

October 24, 2018

Via Hand-Delivery and Email

New Hampshire Site Evaluation Committee
Pamela G. Monroe, Administrator
21 South Fruit Street, Suite 10
Concord, NH 03301

RE: Joint Motion to Strike NHDES's Post-Final Decision Recommendations and Related Testimony,
NH Site Evaluation Committee Docket No. 2015-04

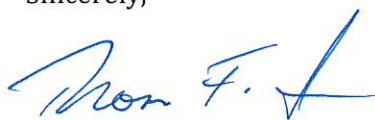
Dear Ms. Monroe:

Please find enclosed for filing in the above-referenced matter an original and one (1) copy of a joint motion by Conservation Law Foundation, the Town of Durham/University of New Hampshire, and the Town of Newington, to strike the New Hampshire Department of Environmental Services' post-Final Decision recommendations, and testimony related thereto.

Copies of this letter and the enclosed Joint Motion have this day been forwarded via email to all parties on the Distribution List.

Thank you for your attention to this matter. Please don't hesitate to contact me with any questions or concerns.

Sincerely,



Thomas F. Irwin
V.P. and Director, CLF New Hampshire

cc: Docket No. 2015-04 Service List

**STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE**

Docket No. 2015-04

Application of Public Service Company of New Hampshire
d/b/a Eversource Energy for a Certificate of Site and Facility for Construction of New
Transmission Line (Madbury to Portsmouth)

**JOINT MOTION TO STRIKE NHDES'S POST-FINAL DECISION
RECOMMENDATIONS AND RELATED TESTIMONY**

Conservation Law Foundation ("CLF"), Durham/University of New Hampshire ("Durham/UNH") and the Town of Newington ("Newington"), intervenors in the above-captioned proceeding, respectfully submit this motion pursuant to N.H. Admin. Rule Site 202.14 requesting that the New Hampshire Site Evaluation Committee ("Committee" or "SEC") strike from the record of this proceeding the New Hampshire Department of Environmental Services' ("NHDES") post-Final Decision recommendations relative to permit terms and conditions and the jet plow trial run, as well as testimony related thereto. In support of this motion, CLF, Durham/UNH and Newington state:

Procedural and Factual Background

1. The proposed Seacoast Reliability Project ("the Project") will significantly impact Little Bay – a critical part of New Hampshire's Great Bay estuary – and has generated substantial concern among intervenors, members of the public, and regulators.
2. Because of the Project's impact on Little Bay, its shore land, and its aquatic resources, the Applicant applied for a wetlands permit, in addition to other permits and approvals, from NHDES.

3. RSA 162-H:7, VI-c requires NHDES “to 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.” Because of the complexities of the Project’s impacts on Little Bay and the Great Bay estuary, this proceeding was stayed for several months to provide both the Applicant and NHDES additional time, beyond the original statutory deadlines established in RSA 162-H:7, to assess those impacts.

4. On February 28, 2018, NHDES issued correspondence to the Committee and a Final Decision from the Wetlands Bureau.¹ The correspondence specifically stated that “Water Division staff have completed their technical review of the application and have made a final decision on the parts of the application that relate to NDES permitting or regulatory authority” The Final Decision recommended approval of a wetlands permit with a number of conditions. NHDES’s correspondence included several specific recommendations to the Committee concerning the Project’s proposed method of crossing of Little Bay, including:

A. A study of horizontal directional drilling (HDD) by the Applicant. NHDES recommended that the study focus on several areas, including, if cost were an issue, a comparative cost analysis with detailed comparative cost information for jet plowing and horizontal directional drilling obtained from two independent contractors. NHDES recommended that it review the study and after review provide the study to the SEC with its comments “regarding method(s) for installing cable across Little Bay.”²

¹ NHDES’s correspondence also enclosed Final Decisions from the Alteration of Terrain Bureau, the Watershed Management Bureau, and the Shoreland Protection Program.

