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I N D E X

WITNESS PANEL: JEFF PARSONS
 MICHAEL LEW-SMITH
 MICHAEL AMARAL
 SCOTT REYNOLDS

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CFP 136 (12/30/16)	Arrowwood Prefiled Testimony	11
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P R O C E E D I N G S

1
2 CHAIRMAN HONIGBERG: Good
3 afternoon, everyone. We have a new witness
4 panel to hear from today. But before we do
5 that, I understand, Mr. Pappas, you need to say
6 something.

7 MR. PAPPAS: I do. Thank you,
8 Mr. Chairman. I have an issue regarding a new
9 exhibit that was just received over the
10 weekend. On Saturday evening, the Applicants
11 uploaded to the ShareFile site Exhibit 124A,
12 and it has 104 files in total as part of the
13 exhibit, and late this morning they uploaded an
14 additional file for this exhibit. There simply
15 is not sufficient time for counsel, and
16 certainly this panel, to carefully review and
17 be prepared to discuss these 105 new files.
18 And within the new document is a 92-page report
19 with tables on a new survey on bats, and the
20 report is dated September 22, 2017, by
21 Normandeau & Associates. And that also was
22 just received as part of these documents.
23 Other documents within this exhibit that were
24 uploaded Saturday night include e-mails

1 starting as early as January of this year, many
2 of them during the summer, June, July, August.
3 And there are also the new Avoidance and
4 Minimization Measures that were recently filed
5 by the Applicant.

6 And I have discussed this with
7 the Applicant earlier today when this came to
8 light, at least when I learned about this.

9 And what our request is, is as follows: That
10 Counsel for the Public and any intervenors,
11 since we can't effectively review and address
12 all these new documents for today, we request
13 the right to review them as time permits and
14 to file any response we think appropriate in
15 response to them after we have a chance to
16 review them. And if we deem it necessary, we
17 serve the right to request that Normandeau &
18 Associates come back and be questioned on
19 them. We don't know right now whether that's
20 appropriate because we haven't had a chance
21 to review them in detail. But certainly we
22 the right to review them, file something in
23 response as we deem appropriate, and if we
24 think it's necessary, make the request to

1 recall, and you can take it up at that time.

2 CHAIRMAN HONIGBERG: Mr. Walker,
3 Mr. Bisbee.

4 MR. BISBEE: Thank you, Mr.
5 Chairman. It doesn't call for much of a
6 response because, as I understand it, Counsel
7 for the Public is saying after they have the
8 opportunity to fully review these documents,
9 they will make whatever request they make, and
10 at that point we can respond to those requests.

11 I would simply add that this
12 is in the ordinary course of working through
13 permits with the other agencies, and we
14 wanted to be sure that we had things updated.
15 So that's what we're doing. But I understand
16 Mr. Pappas's request.

17 CHAIRMAN HONIGBERG: Yes, Mr.
18 Pappas.

19 MR. PAPPAS: Actually, the first
20 part of the request is that we be allowed to
21 file a response after we review them. The
22 second part of the request is to reserve the
23 right to ask in the future to recall the
24 witnesses.

1 CHAIRMAN HONIGBERG: Mr. Bisbee.

2 MR. BISBEE: I'm not clear what
3 the "right to respond" is that he's requesting.
4 If he hasn't seen the documents yet, he doesn't
5 know whether he needs to do anything. So I
6 would think that whatever needs to be done,
7 they will make a request for that when the time
8 comes.

9 CHAIRMAN HONIGBERG: Yeah, Mr.
10 Pappas, it seems unlikely that if there's
11 something in there that you need to address
12 that you couldn't come up with a document that
13 would say I need X or I need Y. I assume that
14 whenever it comes in, you will probably have
15 alerted the Applicant as to what it is you're
16 going to be doing, and so there would be some
17 attempt to talk about that in advance anyway.
18 It also seems likely that, in terms of
19 accepting a filing, we will always accept a
20 filing. What relief is requested in it, I
21 can't speculate.

22 Does anyone else want to say
23 anything about the documents that Mr. Pappas
24 described? I see Ms. Manzelli and I see Mr.

1 Whitley. I saw Ms. Manzelli first.

2 MS. MANZELLI: Thank you, Mr.
3 Chair. I wanted to clarify that other
4 intervenors -- or let me just say it this way:
5 The Forest Society would also like to reserve
6 the right, if needed, to seek recall of
7 witnesses.

8 CHAIRMAN HONIGBERG: Yeah, I
9 think Mr. Pappas's request was broad enough to
10 include the intervenors, but I understand why
11 you said what you said.

12 Mr. Whitley.

13 MR. WHITLEY: My only question,
14 Mr. Chair, was there was some mention of a time
15 frame to review these materials and then to
16 make such requests, and I'm just looking for a
17 little more clarity on when the deadline to do
18 that may be.

19 CHAIRMAN HONIGBERG: Yeah, I
20 don't know who mentioned time frame. I don't
21 remember that word being uttered by Mr. Pappas,
22 although maybe he did.

23 MR. PAPPAS: I just said "as
24 time permitted." I didn't set a deadline

1 because it's 105 documents and we don't know.

2 CHAIRMAN HONIGBERG: As quickly
3 as you can get your arms around what it is
4 you're looking at, it makes sense to act, I
5 mean, even if it is to say this is so
6 overwhelming, it's going to take us months,
7 which I'm sure Mr. Bisbee will have a response
8 to. But as quickly as you can get your arms
9 around what it is you're looking at and say
10 what you need to say.

11 Mr. Whitley, I assume you
12 agree with that.

13 MR. WHITLEY: No, that's fine.
14 That gives me a little bit of direction. Thank
15 you, Mr. Chair.

16 CHAIRMAN HONIGBERG: Anyone
17 else?

18 [No verbal response]

19 CHAIRMAN HONIGBERG: All right.
20 Would you please swear the witnesses in.

21 (WHEREUPON, JEFF PARSONS, MICHAEL
22 LEW-SMITH, MICHAEL AMARAL, SCOTT
23 REYNOLDS were duly sworn and cautioned
24 by the Court Reporter.)

1 CHAIRMAN HONIGBERG: Ms. Connor.

2 MS. CONNOR: Thank you. One
3 procedural matter before we proceed, and that
4 has to do with scheduling. Mr. Parsons teaches
5 on Tuesdays. His area has been described to me
6 as "feathers and fur." To the extent we get to
7 individuals in the audience and they have an
8 opportunity to question today, perhaps they
9 could zero in on him. We can also make him
10 available first thing Wednesday. I apologize
11 that he's not available on Tuesday.

