

1 STATE OF NEW HAMPSHIRE
2 SITE EVALUATION COMMITTEE

3
4 September 21, 2010 9:08 a.m. DAY 2
5 Public Utilities Commission
6 21 South Fruit Street DELIBERATIONS
Suite 10 MORNING SESSION ONLY
Concord, New Hampshire

7 RE: SEC Docket No. 2009-02
8 Application of Laidlaw Berlin
9 BioPower for a Certificate of
10 Site and Facility for a 70 MW
Biomass Fueled Energy Facility
11 in Berlin, Coos County, New
Hampshire.
(Deliberative Session)

12 PRESENT: SITE EVALUATION SUBCOMMITTEE:

13 Thomas Burack, Cmsr.	DES
Amy Ignatius, Cmsr.	PUC
14 William Janelle	DOT
Elizabeth Muzzey	N.H. Div. of Hist. Res.
15 Harry Stewart	Water Division - DES
Craig Wright	Air Resources Div - DES
16 Donald Kent	DRED
Christopher Northrop	OEP
17 Michael Harrington	PUC

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19 Counsel for the Committee: Michael Iacopino, Esq.

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22 COURT REPORTER: SUSAN J. ROBIDAS, LCR NO. 44
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1 P R O C E E D I N G S

2 CHAIRMAN BURACK: Good morning.
3 I wish to call to order today's continuing
4 deliberative session of the State of New Hampshire
5 Site Evaluation Committee in Docket No. 2009-02,
6 Application of Laidlaw Berlin BioPower, LLC for a
7 certificate of site and facility for a 70-megawatt
8 biomass fuel energy facility in Berlin, Coos
9 County, New Hampshire.

10 When we adjourned last
11 evening, we were discussing the issue of the Coos
12 Loop interconnection. And before we leave that
13 topic, I just want to inquire as to whether
14 there's any other discussion that members would
15 like to have of that matter?

16 Mr. Harrington.

17 MR. HARRINGTON: I just wanted
18 to clarify one question asked by Mr. Janelle on
19 how the bidding process would go. And I said I
20 just wasn't familiar enough with the Purchase
21 Power Agreement on that. And having reviewed that
22 last night -- again, I say this as an engineer,
23 not a lawyer, let me preface that -- I didn't see
24 anything in there about bidding practices, one way

1 or the other. So, since the way it is set up is
2 that the payments for energy and renewable RECs
3 are based upon actual production of electricity, I
4 assume that Laidlaw's strategy would be to
5 maximize the output of electricity to maximize
6 their payments; hence, they would bid in probably
7 zero and try to clear the market every hour of
8 every day because they would receive the money
9 from Public Service based on the Purchase Power
10 Agreement on that. And also, the REC payments are
11 based on actual production. So that would seem to
12 be a logical strategy for them to pursue. Hope
13 that helps a little.

14 CHAIRMAN BURACK: Thank you.
15 Is there anything further on
16 that subject?

17 Dr. Kent.

18 DR. KENT: I think I'd just
19 like to note that the Loop has not really reached
20 capacity in an absolute sense. It could be up to
21 400 megawatts was my understanding from testimony,
22 if somebody was willing to pony up a hundred
23 million or 125 million.

24 MR. HARRINGTON: There are a

1 couple of proposals. Public Service has done some
2 preliminary look at it. And in that range -- and
3 it depends on synergies with some other things.
4 But in the range of a hundred to, say, 150
5 million, it could be substantially expanded,
6 either through reconductoring of the Loop itself
7 or actually putting in another line. That was one
8 of the possibilities of, say, for example, the
9 larger wind projects, like the proposed for Noble
10 or the proposed 180-megawatt one which is in the
11 queue. They would have a direct feeder line that
12 would go down to the substation, probably over
13 Moore Dam. And then that would open up additional
14 capacity on the existing Coos Loop to make sure
15 these other plants could do that. So there are
16 different schemes like that.

17 But as of right now, it's not
18 maxed out.

19 DR. KENT: Is it -- once --
20 let's say -- I have a question for you, if you can
21 explain this to me. Say we did upgrade the Loop
22 to get to 400 megawatts, so we wouldn't have any
23 problem with getting everybody's energy online in
24 the foreseeable future. Can all that energy then

1 leave the Loop and head south, or are we going to
2 be bound somewhere down the line?

3 MR. HARRINGTON: Well, part of
4 the evaluation that would be done on that would be
5 to look downstream. I mean, it's one thing to get
6 it over the Moore Dam. Then we'd be looking at
7 the 345 lines that are going south from there.
8 And it's possible there may be some upgrades
9 needed down there as well to handle it. Because,
10 I mean, let's face it, if we have additional -- a
11 couple of two 300-megawatts, it's not going to
12 stay in northern New Hampshire, because the load
13 just simply isn't there for it. So it would have
14 to get down to the southern part of New Hampshire,
15 and probably eventually even into Massachusetts.
16 That would be part of the analysis. I think that
17 that was looked at preliminary, and it's in the
18 ballpark of that 100 to 150 million figure.

19 DR. KENT: Oh, it's included in
20 that?

21 MR. HARRINGTON: It's included
22 into the preliminary look they did at it.

23 DR. KENT: So there's a lot of
24 stakeholders, potentially, if you wanted to find

1 some synergy to split the pot up.

2 MR. HARRINGTON: Yeah. Well, I
3 mean, typically what happens is, and this is where
4 the problem area I guess has been, it's that next
5 person coming online. They do the analysis and
6 say, okay, you can put your plant on, and it's
7 going to cost you a million dollars to
8 interconnect to the substation or something like
9 that. But the next one that comes online, the
10 next 50 megawatts, it's maxed out now. So in
11 order to get your next 50 megawatts on, you not
12 only have to maybe reconduct your part of the
13 Loop, you have to beef up the substation or down
14 in by where they interconnect into the
15 high-voltage part of the system. And you also
16 have to do some things downstream, maybe in
17 Franklin, or somewhere downstream, to accommodate
18 this additional power that's flowing. So that's
19 all looked at as one issue when they do that.

20 DR. KENT: Thank you.

21 CHAIRMAN BURACK: Commissioner
22 Ignatius.

23 CMSR. IGNATIUS: Thank you.

24 Good morning. A couple other

1 comments on the Loop, just to put all of this in
2 context. Even without going to the major upgrade
3 that Mr. Harrington was just talking about, we've
4 heard testimony that there's some required
5 upgrade that Laidlaw would have to do in order to
6 interconnect. And that's relatively small
7 numbers, in the millions as opposed to the
8 hundred millions. And we've heard that they have
9 the approvals to be able to take those next
10 steps. They've identified generally what needs
11 to be done and costed it out. Not to the penny
12 and not to the engineering specs, but they're
13 getting close. And so that level of upgrade
14 needed to interconnect the facility to the Loop
15 is coming to real finality. And the company
16 seems prepared to do that necessary work, and ISO
17 seems agreeable to it being done and sees no
18 problems by their interconnection.

19 So I think on the
20 interconnection for the plant, that's in good
21 shape. I would support -- I don't see any reason
22 why the interconnection is a barrier for approval
23 of this project if other things fall into place.

24 The use of the Loop is a

1 problem for any generators who are currently
2 connected, for Laidlaw if it were to be
3 connected, for anybody still to come who wants to
4 be interconnected that we've talked about, and
5 that's that on the occasional hours there will be
6 times where there's just too much generation
7 coming in for everybody to be dispatched. And
8 that becomes an economic issue. And whether a
9 lender would go forward with a project knowing
10 that that's at risk, that they won't always be
11 able to be dispatched, is something that's really
12 a financial issue, and whether a lender thinks
13 it's worth it to do so, to invest in a project
14 that has that limitation. But it isn't an
15 engineering limitation, and it isn't really
16 anything that this project creates that isn't
17 already in place. You know, if anyone, it's the
18 Granite Reliable Project, the wind project that
19 takes up so much of the power when it's fully
20 operating and takes up so much of the space on
21 the line when it's really blowing, and takes up
22 so little of the space when it's not. So it's a
23 hard one to work with because it lurches from
24 high use of the system to very low use of the

1 system, and that can shift hour to hour.

2 If this project were
3 certificated, it would put a greater stress on
4 existing generators who may not be able to get
5 their power out. But that's a risk, in my view,
6 that they've known all along. It's never been a
7 very realistic problem for them because there
8 hasn't been that much generation. But that's
9 nothing that's changed on them in terms of the
10 structure under which they came in. They may
11 have hoped that it would never change and that
12 there would never be a problem in getting their
13 power out. But there's never been a guarantee of
14 that. There's never been any legitimate
15 expectation that they would always have a chance
16 to have their power dispatched. And in my view,
17 they had a good time of it for a number of years
18 when there really wasn't anything else to
19 displace them. That's changing. Laidlaw adds to
20 that mix, but it's not what creates that
21 situation.

22 So, in my view, the
23 interconnection issues may be hard for some other
24 generators to adjust to, but I see nothing

1 improper with the interconnection. It's the way
2 the system was designed to work. And I think
3 that, on that component, I think the Laidlaw
4 project appears to have a plan in place that's
5 sound and meets the level of acceptance, in my
6 view.

7 MR. HARRINGTON: Just as a
8 quick follow-up to that. I think it's really
9 important for people to understand that these set
10 of rules are nothing unique to the Coos Loop.
11 They weren't invented to deal with the situation.
12 They apply to all facilities in New England. In
13 fact, almost all of the United States does it this
14 way, where the interconnection costs are borne by
15 the generator who wants to come online if there's
16 upgrades required.

17 And this idea that once the
18 transmission's there, you're basically -- someone
19 else can build and compete economically for space
20 on that line is also not unique to the Coos Loop.

21 So, again, as I said before, I
22 don't think our job is to try to pick out the
23 winners and the losers on this one. Everybody
24 knew that these were the rules. And they have

1 been in place for about the last 12 years. So
2 this is -- certainly the Laidlaw project is not
3 something that just popped out. It's been being
4 discussed and looked at, and we've been contacted
5 for possible SEC filings from a few years ago.
6 So I have to assume the other parties up there
7 knew this was possible as well, and they could
8 have taken whatever actions they would have
9 wanted to, to either get a Purchase Power
10 Agreement themselves or do whatever. But that
11 wasn't done, so...

12 CHAIRMAN BURACK: Thank you.
13 Anything further on this issue
14 related to the interconnection?

15 (No verbal response)

16 CHAIRMAN BURACK: All right.
17 Good. What I'd like to suggest that we do next is
18 we turn our sites to the next provision of RSA
19 162-H:16, IV, and that is Subsection C, which
20 would require, if we were to issue a certificate,
21 to find that the site and the facility, quote,
22 will not have an unreasonable adverse effect on
23 aesthetics, historic sites, air and water quality,
24 the natural environment, and public health and

1 safety, period, close quotes. So I would ask if
2 we could try to again have a systematic discussion
3 of these topics, just taking these in order in
4 which they are listed here in the statute,
5 starting with aesthetics. And again, the test is
6 unreasonable adverse effect.

7 And would you like to start,
8 Director Muzzey?

9 DIR. MUZZEY: Yes, I would.

10 CHAIRMAN BURACK: Thank you.

11 DIR. MUZZEY: Regarding
12 aesthetics in this project, the current site was
13 viewed by the Committee back in March. And we had
14 the chance to see that it's a former industrial
15 site that's largely cleared, a lot of debris left
16 behind, not a particularly aesthetically-pleasing
17 site, the one major structure left on the site
18 being a boiler.

19 During our hearing, Laidlaw
20 presented before and after photographs showing
21 the site as we saw it in March and then their
22 plans for landscaping, for refurbishing the
23 boiler and adding other industrial-type buildings
24 to the site. We heard no major concerns with

1 that from our intervenors, although Clean Power
2 Development did not agree with the Applicant's
3 conclusion that the site would be more
4 aesthetically pleasing.

5 We also saw in Exhibit 5 the
6 work that the City of Berlin had done with the
7 Applicant. There's a long section on appearance
8 issues, and it's clear that the City and its
9 community groups have been working with the
10 Applicant to come up with a landscaping plan that
11 the community feels is a good solution. And
12 also, the Applicant's offer to place the
13 newly-constructed transmission line down Shelby
14 Street underground alleviates some of the
15 aesthetic concerns there as well.

16 CHAIRMAN BURACK: Thank you.

17 MR. IACOPINO: And just for the
18 record, Mr. Chairman, the reference to the before
19 and after photographs, photo simulations, from
20 Director Muzzey, that's Laidlaw Exhibit No. 72.

21 CHAIRMAN BURACK: Thank you.

22 And is there not -- I thought
23 there was another exhibit as well.

24 DIR. MUZZEY: Exhibits 11 and

1 12 also show the before and after shots from the
2 perspective of the community ball field adjacent
3 to the site.

4 MR. IACOPINO: I think
5 Exhibit 72 shows it with the silo.

6 DIR. MUZZEY: Oh, the ash silo,
7 the addition of the ash silo, which we didn't see
8 in 11 and 12.

9 CHAIRMAN BURACK: I believe
10 that what happened was that, when the original
11 drawings and simulated drawings were made -- that
12 is, Exhibits 11 and 12 -- they had not designed in
13 or contemplated some kind of a storage chamber for
14 ash.

15 DIR. MUZZEY: Hmm-hmm. Yes.

16 CHAIRMAN BURACK: But upon
17 further evaluation, they determined that was
18 necessary. And so I think we heard testimony that
19 they were working up that revised plan while we
20 were actually in the hearing and then presented
21 that to us as their Exhibit 12.

22 Other thoughts or comments on
23 the aesthetics issue?

24 Commissioner Ignatius.

1 CMSR. IGNATIUS: Thank you.
2 There's another aspect to it, and Director Muzzey
3 referenced this yesterday in another discussion,
4 and that was the vision for Berlin that people
5 within the community had been debating. And I
6 think it's a fair paraphrase to say that many
7 people said this is a community that's been
8 industrial at its heart. It's had a power plant
9 there and has been proud of its workers for many
10 years. And although it wasn't a thing of beauty,
11 it was part of their history. And getting it back
12 going again was not only preferential to it being
13 abandoned, but was consistent with where it had
14 been over the last 50 or 100 years.

15 And there were some others who
16 spoke to a different point of view, saying enough
17 already with the power plant. That has been our
18 history. This is an opportunity to do something
19 radically different. And I think we ought to
20 think more boldly than just finding a new use for
21 the facility.

22 We know that, although people
23 have described that as a polarizing debate, and
24 there's been strong emotions on both sides, we

1 know that the vote of the community authorities
2 and various -- you know, the planning board and
3 the -- is it the city council? Am I getting the
4 right term? -- has been in favor of this project,
5 although probably individuals have had different
6 points of view. But a majority vote has been in
7 support of it. And I think it's -- I find it
8 hard for me as a member of the SEC to
9 second-guess that.

10 We have authority that usurps
11 some of the authority of the community planning
12 function by statute, but I think we need to
13 listen to their voices as well. And if the
14 people who live there, the majority there, those
15 who deal with the development of the city and
16 have spent many, many more hours on this than we
17 have, have come to a conclusion that this is the
18 best use for that area and is consistent with
19 their master plan, I think we -- I feel I need to
20 heed that voice, listen to that very strongly.

21 So, although the development
22 of the -- I guess, then, the other big piece of
23 this is that no one has proposed as an
24 alternative to tear this down and turn it back

1 into some other kind of use. So we're not
2 looking at two choices: One to get it going
3 again as a power plant and a working industrial
4 site versus turn it into a beautiful park. There
5 are no takers for the alternative right now.

6 And so, although it may not be
7 the most aesthetically pleasing thing to have a
8 power plant in the center of your town, right now
9 it seems the alternative is to have an abandoned
10 industrial site right in the center of your town,
11 which is even less aesthetically pleasing than
12 having it operating.

13 So, I think I don't find any
14 unreasonable adverse effect from operating as a
15 power plant.

16 CHAIRMAN BURACK: Thank you
17 very much.

18 Other thoughts or comments on
19 the aesthetics issue?

20 MR. HARRINGTON: More of a
21 question than anything else. Going along with
22 what Commissioner Ignatius just said, one of the
23 people that spoke at the public hearing, they came
24 up with -- they had a bag or a big envelope that

1 they said was full of signatures or something.
2 That's the last we've seen of that. Has
3 anybody -- and maybe, Mr. Iacopino, have you
4 looked at it to see that there indeed are
5 thousands of signatures in there and that they
6 actually say we support the Laidlaw project?
7 Because, I mean, that's a significant portion of
8 the population of Berlin, if, indeed, that's what
9 those --

10 MR. IACOPINO: I have not
11 looked at that.

12 MR. HARRINGTON: Is that
13 something we could just take a look at, I mean, to
14 see what the petitions read?

15 MR. IACOPINO: I'm not sure
16 that the individual ever actually submitted
17 whatever was in the bag. I can check with Jane
18 Murray. I think he was directed to send it to
19 Jane Murray --

20 MR. HARRINGTON: Oh, okay.

21 MR. IACOPINO: -- our
22 secretary.

23 MR. HARRINGTON: I just know we
24 saw the bag, and that was the last I saw of it.

1 MR. IACOPINO: I can check with
2 her. But I suspect that he never followed
3 through.

4 MR. HARRINGTON: Oh, okay.
5 Because it would be significant. He was talking a
6 couple thousand out of a population of I think
7 about 10,000 in Berlin now. So that's a
8 substantial amount of people to get signatures on,
9 assuming some of the 10,000 are children.

10 CHAIRMAN BURACK: Thank you.
11 We will check with the secretary to the Committee
12 to determine if we, in fact, have received those
13 formally as public comments. Certainly, the
14 representation was made to us that there were, I
15 believe it was in the range of a couple thousand
16 signatures in support of the project.

17 I also recall that we heard
18 testimony from the Mayor, Paul Grenier,
19 indicating that one of the platforms on which he
20 ran for mayor and was elected was to see this
21 project constructed.

22 I will just also offer the
23 observation, based on one who has over the years
24 visited Berlin on numerous occasions and grown up

1 not far south of there, and having shopped there
2 as a child, that certainly it is a city that has
3 seen a lot of change over the years. But it has
4 always been an industrial city, or certainly in
5 recent history. And just looking at the
6 photographs of the current site and having seen
7 the current site and having seen the simulations
8 of what the facility will look like if
9 constructed, and understanding that there are
10 plans to redevelop the entire property, I share
11 the view that the plan would not have an
12 unreasonable adverse effect on aesthetics.
13 Overall, I think it's going to be an improvement
14 on what the aesthetic conditions are there.

