

July 28, 2016

Via Email and U.S. Mail

Thomas S. Burack, Commissioner
NH Department of Environmental Services
29 Hazen Drive
Concord, NH 03301
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**Re: Wetland File No. SEC -2-15-02817
Northern Pass Transmission, LLC and Public Service Company of
New Hampshire d/b/a Eversource Energy (“Applicants”)**

Commissioner Burack,

We write on behalf of our client, the Society for the Protection of New Hampshire Forests (“Forest Society”) with respect to “Application for State of New Hampshire Department of Environmental Services Wetlands Permit For Major Dredge and Fill Project for the Northern Pass Transmission Project New Hampshire” (“Wetlands Application”).

We direct this letter to your attention because it raises policy issues to which we believe your capable involvement will be of assistance. To be clear, we perceive Mr. Rennie to be appropriately reviewing the Wetlands Application with care. We have copied Mr. Rennie so he too can be apprised of these comments.

On behalf of the Forest Society, we respectfully request, first, that the Department consider the timing of its final decision. Second, based on the information currently available to the Forest Society, we respectfully request that when the Department does make its final decision, the Department denies authorization for the Wetlands Application.

Additionally, we pose a number of questions, to which we respectfully request the favor of your reply. We state our questions throughout this letter, within the discussion of the relevant topic. However, for your ease, we have additionally listed our questions at the conclusion of this letter.

This letter also addresses two primary concerns of the Forest Society regarding the Wetlands Application submitted by Northern Pass. First, we believe that the Wetlands Application asks DES to exceed its authorized delegation under RSA 162-H. Second, we believe that the Northern Pass Wetland Application as presented fails to satisfy avoidance and mitigation requirements of RSA 482-A.



I. Summary of the Forest Society's Prior Written Comments

As you know, the Forest Society has previously provided two sets of comments on this matter.

First, the Forest Society expressed its concern, by a letter dated April 21, 2016, that the information the Applicants provided to date fell short of what would be required to “make and submit to the committee a final decision on” the Wetlands Application. The letter described the Forest Society overall, its interest in this matter, and its land holdings in and around the proposed route. The letter suggested specific requests for further information.

Specifically, the letter detailed the following inadequacies: (a) the wetlands functions and value assessment the Applicants submitted was inadequate because the Applicants misapplied the applicable methodology and failed to include the entire wetland complexes (including instead merely a small portion of most wetland complexes); (b) the Applicants had not field delineated wetlands and other water resources; (c) the Applicants had not provided any specific plans for restoring each wetlands proposed to be impacted temporarily; (d) the wetlands application lacked information about and wetlands impacts for off-right-of-way access roads, yards, laydown areas, stations, access roads, etc.; and (e) the wetlands application lacked information about whether use of existing roads, including off-right-of-way access roads, would trigger change of use re-permitting requirement.

Second, the Forest Society by another letter also dated April 21, 2016 respectfully requested that the Department make a final decision to not authorize the Wetlands Application based on the information the Applicants provided. In particular, the Forest Society noted: (a) with over 141 acres of wetlands impacts, the project, as proposed, had not demonstrated need, as required by Env-Wt 302.01(b) and 302.04(a)(1); (b) was not the alternative which avoids the maximum amount of wetlands practicable, as required by Env-Wt 302.03(a)(1) and 302.04(a)(2); and (c) had not minimize impacts as required by Env-Wt 302.03(a)(2).

The Forest Society's rationale for these conclusions centered on the fact that buried alternatives impact wetlands far less than the proposed configuration, as had been demonstrated both by the underground portions of the proposed configuration and by complete burial of other HVDC proposed and permitted in New England.

The Forest Society continues to have all of the foregoing concerns and restates its previous requests as described in detail in the two letters of April 21, 2016.

a. Meeting between the Department and the Forest Society



Both April letters requested to meet with DES to discuss these concerns. In response to our April 21, 2016 letters, DES indicated no one at the Department was available to meet with the Forest Society due to the then-upcoming deadline to provide a progress report to the subcommittee of the Site Evaluation Committee which is considering this matter (“SEC”).

We wrote DES again a couple months later on June 20, 2016 requesting to meet with you given that the progress report deadline had passed. We scheduled the meeting for Thursday June 30, 2016 at 1 p.m. However, at about 9 a.m. on June 30, the Department cancelled the meeting, having apparently decided it was inappropriate to meet with the Forest Society. The Forest Society is confused by this decision because the Department has met and continues to meet with the Applicants and has met with others to discuss this matter. While the Forest Society submits this letter in lieu of meeting, we remain willing to meet at any time. As you will see, this letter contains many questions, which we believed would have been better-suited to a meeting rather than a letter.