12 CHAIRMAN HONIGBERG: Understood.
13 Everybody heard Ms. Connor on that? Let us
14 know when you have a chance if you have
15 specific questions for Mr. Parsons or would be
16 appropriate for Mr. Parsons.

17 MS. CONNOR: Thank you.

18 DIRECT EXAMINATION

19 BY MS. CONNOR:

20 Q. Gentleman, would you please individually
21 introduce yourself to the panel, identify who
22 you work for, and provide a brief description
23 of your involvement in this case -- in other
24 words, the areas that you will be covering.

1 A. (Lew-Smith) My name is Michael Lew-Smith. I
2 can take general questions. Kind of project
3 manager. I'm with Arrowwood Environmental.
4 And I'll be discussing rare plants, vernal
5 pools, reptiles and amphibians, and freshwater
6 mussels.

7 A. (Parsons) I'm Jeff Parsons. I'm with Arrowwood
8 Environmental as well, and I'll be addressing
9 mammals, except bats, insects and birds.

10 A. (Amaral) My name is Michael Amaral. I'm an
11 instructor for American Public University, but
12 I was subcontracted by Arrowwood to review the
13 Karner blue butterfly portion of this project
14 in the right-of-way in Concord and Pembroke,
15 New Hampshire.

16 A. (Reynolds) My name's Scott Reynolds. I work
17 for North East Ecological Services. And I was
18 subcontracted by Arrowwood, and my field of
19 focus is bats.

20 Q. Great. Gentlemen, am I correct that you
21 filed testimony in this matter on
22 December 30th, 2016, and that's been marked
23 as Counsel for the Public Exhibit 136?

24 A. (Lew-Smith) That's correct.

1 Q. And do you have that testimony in front of
2 you?

3 A. (Lew-Smith) Yes.

4 Q. Attached to that prefiled testimony was a
5 report with various appendices also dated
6 December 30th, 2016, which was Exhibit E to
7 that same Exhibit 136. Do you have that
8 report in front of you?

9 A. (Lew-Smith) Yes.

10 Q. Finally, on April 17th, 2017, you filed
11 supplemental prefiled testimony, which we
12 marked as Counsel for the Public Exhibit 137.
13 Do you have that in front of you?

14 A. (Lew-Smith) Yes.

15 Q. Great. Do you need to make any corrections
16 to your report or your prefiled testimony?

17 A. (Lew-Smith) No.

18 Q. In preparation -- do you adopt that testimony
19 as of the date of filing?

20 A. (Lew-Smith) Yes, we do.

21 Q. In your preparations for today, have you also
22 reviewed Normandeau & Associates'
23 supplemental prefiled testimony?

24 A. (Lew-Smith) Yes, we have.

1 Q. And have you reviewed pertinent sections of
2 the testimony that they gave to this panel?

3 A. (Lew-Smith) Yes, we have.

4 Q. Have you reviewed their August 2017 Avoidance
5 and Minimization Measures, which hereinafter
6 we'll call "AMMs"?

7 A. (Lew-Smith) Yes, we have.

8 Q. And did you also review amendments to those
9 AMMs which we received this past Saturday?

10 A. (Lew-Smith) Yes, we have.

11 Q. And Mr. Reynolds, with respect to bats, have
12 you reviewed Normandeau's September 27th,
13 2017 Bat Survey which we received yesterday,
14 on Sunday?

15 A. (Reynolds) Within those time constraints, yes.

16 Q. Understood.

17 During your testimony today, are you
18 prepared to address this new information and
19 the analysis set forth in the materials I
20 just referenced?

21 A. (Lew-Smith) Yes, we are.

22 Q. Great. I want to begin with bats, which I
23 understand is going to be directed to Mr.
24 Reynolds. I'd like to first pull up Counsel

1 for the Public Exhibit 336.

2 MS. CONNOR: Can we zoom in on
3 the small-footed bat, which is sort of the
4 middle, top category? Perfect. I don't even
5 need my glasses now.

6 BY MS. CONNOR:

7 Q. Mr. Reynolds, do you recognize this AMM?

8 A. (Reynolds) Yes, I do.

9 Q. And this reflected what was being presented
10 by Normandeau back at the time they testified
11 in June of 2017 as to what was being proposed
12 with regard to the small-footed bat?

13 A. (Reynolds) Correct.

14 Q. And in particular, I want to draw your
15 attention to the fact that it appears there
16 was a seasonal construction restriction?

17 A. (Reynolds) Yes.

18 Q. And what was that?

19 A. (Reynolds) To avoid any suitable roost habitat
20 from June 1 to July 30th.

21 Q. Am I correct there is also a blasting
22 restriction?

23 A. (Reynolds) Correct.

24 Q. And what was that?

1 A. (Reynolds) To avoid blasting from October 15 to
2 April 15.

3 Q. I would like to now pull the AMMs that we
4 received on Saturday, which is part of
5 Applicant Exhibit 124A.

6 MS. CONNOR: Can we go to Page
7 APP85735, and can we also just sort of zoom
8 into the small-footed bat because that's what I
9 want to talk about. Perfect.

10 BY MS. CONNOR:

11 Q. Mr. Reynolds, is that up on your screen as
12 well?

13 A. (Reynolds) Yes, it is.

14 Q. Now, bearing in mind the AMMs that we looked
15 at that were being recommended in June of
16 2017, we now have new AMMs that were proposed
17 in November of 2017. Can you speak to the
18 differences?

19 A. (Reynolds) They removed the time-of-year
20 restrictions for both the summer and winter
21 construction work.

22 Q. And with regard to blasting?

23 A. (Reynolds) There's no reference to any blasting
24 limitations on the current AMM.

1 Q. So would it be fair to say that the current
2 AMMs provide less protection for the
3 small-footed bat than the earlier ones?

4 A. (Reynolds) Less clarification, less -- yes.
5 Yeah, it's much more vague.

6 Q. With reference to the current AMMs, did they
7 adequately provide, in your opinion,
8 protection for the small-footed bat?

9 A. (Reynolds) No, they did not.

10 Q. Can you explain why not?

11 A. (Reynolds) In Dr. Barnum's testimony in June,
12 they were going to work on two aspects of it:
13 One was clarifying what is considered known
14 habitat and known locations, and the other was
15 clarifying how they were going to do protection
16 primarily in the context of blasting and what
17 limitations that would be given, both
18 temporally and how to adequately identify a
19 site as being occupied or non-occupied. And
20 this just sort of leaves it as we're going to
21 talk to New Hampshire Fish & Game as it gets
22 closer to figure out what we'll do. So it
23 actually takes out a lot of detail and just
24 leaves it to some document to be determined

1 later.

