-5 will be revised by removing the following language:

“NOTE: Applications for federal licenses or permits involving energy facilities in New Hampshire's coastal zone are overseen by New Hampshire's Site Evaluation Committee (SEC), in accordance with NH RSA 162-H. The NHCP reviews such applications to

determine compliance with its enforceable policies and provides comments directly to the SEC. For the purposes of CZMA federal consistency, the SEC's process is used, and the NHCP's federal consistency decision is issued through the SEC."

and replacing it with the following:

***“NOTE:** All federal license or permits applicants proposing the siting of energy facilities in New Hampshire’s coastal zone must provide a federal consistency certification as specified at 15 CFR § 930.57 (Consistency certifications) and necessary data and information as specified at 15 CFR § 930.58 (Necessary data and information) to the NHCP. Although it may be included if available, necessary data and information does not include “the data and information obtained at the statutorily required public hearings” as described in the July, 1988, NHCP Program Document. NHCP’s review of the federal consistency certification and necessary data and information will be conducted in accordance with the procedures established at 15 CFR § 930.60 (Commencement of state agency review). In addition, the NHCP will ensure that the public notice requirements of 15 CFR § 930.61 (Public participation) are met. NHCP’s decision regarding the federal consistency certification will be made in accordance with the procedures established in 15 CFR § 930.62 (State agency concurrence with a consistency certification) and 15 CFR § 930.63 (State agency objection to a consistency certification). The NHCP will ensure that the SEC is kept abreast of NHCP actions, including, but not limited to, its final decisions (e.g., concurrences and objections).”*

A link to the NHCP’s *Guide to Federal Consistency* can be found on the New Hampshire Department of Environmental Services’ [Federal Consistency Website](#).

**ATTORNEY GENERAL
DEPARTMENT OF JUSTICE**

33 CAPITOL STREET
CONCORD, NEW HAMPSHIRE 03301-6397

JOHN M. FORMELLA
ATTORNEY GENERAL



JANE E. YOUNG
DEPUTY ATTORNEY GENERAL

November 3, 2021

Chris Williams, N.H. Dept. of Environmental Services
29 Hazen Drive
Concord, New Hampshire 03301

RE: Coastal Zone Management, Federal Consistency, and RSA ch. 162-H

Hello Chris,

You have asked us to review whether the proposed changes to New Hampshire's Coastal Zone Management program comply with New Hampshire law and specifically RSA ch. 162-H.

The proposed change consists of the following:

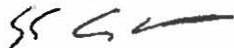
The final decision by the SEC, pursuant to the requirements of RSA 162-H, will no longer constitute the NHCP's federal consistency decision. Instead, the NHCP will adhere to the procedures established in Part 930, Subpart D (Consistency for Activities Requiring a Federal License or Permit) of the federal consistency regulations. All applicants proposing the siting of energy facilities in New Hampshire's coastal zone that require federal licenses or permits subject to NHCP review shall ensure that a federal consistency certification and necessary data and information are provided to the NHCP, consistent with § 930.57 (Consistency certifications) and § 930.58 (Necessary data and information). Although it may be included if available, necessary data and information will no longer include "*the data and information obtained at the statutorily required public hearings*" as described in the NHCP Program Document. NHCP's review of the federal consistency certification and necessary data and information will be conducted in accordance with the procedures established in § 930.60 (Commencement of state agency review). In addition, the NHCP will ensure that the public notice requirements of § 930.61 (Public participation) are met. The NHCP currently posts federal consistency public notices with 14-day comment periods in both the Portsmouth Herald, the largest daily newspaper serving the New Hampshire seacoast, and on NHCP's website. NHCP's decision regarding the federal consistency certification will be made in accordance with the procedures established in § 930.62 (State agency concurrence with a consistency certification) and § 930.63 (State agency objection to a consistency certification).

To ensure that the SEC is kept abreast of NHCP actions, the NHCP will submit copies of all correspondence with applicants, including, but not limited to, requests for additional information, stay agreements, and final decisions (e.g., concurrences and objections), pursuant to § 930.60, § 930.62 and § 930.63, to the SEC. The NHCP will also submit copies of public notices posted on its website to the SEC.

The N.H. Dept. of Environmental Services (“NHDES”) retains the ability to issue federal consistency decisions even for projects under the jurisdiction of the Site Evaluation Committee (“SEC”) pursuant to RSA ch. 162-H. RSA ch. 162-H establishes a streamlined procedure for applicants of certain energy-related projects. Although the SEC retains authority to issue or deny a certificate of site and facility for any proposed project, the statute specifically requires all state agencies having permitting or other regulatory authority to make and submit a final decision on any part of a certificate application that relates to the state agency’s permitting or other regulatory authority. The statute does not prevent NHDES from making decisions within its own jurisdiction provided no action of NHDES runs afoul of the specific requirements of RSA ch. 162-H. Nor does it preclude a faster review by NHDES for federal consistency under the Coastal Zone Management Act. Therefore, the proposed change is consistent with State law.

I hope that this answers any questions you may have had.

Sincerely,



K. Allen Brooks
Senior Assistant Attorney General
Chief, Environmental Protection Bureau
(603) 271.3679

KAB/cmc