II. Additional Information from the Applicants

In the Department’s May 16, 2016 progress report to the SEC (“Progress Report”), the Department requested additional information from the Applicants. The Forest Society seeks an update about the status of and plan for the additional information and guidance on how to obtain it.

We note the recent submission to the Department from the Applicants of the following additional information:

1. July 15, 2016 letter from Normandeau Associates, Inc. to Mr. Rene Pelletier, PG, primarily concerning the Alteration of Terrain (“AoT”) application, but also responding to one wetlands item the Department requested in its Progress Report
2. July 18, 2016 letter from Normandeau Associates, Inc. to the Town of Deerfield;
3. July 18, 2016 letter from Normandeau Associates, Inc. to the Town of Campton;
4. July 18, 2016 letter from Devine Millimet & Branch, P.A. to the Town of Canterbury; and
5. A box of materials delivered to you today.

The July 15 letter from Normandeau also states that the Applicants are working in the field to be able to provide further information again on August 10, 2016 (although it is not clear whether that information would relate only to AoT or also to the Wetlands Application). Last week the Department confirmed that no other additional information had been submitted. But, earlier this week a large volume of materials apparently were delivered to the Department. It is not clear to us whether these new submissions have



been reviewed in enough detail by the Department to determine whether they constitute a complete response to the information requested by the Department in its Progress Report.

The Forest Society would like a meaningful opportunity to review all of the additional information, including that noted above and that which we anticipate the Applicants will provide in the future, and to provide comments to the Department before the Department makes and submits its final decision to the SEC. We know that many of the Conservation Commissions also wish to share with the Department their views on the additional information. Given the sensitivities of the 31 affected municipalities, it seems entirely appropriate for any of them that wish to do so to be able to provide such input. The Forest Society, therefore, respectfully requests that the Department structure its process to allow for the Forest Society and Conservation Commissions to meaningfully provide such input.

What is the best way for the Forest Society, Conservation Commissions, and other interested parties to interact with the Department with respect to the additional information, or the Wetlands Application overall? Given the magnitude and import of this novel application, would the Department afford Conservation Commissions 40 days to review and comment (acknowledging that an established period for review and comment is not usually provided in a formal fashion following responses to requests for more information)?

Perhaps DES will consider offering a public hearing so that the Forest Society, Conservation Commissions, and anyone else that may wish to communicate with DES about the Wetlands Application may do so in a facilitated way? RSA 482-A:8. The project certainly would have significant impacts on wetlands resources, involves complex issues, and is of substantial public interest. So, this is exactly the type of proposed project amenable to a public hearing. Moreover, having one public hearing seems like it might be the most efficient and streamlined mechanism for the Department to capture the comments of interested parties. It could go a long way towards affording parties a meaningful opportunity to provide input.

Of course, numerous public hearings and meetings have already been held with respect to the proposed project. However, as far as we know, none has focused on wetlands and none has made available to participants the ability to dialogue directly with the Department. And while the SEC process is designed to integrate and centralize permitting, it does not appear to take away the Department's authority to hold a public hearing.

To facilitate and hasten the Forest Society's ability to review (and that of Conservation Commissions or others with interest), it will be important for us to know when the Applicants provide additional information and when the Department corresponds with the Applicant. The Applicants have copied the first four of the submissions noted above to the Administrator of the SEC, who then distributed it to a



distribution list per standard practice. We do not yet know if the box of materials was also copied to the SEC. Ideally, the Applicants would continue this practice. The Forest Society is actively seeking guidance as to how to develop a cooperative and functional way to keep up to date without burdening the Department with repeated and numerous RSA 91-A requests. Could you please advise us?

III. It May be Appropriate for the Department to Seek Additional Time

We understand the Department's next deadline to be to "make and submit to the committee a final decision on the parts of the application that relate to its permitting and other regulatory authority," ("Final Decision Deadline"). As you may know, the SEC has granted authority to the SEC Chair to determine, without the necessity of a meeting or hearing of the full subcommittee of the SEC, whether to extend the Department's Final Decision Deadline, but only if the Department requests such an extension. The Forest Society respectfully requests the Department consider asking for such an extension for the following reasons.

First, given that the Department may not have received all of the additional information that it requested in its Progress Report and that it received a large volume of information just this week, it seems unreasonable to expect the Department to meaningfully process all of that information in time to prepare a final decision by August 4, 2016. (We assume that August 4, 2016 is your next deadline, August 4 being 240 days after December 7, 2015, which is the date that the SEC decided that the application was complete. RSA 162-H: 7, VI-c.)