15 Other thoughts or comments on
16 this issue?

17 Dr. Kent.

18 DR. KENT: In the absence of a
19 super majority by the citizens of Berlin, I would
20 accept representations of the elected officials as
21 a voice for Berlin in this matter.

22 CHAIRMAN BURACK: Thank you.

23 Mr. Northrop.

24 MR. NORTHROP: One other

1 comment. Actually, I'm looking for it. I think
2 that there was a local site -- FSEC, site
3 evaluation committee, that was chartered or
4 commissioned, for lack of a better word, by the
5 city council to look into this and to come up with
6 a recommendation. I'm trying to find where that
7 is. I'm not sure if it's an exhibit that was a
8 Laidlaw exhibit or if it was something else
9 submitted. But my recollection is that that local
10 site evaluation committee also went through
11 aesthetics issues. And I think they may have
12 helped with the photo simulations and sort of the
13 visual aspects. And I apologize again. I'm sort
14 of fumbling through trying to find where that is.

15 DIR. MUZZEY: I think it's
16 Exhibit 13.

17 MR. NORTHROP: Exhibit 13.

18 CHAIRMAN BURACK: That's
19 Applicant's Exhibit 13?

20 DIR. MUZZEY: Yes. There's a
21 letter from the Community FSEC Advisory Committee,
22 which explains its purposes. Local Berlin
23 community, organized by the Androscoggin Valley
24 Economic Recovery Corporation as a non-org

1 community committee. The group held public
2 meetings. It worked for approximately nine months
3 to develop a list of recommended stipulations and
4 recommendations. And those, through time, became
5 what we're now referring to as Exhibit 5, the City
6 of Berlin proposed certificate conditions. Looks
7 like there were 17 community volunteers, 2 city
8 staff people, and then 2 members of the press and
9 the public who were invited to the meetings as
10 well.

11 CHAIRMAN BURACK: There do
12 appear to be a number of photographs attached or
13 included as part of this Exhibit 5 that include
14 various -- I'm sorry -- Exhibit 13, that include
15 both photos of the site as it exists today, as
16 well as proposed or simulated pictures of the site
17 as it will look if the project is constructed.

18 MR. NORTHROP: Also, just on
19 the appearance issues, this FSEC advisory
20 committee, which is Exhibit 13, and in their
21 Exhibit C within Laidlaw's Exhibit 13, Item 1 is
22 appearance issues. And the community committee
23 recommends that the physical appearance of the
24 plant be at least as attractive as the photo

1 simulations that are attached as part of
2 Exhibit 13.

3 CHAIRMAN BURACK: Okay. Thank
4 you.

5 MR. IACOPINO: With respect to
6 Exhibit 13, Mr. Chairman, I would just point out
7 that it was submitted by Laidlaw as an exhibit and
8 was premarked. But we also received that same
9 letter in public comment around March 10, 2010,
10 from -- directly from Mr. Makaitis, who was one of
11 the leaders or the chairman of that local
12 committee. So it's in our record in two places.
13 It's in the public comment, and it also was
14 submitted by Laidlaw as one of their exhibits.

15 CHAIRMAN BURACK: Thank you.

16 Any further discussion on the
17 issue of aesthetics? If not, let's turn to the
18 issue of historic sites.

19 DIR. MUZZEY: I can speak to
20 historic sites --

21 CHAIRMAN BURACK: Thank you.

22 DIR. MUZZEY: -- and
23 archeological resources as well.

24 The Division of Historical

1 Resources, also known as the state's Historic
2 Preservation Office, received a request for
3 review by the Applicant under state law R.S.A.
4 227-C:9, as well as Section 106 of the National
5 Historic Preservation Act. The federal review is
6 triggered by the presence of federal permits.
7 And in this case, the U.S. EPA was designated as
8 the lead federal agency for review under
9 Section 106.

10 The Applicant supplied
11 information to the DHR as to resources,
12 historical resources in the area that had already
13 been designated -- in this case, listed to the
14 national register -- as well as a summary of
15 other potential resources that had not yet been
16 identified, giving the DHR enough information to
17 conclude that the boiler itself is not considered
18 historic since it was constructed in the 1990s.
19 There were no direct impacts to the standing
20 historical resources. And considering the
21 surrounding historic neighborhoods and historical
22 properties, such as St. Anne's across the river
23 from the site, that the project presented no new
24 adverse effects to those resources, which is the

1 Section 106 finding.

2 Additionally, due to the high
3 level of previous disturbance at the site of more
4 than 100 years of industrial uses, the division
5 did not request any archeological studies be
6 completed.

7 During our hearing, the
8 Applicant submitted all of this information for
9 our review, and no new concerns for resources
10 were presented in the hearing.

11 CHAIRMAN BURACK: Thank you.
12 Further discussion of historic
13 issues?

14 Dr. Kent.

15 DR. KENT: The buildings -- I
16 just want to make sure I'm clear on this. The
17 buildings on the site are not considered historic?

18 DIR. MUZZEY: Under Section 106
19 of the National Historic Preservation Act, the
20 test for historic is whether or not a property
21 would be eligible for listing on the National
22 Register of Historic Places. That's a high
23 standard. That's the standard we work with under
24 106.

1 A lot of people consider
2 buildings historic in other ways or for other
3 reasons. We have a state register of historic
4 places. Various towns have their own landmarking
5 programs. There was one older building on the
6 site, the remnant of what was one of the original
7 paper-making buildings on the site. But because
8 it was just a remnant of that building, it was
9 not considered eligible for the national
10 register, so it did not fall under the 106
11 review. If someone wanted to come in and
12 redevelop that building in the future, they could
13 work on some other designations if they want it
14 to be recognized.

15 DR. KENT: Thanks.

16 CHAIRMAN BURACK: Is it your
17 expectation that there would likely be any
18 archeological issues that could arise at this
19 site -- that is, if we were to issue a
20 certificate, would we need to have any kind of a
21 condition relating to further reports to the
22 Division of Historic Resources or further
23 investigations, again, if something were
24 discovered?

1 DIR. MUZZEY: Well, the
2 division did have two cases in which they asked
3 for further review. One would be that if the
4 plans changed from as they were submitted to the
5 division back -- I'm not sure when. I believe it
6 was spring or winter of last year -- and also if
7 there were significant community concerns about a
8 resource that had not been identified during the
9 106 review.

10 Additionally, there are state
11 laws that do protect unanticipated discoveries of
12 human remains -- for instance, a Native American
13 burial, that type of thing. Those laws would
14 come into play if that type of discovery was
15 made.

16 CHAIRMAN BURACK: I'm just
17 trying to ascertain whether or not you think it
18 would be -- again, if a certificate were to be
19 issued, whether or not you would see any
20 conditions that would be necessary or appropriate
21 to address historic or archeological issues, or
22 whether, just by a function or operation of law
23 that's already going to be applicable, regardless,
24 those issues would be addressed appropriately?

1 DIR. MUZZEY: I think it would
2 be useful to have some sort of condition that
3 addressed those two continuing concerns of the
4 DHR, as well as the note that if archeological
5 resources are unintentionally discovered, that
6 consultation would continue under the -- with the
7 DHR.

8 CHAIRMAN BURACK: Thank you.
9 Other discussion of historic
10 sites issues? Yes.

11 CMSR. IGNATIUS: I also
12 remember the discussion of interpretive signs
13 being put in various places that would help
14 explain some of Berlin's history and use of the
15 wood products to fuel that development of the
16 city. That seemed like a good idea. It's not --
17 it's sort of helping to build the historic link
18 between Berlin's past and this project. It seemed
19 positive.

20 There was one other building
21 that I remember a discussion of, and it may be
22 the remnant that Director Muzzey was just
23 describing. I've forgotten. It was not directly
24 impacted by this. It was a little bit a ways.

1 It was in pretty bad shape. But I recall
2 something about early development of photographic
3 processing.

4 CHAIRMAN BURACK: Are you
5 talking about the research and development
6 building across the river?

7 CMSR. IGNATIUS: Yes. Maybe
8 so.

9 CHAIRMAN BURACK: Which is a
10 separate site, not part of this project at all.

11 CMSR. IGNATIUS: You're right.
12 And there was some talk at our site visit of
13 whether or not the developer might be willing to
14 help with that building being studied. Maybe they
15 weren't taking on making any commitment to do
16 anything with it, but interested in what might be
17 there or finding partners to develop it. And I
18 don't recall if there was any further discussion
19 about that and whether that was anything that your
20 office's review would have looked at.

21 DIR. MUZZEY: Our office has
22 been working very closely with the project
23 proponents of the research and development
24 building. But I think what you may be talking

1 about is the earlier building that is on the
2 larger parcel but not impacted by the current
3 plans. It was the earliest paper-making-related
4 building on the site. Because there were no
5 adverse effects associated with this project under
6 106, the DHR did not request any additional what
7 would normally be considered mitigation measures,
8 such as signage or any direct contributions toward
9 the rehab of that building.

10 CMSR. IGNATIUS: Thank you.

11 MR. IACOPINO: Mr. Chairman,
12 I'll just point out that when Ms. Ignatius speaks
13 about the interpretive signs, I think she's
14 referring to City's Exhibit 5 under Roman Numeral
15 IV, Community Benefits Section 1. It's on Page 6
16 of the exhibit. And it is at the bottom of that
17 particular paragraph where it talks about the
18 riverwalk having interpretive signage.

19 CMSR. IGNATIUS: Thank you.

20 CHAIRMAN BURACK: I just want
21 to make sure that we have a common understanding
22 of the building that is being referred to here as
23 being a building that does have some -- is a --
24 perhaps this building that was the location of the

1 earliest paper-making facility there. I'm looking
2 at -- perhaps you have a different plan. But I'm
3 looking at a plan in Appendix C to Applicant's
4 Exhibit 1. This is overall site layout and
5 materials plan, Figure 2, prepared by ESS Group,
6 Inc. If that's -- and this is dated November 6,
7 2009. And it appears that there's a building
8 that's a almost square building, but it has one
9 corner of it that's a little bit carved off that's
10 labeled as "existing building." It is on the
11 banks of the Androscoggin River, and it is
12 upstream or up river of the proposed area where
13 all of the wood chips would be stored. Is that
14 the building that's --

15 DIR. MUZZEY: Yes, that is the
16 earlier building. And it does provide a nice
17 opportunity to talk about the history of paper
18 making and the wood industry in Berlin and how
19 that has evolved through time.

20 CHAIRMAN BURACK: Thank you.

21 And I believe that during the
22 site visit we took, at least some of us in
23 conversation with one of the tour guides heard
24 something about that history and about the

1 possibility of eventually some kind of plans
2 there, but nothing definitive at this time.

3 DIR. MUZZEY: Right.

4 CHAIRMAN BURACK: Thank you.
5 Anything further on this issue of historic sites?
6 If not, let us continue to work our way through
7 this section of the statute.

8 And I believe the next issue
9 area that we should talk about is air quality.
10 And we have -- I'm sorry, air and water quality.
11 I suggest we take these in two pieces: First,
12 air quality, then water quality. We've already
13 had some discussion of these issues in the
14 context of the permitting issues for the site.
15 But I think it may be helpful just to provide an
16 overview of the air and water quality issues,
17 specifically with an eye toward ensuring that
18 we're -- we could make a finding or not that
19 there would not be an unreasonable adverse effect
20 on air and water quality.

21 Mr. Wright, do you want to
22 start on air quality?

23 MR. WRIGHT: Sure. Thank you,
24 Mr. Chairman.

1 Throughout these proceedings,
2 we haven't heard a lot of discussion about air
3 quality or air emissions from this facility. I
4 would suspect that's given the historic nature of
5 this site as a pulp mill, and also the fact that
6 this was one of the major emission units at that
7 existing facility. So I would suspect that's
8 why, part of the reason why we haven't heard too
9 much.

10 But in New Hampshire and the
11 country, EPA has established a number of
12 air-quality standards. And New Hampshire has
13 adopted most of those, the vast majority of those
14 air-quality standards and performance standards.
15 The purpose of those standards is to ensure that
16 air emissions from the facility, such as this
17 facility, would not adversely impact human health
18 or the environment. We heard that as part of the
19 application -- we heard from the Applicant that
20 they acknowledged that they would be a major
21 source of NOx emissions in New Hampshire. NOx is
22 a non-attainment pollutant -- in that, we don't
23 meet certain air quality standards for ozone,
24 whereas NOx is a precursor to ozone.

1 CHAIRMAN BURACK: Again, NOx
2 is --

3 MR. WRIGHT: I'm sorry. I
4 still talk in technical jargon. Nitrogen oxide.
5 I'm sorry.

6 CHAIRMAN BURACK: Thank you.

7 MR. WRIGHT: Once they
8 triggered that set of regulations, which is a
9 federal regulation implemented again here at the
10 state level, the facility needs to demonstrate
11 that they will install what we refer to the lowest
12 achievable emission rates. We had heard testimony
13 that the facility were to achieve that by use of a
14 bubbling fluidized bed boiler and the installation
15 of a selective catalytic conduction system, which
16 is generally considered to be state-of-the-art
17 controls across the board for NOx.

18 Also upon start-up, the
19 facility would need to obtain emission offsets --
20 so that is offset their emissions of nitrogen
21 oxides by a ratio of 1.15 to 1. Again, that's a
22 federal requirement. The facility would need to
23 implement that upon start-up. The Applicant in
24 their air permit has indicated that they would

1 comply with that requirement as well.

2 In addition, we heard that the
3 facility is subject to what we refer to in the
4 industry as PSD, or prevention of significant
5 deterioration regulations. As part of that
6 analysis, the facility needs to go through an
7 air-pollution dispersion analysis. The purpose
8 of that analysis is to demonstrate that the
9 emissions out of the stack will ultimately comply
10 with what we refer to as national ambient
11 air-quality standards. Again, federal
12 regulations implemented at the state level. The
13 modeling conducted by the Applicant which
14 demonstrates that the facility will not exceed
15 those standards.

16 In addition, under that
17 program, there is what we refer to as PSD
18 increment requirements. These are in addition to
19 those national ambient air-quality standards, a
20 new facility can only consume a percentage of
21 what's available to them across the board. In
22 this case, the Applicant was able to demonstrate
23 through that modeling analysis that they could
24 comply with those increment requirements as well.

1 In addition, under the
2 umbrella of state regulations in New Hampshire,
3 we commonly refer to that as our state
4 implementation plan. This is where we house all
5 our regulations. This is the state's plan as to
6 how we will achieve the ambient air-quality
7 standards.

8 So, in addition to those major
9 requirements under the non-attainment program and
10 the PSD program, there are also a number of
11 regulations in our administrative rules that the
12 facility would need to comply with.

13 Through review of the
14 application, which was submitted as part of the
15 certificate -- request for a certificate, the
16 Applicant submitted an air permit application,
17 and they identified all of those state
18 regulations that they would need to comply with.

19 As part of the department's
20 review of the application, we were able to
21 determine that -- or the department determined
22 that the facility could comply with all of those
23 standards, whether they be emission-based
24 standards or health-based standards. As such,

1 the department issued a final permit, I believe
2 on July 26th, and compliance with that permit
3 would ensure that the facility would meet air
4 quality standards here in New Hampshire.

5 We also heard some discussion
6 about other federal standards. In addition,
7 these would be what we refer to as federal new
8 source performance standards. In addition, we
9 also heard some discussion about potentially
10 other federal requirements that could be coming
11 down the road under maximum achievable control
12 technology standards. Like Mr. Harrington asked
13 the company on at least one occasion as to what
14 would be their ability to comply with those
15 standards, and I believe the answer we heard was,
16 Well, we really don't know yet because those
17 standards haven't been finalized. But we also
18 did hear a commitment on their part that, once
19 those standards come out, they would have to
20 comply with them like every other source of air
21 emissions in the state.

22 I think the only other thing
23 we really heard, in terms of air quality, there
24 was some questions regarding ash from the

1 facility. We had heard some testimony that the
2 facility would generate somewhere in the
3 neighborhood of 120 tons per week of fly ash,
4 which ultimately we heard would be stored in a
5 silo on site. I think we just had some brief
6 discussion about that. That would be located, I
7 believe, near the turbine building and the boiler
8 building. And I believe the Applicant put up a
9 picture of that.

10 In addition to that fly ash,
11 the facility would also generate some bottom ash,
12 we heard somewhere in the neighborhood of 100 to
13 250 tons per year. There were some questions
14 ultimately asked of what would be the disposal of
15 those two sources of ash at the site. I believe
16 what we heard is that the facility had been
17 negotiating with the Androscoggin Valley Regional
18 Refuse and Disposal District, which is the owner
19 and operator of the Mount Carberry Landfill, and
20 that that facility could accept those ashes. And
21 also, I think we heard testimony that, in terms
22 of fly ash, the facility would not store greater
23 than one week's worth of fly ash on site.

24 I would also just note in

1 general that the Department of Environmental
2 Services also contains -- also has an
3 administrative regulation regarding just fugitive
4 dust. I believe that would also govern the
5 storage and removal of the fly ash from this
6 facility, in that the facility would have to
7 control visible emissions of fly ash or the
8 bottom ash as they handled it or processed it on
9 site.

10 So I believe, taking all that
11 into consideration, in addition to the fact that
12 the department has issued a permit with a number
13 of conditions, that the Committee could probably
14 find -- would find that the facility would not
15 have an adverse impact on air quality.

16 MR. IACOPINO: Mr. Chairman,
17 just for the Committee's convenience, the amended
18 air permit application submitted by the Applicant
19 to DES is Laidlaw Exhibit 48. The Division of
20 Environmental Services' final decision on the air
21 permit is Laidlaw Exhibit No. 50. And the
22 depiction of the silo, simulated depiction of the
23 silo discussed by Mr. Wright is Laidlaw Exhibit
24 72.

1 CHAIRMAN BURACK: Thank you.

2 Further discussion of
3 air-quality issues?

4 MR. HARRINGTON: Yeah. This is
5 sort of a -- kind of goes along with what
6 Mr. Wright was saying, but there's a little bit of
7 a different emphasis I just want to make sure
8 people were clear on it.

9 I was the one who brought up
10 the issue of the new EPA regulations. And I read
11 a quote from whatever it was the American Biomass
12 Generating Association, or something to that
13 effect, that said it would be -- could be
14 devastating on the operation of biomass plants.