² In July 2018, the Applicant submitted a report comparing the jet plow method with horizontal directional drilling. The report did not contain any detailed comparative cost information. There is no evidence in the record that NHDES has reviewed the Applicant’s HDD report. Nor has NHDES provided any analysis or comments about the report to the Committee.

B. A jet plow trial run and associated data and analyses. NHDES recommended that the proposed jet plow trial run include (a) a plan to be submitted to NHDES at least 90 days prior to the trial run, (b) a report of the results of the trial run after its implementation that would be submitted to NHDES and the Committee at least 90 days before the proposed cable installation, and (c) NHDES review of the above information, with recommendations to be provided to the Committee. In its February correspondence, the NHDES further recommended that “cable installation in Little Bay by jet plowing would not be allowed to proceed until authorized by the SEC.”

5. Following the February 28th issuance of NHDES’s Final Decision and recommendations, and without notice to either the Committee or other parties,³ the Applicant engaged in ongoing communications with NHDES for the purpose of negotiating and amending the conditions and recommendations of NHDES’s Final Decision as well as the recommendations regarding the jet plow trial run. Neither the fact that these negotiations were occurring nor the substance of these communications were made known to intervenors until they received on July 16, 2018 a partial response to a technical session record request made on July 10, 2018.⁴

³ Counsel to Durham/UNH, in a letter dated August 3, 2017 to NHDES and the SEC Administrator, requested to receive copies of any and all correspondence and information that the Applicant submitted to NHDES. In response to this letter SEC Counsel, in correspondence dated August 4, 2017, stated: “Your first request is for your clients to receive copies of information filed with the Department of Environmental Services (DES). Traditionally, such documents have been provided to all parties involved in Site Evaluation Committee proceedings. I do not see any reason why the Applicant in this case would not provide you with copies of the documents and information filed with DES.”

⁴ The July 10, 2018 record request was that Eversource provide “all correspondence between Eversource and DES that apply to the development of monitoring criteria as referenced on page 10, lines 26-28, since the time that DES submitted its conditions for the Project to the SEC.” The July 16, 2018 response contained an email dated April 27, 2018 from Sarah Allen to Collis Adams at DES and a copy of a letter of the same date. See TD-UNH Exh. 3, Appendix A. On August 27 and 29, 2018 the parties to the docket received additional correspondence that was responsive to the record request, some of which predated the July 16, 2018 response.

6. In a letter to NHDES dated August 10, 2018, the Presiding Officer of the Subcommittee invoked RSA 162-H:7-a,I(e) and requested information from NHDES concerning changes to the agency's Final Decision that the Applicant had negotiated with NHDES. The letter indicated that the Applicant was requesting that the Committee impose different conditions or refrain from imposing some of NHDES's recommended conditions, and also noted that the Committee "has not commenced adjudicative hearings and has not determined what, if any, conditions it intends to impose." The Presiding Officer's letter also stated the belief that "it is prudent to request your agency's response at this time, rather than waiting until deliberative hearings."

7. After learning of the negotiations and the above-referenced letter, Durham/UNH filed a Motion to Suspend Site Evaluation Committee Proceedings on August 21, 2018. By order dated August 28, 2018, the Presiding Officer issued an order denying the motion on the ground that it was not ripe. The order specifically stated: "If found to be in the public interest, the Subcommittee will have the option to suspend the proceedings."

8. On August 31, 2018, after the first two days of the adjudicatory hearings had been completed, and long after intervenors' date for submitting supplemental testimony (July 20, 2018), including comments on agency final decisions, had passed, NHDES provided correspondence to the Committee identifying the changes that it had negotiated with the Applicant to the February 28, 2018 Final Decision and its new recommendations regarding the jet plow trial run.

