

**STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE**

**Docket No. 2015-06**

**Joint Application of Northern Pass Transmission LLC  
and Public Service Company of New Hampshire  
d/b/a Eversource Energy for a Certificate of Site and Facility**

**June 30, 2017**

**ORDER GRANTING APPLICANT’S MOTION TO FOR PROTECTIVE ORDER AND  
CONFIDENTIAL TREATMENT REGARDING CERTAIN EXHIBITS**

On April 24, 2017, the Applicant filed a Motion for Protective Order and Confidential Treatment Regarding Certain Exhibits (Motion). This Order grants the Motion.

**I. Background**

On October 19, 2015, Northern Pass Transmission LLC and Public Service Company of New Hampshire d/b/a Eversource Energy (collectively Applicant) submitted an Application to the New Hampshire Site Evaluation Committee (Committee) for a Certificate of Site and Facility (Application) to construct a 192-mile transmission line. The transmission line is proposed to have a capacity rating of up to 1,090 MW, and to run through New Hampshire from the Canadian border in Pittsburg to Deerfield.

Contemporaneously with the Application, the Applicant filed an Unassented-To Motion for Protective Order and Confidential Treatment, requesting that the Subcommittee issue a protective order to preserve the confidentiality of the following information: (1) archeological resources data; (2) information on the status, location, and distribution of native plant and animal species and natural communities; and (3) information which was redacted from Julia Frayer’s pre-filed testimony and report titled “Cost-Benefit and Local Economic Impact Analysis of the Proposed Northern Pass Transmission Project.”

The Unassented-To Motion for Protective Order and Confidential Treatment was granted by Order dated May 25, 2016.

On April 24, 2017, the Applicant filed a Motion for Protective Order and Confidential Treatment Regarding Certain Exhibits. The Motion seeks a protective order and confidential treatment of Applicant's Exhibits 108, 109, 110, 112, 119, and 124 listed on Applicant's Exhibit List for Final Hearings Phase II containing information related to: (1) archeological reports; (2) historic sites; and (3) native plants, animals, and natural communications. The Non-Abutting Property Owners from Stark, Lancaster, Whitefield, Dalton, and Bethlehem concur in the Motion.

## **II. Standard of Review**

A state agency must undertake a three step analysis to determine whether information should be exempt from public disclosure pursuant to the Right to Know law, RSA 91-A:5, IV. *See Lambert v. Belknap County*, 157 N.H. 375, 382-383 (2008); *Lamy v. Pub. Utils. Comm'n*, 152 N.H. 106, 109 (2005). The first prong of the analysis is to determine if the Applicant has identified a privacy interest. *Lambert*, 157 N.H. at 382. If a privacy interest is invoked then the agency must assess whether there is a public interest in disclosure. *Id.* Disclosure should inform the public of the activities and conduct of the government. *Id.* at 383. If disclosure does not serve that purpose then disclosure is not required. *Id.* Finally, when there is a public interest in disclosure, that interest is balanced against any privacy interests in non-disclosure. *Id.*

## **III. Analysis and Findings**

The Applicant requests that: (1) materials identified in Applicant's Exhibits 108, 109, 110, 112, 119, and 124 be treated as confidential; (2) a protective order be issued that preserves the confidentiality of the documents identified in Applicant's Exhibits 108, 109, 110, 112, 119, and 124; and (3) the Subcommittee authorize the Applicant to submit proposed redacted versions of Applicant's

Exhibits 108, 109, 110, 112, 119, and 124. The Applicant argues that these exhibits contain confidential information related to the Section 106 consultation process; and the location of rare, threatened, and endangered plant and animal species and exemplary natural communities.

#### **A. Archeological Reports**

The Applicant submits that, as part of its Application, the Applicant included required information regarding archeological resources data and archeological sites within or adjacent to the Project Area. The Applicant argues that, under New Hampshire's Historic Preservation Act, all information that may identify the location of archeological sites must remain confidential, and the disclosure of such information is exempt from RSA 91-A. Motion, p. 2 (citing RSA 227-C:11 under which information that may identify the location of any archeological site on state land, or under state waters shall be treated with confidentiality and is exempt from all laws providing rights to public access). In addition to RSA 91-A:5, which provides that records pertaining to confidential information are exempt from public disclosure, the Applicant relies on RSA 227-C:11, which exempts information identifying the location of archeological sites "from all laws providing rights to public access." The Applicant argues that Exhibit 108, listed on Applicant's Exhibit List for Final Hearings Phase II, contains such archeological information and thus must be exempt from disclosure.