Second, the same logic applies for the Forest Society, Conservation Commissions, or any other party interested in reviewing and making comments. We need time to obtain and review the information that has been submitted.

Third, because the overall procedural schedule has been extended, the case remains in the early stages, and it therefore is not necessary for the Department to submit its final decision in August of 2016. The SEC's rationale for extending the overall procedural schedule aptly describes the time-consuming consequence of the scale of the proposal:

[The proposed project] is unprecedented in both size and geographic scope.... The parties in this docket will have to review, comprehend, and respond to a plethora of reports, documents, and testimony The Subcommittee finds that the 365-day deadline should be suspended to ensure full and timely consideration of the environmental consequences of the Project Considering the magnitude of the Project and the issues raised in this docket, it is in the public interest to suspend the 365-day deadline. ... Given the extensive and complicated nature of the



Application, the suspension of the deadline to issue a determination until September 30, 2017, is reasonable and will assure that the delay does not become undue or unreasonable.

See SEC Docket No. 2015-06, June 15, 2016, Order on Motions to Suspend

At least one other state agency has already sought an extension of time. Extending the Department's Final Decision Deadline will put the Final Decision Deadline back into the typical sequence of proceedings of SEC proceedings, without causing any delay in the SEC's process.

Moreover, because the case is not very developed yet, the Department has not had the opportunity to review and consider information that may be generated which would contain analysis and discussion of wetlands impacts, and other impacts within the Department's jurisdiction. This could include responses to data requests, information from technical sessions, and probably most importantly, any pre-filed testimony and reports that any party may submit.

Of note, Counsel for Public has been granted permission to retain Arrowood Environmental Services, LLC in an amount up to \$142,654 to perform an "environmental review" of the proposed project, which will be focused on two resource areas: Wildlife Habitat; and Rare, Threatened and Endangered Species, and which will include review of the Wetlands Application. Presumably, the many parties whose mission concerns environmental protection (conservation commissions, non-profits, etc.) will also submit pre-filed testimony and reports about wetlands impacts and permitting.

Fourth, because of the Department's Progress Report and recent comments from EPA Region 1 (discussed subsequently), it is possible that the Applicants will opt to propose a significantly changed route. That would mean that the Department's investment in resources in reviewing the current route may have been spent needlessly.

In closing, with respect to the issue of timing, we think it is important to acknowledge the ever-changing field of information. It can reasonably be expected that up until the day the SEC issues its decision to grant or deny a certificate of site, additional information will be submitted. Accordingly, the Forest Society would not expect the Department to wait until "all" information is known and submitted and/or until the state of the application is perfectly settled. However, the four reasons noted above involve substantial and foundational pieces of the process which the Department should have the benefit of considering before it makes and submits its final decisions.

IV. The Wetlands Application Exceeds Authorized Delegation

The SEC is permitted limited delegation rights. For example, RSA 162-H:4, III authorizes the committee to "delegate the authority to monitor the construction or



operation of any energy facility *granted a certificate* ... to the administrator or such state agency or official as it deems appropriate, but shall ensure that the terms and conditions of the certificate are met.” See also RSA 162-H:4 III-a (“The committee may delegate to the administrator or such state agency or official as it deems appropriate to specify the use of any technique, methodology, practice, or procedure *approved by the committee* within a certificate issued under this chapter, or the authority to specify minor changes in the route alignment to the extent that such changes are *authorized by the certificate* for those portions of a proposed electric transmission line... for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate”).

All delegation authority presumes thorough and complete review within the SEC process as a prerequisite to issuance of the certificate, and then only after issuance of a certificate may any such delegation of authority occur.

If, after the SEC grants a certificate, any aspect of the proposed project changes substantially, an applicant must request an amendment to its certificate for such change to be lawful. See SEC Docket No. 2010-01, September 21, 2015, Final Decision and Order on Outstanding Issues. Such changes may also require amendments to permits from other state agencies, such as from the Department. *Id.* In the Groton Wind matter, the SEC decided that three changes were substantial and therefore the applicant “should have brought the revisions to the attention of the Committee before construction by way of a Motion to Amend the Certificate:” placement of an operations and maintenance building in a location different than what was depicted in the application, revising the location of a road that resulted in three wind turbines being located in different areas, and relocating about 700 linear feet of overhead transmission line.