Argument

9. The Applicant's negotiations with NHDES and the changes resulting from the negotiations fundamentally violate the permitting process set forth for SEC applications in RSA

162-H. RSA 162-H grants the Committee the non-delegable right to issue a certificate for an energy facility. As explained below, the role of the state agencies is limited to reviewing the application and advising the Committee.

10. RSA 162-H:7-a specifically delineates the role of state agencies in an SEC proceeding. That statute grants a state agency the authority to: (1) determine completeness of elements required for such agency's permitting; (2) report on such issues to the committee; (3) review proposals or permit requests and submit recommended draft permit terms and conditions to the committee; and (4) respond to the committee if the committee intends to impose certificate conditions that are different from those proposed by state agencies having permitting or other regulatory authority. Under RSA 162-H:7, VI-c, a state agency having permitting jurisdiction is required to "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."

11. Nothing in RSA 162-H gives a state agency the authority or the right to conduct negotiations with the Applicant regarding the conditions or recommendations contained in its Final Decision made under the authority of RSA 162-H:7, VI-c. To the contrary, the use of the term "final decision" in RSA 162-H:7, VI-c strongly suggests that after a state agency concludes its permitting review and forwards its recommendations to the SEC the agency has no further role or jurisdiction in the permitting process until the adjudicatory hearings conclude. Nor should parties to an SEC proceeding, including but not limited to the Applicant, be engaging in ongoing communications and negotiations in an effort to amend a Final Decision and related agency recommendations.

12. In this proceeding the Applicant engaged in ongoing negotiations with NHDES without the knowledge of the parties to the docket or the Committee over a number of months subsequent to the issuance of the DES Final Decision. In fact, as indicated during the September 20, 2018 hearing, those discussions are still ongoing.⁵

13. NHDES's post-Final Decision recommendations alter numerous conditions as well as its prior recommendations related to a jet plow trial run, some in a manner that deprive the Committee and intervenors of important information. With respect to the jet plow trial run, for example, the new, negotiated recommendations fundamentally change (1) when the jet plow run will be conducted; (2) how the data obtained from the jet plow run will be reviewed; and (3) the SEC's role in approving the cable installation based on its review of the data obtained from the jet plow run. Whereas the Final Decision recommended that data and analysis from the jet plow run be submitted to the SEC for review and consideration before the SEC issued its final decision, NHDES's post-Final Decision, August 33, 2018 recommendations now provide no review opportunity for the SEC as part of its independent review and decision-making process. The practical effect of this change is to deprive both the Committee and parties to the proceeding of critical information – the only actual data concerning the environmental impact of jet plowing in Little Bay – that should be considered as part of the Committee's adjudicatory and decision-making processes.

14. NHDES's February 28, 2018 submission to the Committee constitutes its Final Decision within the meaning of RSA 162-H:7, VI-c and must be treated as such.

15. NHDES's new recommendations and new permit conditions issued on August 31, during the adjudicatory hearing, violate the basic permitting process set forth in RSA 162-H and

⁵ Transcript, Day 5, AM pp. 9-10.

are inconsistent with the statutory timeframe required by RSA 162-H:7, VI-c, which is intended to provide all parties with notice of all final recommended permit conditions and sufficient time to prepare for the adjudicatory hearings to ensure a fair and meaningful adjudicatory process.

16. NHDES's new, negotiated post-Final Decision recommendations are not properly before the Committee as a response pursuant to RSA 162-H:7-a, I(e). RSA 162-H:7-a, I(e) specifically provides:

If the committee intends to impose certificate conditions that are different than those proposed by state agencies having permitting or other regulatory authority, the committee shall promptly notify the agency or agencies in writing to seek confirmation that such conditions or rulings are in conformity with the laws and regulations applicable to the project and state whether the conditions or rulings are appropriate in light of the agency's statutory responsibilities. The notified state agencies shall respond to the committee's request for confirmation as soon as possible, but no later than 10 calendar days from the date the agency or agencies receive the notification described above.