15 My major concern there was not
16 that if new regulations came out that Laidlaw
17 wouldn't be forced to comply with them, but what
18 would the financial impact of that be. They did
19 not seem to have any idea of what that was going
20 to be. And since the draft regulations are out
21 there, I would just think it would be kind of
22 common sense for a plant that was going forward
23 like this to be having some idea as to if the
24 regulations are finalized as they've been put out

1 for draft, we estimate that that's going to cost
2 us \$1,000, \$10 million, whatever. When the head
3 of the biomass association says it could be
4 devastating, I assume it's going to be closer to
5 the \$10 million, if not more, than the thousand.

6 So that was my main concern in
7 bringing that up. It wasn't that they'd somehow
8 sneak by and you guys wouldn't catch them when
9 the law changed. I'm quite sure you're very
10 thorough at that. But it would just be the
11 ability -- would it have a negative impact on the
12 ability to go forward with financing of the plan.

13 CHAIRMAN BURACK: Thank you.

14 I think we have to
15 understand -- and we've seen this in prior
16 proceedings, and we'll certainly see this in the
17 future, is that both federal and state
18 regulations may change over time. And that is
19 just a way of life. It's one of the costs of
20 doing business, I suppose, for any facility here.
21 And I think it would be difficult for us to do
22 anything other than be aware that those changes
23 can occur.

24 Any other thoughts or comments

1 on this issue of air quality specifically?

2 Mr. Wright, if I may, I gather
3 what you're saying is that it's not that there
4 would not be any impact on air quality, it's just
5 that -- if this facility were to start off, by
6 operating fully in compliance with all existing
7 applicable laws and regulations, the facility
8 would not have an unreasonable adverse effect on
9 air quality.

10 MR. WRIGHT: That is correct.

11 CHAIRMAN BURACK: Okay. Thank
12 you.

13 Anything further on
14 air-quality issues? If not, let's turn then to
15 issues of water quality and the question of
16 whether there would be an unreasonable adverse
17 effect on water quality as a result of this
18 project being constructed.

19 Mr. Stewart, do you want to
20 take this one up?

21 DIR. STEWART: I will take this
22 one.

23 CHAIRMAN BURACK: Thank you.

24 DIR. STEWART: Thank you,

1 Mr. Chairman.

2 With regard to water quality
3 first, I'll be referencing Exhibits 46 and 47
4 which contain the department's proposed
5 site-specific or project-specific conditions for
6 this particular project.

7 There's really two categories
8 of water-quality concerns for this sort of
9 project. The first is processed water, which in
10 this case is cooling water. In this case, the
11 proposal is to take the water from the city of
12 Berlin waterworks, which has the capacity to
13 provide this water, and then discharge to the
14 Berlin sewer system. The sewer system discharge
15 is regulated by the Department of Environmental
16 Services.

17 The department reviewed the
18 Applicant's sewer connection permit application
19 and also the Applicant's industrial wastewater
20 and direct discharge request. These both were
21 found to be acceptable because the City has the
22 capacity to receive this wastewater, which
23 includes a couple of thousand gallons of domestic
24 wastewater plus cooling water, 211,036 gallons

1 per day average; and about 302,534 maximum is
2 what's approved under the industrial wastewater
3 and direct discharge.

4 MR. IACOPINO: I'm sorry. What
5 was the second number?

6 DIR. STEWART: 302,534. It's
7 the maximum daily processed flow that's been
8 approved.

9 I should note that the
10 discharge to the city of Berlin sewer system
11 is -- or would be the preferred alternative, in
12 theory. The other alternative would be a
13 straight thermal discharge to the river. This
14 provides a buffer, in terms of the effects on the
15 river. So it's a very positive option as
16 compared to the alternative.

17 And with regard to the
18 processed water discharges, again, there are
19 conditions recommended in Exhibit 46 with regard
20 to the sewer connection permit, and 47 with
21 regard to the industrial wastewater and direct
22 discharge.

23 And basically, if the sewer
24 connection is installed in accordance with DES

1 regulations and then operated in accordance with
2 the city's sewer-use ordinance, this will have
3 little or no environmental impact, and not an
4 adverse impact.

5 The other category of issues
6 are site development issues. And with regard to
7 that, there are two department reviews and
8 permits. One is a site-specific or a terrain
9 alteration permit. The Applicant's application
10 was reviewed. And in Exhibit 46, there are
11 contained alteration of terrain recommended
12 permit conditions.

13 In essence, the site impacts
14 are about 37.81 acres, in terms of the contiguous
15 disturbance area with regard to the alteration of
16 terrain permit. The project is proposed to be
17 done in accordance with DES standards. And if
18 that happens, then the activity should not cause
19 or contribute to any violations of surface water
20 quality standards; hence, there would be no
21 adverse water quality impacts.

22 With regard to the Shoreland
23 permit, this is required because impacts occur
24 within 250 feet of the high water level of the

1 Androscoggin River. The actual effect of this
2 project relative to historic activity on the site
3 is to actually reduce the impervious surface area
4 within the 250-foot zone. In theory, going
5 forward, this should result potentially in an
6 improvement in water quality, because that's the
7 purpose of reducing impervious area.

8 Again, there are permit
9 conditions in Exhibit 46 which should ensure, so
10 long as those conditions are implemented,
11 particularly with regard to erosion and siltation
12 controls, that there will be no adverse
13 water-quality impacts from the project.

14 CHAIRMAN BURACK: Thank you for
15 that overview.

16 Questions, comments,
17 discussion of water quality issues?

18 Director Muzzey.

19 DIR. MUZZEY: Given that the
20 community seems to have a high interest in
21 building the riverwalk, I'm just wondering whether
22 the permit review for comprehensive shoreland
23 included the construction of that walk or whether
24 that would be a separate permit and a separate

1 review?

2 DIR. STEWART: You know, I'm
3 not... it must have been included in the review,
4 because I'm reviewing -- I'm looking at a draft
5 plan of February 2nd, 2010, that included the
6 riverwalk. But I will check on that.

7 DIR. MUZZEY: Okay.

8 CHAIRMAN BURACK: If I may, I
9 do recall some discussion. This may be in the
10 testimony of Ms. Laflamme. This may have come up
11 in a question as to what type of surface was going
12 to be used. And I think she made the statement
13 that they did not intend to use any kind of
14 impervious surfaces -- that is, any pavement.
15 It's all going to be stone or some other kind of
16 pervious material for the path.

17 DIR. STEWART: Yeah. If it's a
18 riverwalk that is not paved, a certain impermeable
19 paved surface, then it would not be an issue under
20 the Shoreland Protection Act.

21 DIR. MUZZEY: Okay. Thank you.

22 CHAIRMAN BURACK: Mr. Stewart,
23 I believe we heard some testimony on this; that,
24 although this is not a subject of state

1 regulation, there is a federal requirement for
2 some form of, again, a federal permit under the
3 Clean Water Act for stormwater management, at
4 least during construction? Do you have any.

5 DIR. STEWART: Yes. This sort
6 of project, because it has more than an acre of
7 impact, in terms of the disturbed area, would fall
8 under a stormwater general permit of the
9 Environmental Protection Agency. The conditions
10 of that are -- it's basically a notification of
11 the Environmental Protection Agency and then a
12 commitment to comply with standards, and at which
13 time, essentially, the Applicant would have the
14 permit.

15 The net result of that is
16 that -- the bottom line is that compliance with
17 the terrain-alteration permit conditions and the
18 Shoreland Protection Program permit conditions
19 will result in compliance with the federal
20 stormwater general permit also, so long as that
21 notification occurs.

22 CHAIRMAN BURACK: And would
23 there be ongoing stormwater management
24 requirements, do you believe, for a facility of

1 this kind? I'm not sure if we heard any specific
2 testimony on that. I know that there are
3 various -- under the -- there's both the
4 construction general permit, correct, and that's
5 what you're referring to during the construction
6 phase?

7 DIR. STEWART: Right. Under
8 the EPA, right.

9 CHAIRMAN BURACK: Under EPA,
10 Clean Water Act. But in terms of ongoing
11 operation of this facility, I don't recall that
12 we've heard any testimony or inquired as to
13 whether this facility is subject to a -- because
14 it falls under a specific standard industrial
15 classification, or SIC code, whether it has an
16 ongoing stormwater management obligation.

17 DIR. STEWART: Yeah, there
18 would be, again, a general permit for industrial
19 operations. I believe this would qualify and
20 would fall under that requirement also.

21 CHAIRMAN BURACK: Thank you.
22 Other questions or discussions relating to water
23 quality? Again, we'll have a further discussion
24 about the site investigation issues in a moment

1 here. But just with respect to water quality, in
2 terms of surface water issues and wastewater
3 issues, anything further on these?

4 (No verbal response)

5 CHAIRMAN BURACK: Are there
6 any -- in addition to the conditions that we
7 discussed yesterday, Mr. Stewart, if we were to
8 issue a certificate, are there any additional
9 conditions that you can think of at this time that
10 would be appropriate for us to consider to address
11 at the end in this issues?

12 DIR. STEWART: The one point
13 which we discussed during deliberations was having
14 the environmental monitor, who would be on site,
15 also do a screening of soils that are excavated
16 because of the concern that was raised with regard
17 to the potential for soils that may be
18 contaminated with oil or hazardous materials from
19 historic practices.

20 CHAIRMAN BURACK: Thank you.
21 Is there anything further then
22 on this topic?

23 (No verbal response)

24 CHAIRMAN BURACK: All right.

1 Thank you.

2 Let us turn then to the next
3 category here under this section of the statute,
4 which is the natural environment. And I think
5 there are probably a number of things that we
6 could discuss here, but perhaps the most
7 significant issues, beyond what we've already
8 talked about, would be impacts to wildlife or
9 other effects on habitat.

10 And Dr. Kent, I don't know if
11 you have any thoughts on this set of issues for
12 us.

13 DR. KENT: The Applicant
14 contacted the Natural Heritage Bureau at DRED.
15 The species that were in our records are not in
16 conflict with the project. There was a sighting
17 of a bald eagle along the river, and the Applicant
18 has agreed not to remove trees within 50 feet of
19 the river. Another record a common nighthawk,
20 there's been no recent records. We don't
21 anticipate there's any conflict with the project
22 as proposed.

23 As you know, the site is
24 industrial. Plants are not an issue on the site.

1 So, from a natural heritage standpoint, both
2 state and federal perspectives, there were no
3 issues for the site.

4 Probably the trickier issue,
5 which the Applicant doesn't have a direct
6 responsibility for, is the potential for
7 impacts -- we kind of touched on this issue about
8 forestry practices in quite a bit of detail
9 yesterday. The Applicant has done a good job of
10 trying to address this issue by developing
11 procurement practices which are precedent for the
12 industry. And I guess the rest of it is up to
13 the Department of Resources and Economic
14 Development on this.

15 The procurement practices are
16 a good start. I think we would accept those as
17 they are if we go forward with the certificate,
18 and would rely on our partnerships with the
19 forestry industry and what have proven to be
20 non-industry citizens who feel free to call our
21 department whenever necessary to address what we
22 would refer to here as off-site potential impacts
23 on the natural environment.

24 CHAIRMAN BURACK: Thank you.

1 Other discussion?

2 Mr. Harrington.

3 MR. HARRINGTON: Yeah. As I
4 said before, I think on this, a lot of the natural
5 environment was already covered when we looked at
6 the orderly development and we got into the whole
7 wood basket issue.

8 And I guess, just for the
9 record, I'd restate my position here, that we had
10 testimony brought forward that there would be --
11 when the mills were up and running, the total
12 amount of wood being harvested would at least be
13 as much as would be harvested with the addition
14 of the Laidlaw plant. And that would, I guess,
15 assume that the existing facilities, other
16 existing facilities stayed open.

17 So, from that point of view,
18 we're not increasing the wood harvest. We may be
19 changing where the wood ends up. But as far as
20 the effect on the forest, whether a log or tree
21 gets cut down and gets turned into lumber or pulp
22 or it gets burned, it really doesn't make any
23 difference from the perspective of how it affects
24 the forest.

1 So I think we've been able --
2 the Applicant's been able to show that their
3 additional consumption of wood would only bring
4 it up to but not surpass what was done in the
5 past. And apparently, no one raised any point
6 that in the past there was an unreasonable
7 adverse effect on the natural environment by that
8 level of wood being harvested.

9 So I would think that the
10 Applicant has met its burden in this case.

11 CHAIRMAN BURACK: Further
12 discussion or questions on this issue?

13 Commissioner Ignatius.

14 CMSR. IGNATIUS: Thank you. I
15 don't see anything related to environmental
16 impacts on the site itself. As we've all said,
17 this is already a highly disturbed area, an
18 industrial site. It would have no unreasonable
19 adverse effects by being rehabbed and operational
20 again, and actually some benefits to being cleaned
21 up. And the riverwalk is, you know, a benefit as
22 well.

23 To me, the only real
24 environmental question here is the demand on wood

1 supply that this will call for, because it is
2 such a large facility. And the comment yesterday
3 from Dr. Kent was, and I've been thinking a lot
4 about, if there's a risk of people taking too
5 much wood or taking it in an inappropriate way,
6 that risk exists today with a number of biomass
7 facilities and other wood uses, such as pellets
8 and other wood products.

9 The real key, as he stated it
10 yesterday, was to have standards in place.
11 Whether they're voluntary or they're enforceable
12 by some document wasn't so much important as
13 really setting out what the expectations are for
14 the responsible harvesting of that wood.

15 And as we've heard here, there
16 is a real strong step forward in designing
17 sustainability standards, and the wood procurer,
18 who will have the bulk of the responsibility to
19 produce -- to deliver the wood to the project,
20 has agreed to live by. That sounds like
21 something that hasn't been in place for existing
22 biomass plants. If so, it's been on an ad hoc
23 basis that I don't think has been part of any
24 kind of state policy. And the state has been

1 looking for ways to increase the sustainability
2 standards and thinking on the part of people who
3 are out in the woods. And so I guess I, based on
4 that, would find there's no adverse impact to the
5 environment from this project.

6 I have to say it's extremely
7 difficult to make any sense of the evidence that
8 we've been given, and very frustrating. I don't
9 think anyone's being intentional in trying to
10 obfuscate the situation. It just seems like what
11 I thought was a fairly straightforward question
12 of wood supply turns out to be one of the most
13 complicated things that we've seen. And so the
14 high degree of swing in the estimates, the number
15 of variables that keep shifting on you between
16 impacts of price, impacts of other products, the
17 impacts of other uses outside of the region that
18 have an impact on how much wood is available and
19 how much wood is economic to recover makes it
20 extremely complicated.

21 But I don't see any way to get
22 any more clarity. We could ask for more and more
23 and more studies, and it doesn't seem like any of
24 them will have the absolute answer that would

1 answer the environmental questions about wood
2 supply, not the economic questions.

3 So, on balance, I guess I
4 conclude that I can't see any adverse --
5 unreasonable adverse impact on the environment
6 because of wood issues, although it will be a
7 tremendous demand on wood in the region and
8 throughout -- in the North Country and throughout
9 the region that I think has got to be looked at
10 carefully. And I'm glad that there's some
11 monitoring provisions in there for evaluating the
12 questions of wood supply as it goes forward.
13 Thank you.

14 CHAIRMAN BURACK: Thank you.
15 Other discussion or comment on
16 this issue?

17 I might just observe that what
18 strikes me in some ways as being the most
19 precedential aspect of this proposed
20 sustainability condition -- that is, the
21 stipulation between the counsel for the public
22 and the Applicant -- is that effectively, and
23 perhaps for the first time, we're seeing an
24 owner -- an owner of a facility, a buyer of wood,

1 accepting some responsibility for how our forests
2 are going to be managed long term.

3 Now, one can say that the
4 paper mills used to do this in the era when they
5 owned a lot of their own land. And perhaps they
6 did. So maybe this is just a shift back without
7 a shift in ownership occurring. But, certainly,
8 it is a change in philosophy of a non-landowner
9 to recognize that they have a real stake in how
10 these lands are, in fact, going to be used and
11 managed for the long term. And perhaps that's
12 what's most significant about this.

13 And like you, Commissioner
14 Ignatius, I agree that, while certainly this is
15 going to be a change in the way our forests have
16 been used in recent years, and perhaps an
17 increase or perhaps not in the total amount of
18 wood being harvested, it's difficult to see that
19 there would be an unreasonable adverse effect.
20 And if anything, if the sustainability conditions
21 work as we would all hope them to work, we may
22 actually see an overall improvement in how our
23 forests are managed and in how others within the
24 industry manage their lands, whether they're

1 supplying this particular facility or not.

2 Other thoughts or comments on
3 this issue?

4 Dr. Kent, I do have a question
5 for you, and that is, are there any -- first with
6 respect to the issues of wildlife -- that is, you
7 mentioned, I believe it was a nighthawk, although
8 you said there was no recent sighting there, but
9 a bald eagle. Are there any particular
10 conditions that you would think we should be
11 considering, if we were to issue a certificate,
12 to address that set of issues?

13 DR. KENT: The only condition
14 we should be concerned about is the one we've
15 already agreed to, which is to leave large trees
16 within 50 feet of the river.

17 CHAIRMAN BURACK: Thank you.
18 And with respect to the issue of wood supply and
19 the stipulation that's been entered into, is it
20 your sense, or is it the sense of any others here,
21 that there would be some modifications that we
22 might want to consider to that stipulation? And
23 again, that stipulation -- do you have an exhibit
24 number for that, Mike?

1 MR. IACOPINO: Exhibit 76.

2 CHAIRMAN BURACK: I think
3 it's -- that's right. It's Exhibit 76 of the
4 Applicant's. And again, we don't have to have a
5 full discussion of this now. I just want to see
6 if there are any initial thoughts on this.

7 Mr. Stewart.

8 DIR. STEWART: I have more of
9 a -- maybe it's a question for the attorneys in
10 the group.

11 Under procurement standards
12 and practices, there are several places where
13 this word exists, but in No. 6, LBB will
14 incorporate into its procurement plan a provision
15 requiring that preference be given to suppliers,
16 et cetera.

17 I'm not sure what the test
18 is -- you know, the pass/fail test is for
19 "preference." I mean, what's a good-faith
20 effort, and how is that going to get -- I guess
21 there are reporting and verification conditions
22 here, too. I'm not sure they're robust enough
23 perhaps with regard to this.

24 But anyway, that's my

1 question. What's the pass/fail test on
2 'preference'? I mean, there's obviously a
3 good-faith effort. But how are we going to
4 measure that five years from now if all the wood
5 is backhauled to the facility or, you know,
6 something of that sort? So I just raise the
7 question. And I'm not sure what the answer is.

