

THE STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

SEC DOCKET NO. 2015-06

JOINT APPLICATION OF NORTHERN PASS TRANSMISSION, LLC & PUBLIC SERVICE
COMPANY OF NEW HAMPSHIRE D/B/A/ EVERSOURCE ENERGY FOR A
CERTIFICATE OF SITE AND FACILITY

**MOTION OF THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE
FORESTS TO CLARIFY THAT ISSUES CONCERNING MARCH 1, 2017, DES
DECISION PRESERVED IN EVENT OF AN APPEAL OF THE FINAL SEC DECISION**

Pursuant to Site Rule 202.14, the Society for the Protection of New Hampshire Forests (the “Forest Society”), by and through its attorneys, BCM Environmental & Land Law, PLLC, respectfully requests that the Subcommittee of the Site Evaluation Committee (the “SEC”) clarify that any issues regarding the March 1, 2017, decision of the Department of Environmental Services (the “DES”) to recommend approval of the permits sought by Northern Pass Transmission, LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively the “Applicants”) are not directly and immediately appealable to DES pursuant to the normal (non-SEC-related matters) appellate procedure for a DES decision and are, therefore, preserved and may be raised in an appeal of a final SEC decision. In support of this Motion, the Forest Society states as follows:

BACKGROUND

1. On October 19, 2015, the Applicants submitted an Application to the SEC for a Certificate of Site and Facility (the “Application”) to construct a 192-mile transmission line (the “Project”). As proposed, the Project would have a capacity rating of up to 1,090 MW, and would run through New Hampshire from the Canadian border in Pittsburg to Deerfield.

2. On October 19, 2015, DES received a wetland application, File No. 2015-02817, in which Applicants requested permits for 6,170,053 feet of wetland impact. Letter from Clark B.

Freise, Assistant Comm'r, NH DES, to Pamela G. Monroe, Adm'r, NH SEC, at p. 8 (Mar. 1, 2017) (hereinafter "DES Decision").

3. On March 1, 2017, DES informed SEC Administrator Monroe that the DES Water Division staff had "completed their technical review of the application and have made a final decision on the parts of the application that relate to DES permitting or regulatory authority relative to a Wetland permit, Alteration of Terrain permit, 401 Water Quality Certificate, and Shoreland permits. DES recommends approval of the application with the conditions that are enclosed with this letter." *DES Decision*, at p. 1.

ARGUMENT

I. Appeal Processes for DES and SEC Decisions

1. Outside of the SEC process, a DES decision on a wetland permit application may be appealed using a three-step process: (1) request to DES for a rehearing; (2) appeal to the Wetlands Council; and (3) appeal to the Supreme Court. RSA 541:3; RSA 482:A-10.

2. As set out in more detail in the subsequent paragraphs, inside the SEC process, SEC decisions to grant or deny a certificate of site may be appealed by a similar process: (1) move for rehearing within 30 days of any decision during the proceeding; (2) move for rehearing of the final decision to deny or grant the certificate of site; and (3) appeal to the Supreme Court.

3. All decisions of the SEC made pursuant to RSA 162-H are reviewable in accordance with RSA 541. RSA 162-H:11.

4. That procedure begins with an application for rehearing, which may be made within thirty days of "any order or decision" and may include arguments related to "any matter determined in the action or proceeding, or covered or included in the order." RSA 541: 3.

5. "No appeal from any order or decision of the commission shall be taken unless

the appellant shall have made application for rehearing as herein provided,” and “no ground not set forth therein shall be urged, relied on, or given any consideration by the court, unless the court for good cause shown shall allow the appellant to specify additional grounds.” RSA 541:4.

6. RSA 541:6 provides that “[w]ithin thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court.”

7. “When read together, these sections establish that arguments may be raised on appeal if they relate to ‘any matter determined in the action or proceeding,’ were included in an application for rehearing within thirty days of ‘any order or decision,’ and the agency's ruling on the application was timely appealed to this court.” *Appeal of N. New Eng. Tel. Operations, LLC D/B/A Fairpoint Commc’ns – NNE*, 165 N.H. 267, 272 (2013) (quoting RSA 541).