2 MS. CONNOR: Can we go to the
3 long-eared bat, which is on the page prior,
4 sorry, APP85734, at the very bottom? And if
5 you could blow that up, that would be great.

6 BY MS. CONNOR:

7 Q. Mr. Reynolds, do you see the reference to the
8 Northern long-eared bat?

9 A. (Reynolds) This is for the new AMM.

10 Q. Correct.

11 A. (Reynolds) Correct.

12 Q. Can you address the adequacy of these AMMs
13 with regard to the long-eared bat?

14 A. (Reynolds) They maintain the time-of-year
15 restrictions that were in the previous edition,
16 but they did not address both concerns I raised
17 in my supplemental testimony and Dr. Barnum
18 raised in her testimony in June about what
19 would be considered "known." At that time --
20 give me a second to look at my notes.

21 She stated in her testimony that "known"
22 would be expanded to include sites that were
23 positive for the presence of Northern
24 long-eared bats; acoustically, sites that

1 were -- the language she used was "where
2 we're not sure whether they're there or not,"
3 which in the language of the U.S. Fish and
4 Wildlife Service would be "cannot rule out,"
5 and those distinctions were not made in this
6 document.

7 MS. CONNOR: And for purposes of
8 the record, we'll reference that that testimony
9 from Dr. Barnum was on Day 16 in the PM Session
10 at Page 37.

11 BY MS. CONNOR:

12 Q. So, Dr. Barnum at that time, in response to
13 my questions, indicated that these AMMs
14 should be amended so that "known" included
15 locations that were inconclusive, and that in
16 fact has not been done, has it?

17 A. (Reynolds) No, it has not.

18 Q. Is that important to include in the AMM?

19 A. (Reynolds) Given what I perceive as
20 inadequacies in the pre-construction acoustics,
21 yeah, I think we need to be very clear what are
22 being considered known or potentially present
23 sites.

24 Q. In that regard, how many sites were located

1 in the original acoustic survey, in terms of
2 known locations?

3 A. (Reynolds) If known is taken as confirmed, then
4 there's one location, Deerfield. If known is
5 considered to be where they may or may not
6 present, or where there are no data, then that
7 puts it at a minimum of, I believe, over 24
8 locations.

9 Q. Okay. How long is acoustic survey data for
10 bats useful?

11 A. (Reynolds) According to the U.S. Fish &
12 Wildlife guidelines, which were what were
13 referenced for this project, they're useful for
14 a minimum of two years. They're considered
15 useful as long as nothing has substantially
16 changed, or with prior consultation with the
17 U.S. Fish & Wildlife Service. In the context
18 of major habitat change, White-Nose Syndrome,
19 other features that are altering the abundance
20 of bats in the landscape, probably conservative
21 to say two to three years.

22 Q. So with regard to the Normandeau 2015 Bat
23 Survey, then, if construction doesn't occur
24 by the spring, is that bat data still

1 adequate, useful?

2 A. (Reynolds) It's useful, but it's reaching the
3 end of its life span.

4 Q. Okay. I mentioned when I introduced the
5 panel that we received a 2017 Normandeau Bat
6 Survey, and that is part of Applicant
7 Exhibit 124A. Hmm... Well, that copy of the
8 exhibit bears a date of October 30th. The
9 copy I received over the weekend I will
10 represent had a date of September 22nd. Have
11 you had a chance briefly to review this? You
12 mentioned that?

13 A. (Reynolds)I only reviewed the September
14 version, so I don't know what changed in the
15 October version.

16 MS. CONNOR: May I ask the
17 Applicant why there's a different date on this
18 than the one that was produced over the
19 weekend? I think they're the same exhibit,
20 just with a different cover page.

21 CHAIRMAN HONIGBERG: I think
22 they're trying to figure that out right now.

23 MS. CONNOR: Okay.

24 MR. BISBEE: This report is in

1 the material that you received on Saturday,
2 Doreen, so you have it. The second one, the
3 subsequent one that is on the screen now, had a
4 few minor tweaks to it. I don't know that you
5 need the detail on that right now. But it was
6 not a major change to that report.

7 MS. WEATHERSBY: Could I just
8 ask if this material has been submitted to the
9 Committee?

10 CHAIRMAN HONIGBERG: Mr. Bisbee,
11 do you know if it's been submitted to the
12 Committee?

13 MR. BISBEE: It's part of our
14 exhibits, so yes.

15 MS. CONNOR: I believe they were
16 uploaded Saturday night.

17 CHAIRMAN HONIGBERG: People do
18 understand, don't they, that the Committee
19 members don't have access to the ShareFile;
20 right? Apparently not. I mean, typically
21 that's not uncommon in PUC proceedings or SEC
22 proceedings. The parties exchange all kinds of
23 things, mark them, and they only present them
24 to the Committee when they need to be presented

1 to the Committee. So you all know more about
2 these than we do.

3 So why are there two versions
4 of this, Mr. Bisbee?

5 MR. BISBEE: There was one
6 submitted in September. And I'm being reminded
7 by Ms. Carbonneau that in discussions with Fish
8 & Game, they raised an issue or two that we
9 addressed in the revised version in October,
10 both of which were submitted Saturday night.
11 So, either way, we understand that Counsel for
12 the Public only got them over the weekend.

13 MS. CONNOR: For the record, I
14 received the September 22nd one in response to
15 my request to Attorney Bisbee Saturday morning
16 at 6:30 a.m. I have not ever received --
17 Sunday. I've not ever seen this October 30th
18 one.

19 CHAIRMAN HONIGBERG: I
20 understand, Ms. Connor.

21 MS. CONNOR: Okay.

22 CHAIRMAN HONIGBERG: If you have
23 a request --

24 MR. ASLIN: Just a clarifying

1 question, Dana. You said both versions are in
2 the 124A version? Is the September -- do you
3 know what the APP number is on the September
4 version so we can put that one up for now since
5 that's what Scott's reviewed?

6 MR. BISBEE: Maybe quickly,
7 maybe not.

8 CHAIRMAN HONIGBERG: We're going
9 to take a ten-minute break and let counsel
10 confer with each other and figure out what
11 needs to be done to smooth this out.

12 MS. CONNOR: Thank you.

13 (Recess was taken at 1:32 p.m.
14 and the hearing resumed at 1:40 p.m..)

15 CHAIRMAN HONIGBERG: Ms. Connor.

16 MS. CONNOR: Thank you.

17 We have up on the screen as an
18 exhibit Bates Stamp APP85886, the
19 September 22, 2017 version that Dr. Reynolds
20 and I reviewed this weekend.

21 BY MS. CONNOR:

22 Q. Do you recognize that document?

23 A. (Reynolds) Yes, I do.

24 Q. Can you tell the panel, who have not had an

1 opportunity yet to review this document, what
2 it is?