8 CHAIRMAN BURACK: Thank you.

9 I'm going to suggest that,
10 again, if we get to a point where we determine
11 that we will issue a certificate, we can have a
12 further discussion of this issue as we discuss
13 whatever conditions we may choose to adopt.

14 Any other discussion of this
15 set of issues?

16 Yes.

17 DIR. MUZZEY: I can just add
18 that the Fuel Supply Agreement does address the
19 issue of preference, and we can talk further about
20 that if and when the time comes.

21 CHAIRMAN BURACK: I think the
22 issue with respect to the Fuel Supply Agreement is
23 that it's a confidential agreement. And so if
24 we -- if that's something we really want to be

1 able to discuss further, we would need to go into
2 a non-public session for purposes of doing that.
3 Okay?

4 All right. If there's no
5 further discussion of this issue, what I would
6 like to do is have us take about a ten-minute
7 break and return here at approximately 25 minutes
8 of eleven.

9 (Brief recess taken).

10 CHAIRMAN BURACK: Let us resume
11 our review of the evidence here. And I just want
12 to inquire as to whether there are any further
13 discussion on any of the air or water quality
14 issues that we've been reviewing or natural
15 environment issues.

16 Okay. Seeing none at this
17 time, let's turn then to the next provision of
18 the statute, which relates to public health and
19 safety. And we'll come back then to a discussion
20 after the public health and safety discussion of
21 the issues relating to site contamination and
22 groundwater issues. But why don't we do the
23 public health and safety piece first here.

24 MR. JANELLE: Okay. I can

1 introduce that, Mr. Chairman.

2 First of all, regarding
3 construction and operation of the facility -- and
4 I'm referring to Exhibit 1, Page 97 of the
5 application -- the Applicant has stated that the
6 facility will be designed and managed to ensure
7 maximum safety for employees and the surrounding
8 community and that all designs and equipment for
9 the facility will be in accordance with good
10 engineering practice and the latest editions and
11 standards and regulations for applicable
12 government agencies, governmental agencies and
13 engineering associations, such as OSHA, the
14 National Electric Manufacturers Association, the
15 U.S. Department of Transportation, and the
16 American Society of Mechanical Engineers.

17 The Applicant also stated that
18 there will be a significant -- obviously, there
19 will be a significant amount of wood stored at
20 the site and that fire safety and protection will
21 be provided through the implication of the
22 National Fire Protection Association
23 specifications, and also a complete on-site
24 fire-protection system that will be installed.

1 And, again, in the application
2 on Page 97, a little more about the facility's
3 fire-protection system. It will be designed to
4 NFPA specifications. Its primary source of fire
5 suppression will be the municipal water system,
6 and it will be backed up with a diesel-powered
7 fire pump that will draw from a cooling tower
8 sump in the event the municipal system is not
9 sufficient or operating.

10 Also, I'll refer to Berlin's
11 Exhibit 5. They did touch on safety issues
12 regarding trucking in and out of the facility.
13 On Page 6, No. 2, Laidlaw's committed to work
14 with the City to develop truck traffic safety
15 routing procedures and policies and to establish
16 the most appropriate routing for trucks traveling
17 to and from the plant within Berlin.

18 Also No. 3 on that same page,
19 Laidlaw has stated they would develop a truck
20 delivery policy that shall be communicated to all
21 truck drivers for safe, environmentally conscious
22 truck operation within the city of Berlin.

23 And also in that same
24 document, on Page 9 -- this refers to the

1 fire-suppression issue -- Laidlaw has committed
2 to regularly consult and inform the city fire
3 department on its emergency safety procedures and
4 shall maintain and submit to the city's emergency
5 planning committee and fire department material
6 safety data sheets for any hazardous materials
7 stored at the facility.

8 CHAIRMAN BURACK: Thank you.

9 Further discussion or
10 questions regarding public health and safety
11 concerns?

12 Commissioner Ignatius.

13 CMSR. IGNATIUS: Thank you.

14 This is something that we'll have to discuss more
15 if we get to the point of wanting to issue a
16 certificate with conditions, and that's the
17 question of the role of the City of Berlin in
18 monitoring or taking disputes on any of the issues
19 that really would involve the City itself: Noise
20 issues, hours of trucks, the fire system.

21 As I read the provisions of
22 the City of Berlin's conditions, there's no real
23 mechanism set up for a community involvement to
24 hear or resolve disputes, and there's an

1 expectation that the SEC will handle those. And
2 that is true; ultimately, things do come back to
3 us if there's issues. But I think it's not a
4 very efficient process to assume that every
5 dispute start with the SEC.

6 And I don't know, Mr.
7 Chairman, if we have ever imposed a community --
8 kind of a community panel, community board, to
9 manage these sorts of issues. Often that comes
10 to us as a request, a condition that a
11 municipality would ask to be included in a
12 certificate. But I think it would be helpful
13 here on these kinds of issues. And we can
14 discuss that more if we get to that point later
15 today.

16 CHAIRMAN BURACK: Thank you for
17 raising that issue. Let's put that in our list of
18 items or issues that we will come to if we make a
19 determination that we would issue a certificate.

20 Other discussion of the health
21 and safety issues? One aspect of health and
22 safety that we did hear some testimony on related
23 to noise issues. And I don't know if somebody
24 would be able to provide some guidance or some

1 overview for us on that. Is that something you
2 could do, Mr. Janelle?

3 MR. JANELLE: I can do that,
4 Mr. Chairman.

5 Again, the Applicant has
6 stated that the facility as proposed will
7 generate 70 decibels or less during the daytime
8 at the property line, and 60 decibels or less at
9 night at the property line. And these
10 requirements are also spelled out in, again, the
11 City's stipulations, Berlin No. 5, where they've
12 spelled out those decibel requirements and
13 specific times when those would be met. And
14 they've also addressed truck back-up systems.
15 They've asked Laidlaw to look at those warning
16 systems and see if there's other devices other
17 than audible devices that could be used for truck
18 back-up systems, particularly at night.

19 There's also provisions for
20 site chipping on Page 3 of that document, where
21 it states that chipping will be -- "shall be
22 mitigated by having equipment enclosed and
23 operated in a sound-protected enclosed building."

24 There's also provisions for

1 idling, where they've called out New Hampshire's
2 Rules on Environment, Page 1101.05, that
3 prohibits idling of diesel-powered motor vehicles
4 for more than five minutes when temperatures are
5 above 32 degrees.

6 They've also, in this same
7 document on Page 4, there's discussions or
8 restrictions for queuing on Hutchins Street. And
9 the site has made provisions where trucks can get
10 onto the site instead of having to queue on
11 Hutchins Street. And it states in this
12 provision... prohibit any driver found to have
13 received three or more violations for queuing on
14 Hutchins Street within a 12-month period from
15 making deliveries to the site for six months from
16 the date of the third citation. Laidlaw agrees
17 to work with drivers in order to prevent queuing
18 on Hutchins Street by opening the facility's
19 interior gate, in the event that more than 16
20 trucks are waiting. So they've made provisions
21 to minimize the queuing on Hutchins Street.

22 And also, wood fuel
23 deliveries. Laidlaw -- this is on Page 5 of the
24 Berlin document as well. Laidlaw would not allow

1 wood deliveries between the hours of 9:00 p.m.
2 and 5:00 p.m. on weekdays. Laidlaw shall not
3 allow wood fuel deliveries before 8:00 a.m. or
4 after 6:00 p.m. on Saturdays.

5 CHAIRMAN BURACK: The initial
6 one you said of 9:00 p.m. and you said 5:00 p.m.
7 You mean 5:00 a.m.; correct?

8 MR. JANELLE: I'm sorry.

9 CHAIRMAN BURACK: So, from 9:00
10 at night until 5:00 in the morning there will be
11 no wood deliveries.

12 MR. JANELLE: Yes. Yes.

13 CHAIRMAN BURACK: Thank you.

14 MR. JANELLE: And it states in
15 that same provision there will be no wood fuel
16 deliveries allowed on Sundays.

17 CHAIRMAN BURACK: So there was
18 also some testing done of noise levels. And I
19 believe we had some questioning on the record
20 regarding noise levels, because it did occur to
21 some of us who have sat on other proceedings here
22 in the Site Evaluation Committee that the level of
23 expected noise or acceptable noise was in excess
24 of what we had seen, for example, for gas

1 pipelines regulated by the Federal Energy
2 Regulatory Commission. But what we've learned is
3 that the background noise here at this site is, in
4 fact, in excess of those FERC standards -- not
5 that FERC standards would be applicable here. But
6 I think the important point to understand here is
7 that there has been evaluation of these noise
8 levels. And the City and City officials and this
9 FSEC group that helped to formulate these
10 stipulations that we see before us in Berlin
11 Exhibit 5 have certainly considered the impacts
12 that noise from the facility could have on the
13 community and have taken what they collectively
14 believe to be appropriate steps to control and
15 mitigate those noise issues.

16 Other comments or thoughts on
17 this set of concerns, health and safety?

18 I would also note that we had
19 a little bit of discussion of ash earlier. Not
20 so much dust, but ash. I would note that there
21 are also here a number of provisions on Pages 4
22 and 5 of the City's proposed stipulation. Again,
23 this is City Exhibit 5, which relate to
24 management practices to prevent fugitive dust

1 generally at the site, including that generated
2 by vehicles, coming off of the storage piles,
3 coming off of material transfer points, as well
4 as coming off the roadways. So, it appears that
5 there has been a lot of consideration given to
6 ensuring that residents of the community are not
7 subjected to dust, whether it be wood dust or
8 sand or other small particles from the facility.

9 Mr. Wright, there are no
10 specific air regulations that would govern the
11 operation of such facility, in terms of
12 generation of dust and that sort of thing?

13 MR. WRIGHT: There is a term.
14 I have to go back and check specifics. There's
15 general provisions about controlling dust in our
16 administrative rules. It may be limited to
17 construction activities and trucking activities.
18 But I can certainly go back and review that.

19 CHAIRMAN BURACK: But the
20 facility, because they are on state regulations,
21 if those regulations are written such that they
22 are applicable to this facility, the facility
23 would have to comply with them.

24 MR. WRIGHT: Absolutely. And I

1 think those regulations would be generally
2 consistent with what's been negotiated here with
3 the City, in terms of controlling dust from those
4 types of activities. So this seems to be fairly
5 consistent with what those rules would require,
6 anyways.

7 CHAIRMAN BURACK: Thank you.

8 CMSR. IGNATIUS: Mr. Chairman.

9 CHAIRMAN BURACK: Commissioner
10 Ignatius.

11 CMSR. IGNATIUS: Thank you.

12 One other health and safety
13 issue that relates to emissions is the commitment
14 on the part of the developer and the wood
15 procurer, that no construction or demolition
16 debris be mixed in with the fuel supply. That's
17 been a contentious issue for some other
18 bioplants. And the commitments are -- seem clear
19 in the documents that it's not now and will never
20 be allowed to be an acceptable fuel source.

21 So I think that's another good
22 provision that leads to a conclusion that there
23 isn't a health and safety risk with this project.

24 CHAIRMAN BURACK: Thank you.

1 Any other discussions of any
2 health or safety issues relating to the proposed
3 project?

4 (No verbal response)

5 CHAIRMAN BURACK: Okay. Thank
6 you.

7 I'd like to come back to an
8 issue that we talked about yesterday. We've
9 touched on it briefly today, and I want to spend
10 a little more time on it, relating to the site --
11 issues of historic site contamination and how
12 those issues might be addressed over time.

13 There has been an assertion
14 made by Clean Power Development in its
15 post-hearing memorandum that the Committee did
16 not pay adequate attention to that issue. I
17 would strongly disagree with that assertion and
18 the legal conclusions drawn by Attorney Rodier in
19 that respect. And I think it will be helpful to
20 again provide an overview of, in fact, the
21 significant data that we do have on this issue
22 here.

23 First, it's important to
24 recognize that this is a site with a significant

1 industrial history. As a consequence, just
2 because of the way, historically, operations
3 occurred in the industrial segment of our
4 economy, there is some contamination on the site
5 today, as well as on abutting, or what we might
6 call up-gradient properties -- that is,
7 properties up river or, from a groundwater
8 standpoint, hydrologically -- or hydraulically up
9 gradient of this site.

10 The State of New Hampshire has
11 been involved through the Department of
12 Environmental Services, and the work of the
13 attorney general's office, has been involved with
14 the issues at this site for a number of years.
15 And one of the documents that we heard extensive
16 questioning about relates to the covenant not to
17 sue that was issued by the State of New Hampshire
18 to the group of companies that at the time
19 were -- included Fraser, NH LLC, GNE LLC and the
20 Mount Carberry Landfill, LLC. I'm referring to
21 Public Counsel Exhibit 1.

22 This is, again, an agreement
23 that -- it's important to read in full. It was
24 entered into May 30th of 2002. And, in essence,

1 what occurred is that at the time that the
2 bankruptcy proceedings relating to the James
3 River Paper Company were being sorted out --
4 actually, it was Pulp and Paper of America was
5 the entity at the time, I believe. There was a
6 recognition that environmental issues on the site
7 would need to be addressed, such that they
8 continued to be matters for which parties would
9 take responsibility -- that is, they would not
10 simply be discharged in bankruptcy -- at least
11 that's my understanding of the background here.

12 Mr. Stewart, you may know
13 differently. Is that consistent with your
14 recollections?

15 (No verbal response)

16 CHAIRMAN BURACK: And so this
17 agreement was entered into, whereby the State
18 essentially provided to the parties willing to
19 take ownership of the property a covenant not to
20 sue, whereby they would not be held liable, in
21 effect, for any pre-existing contamination on the
22 site. And again, the specifics of the covenant
23 not to sue were spelled out in Section 2, starting
24 on Page 5 of this agreement. And again, what it

1 says is, "The State shall not take judicial or
2 administrative action against any of the
3 purchasing entities under federal, state, or local
4 laws, rules, regulations, ordinances, writs,
5 awards, decrees, stipulations, or under the common
6 law for any civil or administrative liability with
7 respect to or arising out of existing
8 contamination, including, but not limited to,
9 liability for monetary or natural resource
10 damages, statutory penalties, injunctive and other
11 forms of equitable relief, or reimbursement,
12 remedial, or response costs."

13 And "existing contamination"
14 is a defined term under the document. But in
15 essence, it's the contamination that existed
16 prior to the closing, but would not include any
17 stored, processed chemicals and that sort of
18 thing at the time of the closing. But there are
19 a number of elements that are expressly laid out
20 as being covered by this covenant not to sue.
21 And again, these are all specified in Section 2B
22 of this agreement.

23 The State does reserve certain
24 rights under Section 4 of the agreement -- that

1 is, the covenant not to sue is without prejudice
2 to the State's right to pursue action against the
3 purchasing entity or any party that's entitled to
4 the benefits for such things as the release of
5 additional pollutants or contaminants, other than
6 the existing contamination that occurs at the
7 property after the date of closing, or claims
8 based on negligent or reckless aggravation of
9 existing contamination by a purchasing entity or
10 its assigned, or claims based on criminal
11 liability of a purchasing entity or its assigned.

12 It's also important to
13 recognize that, if the State would pursue claims
14 under this reservation of rights, the negligent
15 or reckless aggravation of the existing
16 contamination by the purchasing entity must be
17 proved by the State -- that is, the burden shifts
18 to the State to show that the party actually was
19 negligent or reckless in aggravating the
20 pre-existing contamination.

21 And the liability, if the
22 State were to be able to pursue those claims to
23 make such proofs, the liability of the purchasing
24 entity would only extend to the damages or harm

1 that's actually attributable to the aggravation
2 of the existing contamination.

3 It's also, I think, important
4 to recognize that under Paragraph 3 of this
5 agreement, the State of New Hampshire, actually
6 by eminent domain, ultimately took ownership of
7 the bed of the river where there was
8 contamination resulting from what's known as the
9 chloro-alkali site, which is on a property,
10 again, up river from the existing Fraser, or now
11 Laidlaw or PJPD property. And that site, the
12 chloro-alkali site, which involves mercury in
13 bedrock, as well as toxin issues, that site is
14 being addressed by the New Hampshire Department
15 of Environmental Services and the U.S.
16 Environmental Protection Agency under the
17 provisions of what's known as the Comprehensive
18 Environmental Response Compensation & Liability
19 Act, also known as CERCLA. Some of us more
20 commonly refer to it as the "Super Fund." That
21 is a national priority list site under that
22 statute, and it is being addressed under that
23 statute. And that responsibility for addressing
24 that contamination rests with the State and the

1 U.S. EPA.

2 So, this agreement is
3 assignable, and it is applicable to its assigns.
4 My understanding is that, while there were some
5 issues relating to whether or not all of the
6 conditions were satisfied, it appears to be the
7 case that the covenant is still in full force and
8 effect, as it pertains to the Applicant and the
9 related entities here at this site.

10 There is a related
11 condition -- at least that is my understanding at
12 this time. And I believe we saw a letter from
13 the -- I'm sorry. That is my understanding at
14 this time.

15 There is a letter from
16 Attorney Roth to Attorney Needleman that's dated
17 August 27, 2008, providing some assurances with
18 respect to North Atlantic Dismantling's
19 compliance with environmental requirements at the
20 site. And again, that's Public Counsel
21 Exhibit 4.

22 There is a related issue here
23 that was also referenced in the covenant not to
24 sue, and that is the agreement with U.S. EPA

1 relating to what's known as the T1 site
2 remediation agreement. This is the transformer
3 area where there were some PCBs or
4 polychlorinated biphenyls in the soils. And
5 during our site visit, we did walk past that
6 location of that -- of the T1 area. And we have
7 been informed that they intend to comply with the
8 requirements of that agreement with EPA and that
9 they do not expect to disturb that area.

10 So, this covenant not to sue
11 will continue to be effective and to apply to the
12 site and to site conditions.

13 It is, I think, also worth
14 just pointing out that -- and this is addressed
15 in Public Counsel's Exhibit 3, which is the
16 agreement for the treatment of Dummer -- that's
17 D-U-M-M-E-R -- Yard leachate, as well as Public
18 Counsel Exhibit 5, which is a letter from Michael
19 Walls, Assistant Commissioner of DES, to Attorney
20 Peter Beeson. And that letter is dated
21 September 20, 2007.