RSA 227-C:11 also provides that state agencies, institutions, political subdivisions, permit holders, and private landowners should consult with the Commissioner of the Department of Cultural Resources before any disclosure of such information. *Id.* The purpose of this consultation is to "insure that the disclosure would not create a risk to the historic resource or that it is done in a manner to minimize the risk." *Id.* Information regarding the nature and location of archeological resources is similarly protected under federal law. *See* 16 U.S.C. § 470hh(a).

It is thus clear that the Applicant has properly identified a basis for claiming confidentiality. The New Hampshire Right to Know act exempts from public disclosure information that is “confidential, commercial or financial.” *See* RSA 91-A:5. Information regarding archeological sites appears to be confidential information that should be exempt from public disclosure under RSA 91-A:5. Archeological sites are protected by statute. *See* RSA 227-C. They are considered to be among the “most important environmental assets of the state.” RSA 227-C:1-a. The statute recognizes that social and economic development threatens such assets and recognizes the need for protection. *Id.* Understanding the importance ascribed to archeological resources by the legislature and the need to protect such resources, it follows that such archeological data qualify as confidential information under RSA 91-A:5.

The determination that information is “confidential” requires us to undertake the three-step analysis to determine whether information should be exempt from public disclosure pursuant to RSA 91-A: 5, IV. Here, the public benefit of disclosing the archeological information in Exhibit 108 is slight, and disclosure would be detrimental to the public interest in protecting archeological resources. Therefore, the information contained within Exhibit 108 is exempt from disclosure under the exemption provisions of the Right to Know law. RSA 91-A:5, IV.

The Motion is granted as to archeological information, and Exhibit 108 will not be disclosed or made available to the public. If any party to this docket desires access to archeological information contained within Exhibit 108, they should follow the procedures set forth below.

### **B. Historic Sites**

The Applicant argues that there are confidentiality concerns with documents relating to the separate review process directed by the U.S. Department of Energy (DOE) as required by Section 106

of the National Historic Preservation Act of 1966. The Applicant notes that, as part of the Section 106 process, “federal agencies identify historic properties, determine potential adverse effects on those historic properties from the proposed undertaking, and determine how the adverse effects should be resolved.” *See* Motion, p. 3 (citing <http://www.northernpassis.us./consultations/section106/>). The Applicant explains that, with respect to the Project, the DOE has issued confidentiality/sensitive information guidance for the Consulting Parties that precludes the distribution of work product documents and communications arising out of DOE’s Section 106 consultation to non-consulting parties. The Applicant indicates that it is a Consulting Party in the Section 106 process and is subject to the DOE directives on the confidential treatment of documents. The Applicant submits that the DOE has directed the Applicant to maintain as confidential documents including the archeological reports, the above-ground resources eligibility evaluations and effects assessments, and e-mails and related material on Consulting Party input in the Section 106 review process.

The Applicant is cognizant however of the relevance of this information to the Application and to the testimony presented by the Applicant and other parties on the issue of whether the Project will have an unreasonable adverse effect on historic sites. The Applicant indicates that, in an effort to respect the DOE directives yet still provide the parties in this docket with access to the Section 106 material, the Applicant proposed to DOE that the documents be reviewable by the parties in the same manner as Consulting Parties are allowed access to them in the Section 106 process. The Applicant indicates that DOE has agreed with this course of action, and the N.H. Division of Historical Resources (NHDHR) concurs. The Applicant also notes that many of the intervenors in this docket with an interest in historic sites are also Consulting Parties in the Section 106 process. The Applicant submits that Exhibits 108, 109, 110, 112, and 119 fall within the ambit of information subject to the DOE directive, and requests that such exhibits be treated as confidential, with access allowed as

approved by the DOE. The process in place for the Section 106 document review is to allow parties to review the documents at the NHDHR offices at 19 Pillsbury Street, Concord, N.H., between the hours of 8:30 a.m. and 4:00 p.m. Monday-Friday by contacting Tanya Krajcik at [Tanya.krajcik@dcr.nh.gov](mailto:Tanya.krajcik@dcr.nh.gov) or (603) 271-3483.