II. General Understanding in SEC Matters is that State Actions are Not Immediately Appealable

4. When a matter is pending before the SEC, it is generally understood that parties cannot follow this typical appellate procedure, which in the case of DES would involve an appeal to the Wetlands Council. Instead, it is generally understood that parties may raise any issue regarding the state agency decision on an appeal of the final SEC decision.

5. However, this Motion seeks clarification of this general understanding, because this general understanding is not explicitly supported by the relevant statute and rules. None of the sections of RSA 162-H that discuss various aspects of state agencies in an SEC matter address the issue of how to appeal agency-specific determinations of statutes that are not necessarily part of the SEC statutory scheme (RSA 162-H, 16) upon which the SEC will partially base its decision. RSA 162-H:1; RSA 162-H:3, I; RSA 162-H:7-a, I(a); RSA 162-H:7-a, I(e); RSA 162-H:16, I.

8. The Forest Society seeks clarification of whether this understanding is correct, because the Forest Society's position is that DES's March 1, 2017, is flawed for a number of reasons, including the following non-exhaustive list:

- a. DES's finding that the evidence demonstrates that this proposal is the alternative with the least adverse impact to areas and environments under DES' jurisdiction per Env-Wt 302.03 is unlawful, unreasonable, and not based on sufficient evidence; and
- b. DES did not properly apply the statute and rules governing practicability. Specifically, Applicants did not submit and DES did not base its decision on the legally-required financial rationale for meeting the standard that the cost of avoidance would not be practicable.

CONCLUSION

9. The Forest Society desires to challenge DES's March 1, 2017 determination, but requests a ruling that it need not, indeed may not, file an appeal using the typical DES appellate procedure, and instead may raise any issue regarding the DES decision in a motion for rehearing to the SEC and appeal, should the SEC decide to issue a certificate of site approval.

10. Further, by filing this Motion, the Forest Society hereby asserts that it has preserved its right to file a motion for rehearing of the March 1, 2017, decision with DES and appeal to the Wetlands Council in the event the SEC declines to issue the clarification sought.

11. The parties below take the following positions with respect to this request:

- a. Concur:

Abutting Property Owners (overhead portion), Dummer, Stark, and
Northumberland

Abutting Property Owners (overhead portion), Whitefield, Dalton, and Bethlehem

Abutting Property Owners (underground portion), Bethlehem to Plymouth
Combined Group of Intervenors Clarksville-Stewartstown
Grafton County Commissioners
Municipal Group 2
Municipal Group 3-South
NGO Group, Appalachian Mountain Club, Conservation Law Foundation, Sierra
Club Chapter of NH, and Ammonoosuc Conservation Trust
Non-Abutting Property Owners (overhead portion), Stark, Lancaster, Whitefield,
Dalton, and Bethlehem
Pemigewasset River Local Advisory Committee

- b. The remainder of the parties did not respond to a request for their position.

WHEREFORE, the Forest Society respectfully requests that the Subcommittee:

- A. Clarify any issues concerning the March 1, 2017, decision of DES to recommend approval of the permits sought by Applicants are not directly and immediately appealable pursuant to the normal appellate procedure for a DES decision and are, therefore, preserved and may be raised in an appeal of a final SEC decision granting a certificate of site approval; and
- B. Grant such further relief as is deemed just and appropriate.

Respectfully Submitted,

**SOCIETY FOR THE PROTECTION OF
NEW HAMPSHIRE FORESTS**

By its Attorneys,

BCM Environmental & Land Law, PLLC



Date: March 31, 2017

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on this day, March 31, 2017, a copy of the foregoing Motion was sent by electronic mail to persons named on the Service List of this docket.



Amy Manzelli