22 I believe we heard testimony
23 and determined that the liabilities associated
24 with this agreement are not liabilities that were

1 acquired by Laidlaw or PJPD in connection with
2 this particular project. And therefore, this
3 particular set of issues, unless others
4 understand differently, my understanding is it
5 would not actually apply to this Applicant.

6 The testimony that was
7 elicited from Mr. Frecker by Attorney Brooks on
8 the afternoon of August 23rd relating to site
9 conditions, I think, demonstrates that the
10 Committee has looked into this issue. And we
11 have received testimony on it. And I think we
12 can have confidence that there are appropriate
13 measures in place to address contamination.

14 Again, the testimony itself on
15 this issue appears on -- starting on Page 9 of
16 this transcript. Again, Attorney Brooks asks
17 Mr. Frecker to review what was known about the
18 site, understanding that there was a -- there had
19 been a series of site investigations done here,
20 including one that predated that covenant not to
21 sue. I believe that study is referenced in the
22 covenant not to sue. But then there was a
23 further site investigation study done of the site
24 by parties that -- ESS, I believe it was, on

1 behalf of Laidlaw.

2 So the question that is asked
3 by Mr. Brooks on Page 9 of the deposition is,
4 quote, You don't plan on doing anything
5 significant at this point in terms of disturbing
6 any of the contaminants in the groundwater. In
7 other words, when we did the plant walk, you
8 discussed the fact that, because there's an
9 existing structure you won't have to do as much
10 drilling to get to bedrock, that kind of thing.
11 So my understanding is that, even with the
12 drainage swales and retention basins and things
13 like that, that you're not going to really
14 puncture into contaminants that much; is that
15 correct?

16 Mr. Frecker's response was,
17 "That is correct. The data we have shows the
18 groundwater levels at the site exist 10 feet or
19 more below the surface. And the deepest
20 foundations that are contemplated at this point
21 are about 8 feet. Even if there was some
22 encountering of groundwater, the levels of
23 organics that are found are not particularly
24 difficult to handle. They're relatively

1 low-part-per-million-type levels of very readily
2 treatable organics that can be well managed."

3 Again, Attorney Brooks went on
4 to ask regarding whether the company envisions
5 doing any additional monitoring or testing of
6 groundwater, including determining the geographic
7 scope or whether that work would be limited just
8 to the Laidlaw site itself. And Mr. Frecker's
9 response was twofold. First, he explained -- and
10 again, this is on Page 11 of the transcript of
11 this date, August 23rd, afternoon. He says,
12 "Independent from what the City may do, and
13 Laidlaw may assist the City in doing, we have
14 committed to, in the application, conducting the
15 necessary studies, subsurface studies in the
16 areas where there would be intrusive activities,
17 excavations of any size, and properly
18 characterizing the soils, sampling the soils and
19 materials in those areas to make sure that all
20 those materials are properly handled. So there
21 will be a subsurface investigation to some degree
22 to assure that all of the construction activity
23 occurs properly without causing any harm to
24 public safety."

1 He goes on to say, "With
2 regard to the stipulations that have been
3 negotiated with the City, the City has talked to
4 at least one consultant about a preliminary scope
5 of work which would occur in multiple phases,
6 which would include soil and groundwater
7 sampling, both in the location of the project,
8 focused in the area where the project would be
9 built initially, and expanded to other portions
10 of the site itself."

11 He goes on to say, "I believe
12 that that scope, as I characterized it, is a
13 draft scope of work, but at least it sets forth
14 the structure for how those investigations may be
15 conducted." And he goes on to say, "And I should
16 say part of the stipulation is for Laidlaw to
17 provide a significant level of monetary support
18 and cooperation in having that study conducted."

19 If we turn now to the City's
20 Exhibit 5, which is the proposed stipulation
21 between the City and Laidlaw, and look at Page 8
22 and 9, Section 13 of that agreement, what we see
23 is a provision that calls for Laidlaw fully
24 funding a Phase II environmental site

1 characterization dated August 10, 2010, prepared
2 by a company called New England EnviroStrategies,
3 Inc. that's referred to as the scope of work.
4 And that is described as being to investigate
5 subsurface conditions at the site and evaluate
6 possibilities for its redevelopment.

7 And Laidlaw had stipulated
8 what provisions Laidlaw will -- what aspects of
9 what stages of that study Laidlaw will fund up to
10 an amount, it says here not to exceed \$125,000.
11 And there is then a considerable additional
12 discussion of this issue here and how this work
13 would be addressed, recognizing that the City
14 apparently had notified Laidlaw through an intent
15 to sue under the Federal Resource Conservation &
16 Recovery Act -- actually, this was actually
17 addressed to PJPD Holdings, as stated on Page 9
18 here -- that it felt that it had a basis to bring
19 a claim against them if they did not take --
20 undertake certain action or work here at the
21 site. And so, evidently, part of the
22 understanding here is that this work is being
23 funded in order to address those potential legal
24 actions.

1 I think it's important that we
2 understand that all of this work is going to be
3 conducted if the certificate were to be issued
4 here. It is not, in my experience and the
5 experience of the Department of Environmental
6 Services, at all unusual or out of the ordinary
7 for construction activities to be undertaken on
8 one portion of a site, not knowing what the
9 conditions might be on all aspects of a site,
10 particularly under circumstances where there is a
11 covenant not to sue, as exists here. Arguably,
12 the obligation of the property owner seeking to
13 construct a facility there is simply to ensure
14 that in undertaking their construction they do
15 not, again, as specified in the covenant not to
16 sue, they do not -- I just want to get the
17 terminology --

18 MR. HARRINGTON: Excuse me,
19 Mr. Chairman. Could you maybe help out some of us
20 nonlawyers and explain exactly what a covenant not
21 to sue implies so we are all on the same page?

22 CHAIRMAN BURACK: Sure.

23 MR. HARRINGTON: Thank you.

24 CHAIRMAN BURACK: Be happy to.

1 A covenant not to sue, in
2 essence, is an agreement by the government that
3 it will forebear from bringing a claim against a
4 party who would otherwise be liable for, in this
5 case, certain site investigation and clean-up
6 activities. And it's agreeing to forebear from
7 undertaking -- from taking that lawsuit, for
8 example, in exchange for certain consideration
9 that is being provided by the party that's
10 receiving the benefit of the covenant.

11 I believe in the case of the
12 original covenant not to sue that there were
13 certain -- again, certain provisions or
14 conditions that the party was agreeing to enter
15 into, certain things they were agreeing to
16 undertake as a condition of receiving the benefit
17 of that covenant.

18 As a general matter, covenants
19 not to sue have become a pretty common way of
20 approaching these issues under state law, either
21 under our state Brownfield statute, which is
22 R.S.A. 147-F, or generally under the overall
23 enforcement authorities that exist under the law,
24 in the hands of the attorney general, to issue

1 covenants not to sue, to forebear from bringing a
2 claim.

3 But one of the major benefits
4 that the State effectively receives from granting
5 a covenant not to sue is a commitment from a
6 party that they are, in fact, going to come in
7 and redevelop a site and at least address the
8 contamination to an extent sufficient to ensure
9 that the site can be redeveloped in a way that
10 will allow it to be put back into the stream of
11 commerce, put back onto the tax rolls, provide
12 economic benefit to the community, and ensure
13 that the major pathways by which the public might
14 be exposed to contamination and the environment
15 might be significantly threatened are being
16 addressed, even if the site is not completely
17 cleaned up.

18 MR. HARRINGTON: I think that
19 helps quite a bit.

20 CHAIRMAN BURACK: Does that
21 help you?

22 MR. HARRINGTON: So in this
23 case, basically it will allow further development
24 of the site, which otherwise someone would not do

1 because they feel that they would be inheriting
2 any potential problems of pollution from a hundred
3 years ago that was found on the site, and that's
4 too much of a risk for someone to do. Okay.
5 That's explains it.

6 CHAIRMAN BURACK: That's
7 correct. From a policy standpoint, that's the
8 basic underlying principle here.

9 MR. HARRINGTON: Thank you.

10 CHAIRMAN BURACK: So, again,
11 the situation we have here at this site is one
12 where we have testimony that there has been
13 investigation undertaken. There is some known
14 contamination here. The consultant for Laidlaw
15 believes that they will be able to conduct the
16 construction that they need to conduct for the
17 proposed plant without having any impact on the
18 contamination; or to the extent that they do
19 encounter contamination, they believe that they
20 can appropriately address that contamination.

21 And again, in my experience,
22 this is a very appropriate and customary way of
23 addressing these kinds of site contamination
24 issues. I would expect that -- and again,

1 Mr. Frecker's testimony lays this out here, that
2 they will -- perhaps before or as they are
3 undertaking their construction, they will be
4 doing monitoring to determine whether they are
5 encountering any contaminated soil or
6 groundwater. If they do, they would take
7 appropriate measures under applicable laws and
8 regulations to characterize any materials that
9 they might have to excavate, to dispose of those
10 properly, and then, as necessary, to address any
11 groundwater contaminants that they address.

12 And that's the basic process
13 for how these things are handled. But I --
14 again, as I said, I simply cannot accept and do
15 not agree with assertions made by Clean Power
16 Development that, in order for a project of this
17 kind to proceed, or for this Committee to have
18 determined that there would not be an
19 unreasonable adverse effect on air or water
20 quality, that there would have to be an
21 exhaustive study of all aspects of soil or
22 groundwater conditions at the site.

23 I believe that there is
24 sufficient data here for us to have confidence

1 that the work proposed will not have an
2 unreasonable adverse effect. And, if anything,
3 because there are parties prepared to come
4 forward and undertake investigation of the site,
5 that will, in fact, provide a basis and the data
6 that are necessary for further remediation of the
7 site as may be necessary.

8 Mr. Stewart, I don't know if
9 you want to add anything to that?

10 DIR. STEWART: Just one point.

11 As the monitoring occurs, as
12 construction occurs and soil is excavated for
13 various, you know, purposes under what's required
14 for construction, if contamination, either
15 presumably oil or hazardous chemicals, are
16 detected in the soils, there is an obligation
17 for, really, all parties on the site who have
18 knowledge of that contamination to notify the
19 State under various statutes, which I don't have
20 committed to memory anymore. I used to.

21 But the point is that under --
22 there's various statutory requirements to notify
23 the Department of Environmental Services if
24 significant contamination is uncovered. So, in

1 addition to the reservation of rights under the
2 covenant not to sue, there's direct requirements
3 on parties that are involved with the
4 construction to notify the State.

5 CHAIRMAN BURACK: Thank you,
6 Mr. Stewart.

7 Are there other discussions of
8 this issue?

9 Director Muzzey.

10 DIR. MUZZEY: I have just a
11 question. Regarding the T1 PCB site, we don't
12 have a covenant not to sue. We have a different
13 type of document, an agreement for addressing the
14 contamination. Could you explain, again, whose
15 responsibility it is to address that contamination
16 as we go forward and where the Applicant makes any
17 commitments for doing that?

18 CHAIRMAN BURACK: Public
19 Counsel Exhibit 2 is the document that's captioned
20 U.S -- "United States Environmental Protection
21 Agency, Region I, In The Matter of T1 Transformer
22 Area, Burgess Mill Facility, Berlin, New
23 Hampshire, Agreement for Addressing PCB
24 Contamination at the T1 Transformer Area." If we

1 go to the end of the document, we will see that
2 the signatories to the document are Fraser NH,
3 LLC, the Environmental Protection Agency, through
4 EPA Region I, as well as the New Hampshire
5 Department of Environmental Services, by our
6 former assistant commissioner, as well as the
7 attorney general office as signatories as well.

8 And this agreement, just
9 looking for the term in here... yeah, if you look
10 at Page 8 of the agreement, Paragraph 39, what
11 this states is that the provisions of this
12 agreement shall apply to and be binding on the
13 parties and Fraser's successor assigns from time
14 to time, and to any and all officers, directors,
15 employees and agents of Fraser and its successor
16 assigns from time to time.

17 And it goes on to state, "This
18 agreement may be assigned or transferred to
19 successors in title, subject only to compliance
20 by successor owners, with the conditions and
21 obligations set forth herein."

22 It also has a limitation on
23 assignability to any person, which, prior to
24 Fraser's acquisition, acted as an owner or

1 operator, or in any similar capacity with respect
2 to Berlin or Gorham Mills. And it goes on to
3 say, "Under no circumstances shall this agreement
4 be interpreted to relieve any person of
5 environmental liability under any state or
6 federal statute or any common law doctrine if
7 that environmental liability is based on the
8 person's actions or status prior to the
9 November 2, 2001." Again, simply making clear
10 that parties who had liability prior to the date
11 of this agreement would continue to have
12 liability and would not be absolved of that
13 liability. But I think it's very clear from this
14 that the terms of this agreement are applicable
15 upon the assigns of Fraser.

16 And my understanding, and I
17 believe we heard testimony to this effect, and I
18 believe there may have been an exchange with
19 counsel for the Applicant about this, that the
20 Applicant acknowledges and is prepared to accept
21 responsibility under the terms of this agreement
22 to continue to be bound. And, again, I believe
23 we've heard that PJPD, as well as Laidlaw Berlin
24 BioPower and NewCo, were all prepared to be bound

1 by this agreement. And certainly, I would
2 recommend that if we were to issue a certificate
3 here, that a condition be that all of those
4 parties agree to be bound by this agreement, and
5 to the covenant not to sue as well.

6 MR. HARRINGTON: Mr. Chairman,
7 would they be jointly and separately liable then
8 at that point? Or how does that work? Would the
9 three of them -- three different issues were
10 brought up because of -- we were told for
11 liability reasons. So...

12 CHAIRMAN BURACK: I think --
13 again, we can discuss this further if we get to
14 this point. But I think my recommendation would
15 be that we specify that they would be jointly and
16 separately liable -- meaning, they would each be
17 liable not only for their own share, but for the
18 shares of the others.

19 Did that answer your question,
20 Director Muzzey, or do you want further details
21 on the issues?

22 DIR. MUZZEY: For the time
23 being, I think that's terrific. Thank you.

24 CHAIRMAN BURACK: That's

1 sufficient? Okay.

2 Other questions or comments or
3 issues relating to site conditions, particularly
4 relating to the site contamination matters?

5 Okay. If not, before we go to
6 a general discussion, I want to see if there are
7 any aspects of any of what we have covered to
8 date in our review of the evidence that anyone
9 would like to come back and revisit or add
10 anything further to, in terms of our -- again,
11 our consideration.

12 Mr. Harrington?

13 MR. HARRINGTON: Yeah. I had
14 some concerns, I guess, or things that are kind of
15 like open questions on the financing and the
16 financial issues. There was some discussion
17 yesterday on whether or not Laidlaw was stating
18 that the various tax credits, the production --
19 the investment tax credit, which I believe is for
20 30 -- could be up to 30 percent, and then that --
21 what was the --

22 CMSR. IGNATIUS: New Market
23 Tax.

24 MR. HARRINGTON: -- New Market

1 Tax, which was in the vicinity of 10 million,
2 whether they were needed or not. And there was
3 some discussion yesterday that someone thought
4 that somebody from Laidlaw said that they weren't
5 needed for the project to go forward. And the
6 reason I bring that up is because there's dates
7 associated with those. And I looked a little
8 closer into a few things. And if you look on the
9 August 25th transcript, which is Day 3 morning
10 session. On Page 122 it starts. There's a
11 discussion of Bartoszek, Mr. Bartoszek, by Mr.
12 Rodier, I believe. And it's questions on this.
13 And it starts with -- on Section 122, it says:

14 "We want to start construction
15 by the end of the year. That's correct.

16 "QUESTION: For all the
17 reasons that we know, you want to get these tax
18 incentives; right?

19 "ANSWER: It is, yes.

20 "QUESTION: Okay. According
21 to your filing at the PUC, you need a final
22 decision from the PUC by November 10th?"

23 "I believe that's what it
24 says. Correct."

1 "Or what?"

2 "ANSWER: I'm sorry.

3 "QUESTION: ...or what...
4 happens if you don't get it [sic]?"

5 "ANSWER: It is important for
6 the project to commence construction by the end
7 of the year, as I believe it was discussed
8 earlier in these proceedings, for the purposes of
9 qualifying for the Federal Investment Tax Credit,
10 which is an important part of the [sic] financing
11 of the [sic] project." And then it goes on to
12 get into some things about appealing and so
13 forth."

14 And in that petition that was
15 submitted by Laidlaw to the PUC in the Purchase
16 Power Agreement, which is actually the Public
17 Service case, it says LLB further requests that
18 the Commission investigate and act on the Public
19 Service New Hampshire petition on an expedited
20 basis because financing for and commencement of
21 construction of the project are highly dependent
22 on the contract becoming effective prior to
23 November 10, 2010.

24 Specifically, the project's

1 financing plan utilizes a program established
2 under Section 1603 of the American Recovery &
3 Reinvestment Act of 2009, which provides cash to
4 qualifying renewable energy investment in lieu of
5 the investment tax credit otherwise available
6 under Section 48, blah, blah, blah. And this
7 money is only available to qualifying facilities
8 that commence construction prior to January 1st,
9 2011.

10 It goes on to state later on
11 in their financing transaction, by November 15th,
12 if the transaction closing does not occur by this
13 date, each of these CDEs may relocate their --
14 and this is the New Market Tax Credit -- to other
15 projects.

16 Further on in Section 11, the
17 New Hampshire Business Finance Authority has
18 committed most of the recovery zone facility
19 board's authority, but may have at least
20 20 million of such authority unused and
21 available. This project is an excellent
22 candidate to absorb any unused RZFB. However,
23 RZFB authority must be used by the individual
24 states before the end of 2010 or will be lost.

1 And then, as kind of a caveat,
2 finally, while the project may be able to
3 reassemble some of the foregoing financing
4 benefits in a revised financing plan next year,
5 northern New Hampshire needs jobs right now."

6 CHAIRMAN BURACK: Mr.
7 Harrington, I'm sorry. What's the document you're
8 reading from at this moment?

9 MR. HARRINGTON: This is a
10 petition for approval of Purchase Power Agreement
11 between Public Service Company of New Hampshire
12 and Laidlaw Berlin Power, LLC. It was the
13 document that Attorney Rodier was reading from
14 when he did his cross-examination.

15 CHAIRMAN BURACK: But is that
16 actually an exhibit in --

17 MR. HARRINGTON: I don't
18 believe Clean Power put it in as an exhibit. That
19 was part of it. The other part is from the
20 testimony.

21 CHAIRMAN BURACK: And where are
22 you in the testimony?

23 MR. HARRINGTON: The testimony,
24 again, is on August 25th, which is the Day 3

1 morning session.