As this language makes clear, agency responses pursuant to RSA 162-H:7-a are intended to assist the Committee *after* it has determined as a result of its adjudicatory hearings that it "intends to impose certificate conditions that are different than those proposed by state agencies. . . ." *Id.* Given that the adjudicatory hearings had not even started when the Applicant contacted NHDES to negotiate changes to the NHDES Final Decision, the Committee had not determined, when the Presiding Officer wrote to NHDES on August 10, 2018, that it intended to impose certificate conditions different from those proposed by NHDES in its Final Decision. Accordingly, RSA 162-H:7-a, I(e) was not lawfully invoked to elicit the information provided in NHDES's August 31, 2018 submission.

17. The NHDES August 31st recommendations clearly result from the post-Final Decision negotiations between the Applicant and NHDES, with no opportunity for involvement by the Committee or intervenors. Those improperly negotiated, untimely recommendations fall outside the Committee's statutory construct and have created confusion among the parties,

prejudiced the intervenors' rights to effectively participate in this adjudicatory proceeding, and deprived intervenors and the Committee of information that should be developed in and subjected to the adjudicatory process.

18. Pursuant to the statutory permitting process set forth in RSA 162-H, it is evident that after NHDES issued its Final Decision in February 2018 it lacked authority or jurisdiction to change that decision or its recommendations. Accordingly, the new negotiated recommendations should not be accepted or made a part of the final SEC record or decision.

19. Moreover, RSA 162-H:7-a, I (e) authorizes "the committee" to notify a state agency if the committee intends to impose certificate conditions that are different than those recommended by the agency. The Presiding Officer has no similar authority. The Presiding Officer's authority is specifically spelled out in the statute and is limited to deciding procedural matters. *See* RSA 162-H:4, V. In addition, the Committee cannot delegate its authority under RSA 162-H:7-a, I(e) to the Presiding Officer. *See* RSA 162-H:4, III-b. Accordingly, the Presiding Officer had no authority before the adjudicatory hearings commenced to invoke RSA 162-H:7-a, I (e) and request that NHDES provide the information contemplated in that statute.

20. The SEC should deliberate on NHDES's Final Decision dated February 28, 2018 and if, exercising its authority as the independent, final decision-maker for this Project, it determines that some of NHDES's recommended permit conditions and other recommendations should be changed, it can then invoke the process required by RSA 162-H:7-a, I (e) and allow any new recommendations to be subject to the adjudicatory process.

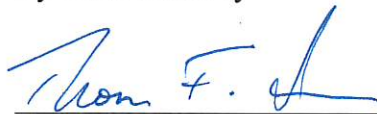
21. Intervenors Durham Historic Association, Helen Frink, and Durham Residents concur with the relief requested in this Joint Motion. Counsel for the Public does not concur in the relief requested and plans to file a response to this Joint Motion. The Applicant objects.

WHEREFORE, CLF, Durham/UNH and Newington jointly request that the Committee:

- A. Strike NHDES's post-Final Decision recommendations and related testimony filed by the Applicant;
- B. If, during its deliberations, the Committee determines that it wants to deviate from NHDES's February 28, 2018 Final Decision and recommendations, notify NHDES in accordance with the statutory process required by RSA 162-H:7-a, I (e);
- C. Provide the parties with the opportunity to address any recommendations NHDES provides that are new or different from its February 28, 2018 Final Decision and recommendations, including submitting supplemental testimony and the ability to recall witnesses if necessary; and
- D. Grant such other relief as it deems appropriate.

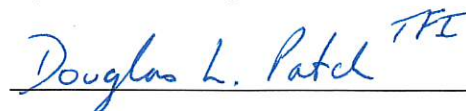
Respectfully submitted,

Conservation Law Foundation
By Their Attorney



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Dated: October 24, 2018

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Joint Motion has, on this 24th day of October, 2018, been sent by email to the service list in Docket No. 2015-04.



Thomas F. Irwin