Distinct from delegation, the SEC law requires that before the SEC decides an application, a state agency with permitting or regulatory authority shall report progress, outline draft permit conditions, specify additional data requirements, and eventually make and submit to the committee a final decision. RSA 162-H:7, VI-b; VI-c. The SEC shall then “incorporate in any certificate such terms and conditions as may be specified” by the Department. RSA 162-H:16, I. However, the SEC “shall not issue any certificate” of site if the Department “denies authorization for the proposed activity over which it has permitting or other regulatory authority.” This makes DES’ final decision—including the information gathering and analysis behind it—critically important.

In addition to these mandatory duties, state agencies are afforded several discretionary options for participation in a proceeding before the SEC, including identifying issues of concern, designating witnesses to appear before the SEC, and more. RSA 162-H:7-a, I. These important roles of state agencies afford the SEC the benefit of the state agencies’ high level of subject matter expertise before the SEC makes its decision to grant or deny a certificate.



These two concepts, post-decision delegation and pre-decision state agency participation, together mean that the SEC must have before it all aspects of the details of an application, including the details the state agency required and relied upon to submit its final decision to the SEC. In practice, the SEC appropriately places a great deal of weight on state agencies' final decisions. Overall, the SEC is likely to take very seriously all aspects of the Department's final decision.

Yet, the way that the Applicants have structured their application, including its Wetlands Application, the SEC will not have before it the complete information concerning the proposal. The application makes explicit that certain information will not be provided until after a certificate is granted. For example:

1. "Final specifications" for restoration plans are proposed to be developed after the permit is issued (Normandeau Associates Inc. Northern Pass Transmission Project. *Natural Resources Mitigation Plan*. October, 2015. page 4-1.) Note that the plans for restoration contained in the Wetlands Application are significantly less than what is typical.
2. The Applicants propose, if additional off right-of-way access roads ("ORAR") are needed, "appropriate permit amendments would be requested" after permitting (Normandeau Associates Inc. Northern Pass Transmission Project. *Wetlands, Rivers, Streams, and Vernal Pools Resources Report and Impact Analysis*. October, 2015. page 4-3.) We presume this means delaying the assessment of the need for more ORARs until during construction.
3. The Applicants propose to identify storage and staging areas later, in the construction management plan, and that they will apply for and "receive all necessary approvals prior to establishment and use" (Normandeau Associates Inc. Northern Pass Transmission Project *Application for Department of the Army Permit, USACE*, October, 2015. page 76.)

The law requires all such information and permit applications to be provided to the Department before the Department submits its final decision to the SEC, and therefore the complete information would be before the SEC before it makes its decision to grant or deny the certificate.

The Application presumes it is acceptable to not provide all of the information now, and instead to provide it to the Department and to likely seek permit amendments and/or new permits after the fact. Although we believe the Application is silent on this point, it appears that the intent would be to provide the information and seek amended and/or new permits without any involvement of the SEC, meaning that the Applicants would not seek any amendment to the certificate. Through the Wetlands Application, the Applicants ask the Department to approve this arrangement, but the Department cannot



approve a permit that would assume as an integral part of it an arrangement that is unlawful under the SEC law.

As in the Groton Wind case, the lack of this information before the Department and then the SEC make their respective decisions likely means that many substantial changes to the proposed project could occur without any SEC oversight. The Applicant could make a myriad of significant decisions later, for examples: a determination that many new ORARs are needed, or they are needed in new and different locations, which, presumably could cause the line or other project infrastructure to be relocated; wetlands restoration could be planned and/or carried out in such a way that the area of permanent wetlands impacts is increased from what has been applied for; or storage and staging areas could be located so that impact to adjacent property owners is so unreasonably adverse that the SEC would not have permitted the project in the first instance.

The Applicants' desired arrangement presumes that providing these types of information to the Department later is acceptable, but it does not fit into any of the permissible types of delegation. Developing restoration plans; identifying off right-of-way access roads and storage and staging areas, and applying for new permits or permit amendments for them, are not generally the types of activities that the SEC is authorized to delegate to the Department following a decision to grant a certificate. The SEC's delegation authority includes monitoring the construction or operation, authorizing DES to specify the use of any technique, methodology, practice, or procedure approved by the committee, and authorizing DES to approve minor changes in the route alignment, and proving this information after an SEC decision does not fit into any of these authorizations.

The Applicants have not justified why this information cannot be provided now. But, even if they did, leaving DES to resolve these issues after a grant of a certificate would exceed delegation authority. The Applicants should provide this information now, before DES and then the SEC would be able to make their decisions.