The Applicant's approach is reasonable. While noting the sensitive nature of the information contained within Exhibits 108, 109, 110, 112, and 119, the Applicant also recognizes the relevance of this information to these proceedings. The Applicant does not ask to preclude the parties in this docket from access to Exhibits 108, 109, 110, 112, and 119, but rather to provide a procedure for access to such exhibits in a manner consistent with the DOE directive so that the Applicant may both satisfy its obligations to the parties and Subcommittee in this docket as well as its obligations as part of the Section 106 process. The method proposed by the Applicant is reasonable in light of the interests in disclosure and the sensitive nature of the material to be disclosed.

The Applicant's Motion is granted as to information pertaining to historic sites contained in Exhibits 108, 109, 110, 112, and 119. If any party to this docket seeks disclosure of Exhibits 108, 109, 110, 112, and 119, they may follow the procedures set forth below.

### **C. Native Plants, Animal Species, and Natural Communities**

The Applicant also seeks a protective order and confidential treatment with respect to materials relating to New Hampshire's native plants, animals, and natural communities as well as those documents containing information subject to a data sharing agreement between the Applicant's expert, Normandeau Associates, Inc. (Normandeau), and the New Hampshire Natural Heritage Bureau (NHNHB). Specifically, the Applicant asserts that the documents and communications contained with Applicant's Exhibit 124 should be treated as confidential, as they include information relating to native plants, animal species and natural communities. The Applicant submits that, as part of its work,

Normandeau has coordinated with NHHNB regarding information on known locations of rare species and exemplary natural communities. The Applicant indicates that NHHNB provided Normandeau with digital data for the Project pursuant to data sharing agreements, including information on known locations of rare, threatened and endangered plant and animal species and exemplary natural communities that would be potentially impacted by the Project. The Applicant indicates that, in agreeing to provide this data to Normandeau, NHHNB restricted its distribution and required that specific locational information not be publicly disclosed. The Applicant argues that its Exhibit 124, the update to Appendix 48, Regulatory Agency Consultation Summary Table, includes information regarding natural resource data and natural resources sites within or adjacent to the Project Area as required. This information, according to the Applicant, includes maps, surveys and other material relating to the specific location and type of native plant and animal species and natural communities. The Applicant argues that the importance of protecting and preserving native species and natural communities, as well as the specific restrictions placed upon the distribution of this information by the NHHNB, warrant exemption from RSA 91-A. The Applicant asserts that producing information about the location of sensitive native species could negatively affect those resources, and stands in stark contrast to the legislative intent of the New Hampshire Native Plant Protective Act of 1987, RSA 217-A:2, providing that native plants and natural communities throughout the State should be protected and conserved, and accorded protection as is necessary to maintain and enhance their numbers. *See* RSA 217-A:2. The Applicant contends that the benefits of non-disclosure to the general public largely outweigh any public interest in obtaining these documents.

Data regarding the status, location, and distribution of rare, threatened and endangered native plants, animal species, and natural communities appear to be confidential information that should be exempt from public disclosure under RSA 91-A:5. Rare, threatened, and endangered native plants as

well as animal species and natural communities are protected by a number of statutes. *See* RSA 217-A:2; RSA 212-A:3; RSA 212-B:2. The State recognizes that said resources are “in jeopardy” and require protection by the State. *See id.* Considering the importance ascribed to rare, threatened and endangered native plants, animal species, and natural communities by the legislature and the need to protect such resources, it follows that documentation identifying said resources and their location qualifies as confidential information under RSA 91-A:5.

In addition, the disclosure of rare, threatened and endangered native plants, animal species, and natural communities is exempt under the Right to Know law. Specifically, in this case, the public benefit of disclosing information relating to the status, location, and distribution of the rare, threatened and endangered native plants, animal species and natural communities is slight, and in fact, disclosure would be detrimental to the public interest in protecting said resources. Therefore, the documentation and communications contained within Applicant’s Exhibit 124 is exempt from disclosure under the exemption provisions of the Right to Know law.