3 A. (Reynolds) Again with the caveat that I've had
4 about less than 30 minutes to look at it
5 myself, it appears to be a follow-up study that
6 was conducted by Normandeau in the summer of
7 2017, and I think in their language, to "survey
8 inaccessible locations" or "survey locations
9 that had failures from that initial survey."
10 It involved 38 locations that I believe were
11 sampled using the same U.S. Fish & Wildlife
12 guidelines. Again, it's all acoustic
13 monitoring. And the results of the survey, in
14 short, were that they documented 20 locations
15 with potential Northern long-eared bats, 27
16 with potential Indiana myotis. And they also
17 had -- the most abundant documentation was for
18 little brown myotis, and they also documented
19 Eastern small-footed myotis.

20 Q. I'm going to stop you right there. Have you
21 covered all of the bats that they found?

22 A. (Reynolds) No. I mean, they documented other
23 bats that are state threatened. But in terms
24 of we've been focusing primarily on the myotis

1 bats, so those were the four myotis species
2 that were highlighted in the report.

3 Q. Am I correct that the Indiana bat is
4 something that was not located in their 2015
5 survey?

6 A. (Reynolds) It was not looked for in the 2015
7 survey by the filter that was used because it's
8 not considered to be resident in the state of
9 New Hampshire.

10 Q. What is an Indiana bat?

11 A. (Reynolds) It is a congener of the other
12 groups. It's a species similar to little brown
13 myotis and the Northern long-eared myotis. It
14 is found generally south of us and west of us.

15 Q. What is the protection level afforded to an
16 Indiana bat?

17 A. (Reynolds) It is a federally endangered
18 species.

19 Q. Do the current AMMs address any protection
20 for this federally endangered species, the
21 Indiana bat?

22 A. (Reynolds) No, they do not.

23 Q. What protection is required for a federally
24 endangered bat?

1 A. (Reynolds) In general, they follow the acoustic
2 monitoring protocol that was developed actually
3 for this species. It's just been adapted for
4 the northern myotis. Once they have been
5 determined to be present, then there's a whole
6 bunch of different avenues that a developer or
7 any party can undergo. But it usually involves
8 consultation with the U.S. Fish & Wildlife
9 Service, a Section 7 consultation. It can
10 involve a habitat conservation plan, it can
11 involve incidental take permit. It's not my
12 field of expertise, but there's several
13 remedies.

14 Q. In terms of the greatly expanded number of
15 locations at which we now have documentation
16 from Normandeau of either Northern long-eared
17 bats, Indiana bats -- and what was last one?

18 A. (Reynolds) The Eastern small-footed.

19 Q. -- Eastern small-footed, what needs to happen
20 next in order to protect them, beyond knowing
21 that they are at these locations, or
22 potentially at these locations?

23 A. (Reynolds) Well, to clarify, the results I gave
24 were the automated results from their

1 classifier. Like the 2015 report, Normandeau
2 did a manual vetting of all calls that were
3 identified as "potential calls of interest."
4 So, initially in 2015, that was just the
5 long-eared bat and the small-footed. And I
6 presume for 2017 they also vetted manually for
7 the Indiana myotis. So their final
8 determination was a much smaller group of that.
9 They removed all but one of those sites for the
10 Northern. So they eliminated 19 of those 20
11 through manual vetting; 11 of those were
12 considered ambiguous. My version of the report
13 from September 27th [sic] stated only 9 of
14 those were ambiguous. But if you look at Table
15 3 of the report, there were actually 11 sites
16 that either "cannot be ruled out" or are
17 "unable to identify," which by the U.S. Fish &
18 Wildlife criteria equals "presence." So there
19 should have been 11 ambiguous sites for the
20 Indiana bat; 23 of those -- 27 sites were
21 identified as "ambiguous." And I don't believe
22 they broke down the little brown or the Eastern
23 small-footed any more than that. So it wasn't
24 the whole 20 and 27 according to the manual

1 analysis. It went down to -- again, this
2 revolves around what is the definition of
3 "known." If the definition of "known" is
4 consistent with the U.S. Fish & Wildlife, then
5 it would be 12 locations for the Northern
6 long-eared and 23 locations for the Indiana
7 myotis.

8 Q. And have you been able to determine how many
9 locations, how many towns this now implicates
10 along the corridor in which the AMAs [sic]
11 would apply with regard to these two species?

12 A. (Reynolds) It would be 10 towns for the
13 Northern long-eared and 12 towns for the
14 Indiana myotis.

15 Q. I also want to briefly bring up another part
16 of the filing from this weekend in Exhibit
17 124A, an October 19, 2017 letter from the
18 United States Department of Interior. Oh,
19 sorry. APP85584.

20 Dr. Reynolds, have you had an
21 opportunity to briefly look at this exhibit?

22 A. (Reynolds) Yes, I have.

23 Q. Am I correct --

24 MS. CONNOR: Actually, can we go

1 to the last two pages, which is the literature
2 cited, Pages 28 and 29?

3 BY MS. CONNOR:

4 Q. Have you reviewed sort of what I would call
5 the "appendix," the literature cited pages?

6 A. (Reynolds) Yes.

7 Q. And am I correct that in terms of the filing
8 to the Interior, what has been presented is
9 the Normandeau 2015 survey, but not the
10 Normandeau 2017 survey?

11 A. (Reynolds) Correct.

12 Q. And so any opinions that were reached in this
13 exhibit with regard to the bats didn't have
14 the benefit of the most recent bat survey.

15 A. (Reynolds) The two sections that are itemized
16 in the opinion on Page 3-4, the Northern
17 long-eared bat, page 4 for the Indiana myotis,
18 make no reference to -- they make reference to
19 the 2015 data, some 2013 data that I don't have
20 access to or have never seen, but then no
21 reference to the 2017 data.

22 Q. Okay. What impact does the discovery of a
23 federally endangered Indiana bat have on the
24 federal review of this project?

1 A. (Reynolds) I would believe it opens the door to
2 additional consultation and review.

3 Q. Do the current AMMs from November of this
4 year address the criticisms in your
5 supplemental testimony with regard to
6 protection for bats if this project gets a
7 permit?

8 A. (Reynolds) No, they do not.

9 Q. Why not?

10 A. (Reynolds) Take it by species or --

11 Q. Certainly.

12 A. (Reynolds) All right. Start with the Northern
13 long-eared. In my supplemental testimony I
14 suggested that there should be more
15 clarification on what is, again, back to the
16 issue of "known," what would be qualified as
17 "known." There should also be --

18 Q. I'm going to stop you right there. And in
19 terms of what's known, you're referencing the
20 fact that known would include actual known,
21 which is what we think of when we think of
22 the word, but also anyplace where you have
23 inconclusive data?