2 CHAIRMAN BURACK: Okay.

3 MR. HARRINGTON: And if you go
4 to Page 122, and I think the key line here is in
5 answer to a question, Well, what happens if you
6 don't get it, meaning the PUC approval by
7 November 10th. And Mr. Bartoszek says, "It is
8 important for the project to commence construction
9 by the end of the year, as I believe it was
10 discussed earlier in these proceedings, for the
11 purposes of qualifying for the Federal Investment
12 Tax Credit, which is an important part of
13 financing the project."

14 And I just -- the point here
15 is it sounds as if what we were discussing
16 yesterday may not be correct -- unless this is
17 contradicted someplace else in the testimony --
18 that getting these financial -- these tax
19 credits, the Federal Investment Tax Credits are
20 an important part of financing the project;
21 hence, they are part of the financing as
22 presented right now. Now, it may be, and I think
23 it was stated, that if they don't meet the
24 deadline of the end of the year, it's possible

1 there might be some other way to do it next year.
2 But that's kind of hypothetical on their part.

3 And I just looked at the
4 schedule that was presented by Commissioner
5 Ignatius yesterday for the Purchase Power
6 Agreement, where it doesn't even get a prehearing
7 conference until -- is it next week, I guess?

8 CMSR. IGNATIUS: September 29th.

9 MR. HARRINGTON: September 29th.

10 Then it will have hearings and so forth. And
11 whenever their decision is reached, it would be
12 subject to a request for a rehearing and then
13 subject to appeal to the Supreme Court. I don't
14 see how we get to this decision being finalized by
15 the end of the year, which, if nothing else, would
16 tend to put in jeopardy the ability to get the
17 financing. So, I just think it's an issue we have
18 to deal with, because apparently they're saying
19 that, again, an important part of the financing of
20 the project is getting that Federal Investment Tax
21 Credit.

22 And I'm not sure of the best
23 way to address that. But maybe there's some type
24 of a stipulation or a contingency based on that

1 they have to submit some alternative financing
2 plan if the tax credits are not available. We're
3 talking a significant amount of money here on the
4 investment tax credit. It's 30 percent of the
5 cost of the project. And I think they said in
6 the vicinity of 9 to 10 million for that New
7 Market Tax credits.

8 The other ones really weren't
9 discussed that were mentioned in the filing on
10 the Public Service issue. That's even additional
11 money. But just those two alone, we're looking
12 at somewhere in the range of, I think it was
13 around \$50 million out of a project that was
14 going to cost around \$120 million, not including
15 financing costs and so forth.

16 So it's a significant impact
17 on the project. And I would think, if they're
18 planning on doing that and they don't get that
19 because the deadlines aren't met, that they're
20 going to have to come up with some other way of
21 showing that they can -- that they have the
22 financial capability to, you know, go along with
23 the statement that the Applicant has adequate
24 financial capability to assure...

1 CHAIRMAN BURACK: Thank you,
2 Mr. Harrington, for bringing this issue to us. I
3 think we heard testimony from the Applicant that
4 they understand that the construction is not
5 likely to start before November, that November
6 date that you described here. But they are
7 prepared to move forward with the project and take
8 the risk on those -- that particular category of
9 funds that you've described, and that the project
10 could, in fact, proceed without those funds. It
11 may be that some of the other testimony that we
12 heard on this issue could have occurred in our
13 confidential session, and we may want to take a
14 look there as well.

15 But I have a pretty clear
16 recollection that, if for some reason even they
17 were not able to meet the December 31 date, that
18 there would be an opportunity, potentially, to
19 pick up at least the New Market Tax Credits in
20 the next funding cycle through, I believe they
21 said it was the federal reserve. But I believe
22 we also heard testimony that they were not
23 dependent on the investment tax credit or the
24 production tax credit in order to be able to

1 finance the project.

2 MR. HARRINGTON: Well, that
3 would contradict clearly what Mr. -- I always
4 don't get his name quite right -- Mr. Bartoszek
5 stated here, where he says it's an important part
6 of the financing of the project. So maybe we need
7 to look at that other section in confidential --
8 in closed session or something. But's we need to
9 compare those two, I think.

10 CHAIRMAN BURACK: Maybe we need
11 to look at those and see if there's any other
12 testimony on that and determine whether this is
13 something we need to discuss further or not.

14 Commissioner Ignatius, did you
15 have something?

16 CMSR. IGNATIUS: A comment. It
17 seems to me that ultimately those financing
18 questions will be a decision for the lenders to
19 make and the equity investors. If time slipped
20 and certain monies that were anticipated are no
21 longer available, that may mean the lenders aren't
22 prepared to come forward. It may mean that other
23 investors bring in more than they might have
24 expected to. I think if we're concerned that the

1 timing is so extreme that it really brings the
2 possibility of the project being in jeopardy, we
3 should look at that. But if it's a matter of
4 whether it's still financially viable for the
5 developer to go forward -- and that's really in
6 other people's hands -- I guess I'm okay with a
7 decision to go forward, with the understanding
8 that it may never be built. A certificate doesn't
9 mean a guaranty that a project actually goes
10 forward. But if everything else is in place, or
11 the conditions that we were to agree to were in
12 line, the fact that the dates may cause some of
13 those financial pieces to fall apart I don't think
14 is a basis not to take action that we would
15 otherwise take. How it all ultimately plays out
16 remains to be seen.

17 MR. HARRINGTON: I would agree
18 with Commissioner Ignatius, that this may be a
19 self-regulating thing, in that, if you don't have
20 the financial wherewithal, you don't get the
21 loans. But the statute does specifically say that
22 we're supposed to determine if the Applicant has
23 adequate financial capability to assure
24 construction and operation of the facility and

1 continuing compliance with the terms and
2 conditions of the certificate.

3 It doesn't give us the
4 liberty, I guess, or the freedom to say, well,
5 we'll assume the lenders won't give them money if
6 they don't have financial capability.

7 In the past -- for example, in
8 the Noble project, we put that in, that they had
9 to come back with -- you know, they had to get
10 adequate financial capability before they could
11 start construction.

12 I tend to agree, this is a
13 little different because that was -- the concern
14 there was we didn't want people to start putting
15 in fairly low cost, fairly destructive things,
16 like roads on top of mountains, and then run out
17 of money. Here, it's probably not going to move
18 forward with anything until they get the
19 financing for everything.

20 But nevertheless, the statute,
21 to me, I don't think it gives us that
22 flexibility. It says we have to determine that
23 they have adequate financial capability. And
24 what at least the CEO of the company is saying

1 here is that the Federal Investment Tax Credit is
2 an important part of the financing. And when
3 you're talking about 30 percent of your project
4 costs, I would say that's a very important part.
5 And we at least have to address this issue
6 further to determine if we need a stipulation
7 that, if they don't get these credits, that they
8 re-present an additional financing plan or
9 something to that effect. I don't have it
10 finalized yet. But I think it's something we
11 have to deal with.

12 CHAIRMAN BURACK: Thank you.
13 And certainly we can discuss this further. And
14 again, we will want to see if there is any other
15 testimony on this matter.

16 I'm just reading and rereading
17 now Mr. Bartoszek's testimony here. And he does
18 say it's important, but he does not say it's
19 essential. He does not say here that if they
20 fail to get this investment tax credit for --
21 qualified before the end of the year, that the
22 project simply could not be built, that they
23 would not have sufficient financing to be able to
24 conduct it.

1 I understand how one could
2 potentially draw that conclusion from his
3 testimony, but I'm not sure that that's the only
4 conclusion that you could draw from it.

5 MR. HARRINGTON: And I'll leave
6 this to the lawyers to determine again. This
7 thing I'm reading from was not introduced as
8 evidence, to the best of my knowledge, by Clean
9 Power. But here it does say -- and this is a
10 document signed by Laidlaw -- that specifically,
11 the project's financing plan utilizes a program to
12 establish under the American Recovery &
13 Reinvestment Act, which provides cash to
14 qualifying renewable energy investment in lieu of
15 investment tax credits.

16 So, certainly, what they're
17 saying is the existing plan utilizes that. So if
18 that's the plan one would conclude that we've
19 been presented with, and my -- I guess my
20 question is, if that major part of the plan is
21 not going to be valid or might not be valid, do
22 they still then retain the adequate financial
23 capability? That's all.

24 CHAIRMAN BURACK: Okay. Thank

1 you.

2 MR. HARRINGTON: See if I can
3 find these other things ...

4 DR. KENT: Mr. Chair?

5 CHAIRMAN BURACK: Yes.

6 DR. KENT: Mr. Harrington, what
7 were you just reading from again?

8 MR. HARRINGTON: The last
9 document I was reading from was a petition that --
10 I'll put it in layman's terms, all right, I think
11 people will understand besides the lawyers.

12 This is a petition that
13 Laidlaw filed with the PUC on the docket that
14 deals with the Public Service Commission
15 approving or reviewing the Purchase Power
16 Agreement between the two entities. And they are
17 basically requesting that, because of those
18 reasons, that the PUC give it an expedited
19 consideration and make a fast decision because of
20 these deadlines that were coming up later on in
21 the year. So they're requesting that the -- this
22 says construction of the project -- it says
23 filing the petition on an expedited basis because
24 financing for and commencement of construction of

1 the project are highly dependent on the contract
2 becoming effective -- the contract between
3 Laidlaw and Public Service -- becoming effective
4 prior to November 10, 2010. Those are Laidlaw's
5 words.

6 DR. KENT: Okay. Yeah. I'm
7 afraid my recollection of testimony is more in
8 line with the Chair's, that the project didn't
9 need those Recovery & Reinvestment Act Funds to go
10 forward. But certainly it's important. You want
11 to -- I mean, 30 percent of construction costs,
12 it's got to be important to you that you want to
13 meet those deadlines. But it wasn't essential.

14 And secondly, I'm a little
15 confused about whether there needs to be an
16 unappealable certificate from the SEC before
17 financing can occur, before construction can
18 occur.

19 MR. HARRINGTON: I think I can
20 clarify that. That was kind of taken out of
21 context when that statement was made, because as
22 it actually appears in this same document that I
23 just spoke about, it doesn't say anything about
24 financing or construction or whatever. What it

1 says is that, as set forth in the petition, which
2 was Public Service's petition to the PUC, receipt
3 from this Commission of a final non-appealable --
4 okay. Public Service's obligation to begin
5 purchase of the project's output is contingent
6 upon receipt from this Commission of a final
7 non-appealable decision approving and allowing for
8 full cost and recovery of rates, terms, and
9 conditions of the PPA. What they're saying is
10 that Public Service won't be able to buy the power
11 from Laidlaw until the PUC has a non-appealable
12 decision. And since the plant hasn't even been
13 built yet, I'm assuming that that deadline is a
14 couple of years off anyways.

15 DR. KENT: I think that's at
16 the heart of my query here. We're talking about
17 something that's way down the road, and there's
18 lots of activity that's going on before that.

19 MR. HARRINGTON: Well, the
20 other part is --

21 DR. KENT: The Applicant can
22 continue to move toward construction of its
23 facility without the PUC having agreed with the
24 PPA at its own risk; correct?

1 MR. HARRINGTON: Well, I would
2 think by what the other testimony that was given
3 here and the statements of Laidlaw, they've made
4 it pretty unequivocal on that, that they must have
5 the PPA approved to go forward.

6 Now the question that comes
7 down is, if they get the PPA approved and it
8 happens in January, let's say, then maybe they
9 lose the production -- the investment tax credits
10 and this New Market Taxes. Maybe they don't.
11 Maybe there's a possibility to get them. But
12 it's pretty much assured if they get approval
13 now, meaning this year, that they will get those
14 two types of tax benefits, which amount to
15 somewhere around \$40 million.

16 So that's what I think what
17 the issue is. I think they were pretty clear
18 that until and such they get their PPA approved,
19 they're not going to get financing to do anything
20 major, any major construction, or much of
21 anything on this.

22 DR. KENT: So you're saying
23 that the New Market Tax Credits and the American
24 Recovery and Reinvestment Act Funds are dependent

1 on a signed PPA?

2 MR. HARRINGTON: I'm reading
3 what they said. The petition -- on an expedited
4 basis because financing for and commencement of
5 the construction of the project are highly
6 dependent on the contract becoming effective prior
7 to November 10, 2010. Specifically, the project's
8 financing plan utilizes a program established
9 under 1603 of the Recovery Act which provides cash
10 qualifying renewable energy investments in lieu of
11 the investment tax credit otherwise available
12 under Section 48 of the Internal Revenue Code.
13 The 1603 Program is available only to qualifying
14 facilities that commence construction prior to
15 January 1st, 2007.

16 And there was some discussion
17 on exactly what that meant. I think
18 "commencement of construction" is a pretty
19 liberal term we've heard. It's not -- I mean,
20 maybe you file -- you declare you're commencing
21 construction. You have one person on the site or
22 whatever. I don't know exactly what it means,
23 but I'm just reading what it says. But there is
24 a deadline on getting the tax credits.

1 CHAIRMAN BURACK: Mr.
2 Harrington, if I may, I want to just direct
3 everybody's attention to the -- again, in the
4 afternoon session of August 25th, we began that
5 afternoon, really, with Mr. Roth's
6 cross-examination of Mr. Bartoszek.

7 MR. HARRINGTON: One second.
8 What was that again?

9 CHAIRMAN BURACK: Sure. Again,
10 this is in the afternoon session, the PM session
11 of August 25th.

12 MR. HARRINGTON: Oh, PM
13 session. What page are we on?

14 CHAIRMAN BURACK: And I believe
15 this is just earlier in the same document that you
16 were referring to. You were at Page 122 or so of
17 this transcription. I just want to take all of us
18 earlier in this transcript.

19 DIR. MUZZEY: So it's later.

20 CHAIRMAN BURACK: Again, this
21 is the afternoon session of August 25th. If you
22 go to about Page 13 or so...

23 MR. HARRINGTON: Did you say
24 13?

1 CHAIRMAN BURACK: Yeah.
2 Actually, you can start even earlier than that.
3 You can start on Page 10, continuing on from
4 there. And what you'll see is Mr. Roth asking
5 about funds from the American Recovery &
6 Reinvestment Act. And about the middle of Page 11
7 there's discussion about a 30-percent -- it
8 says -- Bartoszek says at Line 18, "Thirty percent
9 of the capital costs of the project can be taken
10 as an upfront grant or tax credit. Requirements
11 to meet the program are that the project commence
12 construction by the end of the year, and there is
13 some specific guidelines as to what
14 constituents" -- I think it should read "what
15 constitutes commencement of construction. There
16 are also some alternatives of commencement of
17 construction that involve capital expenditures,
18 but I probably would refer you to the -- I'd
19 rather not recount all of those in specificity,"
20 in other words, I think he was saying look to the
21 statute of the rules themselves for the specifics
22 here.

23 And then it continues on down
24 here. And the question that Attorney Roth asks

1 at Line 19 of Page 12 is, essentially, in your
2 business model, how much are you hoping to get
3 out of this. Mr. Bartoszek says, "Well, as we've
4 discussed, the overall capital budget of the
5 project is somewhat fluid because the EPC
6 contract" -- that would be the contract with
7 Babcock & Wilcox for the actual construction, or
8 retrofitting of the boiler -- he says that the
9 EPC contract hasn't been finalized. "Based on
10 the approximate costs of a hundred to
11 \$120 million range, presumably looking at a
12 credit in the \$30 to \$40 million range."

13 And he goes on to say, "And I
14 guess I don't want to be overly cumbersome about
15 this, but to kind of briefly explain again the
16 sort of breakdown in the corporate structure,
17 PJPD is the owner of the assets, the physical
18 assets and physical property. One of the reasons
19 that arrangement is commonly set up that way is
20 so that an entity" -- "so that that entity can
21 receive the tax benefits."

22 Continue on down here onto
23 Page 14, there's some question about where these
24 funds are showing up, whether they're showing up

1 as equity or debt. And Mr. Bartoszek indicates
2 on Line 4 of Page 14 that it will be contributed
3 presumably as equity to the project.

4 He goes on to say, this is on
5 Line 7, "It's probably also worth noting that in
6 the calculations we've done to date and in the
7 financial model we've supplied as part of the
8 request for information is considered
9 confidential, we have not included assumptions
10 with respect to the ITC due to the uncertain
11 nature as to whether or not we'll qualify for
12 it."

13 And Mr. Roth goes on to say,
14 "Right. I noticed that, and I'll ask you about
15 that in the confidential session." He then goes
16 on to say, "So that 30 percent, or \$40 million,
17 will come into PJPD and be used somehow by the
18 Applicant of this proceeding as part of the
19 equity investment?" asked Attorney Roth.

20 And Mr. Bartoszek responds,
21 again starting on line, looks like 22, he says,
22 "Well, my assumption would be -- and, again, we
23 don't know that we're definitely going to get it.
24 So at best, we have to make an assumption at this

1 time."

2 And he goes on to say, "If you
3 go back up the left side of the chart" -- I
4 believe he's referring to Applicant's Exhibit
5 65 --

6 MR. HARRINGTON: That's the
7 confidential one?

8 CHAIRMAN BURACK: No, this is a
9 document we spent some time looking at yesterday.
10 This is the flow chart showing the capital
11 structure of the project.

12 MR. HARRINGTON: Oh, oh, this
13 thing.

14 CHAIRMAN BURACK: Are you
15 following me?

16 MR. HARRINGTON: Yes, I am.

17 CHAIRMAN BURACK: All right.
18 Then Mr. Bartoszek goes on to say, "If you go back
19 up the left side of the chart, you see the source
20 of the equity capital. And you go back up to
21 NewCo, NewCo's contributing cash equity to finance
22 the development of the project. So, as I
23 mentioned earlier, we contemplate we received an
24 allocation of New Market Tax credits, which will

1 result in new, additional equity going into the
2 project. And similarly, I would expect that if we
3 are able to get the proceeds of the ITC, again,
4 that would be additional equity contribution on
5 the part of PJPD, or one of those entities to the
6 equity of the project."

7 In other words, what I hear
8 him saying -- what I understand him to be saying
9 here is, if we qualify for these tax credits,
10 that will reduce the amount of equity that we
11 have to go out and raise on the private equity
12 market. But otherwise, you know, they're going
13 to go out to the private equity market to obtain
14 that financing.