V. Avoidance & Minimization for All Overhead Portions

In the Progress Report, the Department noted its concerns about the proposed new 32-mile overhead right-of-way and requested revised plans "that consider and utilize the NH Route 3 alternative from Pittsburg to Northumberland." The Forest Society agrees with the Department's observation that avoidance of significant wetlands disturbances in the new 32-mile right-of-way is practical and essential, and we also believe the alternative posed by the Department is one reasonable way of achieving this goal.

However, it begs a question about all remaining overhead sections of the route: if impacting wetlands as a result of an overhead route does not meet the legal requirements for wetlands protection in the new 32-mile right-of-way, why did the Department not state a similar concern and make a similar request for all other overhead portions, where



similarly significant impacts to wetlands are proposed? Granted, the southern third is generally proposed to be located in an existing right-of-way corridor. But, we see do not the legal basis for being more protective of the northernmost wetlands than of the more southerly wetlands. Is it correct to interpret the Progress Report to mean that the Department has determined that the wetlands impacts for the overhead portions aside from the new 32-mile right-of-way are acceptable and/or permissible? If so, we would very much appreciate knowing your basis for doing that.

In the Progress Report, the Department devoted no or little analysis and comments to the required showing of need in the context of determining the least impacting alternative. Could you please explain the Department's thinking about this?

Lastly, we note that if the Departments' final decision is the wetlands permit should be authorized, the Forest Society would strongly encourage the Department to require robust and independent third party monitoring.

VI. Temporary Impacts: Some Seem Permanent

As noted in one of the Forest Society's April 21, 2016 letter, the Forest Society believes that many of the wetlands impacts the Applicants characterized as temporary will actually be permanent. In a letter dated July 14, 2016¹ from the United States Environmental Protection Agency, Region 1 to U.S. Army Corps of Engineers, New England District, EPA Region 1 seems to concur with this point. A copy of the letter is attached so you can see the full text, but to highlight the pertinent part, EPA Region 1 wrote:

While the temporary impacts are not permanent, impacts can be substantial in size and remain long after the fill is removed For example, soil compaction ... can result in a change in the wetland type and soil temperature, and in some cases result in a conversion to upland.... Most of the secondary impacts, such as cutting wetland vegetation, would be a permanent impact. The project would cause direct and secondary impacts to many streams and vernal pools, reducing the overall wildlife productivity.... This project would entail impacts beyond the footprint of the fill itself resulting in a loss of biological diversity.

Does the Department also believe that any of the wetlands impacts the Applicants characterized as temporary will actually be permanent? If so, how will this affect the decision-making within DES as to the viability of the application itself?

¹ This letter is dated erroneously as June 14, 2016.



VII. Summary of Questions

Following is a summary of the questions stated in the body of the letter, along with an additional question.

1. Does the Department's presentation of draft conditions in its May 16, 2016 progress report mean that the Department has already decided that its final decision will be that the wetlands permit should be authorized?
2. With respect to the additional information the Department requested of the Applicants in the Department's May 16, 2016 progress report to the SEC, what is the best way for the Forest Society, Conservation Commissions, and other interested parties to interact with the Department with respect to the additional information, or the Wetlands Application overall? (Would the Department afford the Conservation Commissions 40 days to review and comment? Perhaps DES will consider offering a public hearing?)

Please advise us as to how to develop a cooperative and functional way to keep up to date without burdening the Department with repeated and numerous RSA 91-A requests.

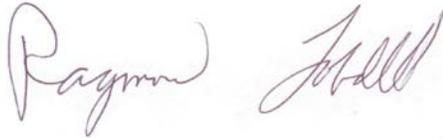
3. If impacting wetlands as a result of an overhead route does not meet the legal requirements for wetlands protection in the proposed new 32-mile right-of-way, why did the Department not state a similar concern and make a similar request for all other overhead portions, where similarly significant impacts to wetlands are proposed?
4. Is it correct to interpret the Department's May 16, 2016 progress report to the SEC to mean that the Department has determined that the wetlands impacts for the overhead portions aside from the new 32-mile right-of-way are acceptable and/or permissible? If so, we would very much appreciate knowing your basis for doing that.
5. Please explain the Department's thinking in that in the Department's May 16, 2016 progress report to the SEC the Department devoted no or little analysis and comments to the required showing of need in the context of determining the least impacting alternative?
6. Does the Department believe that many of the wetlands impacts the Applicants characterized as temporary will actually be permanent?



Conclusion

The Forest Society thanks the Department for its careful consideration of this unprecedented proposal, and in particular of the Wetlands Application. We are available should you have any questions, and we look forward to your response.

Very truly yours,



Ray D. Lobdell, CWS, CSS



Amy Manzelli, Esq.

cc:

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