24 A. (Reynolds) So, I've either written or orally

1 testified, and Dr. Barnum I think testified on
2 this as well, the issue is the acoustic
3 monitoring; it's got a high level of error.
4 So, some of the data can be confidently
5 assigned to species, and that's what Normandeau
6 did on their 2015 and 2017 reports. And those
7 would be classically considered "known,"
8 documented presence of that species. Then
9 there's a large section of calls that are
10 ambiguous. And different biologists use
11 different terms. The terminology of the U.S.
12 Fish & Wildlife is "cannot rule out." So if
13 you can't -- if the automated system says it's,
14 for example, an Indiana myotis, and you can't
15 provide evidence that it's not Indiana myotis,
16 you refer to it as "cannot rule out." And
17 Normandeau used that terminology. I think they
18 also in some of the tables used "ambiguous" as
19 a criteria -- or as a determination. And they
20 also, in the 2017 report, said something like,
21 I think, "poor quality, could not I.D." In my
22 opinion, all three of those would fall under
23 the U.S. Fish & Wildlife description as "cannot
24 rule out" and therefore, by their guideline

1 criteria, should be considered as "present,"
2 which would trigger another set of survey
3 efforts. Essentially, they should then go out
4 and either re-sample acoustically, or more
5 appropriately, actually do what's called
6 "missed net surveys," where you actually
7 capture the bats and have them in hand, and you
8 can tell species much easier when you're
9 actually holding them.

10 I forget what your original question
11 was. Is that the answer to it?

12 Q. Well, the question was whether or not the
13 current AMMs address your criticisms with
14 regard to the protection for the bats. And
15 you started by species.

16 A. (Reynolds) So that was to get to my first
17 concern was we need to know what "known" means,
18 or make sure we're all using the same concept
19 of the term "known." So it should be all
20 those.

21 I believe I stated in my supplemental
22 testimony, and Dr. Barnum stated it as well,
23 I think the time restrictions for that
24 species is appropriate. So the time-of-year

1 restrictions for tree clearing are also
2 appropriate.

3 In my supplemental testimony, I brought
4 up the issue of buffers. One issue we have
5 with just acoustic monitoring is that a lot
6 of the U.S. Fish & Wildlife protections are
7 based on the roost tree and proximity to
8 roost tree. But since there was no attempt
9 to document roost trees, there's no attempt
10 to create buffer zones around those roost
11 trees. So there's no potential -- or there's
12 no documentation or attempt to create buffer
13 zones around these acoustic capture sites
14 because they didn't consider -- they
15 considered the absence of roost trees to
16 forego the need to have buffer zones. But
17 there's absence of roost trees because
18 there's no surveys to look for roost trees.
19 And even though in their actual wildlife
20 report they created guidelines for that, they
21 stated in their original wildlife report that
22 most captures are within one and a half miles
23 of a roost tree, or three miles of a
24 hibernaculum. So there were geographic

1 boundaries identified in the original
2 wildlife report, but they weren't
3 incorporated in any type of BMP or AMM. So I
4 would think the Northernns would need those.
5 And holding aside the whole environmental
6 monitor question, I think the AMM question --
7 AMM needs to have more detail on what is
8 considered a known location, which is
9 identified by the presence, acoustic presence
10 of the bats, and that they would need to
11 identify what is a buffer around those
12 locations for impact.

13 Q. So, clarification unknown, buffer around
14 roost trees or long-eared bats, and then the
15 blasting and construction seasonal
16 restrictions that used to be in the old AMMs,
17 would that at least get you started in the
18 right direction?

19 A. (Reynolds) For the Northernns, the blasting
20 concern for the Northernns would also be in
21 relationship to the winter hibernaculum. That
22 was never in the AMMs and probably should be
23 incorporated. It was an issue brought up by
24 the agencies back in 2013, I believe, that any

1 activities near the hibernaculum should be
2 protected. So it should be a buffer zone or
3 time-of-year restriction in the AMM around
4 known hibernaculum for the Northern long-eared
5 bat. There's three within three miles of the
6 Project site.

7 Q. And the seasonal restriction that you would
8 recommend with regard to those three known
9 hibernaculum --

10 A. (Reynolds) It's in their wildlife report. I
11 think it's like October 15 through April 15.

12 Q. Thank you. Is there anything further that
13 you would like to say about the new report,
14 bearing in mind you've had less than an hour
15 to review it?

16 A. (Reynolds) On the new report, no. There's
17 other AMM issues for the small-footed, if you
18 want to do that now or --

19 Q. Yes, please.

20 A. (Reynolds) So, for the small-footed, as you
21 already highlighted, the time restrictions were
22 taken off the AMMs for that species because
23 they were not useful time restrictions. But in
24 the absence of that, nothing was replaced. So,

1 again, we need to clarify "known" for Eastern
2 small-footed. We need to put some type of
3 language back in about blasting. There's no
4 mention of blasting, and that would be the
5 primary impact on this species because they're
6 roosting habitat is rocky substrate, and where
7 they're going to be impacted by this project is
8 most likely through blasting of tower stands,
9 or whatever they need to do where these rocky
10 materials are. And there needs to be some type
11 of guidelines for how to sample those bats
12 which can occupy those sites year-round, and
13 when they can sample, how they should sample,
14 and when they can clear a site for blasting.
15 And those details were not incorporated into
16 the AMM.

17 Q. Thank you. Any further comments with regard
18 to the current AMMs?

19 A. (Reynolds) No.

20 MS. DORE: May I ask a question?
21 The report we're talking about is the
22 September 27th. Is it confidential?

23 MS. CONNOR: No.

24 MS. DORE: I notice that

1 Exhibit 124A does not actually contain that
2 report. So, will the Applicant be filing it,
3 or you will be filing it?

4 MS. CONNOR: It's theirs.

5 MR. BISBEE: If it doesn't, we
6 will add it.

7 MS. DORE: Thank you.

8 BY MS. CONNOR:

9 Q. Okay. We're going to move on to wild lupine.

10 MS. CONNOR: Can we bring up
11 Applicant Exhibit 124A, APP85735? And can you
12 zoom in the middle which has the Karner blue
13 and wild lupine?

14 BY MS. CONNOR:

15 Q. I'm not sure if this is going to be Mr. Smith
16 or Mr. Amaral, but I'll just ask the question
17 and then one of you can chime in here.

18 The current AMMs with regard to wild
19 lupine indicate that work should take place
20 outside of the April 1 to August 31st growing
21 season, ideally in winter under frozen
22 conditions and with snow cover, to the extent
23 practicable. Can you address whether or not
24 this AMA [sic] adequately protects the wild

1 lupine, and why or why not?