15 MR. IACOPINO: I would also,
16 for the convenience of the Committee, point you to
17 that same transcript at Page 58. I don't know
18 who's doing the questioning, but there's a
19 question that begins at Line 19 which asks
20 Mr. Bartoszek directly, what would be the impact
21 on the project if they were not able to qualify
22 for the tax credits. And it begins at Line 19,
23 Page 58 of Day 3, p.m. session.

24 CHAIRMAN BURACK: Again, I'll

1 just read this. Mr. Bartoszek's response was,
2 "That's a good question. As I mentioned earlier
3 with respect to the financial model that we
4 provided in the confidential documents, we've not
5 included either of those, taking credit for either
6 of those in that financial model." And there, I
7 believe the "either" is the investment tax credits
8 or the New Market Tax credits.

9 "But to give you the response
10 I got from Key Bank when I discussed this with
11 them, the basic response is every bit of equity
12 of this type is helpful to the financing of the
13 transaction. So, certainly it's -- it creates a
14 more likely closing of the -- financial closing
15 of the project financing to have these than to
16 not have these."

17 Again, Key Bank was described
18 to us, as I understood it, as essentially being
19 the agent or the broker of -- whose job it would
20 be to try to raise the private equity capital
21 here to complete the financing of the project.

22 MR. HARRINGTON: Well, there
23 certainly seems to be some contradictions in some
24 of the testimony, as well as the public filings

1 made by Laidlaw. I guess we can at least leave it
2 at that. And I'm not quite sure how to resolve
3 those, but...

4 CHAIRMAN BURACK: I'm not sure,
5 for purposes of this proceeding, that we
6 necessarily need to definitively resolve those. I
7 think the question for us is ultimately whether we
8 feel that the Applicant has met its burden with
9 respect to what it needs to show to qualify for a
10 certificate here.

11 Are there other --

12 MR. HARRINGTON: Before we
13 leave that, I just maybe had a question for
14 Mr. Iacopino.

15 This document, that's a public
16 document. You can get it off of the PUC Web
17 site. But it was never submitted as evidence in
18 this hearing. But, I mean, what clearly Laidlaw
19 is saying here is that it basically contradicts
20 the testimony that was just read.

21 One of these can't -- they
22 both can't be correct, because it says here that
23 the financing and commencement of construction of
24 the project are highly dependent on the contract

1 becoming effective prior to November 10th, 2010,
2 and then the next one is specifically -- and I
3 won't read the whole thing again because I've
4 already read it twice. It goes on to talk about
5 getting that money out of the American Recovery &
6 Reinvestment Act.

7 Do we just simply pretend this
8 document doesn't exist because it wasn't
9 submitted as evidence? What's the legal basis of
10 how we handle this? Because clearly, they --
11 both statements can't be accurate.

12 MR. IACOPINO: Well, you are
13 required to consider what is before you. But if
14 the Committee wishes to take administrative notice
15 of that document, it can certainly do so. I'm not
16 going to give you an opinion on whether it's
17 actually contradictory or not. I don't have it in
18 front of me.

19 MR. HARRINGTON: I don't expect
20 that.

21 MR. IACOPINO: I don't have it
22 in front of me. But it's up to the Committee if
23 you wish to take administrative notice of that
24 document, if you believe that it is somehow

1 relevant to what you have to consider here today.
2 You certainly have the opportunity to do that.
3 You know, obviously, notice would be given to the
4 parties through -- by virtue of your final order.
5 And then, if they disagreed with our taking of
6 that administrative notice, they could certainly
7 raise that in their motion for a rehearing, or
8 they could file some other type of pleading.
9 Theoretically, the parties should have notice that
10 we're going to take administrative notice on
11 something.

12 MR. HARRINGTON: I mean, is
13 that a formal process, taking administrative
14 notice? I'm not -- I'm unfamiliar with that --

15 MR. IACOPINO: Yes.

16 MR. HARRINGTON: -- how that
17 works.

18 MR. IACOPINO: Yeah. It's
19 basically like a ruling that the Committee is
20 going to consider something as evidence. It's the
21 same as if one of the parties in the case wanted
22 to put in a new exhibit and other parties
23 objected. The Chair would have to make a decision
24 on whether or not to accept that new piece of

1 evidence.

2 MR. HARRINGTON: Well, I'd like
3 to, whatever the initial process is, start that
4 process to give it administrative notice.

5 MR. IACOPINO: I think what you
6 want to do is you want to move that the Committee
7 take administrative notice of the Public Utilities
8 Commission document that you have before you.

9 MR. HARRINGTON: I'll move that
10 the Committee take administrative notice of a
11 document from Rath, Young & Pignatelli directed to
12 Debra Howland, Executive Director and Secretary of
13 the New Hampshire Public Utilities Commission,
14 called "Petition for Approval of Purchase Power
15 Agreement Between Public Service Company of New
16 Hampshire and Laidlaw Berlin BioPower, LLC" in
17 Docket DE 10-195, dated August 17th, 2010.

18 CHAIRMAN BURACK: What I'd like
19 to do, because I have not had a chance to review
20 this document, is take this motion under
21 advisement --

22 MR. HARRINGTON: Sure.

23 CHAIRMAN BURACK: -- and we'll
24 consider this and make a ruling.

1 MR. IACOPINO: What's the
2 docket number, Mike?

3 MR. HARRINGTON: It's DE
4 10-195.

5 MR. IACOPINO: Thanks.

6 MR. HARRINGTON: It was
7 received at the PUC on the same day, August 17th.

8 CHAIRMAN BURACK: Thank you.
9 Thank you, Mr. Harrington, for those questions.

10 Are there other aspects of the
11 testimony or the evidence that members would like
12 to consider further before we proceed to the next
13 phase?

14 Dr. Kent, do you have
15 something?

16 DR. KENT: I qualify this by
17 saying I'd like to see that document if it's
18 admitted as evidence, but I'm not necessarily in
19 agreement with Mr. Harrington that this is
20 contradictory to the testimony.

21 CHAIRMAN BURACK: Thank you.

22 Any other aspects of the
23 evidence specifically that people would like to
24 discuss?

1 (No verbal response)

2 CHAIRMAN BURACK: Thank you. I
3 think we've done a very comprehensive job of
4 reviewing the evidence in the case as it pertains
5 to all of the statutory elements.

6 I do just want to note for the
7 record that the Committee received a letter dated
8 September 8, 2010. It was addressed to me in my
9 capacity as Chairman of the Committee. This is a
10 letter from Waldron Engineering and Construction,
11 Inc., and it relates to the application for the
12 Laidlaw Berlin BioPower, LLC for a certificate of
13 site and facility for renewable energy facility
14 in Berlin, New Hampshire. I just want to read
15 this letter briefly into the record.

16 This reads, "Dear Mr. Burack,
17 on behalf of Waldron Engineering, Inc., we wish
18 to advise members of the Site Evaluation
19 Committee that Waldron is no longer providing
20 engineering services to Laidlaw Berlin, LLC for
21 the above-mentioned project. In fact, Waldron
22 has not furnished any professional services to
23 the project for quite some time. We note that in
24 Laidlaw's December 15, 2009 application to the

1 Committee, it represents that, quote, Waldron is
2 providing engineering and consulting services
3 with respect to the project's equipment, design,
4 layout and balance of plant integration, period,
5 close quotes. This is no longer the case, and we
6 wanted to make sure that there were no
7 misunderstandings. Should you have any questions
8 regarding the above, I can be reached at the
9 above address. Regards, Terrence J. Waldron,
10 P.E., President. And copies of that letter were
11 sent to Laidlaw Berlin BioPower, LLC and to the
12 City of Berlin."

13 What I'd like to --
14 Mr. Harrington.

15 MR. HARRINGTON: Just one
16 other -- I wanted to, in the way of being
17 thorough, there was a fairly extensive submittal
18 of -- by Mr. Rodier on post-hearing brief of Clean
19 Power Development. And I think a lot of the
20 issues that are raised there we have discussed,
21 but it may not be a bad idea simply to go through
22 that to make sure we've addressed all of the
23 concerns that he has raised. I don't mean we have
24 to do it this second, but somewhere in the

1 proceeding.

2 CHAIRMAN BURACK: Thank you.
3 No, this would be an entirely appropriate time to
4 do that. Certainly, I have thought that through
5 and believe that we have addressed in our
6 discussions already all of these issues. But
7 certainly, if there are any aspects of his
8 argument or aspects of the Applicant's
9 post-hearing memorandum that members would like to
10 discuss, by all means, let's have that discussion.

11 So, Mr. Harrington, was there
12 any particular aspect --

13 MR. HARRINGTON: Just starting
14 with his first one about the Applicant cannot be
15 granted a certificate of site and approval unless
16 and until the Purchase Power Agreement is
17 approved, I would tend to think that, under the
18 provision of RSA 162-H:16, VI, the certificate of
19 site and facility may contain such reasonable
20 terms and conditions as the Committee deems
21 necessary, that we could put that in as a
22 provision, that they have to get the Purchase
23 Power Agreement approved, but we wouldn't have to
24 say we put the proceedings on hold until such time

1 that that occurs. But I do think, given the
2 statement that it seems to be very unequivocal
3 that the Purchase Power Agreement is absolutely
4 essential for the financing of the project, that
5 that would be a reasonable condition to impose.

6 CHAIRMAN BURACK: Thank you.

7 And I think we have discussed
8 that already. And we can discuss that further if
9 we get to the point where we determine we would
10 issue a certificate.

11 MR. HARRINGTON: I think we
12 discussed the reasonable alternatives part
13 completely. There was no specific need to revisit
14 that, nor is there, starting on Section E, which
15 talks about the ground pollution issues, I thought
16 the Chairman covered that completely, and there's
17 really no need to revisit all of that.

18 That kind of leaves me with
19 this question that I'm just not sure about, and
20 maybe defer to Mr. Iacopino. His Section D, says
21 NewCompany is the party responsible for
22 constructing and operating the project and,
23 accordingly, should be the Applicant. And I just
24 don't have a legal basis to look at that. But

1 certainly, there seems to be some questions
2 raised here with this changing around of who owns
3 what and who's doing what, that maybe we could at
4 least spend a couple of minutes looking at that.

5 MR. IACOPINO: Sure. Just so
6 you're aware, the Applicant is Laidlaw Berlin
7 BioPower, Inc.

8 CHAIRMAN BURACK: LLC.

9 MR. IACOPINO: LLC, I'm sorry.
10 Because of the nature of that
11 particular -- it's a special-purpose entity that
12 was created. And it's a subsidiary -- or it will
13 be a subsidiary of NewCo. In the past, we, the
14 Site Evaluation Committee, has, in fact, granted
15 certificates to companies that are, in fact,
16 subsidiaries of other companies. And, in fact,
17 the use of these special-purpose entities have
18 probably been before us in virtually every
19 renewable project that we've seen since the
20 statute -- well, since Lempster, at least. Even
21 the Lempster Wind Project, which is owned by a
22 very large company, called Iberdrola, is
23 actually -- the Applicant is actually a
24 special-purpose-entity LLC, similar to this one.

1 So, that is who the Applicant is. And quite
2 frankly, an intervenor doesn't have the right to
3 tell the Applicant who they should be.

4 However, there are -- and I'm
5 not suggesting you utilize any of these
6 conditions or not. You will decide that. But
7 there are -- you can, in this particular case,
8 based upon the representations made, insert
9 conditions in any certificate regarding the
10 relationship between this particular Applicant
11 and its parent company. You can insert
12 conditions that, as Ms. Ignatius discussed in
13 some detail yesterday, that clearly lay lines of
14 responsibility and require that, if those
15 companies are not going to agree to sign off on
16 the certificate, the certificate will not be
17 valid. And through conditions like that, you
18 can -- you may be able to -- it's up to you all
19 to decide -- you may be able to ameliorate any
20 concerns that you have about this particular
21 argument that it's the wrong company who is the
22 Applicant.

23 MR. HARRINGTON: That helps
24 quite a bit. I think my concern was more raised

1 on this case because it seems to be in flux as
2 we're having the hearings. It seems to change,
3 and it's still not quite clear looking at these
4 different charts who's doing what to who.

5 MR. IACOPINO: And again, just
6 for the convenience of the Committee, what you do
7 not -- at least I have not seen come before the
8 Committee, is any evidence that that closing to
9 create the structure that is contained in
10 Exhibit 65 has actually occurred.

11 MR. HARRINGTON: Okay. Thank
12 you. That helps.

13 And I think, like I said, most
14 of this is the environmental issues that were
15 already covered. I think that does it.

16 CHAIRMAN BURACK: Okay. The
17 other issue that you skipped over that he raised
18 is -- and this is Item C -- his argument that
19 Applicant's proposed facility will interfere with
20 the orderly development of the region. Is there
21 further discussion of that issue that you think we
22 should have?

23 MR. HARRINGTON: I thought we
24 covered that pretty much adequately already under

1 the whole discussion of available alternatives the
2 other day. So I didn't see any need to readdress
3 that, unless somebody else wants to.

4 CHAIRMAN BURACK: Thank you.

5 Anybody wish to speak further
6 to this? Again, what we see is references to
7 public comment received from five different
8 entities which are involved in similar businesses
9 to what the Applicant would be involved in, and
10 the argument is that because those facilities
11 could suffer a net loss of jobs or economic
12 activity, therefore, there would be a severe
13 disruption of orderly development of the region.
14 And that's the argument that's being made here.

15 I would agree with
16 Mr. Harrington. I think we discussed that quite
17 extensively yesterday. But I just want to see if
18 anybody feels that there's any further discussion
19 they want to have regarding this argument.

20 Director Muzzey.

21 DIR. MUZZEY: I agree as well,
22 that we discussed that in detail yesterday, and I
23 don't see any need for further discussion of that.

24 CHAIRMAN BURACK: Thank you.

1 Okay. Any other aspects of
2 Clean Power Development's arguments that anybody
3 wishes to address at this time?

4 (No verbal response)

5 CHAIRMAN BURACK: All right.
6 Any aspects of the Applicant's post-hearing
7 memorandum that anybody would like to discuss?

8 Again, just principal
9 arguments the Applicant makes here after spelling
10 out the requirements of 162-H. I might just note
11 here for the record that 162-H:16, IV, has been
12 amended, and Subsection D relating to the
13 requirement that there be a finding -- that the
14 project would be consistent with the state energy
15 policy established in RSA 378:37, that provision
16 in fact, was repealed by the Legislature. And so
17 that's not a standard that we have to apply here.

18 Having said that, the
19 arguments -- or the principal issues on which the
20 Applicant touches in this memorandum is, first,
21 an assertion that they feel that they have met
22 their burden with respect to each of these
23 specified statutory criteria; and then there is
24 discussion about the sustainability conditions

1 and about the orderly regional development issue,
2 and those are the issues that the Applicant
3 touches on in his post-hearing memorandum.

4 Is there any discussion
5 anybody would like to have of these issues?

6 (No verbal response)

7 CHAIRMAN BURACK: Okay. Thank
8 you.

9 All right. The next order of
10 business for us would be to just begin a general
11 discussion of the application. And this will be
12 a precursor to our holding what I would describe
13 as a straw poll or straw vote, just to get a
14 sense as to where the members are with respect to
15 whether a certificate should or should not be
16 issued. And if we -- once we have that straw
17 vote, we'll have a clear sense as to what the
18 next steps would need to be.

19 But let's see if we could just
20 start with some general discussion. And we'll
21 probably go for about 20 minutes or so and then
22 take a break for lunch about 12:30 or so. But
23 just a general discussion of issues and concerns
24 and perspectives and, if you were so inclined,

1 what your inclinations may or may not be with
2 respect to a certificate issuance.

3 Would someone like to start?

4 MR. NORTHROP: Would it be
5 helpful to go through the -- look at the statute
6 and sort of start there as a --

7 CHAIRMAN BURACK: Sure, we can
8 certainly do that.

9 MR. NORTHROP: Since obviously,
10 we have to comply with 162-H. Those are what we
11 need to find, so it might be --

12 CHAIRMAN BURACK: Absolutely.

13 MR. NORTHROP: But I can't
14 start because I don't have the statute in front of
15 me, so...

16 MR. IACOPINO: Here you go, Mr.
17 Northrop. You can start. There's the statute.

18 MR. NORTHROP: Well, the first
19 is Roman IV, Sub A, whether the Applicant has
20 adequate financial, technical and managerial
21 capability -- whether the Applicant has adequate
22 financial, technical and managerial capability to
23 ensure construction and operation of the facility
24 and continuing compliance with the terms and

1 conditions of the certificate. So, in my mind, I
2 guess that one could be a place to start, whether
3 we think that the Applicant has demonstrated that
4 they have adequate capability.

5 I guess in my mind, what I've
6 seen of the evidence and heard of the testimony,
7 the Applicant has demonstrated that they have
8 adequate financial, technical and managerial
9 capability to ensure compliance -- to ensure
10 construction and operation of the facility and
11 continuing compliance with the terms and
12 conditions of the certificate.

13 CHAIRMAN BURACK: Thank you.

14 Others who wish to offer
15 thoughts on this? Any differing perspectives?

16 And I understand,
17 Mr. Harrington, there's a document that we're
18 going to look at, and I'll make a ruling on it
19 here shortly, that could have some bearing on
20 this issue. But I just want to get a sense as to
21 whether there are other perspectives on this
22 issue.

23 MR. HARRINGTON: I think with
24 adequate conditions, that they've -- the Committee

1 could assign, that they've met this requirement.

2 CHAIRMAN BURACK: Thank you.

3 Are there other --

4 Mr. Janelle?

5 MR. JANELLE: I would agree. I
6 believe they've put a team together that proves
7 that they've proven they constructed a plan in
8 Minnesota, I believe. They've been an operational
9 team that has experience running the plant.

10 They've got a design firm and a contractor that's
11 experienced with this type of boiler, Babcock &
12 Wilcox.

13 So I would say, as far as the
14 technical and managerial capability, I would
15 agree. They've shown that they can do this.

16 CHAIRMAN BURACK: Thank you.
17 Other thoughts on this aspect? Okay.

18 DR. KENT: I would add that I
19 agree with what the Committee members have said,
20 if we have the appropriate conditions in place.

21 CHAIRMAN BURACK: Thank you.

22 All right. Any other
23 discussion then of this section of 116:H-16
24 [sic]? Any other observations people would like

1 to offer?

2 If not, let's continue down to
3 the next section, which relates to a finding that
4 the site, quote, will not unduly interfere with
5 the orderly development of the region, with due
6 consideration having been given to the views of
7 municipal and regional planning commissions and
8 municipal governing bodies, close quote. Anybody
9 wish to lead us in a discussion of this issue?