If any party to this docket seeks disclosure of said documentation, they may file a motion setting forth the reason for the requested disclosure and follow the procedures set forth below.

#### **IV. Treatment of Confidential Information**

Applicant’s Exhibits 108, 109, 110, 112, 119, and 124 listed on Applicant’s Exhibit List for Final Hearings Phase II shall be treated as confidential and shall not be disclosed to the public. As requested, the Applicant is permitted to submit proposed redacted versions of Exhibits 108, 109, 110, 112, 119, and 124.

The parties in this docket may access and review the information contained within Exhibits 108, 109, 110, 112, and 119 in the manner prescribed by the DOE for Section 106 document review. The parties may review the documents at the NHDHR offices at 19 Pillsbury Street, Concord, N.H.,



between the hours of 8:30 a.m. and 4:00 p.m. Monday-Friday by contacting Tanya Krajcik at [Tanya.krajcik@dcr.nh.gov](mailto:Tanya.krajcik@dcr.nh.gov) or (603) 271-3483. The confidential information contained in Exhibits 108, 109, 110, 112, 119, and 124 will be available for review by the members of the Subcommittee without the need to sign a confidentiality agreement. Subcommittee members may review the confidential material at the offices of the Site Evaluation Committee without participation by parties to the proceeding. Subcommittee members are not required to sign a protective agreement.

The confidential information contained in Exhibit 124 will be available for review by Counsel for the Public without the need to sign a confidentiality agreement.

If a party to these proceedings seeks access to documentation contained within Exhibit 124 must, in accordance with the Presiding Officer's Orders dated May 25 and July 6, 2016, file a motion identifying the reason for such access and execute a protective agreement in the form set forth and attached hereto. A true copy of the Motion and protective agreement shall also be forwarded to the Applicant. Only parties authorized by the presiding officer, after receipt of the executed protective agreement, shall be afforded access to the confidential information. The parties shall not make any copies of such information or use the information for purposes other than the preparation for, and conduct of, the proceedings in this docket. If a party is granted authority to review the confidential material, then such review shall occur at the offices of the Site Evaluation Committee during normal business hours.

Unless otherwise ordered, the parties shall not reference the confidential information during public proceedings in this docket or at any time in public. Upon completion of this proceeding and any resulting appeals, the parties shall destroy any notes referencing the confidential information and return all confidential information to the Applicant. Within sixty days thereafter, each party shall certify to the Applicant, with a copy to the Administrator of the Committee, that said notes have been destroyed

and all confidential information has been returned. The rights of the parties under this Order are not assignable and may not be transferred in any manner.

Unless otherwise ordered, any future requests for a protective order, which are subsequently granted by the presiding officer, will be handled with the same procedures detailed above.

Copies of the confidential materials shall not be made available to any party to the proceeding without an explicit order from the presiding officer.

SO ORDERED this thirtieth day of June, 2017.



---

Martin P. Honigberg, Presiding Officer  
Site Evaluation Committee

EXHIBIT A

THE STATE OF NEW HAMPSHIRE  
SITE EVALUATION COMMITTEE

SEC Docket No. 2015-06

CONFIDENTIALITY AGREEMENT

I, \_\_\_\_\_, hereby certify that I am a Party to the above-captioned proceeding and in connection with my interests therein, I request to be given access to the following Confidential Information maintained by the Site Evaluation Committee: \_\_\_\_\_.

I further certify that I have read the Site Evaluation Committee's protective order issued in the above-captioned matter, understand it and agree to be bound by it. I understand that this Exhibit A does not authorize my access to the above Confidential Information until I have signed and delivered it to counsel for Northern Pass Transmission, LLC and Public Service Company of New Hampshire, and until it has been provided to the Site Evaluation Committee by said counsel.

Date: \_\_\_\_\_

\_\_\_\_\_  
Signature of Party to Docket No. 2015-06

\_\_\_\_\_  
<sup>1</sup> A "Party" or "Parties" to the SEC Proceeding include Counsel for the Public, and any individual or organization, and their attorney, who have been granted intervenor status in the SEC Proceeding by the presiding officer or chairman, pursuant to Site 202.11.