2 A. (Lew-Smith) I'm actually going to pass that one
3 off to Michael Amaral for reasons why I can
4 talk about in a minute. But I think it's a
5 little more appropriate for the Karner blue
6 issue.

7 A. (Amaral) I think as probably everyone has
8 already heard, the Karner blue butterfly is
9 present on the lupine plants underneath the
10 right-of-way at some life stage all year long.
11 So in the growing season there will be adult
12 butterflies, eggs and caterpillars, or larvae,
13 if you will. In the non-growing season,
14 there'll be the eggs laid by the adult female
15 Karner blues that are going to overwinter on
16 those dried-up lupine leaves and that will
17 emerge the following spring.

18 Disturbance, construction activity on
19 top of those lupine plants, even in the
20 non-growing season, could have a harmful
21 effect on both the lupine plants and the
22 Karner blue butterfly eggs. But the
23 likelihood that there will be a harmful
24 effect is much diminished if the heavy

1 equipment is scheduled to occur when there's
2 snow on the ground, when the ground is frozen
3 and so more rigid and less likely to be
4 rutted up by the heavy equipment, and if
5 there's construction matting, timber mats put
6 on top of that. That would be the ideal time
7 of year and method to minimize impacts to the
8 Karner blue butterfly eggs and lupine plants
9 under the Eversource right-of-way in that
10 section of the Project.

11 Q. So, even though this has a seasonal
12 restriction, it is the second clause of the
13 AMM that I understand is the most important
14 to basically do anything in this area with
15 wild lupine in winter, under frozen
16 conditions; correct?

17 A. (Amaral) Yes, and with the additional use of
18 the timber mats.

19 Q. Right. And would it be fair to say that it
20 is unlikely, given that it is November
21 already, that we would not have frozen
22 conditions and/or snow on September 1st?

23 A. (Amaral) Yes, I think it's highly unlikely
24 we're going to have even a frost by

1 December 1st, let alone frost on the ground or
2 any snow cover. So...

3 Q. So if we were to -- if you were to recommend
4 a seasonal restriction as opposed to simply
5 saying winter under frozen conditions and
6 with snow cover, what would the appropriate
7 seasonal restriction be?

8 A. (Amaral) Yes, I would use winter construction,
9 and as "winter" is defined, December 21st to
10 March 20th, thereabouts, and preferably when
11 there's snow on the ground, which is more
12 likely in the Concord area to be sometime in
13 January or February, perhaps into early March.

14 Q. The current AMMs do not have the limitation
15 on the time that the timber mats can be down.
16 Is that something that needs to be addressed?

17 A. (Lew-Smith) So I would like to say that the
18 fact that they are committing to using timber
19 mats at any time of year is good, is a step in
20 the right direction in order to protect the
21 lupine plants themselves, the question being --
22 so the unknown is how long are they going to be
23 down there. And of course, the longer they're
24 down there, the more harm they're going to be

1 doing to the lupine plants. So, from our
2 perspective, it would be good to have a time
3 frame on that, or even a time limit. You know.
4 they've committed to only having the timber
5 mats down for a week, two weeks, you know,
6 whatever it's going to be. So we know that if
7 timber mats are going to be down there for two
8 months, I'm not quite sure what good they're
9 doing, you know -- well, let me say they're
10 starting to do more harm than they are good.

11 Q. In the current AMM, third bulletin, refers
12 once again to a phrase that I discussed at
13 length with Dr. Barnum, "to the extent
14 practicable." Can you address that, whether
15 that has a definition and what that means to
16 you?

17 A. (Lew-Smith) Well, I don't think it matters what
18 it means to me. It's vague. It's a vague
19 term. And it's a little frustrating, being
20 someone that has to evaluate impacts, to get a
21 statement like that. You know, I don't know
22 what to do with a statement like that, if
23 you're telling me you might have to blast and
24 damage root systems, or we might not. And so I

1 would like to see an actual commitment to it.
2 If you take that "to the extent practicable"
3 phrase out of that clause, I think, you know,
4 then I don't have any other problems with that
5 clause. That's an important step. But it
6 really changes it from being, you know, if
7 you're really doing cuts and fills, your impact
8 to the lupines has just shot right through the
9 roof, okay.

10 Q. And is that because of the root system of the
11 plant?

12 A. (Lew-Smith) Yes.

13 Q. These AMMs which deal with wild lupine also
14 link in the Karner blue. And I believe one
15 of you just testified that's in fact because
16 Karners are always present on the wild
17 lupine. Do these AMMs avoid direct mortality
18 to the Karner blues?

19 A. (Amaral) No, they don't.

20 Q. Do these AMMs address the other protected
21 butterflies that we know exist at the Concord
22 site, the Frosted Elfin and the Duskywing
23 Skipper?

24 A. (Parsons) I think we're jumping around here to

1 different consultants, different biologists.

2 The Frosted Elfin is only known from the
3 Concord pine barrens. And the numbers of the
4 Frosted Elfin that have been discovered at
5 the pine barrens are quite low; I believe
6 they're in the range of less than a dozen to
7 slightly over two dozen. So this is a very
8 small population that also lays its eggs, its
9 larvae, on the wild lupine plant. But no
10 survey was done to determine the distribution
11 of the Frosted Elfin or, for that matter, the
12 Duskywing Skipper, which has a similar
13 biological need for the plant. So it is
14 impossible at this time to determine what the
15 impacts are of losing any of the wild lupine
16 because there is no reserve to draw upon.
17 There are no other individuals, in particular
18 the Frosted Elfin, to reintroduce into a
19 mitigation site. So at this point it is
20 unclear whether or not the Frosted Elfin will
21 be -- what the degree of impact will be.

22 Q. So, even though the Applicant has made great
23 strides in reducing the number of wild lupine
24 affected, if it turns out that the Frosted

1 Elfin, because the number is so small, happen
2 to like the plants that must go underneath
3 the construction pad, what happens?

4 A. (Parsons) Right. Well, the decrease in the
5 impact area for the Karner blue is certainly a
6 positive step. But for the Frosted Elfin, its
7 impact is completely indeterminate. We don't
8 even know why the Frosted Elfin chooses a
9 certain subpopulation of the wild lupine from
10 year to year to lay its eggs on. It may be
11 because it's been a very wet year, so it
12 chooses a dry subpopulation of lupine. So
13 there are a whole number of factors that it
14 could be, and we don't know even know what
15 those factors are. That being said, we cannot
16 make a determination that the reduction in wild
17 lupine impacts will result in the Frosted Elfin
18 utilizing the wild lupine in areas where it
19 remains.