10 MR. HARRINGTON: Just say as
11 far as the second part of it, I mean, there's not
12 much controversy here on which way the municipal
13 and regional planning commissions and municipal
14 governing bodies went. They seem to be all
15 unanimously in favor of the project. So I think
16 that probably says quite a bit for this. Even,
17 you know, given the fact that some of the things
18 that were raised by Clean Power and some of the
19 other biomass facilities, that this would have a
20 negative impact on their business, they couldn't
21 sell that argument, I guess, to the municipal and
22 regional planning commissions and municipal
23 governing bodies because, though I think most of
24 them stated they were in favor of both projects,

1 none has said that they're not in favor of Laidlaw
2 because it will cause the others to close down.
3 So I think that is a pretty solid statement that
4 we got from them on that, as far as the direction
5 they would like to see us go.

6 CHAIRMAN BURACK: Other
7 thoughts or comments on this aspect?

8 Dr. Kent.

9 DR. KENT: As we discussed
10 yesterday, much of this argument about it being
11 disorderly development of the region made by Clean
12 Power and some of the other existing facilities is
13 predicated on an inadequate fuel supply. And I
14 believe this Committee has ended up in a place
15 where we don't know whether that supply is
16 adequate or inadequate. So, without some clear
17 standing on that issue, there's certainly no basis
18 for us using wood supply as the reason -- or an
19 inadequate wood supply as a reason why there would
20 be some threat to the regional development.

21 CHAIRMAN BURACK: Thank you.
22 Other observations on this
23 issue?

24 I would just offer the

1 observation, just following up on
2 Mr. Harrington's observation, that I'm not sure
3 we could characterize the regional planning
4 organizations as being unanimous in their
5 support. I think in our discussion yesterday we
6 determined, after reading the letter from North
7 Country Council, that it was perhaps more
8 noncommittal one way or another, as opposed to
9 specifically supporting or opposing the project.
10 But I --

11 MR. HARRINGTON: They are
12 considered a plan of --

13 CHAIRMAN BURACK: North Country
14 Council is, in fact, the regional planning
15 commission for the North Country. But I just
16 wanted to just make sure that our statement on the
17 record today on this issue is consistent with our
18 statement yesterday, and I think that's where
19 we -- where in our discussion we came out
20 yesterday with that issue.

21 MR. HARRINGTON: My mistake.

22 CHAIRMAN BURACK: No, not a
23 problem. Not a concern.

24 Other thoughts or comments on

1 this aspect of the finding that you must make?

2 DR. KENT: I would add that the
3 North Country Council was helpful in providing us
4 some guidance for deliberations, as well as our
5 conditions, by staying neutral and proposing
6 criteria that were essential for maintaining
7 orderly development.

8 CHAIRMAN BURACK: Thank you,
9 Dr. Kent.

10 The next aspect that we would
11 have to make findings on relates to that of not
12 having an unreasonable adverse effect on
13 aesthetics, historic sites, air and water
14 quality, the national environment, and public
15 health and safety.

16 Would someone like to offer
17 any thoughts on this finding, which is really a
18 set of multiple findings? We can take them one
19 at a time if folks wish to do so.

20 DR. KENT: No, I think we've
21 discussed those at length this morning. We
22 have -- much of that is addressed by permits from
23 state agencies. And they've met the requirements
24 of the state agencies. And the less regulated

1 issues like aesthetics, we've addressed that. And
2 I heard no discussion this morning that they
3 hadn't met the burden for any of those points.

4 CHAIRMAN BURACK: Thank you.

5 Is there -- or are there any
6 other thoughts or observations?

7 Director Muzzey.

8 DIR. MUZZEY: I agree that the
9 project does not seem to present any unreasonable
10 adverse effects on any of these areas, and, in
11 addition, may in fact provide some benefit to
12 these types of areas. I believe it was Director
13 Stewart yesterday who mentioned the benefit of
14 reusing a Brownfield site and the benefits that
15 that provides.

16 CHAIRMAN BURACK: Thank you.
17 Any other observations on this?

18 Mr. Northrop.

19 MR. NORTHROP: I would echo
20 what Director Muzzey said, and also Dr. Kent, that
21 the Applicant seems to have met this burden,
22 certainly, from the aspect of air and water
23 quality and natural environment, with the issuance
24 of state permits, and following those permits and

1 any conditions that may be included on the
2 permits.

3 And also on aesthetics, which
4 may be more of a subjective issue, but I agree
5 with Director Muzzey, that with its aesthetics
6 there may actually be a benefit, that the plant
7 that's there now may not be too aesthetically
8 pleasing, and the plant that may be built, the
9 improvements and the changes as far as siting and
10 colors and landscaping, things like that, in my
11 mind, would be an improvement to the area.

12 So I think that there's
13 actually certainly not an unreasonable adverse
14 effect, but, in fact, an actual benefit that will
15 result to the City because of the project.

16 CHAIRMAN BURACK: Thank you.

17 Any other observations anyone
18 wishes to offer on this element of the statute?

19 DR. KENT: Mr. Chairman.

20 CHAIRMAN BURACK: Yes,
21 Dr. Kent.

22 DR. KENT: I think on the less
23 tangible issues of aesthetics, public health and
24 safety, we can be reassured by the agreement with

1 the City of Berlin.

2 CHAIRMAN BURACK: Thank you.

3 Anything else on this, or on

4 A, B or C?

5 Mr. Janelle?

6 MR. JANELLE: I guess I would

7 just -- regarding the natural environment, I mean

8 much of the impact is going to occur in the woods

9 where wood is harvested. And the Applicant has

10 looked at using the best management practices,

11 looked to employ foresters that comply with those

12 management practices, and also provide incentives

13 to hire -- to buy wood from foresters that

14 practice those best management practices.

15 CHAIRMAN BURACK: Thank you.

16 Anything else on any of these

17 three elements?

18 (No verbal response)

19 CHAIRMAN BURACK: All right.

20 If not, I just want to go back up to the top of

21 this provision of the statute RSA 162-H:16 IV,

22 which reads, "The Site Evaluation Committee, after

23 having considered available alternatives and fully

24 reviewed the environmental impact of the site or

1 route, and other relevant factors bearing on
2 whether the objectives of this chapter would be
3 best served by the issuance of the certificate..."
4 So I just want to offer thoughts or observations,
5 first, on the issue of available alternatives.

6 MR. HARRINGTON: Well, don't
7 everybody look at me at once. I'm still
8 struggling with this thing, as to what exactly is
9 the proper usage of this term, what it really
10 means, "considering available alternatives." I
11 realize that in the past it hasn't been looked at
12 very much, but this time it was specifically
13 brought up as an issue by one of the intervenors.
14 So I may be taking the route -- I don't know
15 yet -- that the Chairman mentioned the other day,
16 that it will be a different route, but getting to
17 the same place. Because I think even if you go to
18 the broader way of considering available
19 alternatives as alternatives in this case, not
20 meaning any possible power plant, but the
21 available ones, which limits it to the -- somewhat
22 to the area of the Laidlaw plant, and in looking
23 at those, what we have to do is you have to
24 consider them. And I think you can certainly make

1 a case, if you can consider them and say that it
2 doesn't go against the objectives of this chapter
3 by considering what the effect would be on the --
4 whether it be Clean Power Development or the other
5 biomass facilities in the area.

6 And the same would be when you
7 look at the whole thing we went over with MIS and
8 economic dispatch and so forth. So, even if you
9 were to take the more, the slightly broader idea
10 of why that is, I think it gets you to the same
11 place, that the -- considering the available
12 alternatives from that slightly wider scope, it
13 doesn't do anything to say that this project will
14 not meet the objectives of the chapter. So I
15 think it could be going in that direction. But I
16 think, as you mentioned the other day, the
17 Chairman mentioned it, it may be just a different
18 path to the same location.

19 CHAIRMAN BURACK: Thank you.
20 Other thoughts or observations
21 on this issue?

22 Mr. Stewart.

23 DIR. STEWART: With regard to
24 the particular sort of facility, the

1 corporation -- or the Applicant, the use of the
2 Brownfield site, as Director Muzzey indicated
3 earlier, and I apparently mentioned yesterday, I
4 think is an important element of this. It's not a
5 Greenfield. It's an existing, developed site
6 that's being renovated. That's very important.

7 And from a water perspective,
8 the use of the city of Berlin's water and
9 discharge to the sewer system in lieu of a -- you
10 know, an alternative to that is a direct
11 discharge to the river is a superior alternative.
12 So I think from that perspective, the Applicant
13 has met that test.

14 CHAIRMAN BURACK: Thank you.

15 Any other observations on this
16 issue?

17 (No verbal response)

18 CHAIRMAN BURACK: Okay. The
19 next aspect here is, having fully reviewed the
20 environmental impact of the site, or route -- in
21 this case, I suppose you could say we have both a
22 site that includes a route of the power
23 transmission line coming out of the plant going to
24 the Coos Loop here. Anybody want to offer any

1 observations on this aspect here?

2 MR. NORTHROP: Mr. Chair.

3 CHAIRMAN BURACK: Mr. Northrop.

4 MR. NORTHROP: Relative to the
5 environmental impact, I go back to the permits
6 that are issued for air quality and water quality
7 and alteration of terrain and things like that,
8 that, given the review by the state agencies, the
9 relative state agencies, and our review of those
10 permits, that we have fully considered the
11 environmental impact.

12 CHAIRMAN BURACK: Thank you.

13 Any other observations on
14 that?

15 CMSR. IGNATIUS: Mr. Chairman,
16 on the route to connect to the transmission
17 system, that's really under the control of the ISO
18 in their requirements of what has to be done in
19 order to make a safe and reliable interconnection.
20 But we know that that has been studied and
21 approved by the ISO and commitments made by the
22 Applicant to do the things that are being required
23 for that interconnection. So I think that
24 condition, we can assume, is well met by the plans

1 that have been proposed and the status with the
2 ISO at this point.

3 It still holds open the need
4 for further ISO involvement if the intention to
5 go to the full 70-megawatt plant goes forward.
6 It seems as though the papers were submitted to
7 us assuming 70 megawatts, but the submission to
8 the ISO were assuming a smaller number that since
9 has been rethought but not studied.

10 And so the Applicant stated
11 that they intended to go back to the ISO for
12 further study to increase the output. If they're
13 successful in that, I don't know if that involves
14 further proceedings on our part, because our
15 certificate request came in at 70 megawatts. But
16 it would be one of those things that, if we do
17 issue a certificate, you'd want a condition to
18 have submission of the final approvals from the
19 ISO made part of the record here as a sort of
20 compliance issue.

21 CHAIRMAN BURACK: Okay. Thank
22 you.

23 I would just offer the
24 observation, as well, that I do believe, as Mr.

1 Northrop suggested, that we have, in fact, very
2 fully reviewed the environmental impact of the
3 site. We've looked at all the different aspects
4 here, including air quality, water quality,
5 groundwater issues, and I think we've been quite
6 thorough in our review and analysis of these
7 issues.

8 Are there any other comments
9 on either of those first two aspects of the
10 settlement?

11 Okay. If not, the next clause
12 of the statute reads, "and other relevant factors
13 bearing on whether the objectives of this chapter
14 would be best served by the issuance of the
15 certificate." And I think that, really, the
16 question is, are there any other relevant factors
17 that any members of the Committee would like to
18 speak about. Again, when we're talking about the
19 objectives of the statute, I think these are
20 really what's specified in RSA 162-H:1. And if
21 folks would like to take a moment just to read
22 that through for themselves and then determine
23 whether there's anything further they would like
24 to discuss, we can do so.

1 CMSR. IGNATIUS: Mr. Chairman?

2 CHAIRMAN BURACK: Yes.

3 CMSR. IGNATIUS: I wanted to
4 address the reference in 162-H:1, the declaration
5 of purpose. That final clause in the second to
6 the last sentence says, "all to assure that the
7 state has an adequate and reliable supply of
8 power" -- excuse me -- "of energy in conformance
9 with sound, environmental principles." And to
10 comment on some statements that Mr. Harrington
11 made quite correctly, that we were in a surplus
12 capacity right now, and his observation that in
13 the height of the heat wave we still were okay in
14 the region. I don't dispute his statements. That
15 is a fair description of where we are right now in
16 New Hampshire and in the region. But we have seen
17 a drop in energy consumption with the drop in the
18 economy. We assume that growth will come back
19 into the demand, back up again and continue to
20 grow over time. That's been our experience over
21 years, though we're currently in a bit of a drop.
22 And so I think it's important to know that the
23 electric demand is projected to continue to grow
24 in coming years, and the current state we're in

1 isn't necessarily the level that it will remain
2 at.

3 The other piece of it that's
4 important in this state has been a push towards
5 more renewable power and to -- you can see that
6 desire through the creation of a renewable
7 portfolio standard that has a requirement for a
8 renewable source of power or RECs commensurate
9 with that level of power that steps up year to
10 year in the state.

11 And so I think it's both a
12 question of is there adequate power going
13 forward -- in this case, the plant is proposed
14 for a 20-year term, and possibly longer -- is
15 there -- do we have adequate supplies of power
16 going out 20 years, and do we have enough
17 renewable power going out the next 20 years?

18 So I think if you look at it
19 from the context of the future rather than
20 today's -- a snapshot of today's needs, I would
21 conclude that a further renewable generator like
22 this biomass plant is consistent with the
23 purposes of the statute, to assure an adequate
24 and reliable supply of energy, particularly in

1 the context of the desire in other statutes for
2 more renewable energy.

3 CHAIRMAN BURACK: Thank you,
4 Commissioner Ignatius.

5 MR. HARRINGTON: I'd just like
6 to comment on that.

7 Just so it's clear what I was
8 referring to there was that we have -- presently
9 we have an adequate and reliable supply of energy
10 for the next at least five or six years, maybe
11 longer, unless something drastic happens, because
12 of the large surplus we have with the capacity
13 market.

14 What my point was, though,
15 this plant coming on does nothing to show -- does
16 nothing to make it less reliable or less
17 adequate. There's nothing negative with regard
18 to those points with this plant coming online.
19 If anything, the addition of more generation
20 always makes it more adequate and more reliable.

21 And I agree completely with
22 the Commissioner on the sound and environmental
23 principles. As defined by the State of New
24 Hampshire, those represent the renewable

1 portfolio standard. This plant would qualify as
2 a renewable energy generator under that law. So
3 it complies with the sound environmental
4 principles of the State of New Hampshire.

5 CHAIRMAN BURACK: Thank you.

6 Others who would like to offer
7 any observations on any aspects of 162-H as they
8 see it as being relevant to our deliberations
9 here?

10 (No verbal response)

11 CHAIRMAN BURACK: I would just
12 offer the observation, having sat on a number of
13 these, that it strikes me that, perhaps more so
14 than many other projects, we, in fact, have
15 brought a very integrated review to this project,
16 in terms of looking at the land-use issues,
17 looking at the environmental, the economic, the
18 technical issues, and really trying to resolve
19 these in a very integrated fashion. I believe we
20 have acted in a manner that's very consistent with
21 the declaration of purpose of the statute in that
22 respect.

23 Any other thoughts or
24 observations?

1 (No verbal response.)

2 CHAIRMAN BURACK: Okay. If
3 not, before we go to lunch, unless there are any
4 other discussion that members would like to have,
5 I just want to get just a straw poll here. This
6 is not binding on anyone at this point. I just
7 want to get a sense as to where we're likely to go
8 when we resume after lunch.

9 I'll ask, first, how many
10 would support issuance of a certificate, provided
11 that appropriate conditions could be agreed upon
12 among us. That would be the first show of hands.
13 And the second would be how many would not
14 support a issuance of a certificate. And, also,
15 how many would abstain from making a decision at
16 all at this time. That's an option as well.

17 MR. NORTHROP: I just have one
18 question, sort of procedurally.

19 CHAIRMAN BURACK: Yes.

20 MR. NORTHROP: Once we sort of
21 go through this straw poll, ultimately our
22 decision will be based on the -- ultimate real
23 formal decision, I'm assuming, will be based on
24 the actual written order? Is that -- would we

1 then be taking the final vote once that's written
2 and we have all the conditions and things like
3 that? Just sort of...

4 CHAIRMAN BURACK: What we have
5 done in the past -- thank you for that question,
6 Mr. Northrop.

7 What we do as a Committee is
8 we take a vote to determine whether or not we
9 wish to issue a certificate with the conditions
10 that are agreeable to at least a majority of the
11 Committee, and then we ask our legal counsel to
12 memorialize in writing the decision of the
13 Committee, and we will then review a draft of
14 that decision document. And once everybody is
15 ready to sign it, we then actually issue the
16 signed copy of the order, and that is the formal
17 statement of our decision. Is that helpful?

18 MR. NORTHROP: Yes. Thanks.

19 CHAIRMAN BURACK: Okay. Any
20 other questions about this? You all understand
21 what I'm asking us to do? So, initially, I just
22 want to get a sense, a straw poll: Would you --
23 again, this is not binding at this point on
24 anybody. Would you support issuance of a

1 certificate with appropriate conditions? Would
2 you not support issuance of a certificate? Or are
3 you going to abstain at this time, pending the
4 opportunity to hear further discussion?

5 So, first, how many would
6 support issuance of a certificate with
7 appropriate conditions?

8 (Show of hands by all members.)

9 CHAIRMAN BURACK: Okay. So are
10 there any who would not support issuance of a
11 certificate?

12 (No verbal response)

13 CHAIRMAN BURACK: Are there any
14 who would abstain?

15 (No verbal response)

16 CHAIRMAN BURACK: All right. I
17 think we have a -- it appears we may have some --
18 a full consensus here among the Subcommittee
19 members here. So what I'd ask us to do is take
20 lunch. When we return from lunch, perhaps the
21 most productive way for us to do this would be to
22 work through, first, a list of all the conditions
23 that we would want to have as part of a
24 certificate and see if we can reach agreement on

1 all of those. And we'll do that in accordance
2 with the statute, in the same systematic way that
3 we've taken this right through this process. And
4 once we have a full set of conditions, at least
5 conceptual conditions that we believe is the full
6 set of what's needed, we would then take a single
7 vote to issue a certificate subject to those
8 conditions. Okay?

9 So that's our plan. It is now
10 approximately 20 minutes of one. Let us try to
11 reconvene here in approximately 35 minutes, at
12 1:15. Thank you all.

13 (Where upon the lunch recess was taken
14 at 12:40 p.m.)

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**SEC 2009-02 DAY 2 AM DELIBERATIONS - September 21, 2010
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