20 Q. Mr. Amaral, we had up a few minutes ago the
21 October 19, 2017 report from the United
22 States Department of Interior which has been
23 filed as part of Applicant Exhibit 124A. And
24 am I correct that you're familiar with their

1 findings with regard to the impact which this
2 project might have on the Karner blues, given
3 the Applicant's revised construction design?
4 Correct?

5 A. (Amaral) Yes, I am.

6 MS. CONNOR: Can we also pull up
7 at this time Counsel for the Public
8 Exhibit 602.

9 BY MS. CONNOR:

10 Q. Do you recognize this report?

11 A. (Amaral) Yes, I do.

12 Q. What is it?

13 A. (Amaral) It's an annual report prepared by the
14 New Hampshire Department of Fish & Game on
15 their Karner blue butterfly captor-rearing
16 program, their recovery program for the
17 species, the habitat they've managed in the
18 Concord area for that species.

19 MS. CONNOR: Can we turn to Page
20 014365, which hopefully will be Figure 2?

21 BY MS. CONNOR:

22 Q. Mr. Amaral, can you describe for those of us
23 that are not good with graphs what's shown at
24 the top of this page?

- 1 A. (Amaral) All right. So there are a couple
2 lines there. It's a fairly simple graph with
3 numbers of butterflies on the left-hand column
4 and years across the bottom. And the blue line
5 indicates second brood. So, during the --
6 there's two flights of Karner blues every
7 summer, a first brood and a second brood. The
8 first brood is in June and the second brood is
9 later in July, early August. And so it's
10 generally considered best to do a population
11 estimate during the second brood because that's
12 when you're going to get the largest number of
13 animals. So the blue line is the number of
14 captive-raised butterflies that the New
15 Hampshire Department of Fish & Game has raised
16 and released. And the red line is their
17 population estimate for wild Karner blue
18 butterflies, the butterflies they've seen in
19 the wild. And that does not include the number
20 of captive-raised and released that year. So
21 the butterflies they raise and release are
22 marked, and they can distinguish those from
23 wild butterflies in the wild.
- 24 Q. Am I correct that the estimate or the egg

1 count prepared by Dr. Barnum upon which the
2 Interior based its findings was taken from
3 data from 2015?

4 A. (Amaral) Yes. And, you know, now that we have
5 the benefit of hindsight, it perhaps was not
6 the best year to do a one-day/one-year survey
7 of lupine plants for the presence of Karner
8 blue eggs at the main source, or the Eversource
9 right-of-way, because as you can see from this
10 graph, in 2015 the wild population was at its
11 lowest point in five years; looks like about
12 750 animals. That's 750 animals mostly at the
13 Concord Airport and on Chenell Drive on some
14 conserved land, and some at the Eversource
15 right-of-way. So if the population in the
16 entire Concord pine barrens was at a low point
17 in 2015, that means the fewest numbers of
18 females were out and about. That would mean
19 that if you surveyed all the lupine plants
20 everywhere, you would find a lower, much lower
21 number of eggs than would be present if the
22 population was at a high point -- for example,
23 in 2016, where there were over 3,000 estimated.
24 So it's just in general, it was -- the

1 population was at a low point. That turns out
2 to be a bad time to try and estimate how many
3 Karner blue eggs would be present on lupine
4 plants in the Project area or anywhere in the
5 Concord pine barrens.

6 Q. And since we don't know when this project is
7 going to start, we don't know -- am I correct
8 that we don't know how many Karner blue eggs
9 might be present? It could be a low year,
10 could be high year?

11 A. (Amaral) That's correct. And that 2016 Fish &
12 Game report also, I believe, makes mention of
13 their captive-rearing and release program,
14 which is intended to bolster the number of
15 Karner blues in the wild, they are releasing
16 butterflies not only at the airport and at the
17 U.S. Fish & Wildlife Conservation easement on
18 Chenell Drive, but also on property owned by
19 the Praxair Corporation, which wanted to do a
20 conservation project for their corporation and
21 is partnering with Fish & Game. They own the
22 land underneath the Eversource Northern Pass
23 right-of-way. And Fish & Game released 110
24 Karners at that site in 2016, the year after

1 the egg survey was done.

2 And a little bit about Karner blue
3 butterfly female reproductive capability. A
4 single female can lay 100 to 200 eggs. So if
5 69 female butterflies were released in 2016
6 kind of in the general project vicinity,
7 that's the potential for 7- to 10,000 Karner
8 blue butterfly eggs to be deposited on lupine
9 plants the year after the 2015 egg survey was
10 done.

11 So I guess I would submit that the only
12 way to really estimate the number of Karner
13 blue eggs that are going to be taken by the
14 impacts of lupine under the Eversource
15 right-of-way is to do a survey the season
16 before construction is going to occur and not
17 years in advance, unfortunately.

18 Q. When Dr. Barnum was on the stand on Day 20 in
19 the A.M. Session, Pages 91 to 92, she
20 testified that the Karner blues in 2015 were
21 self-sustaining at the Concord site. Does
22 this table support that?

23 A. (Amaral) No. I think it demonstrates they are
24 not only not self-sustaining, I think it's even

1 hard to see stability in that population graph.
2 You know, you look at that, and if your stock
3 portfolio was bouncing up down to that degree,
4 you would not be congratulating your financial
5 advisor on its stability. I think you'd be
6 happy that it shot up in 2016, but you'd be
7 still worried about what it might do next year.

8 Q. I want to pull up the February 14, 2017
9 minutes from Fish & Game. I believe they are
10 also part of Applicant Exhibit 124A,
11 APP86281. And if we look down at the very
12 bottom, there's a reference that Fish & Game
13 noticed or commented that a number of
14 Normandeau Best Management Practices, which
15 we've also been describing as "AMMs" used the
16 phrase "to the extent practicable," and they
17 commented that it's difficult to understand
18 the meaning of this phrase with respect to
19 avoiding and minimizing impacts to specific
20 species.

21 Would you agree with the comments of
22 Fish & Game concerning this phrase, to the
23 extent that it still exists in the current
24 AMMs, that it's problematic?

1 A. (Amaral) Yes, I think it lacks certainty and
2 clarity. And from an advocate for the
3 protection of Karner blue butterfly, I would
4 think that "to the extent practicable" should
5 only apply to the situation where a
6 construction activity is scheduled to occur in
7 the best possible time to minimize effects
8 during the winter, and you do that. But the
9 ground is neither frozen or snow-covered, but
10 you've made the effort to only construct in
11 winter. It then becomes not practicable to not
12 construct. So you go forward, after consulting
13 with the resource agencies, and use timber mats
14 to do the best job you can. That's, to me, how
15 that phrase should be used in that context.

16 Q. And am I correct that there is no language in
17 the most recent version of the AMMs that
18 explains the process for deciding whether
19 compliance is practicable?

20 A. (Amaral) I think that's correct, but I didn't
21 see it.

22 Q. If we turn to Page 2 of the same minutes
23 notes, APP86282 --

24 MS. CONNOR: Could we blow up

1 the first -- actually, the second bulletin.

2 That works.

3 BY MS. CONNOR:

4 Q. Fish & Game asked the question, or referenced
5 in their minutes, "Who is the environmental
6 monitor? What are their qualifications?" Do
7 the most recent AMMs address these questions?

8 A. (Amaral) Not to my knowledge.

9 Q. Can each of you, bearing in mind you handle
10 different species and different plants,
11 address the qualifications that would be
12 required of an environmental monitor and how
13 many would be required to implement the AMMs
14 with regard to your particular species?

15 A. (Lew-Smith) Well, with regard to the rare
16 plants, you would need someone who's able to
17 identify the rare plants. And you would
18 also -- well, for someone dealing with snakes
19 or turtles, you would need someone who is able
20 to identify snakes and turtles by species. And
21 in terms of how many you would -- how many
22 environmental monitors you would need, I'm not
23 sure. It's a complex project. A lot of it
24 depends on the construction schedule, so...

1 A. (Parsons) I guess if we're going to have
2 environmental monitors identifying butterflies
3 and Skippers, then they would have to have a
4 background in entomology and, you know, the
5 identification of these species. In my case,
6 they also have to be ornithologists or
7 qualified in identifying birds in the field,
8 and then, of course, also dealing with mammals.
9 So this person would have to be a jack of all
10 trades, I guess. They would have to be at
11 least familiar with the techniques of
12 identifying the tracks and sign of mammals that
13 are of concern in this project, and it doesn't
14 seem as if one could do that.

15 Q. In terms of one covering all those areas or
16 one covering nearly 200 miles of the Project,
17 or both?

18 A. (Parsons) I think one covering all those areas
19 would be very difficult. I would think you'd
20 have to have all this expertise encompassed by
21 a couple of different people that can move
22 around the work sites addressing needs as they
23 come up.

24 Q. Do you have any estimate on the number that

1 it would take to cover the massive amount of
2 miles involved in this project?

3 A. (Parsons) I'm afraid I really don't.

4 A. (Lew-Smith) Can I just say, from our
5 perspective, you know, the use of environmental
6 monitors is a really important step. I think
7 it's integral to carrying out some of these
8 BMPs. So I don't want it to look like we're
9 against the process.

10 Q. Mr. Amaral?

11 A. (Amaral) I don't have anything to add to what
12 Jeff said. A winter construction schedule
13 during -- in the Concord pine barrens where
14 Karner blues occur would only need to make sure
15 that the Project equipment and people were
16 confined to the areas that were fenced out in
17 the growing season, to mark where the rare
18 species were.

19 But if I can go back, I realize my
20 previous answer was incomplete with respect
21 to the Fish and Wildlife Service biological
22 opinion. I talked about how it was a very
23 imperfect way of trying to estimate the
24 number of Karner blue eggs that were likely

1 to be taken and why. But I should have also
2 mentioned that another way of sort of, in
3 general, assessing impacts to the Karner is
4 looking at the square footage of lupine
5 plants that are going to be disturbed on
6 impacted by construction. And in that
7 respect, Eversource has made an important
8 project improvement where they've changed the
9 location of a set of poles and avoided,
10 completely avoided one of the lupine patches
11 that would have been impacted. So now the
12 square footage of lupine plants that will be
13 impacted is much reduced, and that should,
14 all things being equal, result in fewer
15 Karner blue butterfly eggs being taken than
16 had that change not been made. So that's a
17 positive change that should reduce effects on
18 the Karner blue as well.

19 Q. Am I correct, just before we leave that,
20 though, is there any way to know which lupine
21 plants a Karner is going to decide to their
22 layer eggs on? You mentioned in a dry year
23 they might go to one plant, or in a wet year
24 might go to another plant.

1 A. (Amaral) That's correct. They don't lay all
2 100, 200 eggs in one spot. They lay a few
3 here, a few there, and they move around finding
4 something special about the plants that they
5 lay their eggs on that we don't really
6 understand. So, again, the best way to
7 determine how many lupines and how many eggs
8 are going to impacted is to survey that
9 particular site or those particular sites right
10 before construction.

11 Q. Dr. Reynolds, with regard to an environmental
12 monitor that can identify and implement AMMs
13 regarding the various different types of
14 bats, including, if need be, missed netting,
15 are there such people in the state, and how
16 many do you need?

17 A. (Reynolds) I don't know how many you need.
18 Again, depends on how tight the construction
19 schedule is. But by the AMMs that we have that
20 appear to be dominated by acoustic monitoring,
21 you're going to need qualified monitors to set
22 up acoustic equipment.

23 I'm equally as concerned about the
24 turnaround, because if these are being done

1 in season, then you have to actually do the
2 monitoring, analyze the monitoring, come up
3 with a result, have consultation with the
4 agencies, determine the interpretation of
5 those results, and then from that point you
6 have presence or not presence to allow
7 construction. So there's just intrinsic
8 timing issues. And if bats are present, then
9 you need federal permits for missed netting.
10 You need qualifications for radiotelemetry
11 and emergence counts. It's a very select,
12 unique set of skills that relatively few
13 people have. And they're typically very busy
14 because it only occurs in one season. All
15 this work occurs in one season of the year.

16 Q. Am I correct that you told me previously that
17 with regard to the identification step, that
18 there may be as few as two people qualified
19 in the state of New Hampshire to do that
20 work?

21 A. (Reynolds) That are state and federally
22 permit-holding, there are very few.

23 MS. CONNOR: I want to move to
24 the bottom of this same page, Sandy, dealing

1 with turtles. It's the last two bulletins.

2 Great.

3 BY MS. CONNOR:

4 Q. The February 2017 New Hampshire Fish & Game
5 Minutes note that wood turtles blend in very
6 well with their habitat, and even New
7 Hampshire Fish & Game herpetologists have
8 difficulty locating them in the field through
9 sweeps. There's a suggestion right above
10 that, that because of this difficulty,
11 perhaps we should have seasonal restrictions
12 over sweeps.

13 Can one of you address these particular
14 concerns? Do you agree that finding wood
15 turtles is very difficult?

16 A. (Lew-Smith) I would concur with both of those
17 statements, yeah.

18 Q. Do the most recent AMMs impose seasonal
19 restrictions for turtles over sweeps?

20 A. (Lew-Smith) They do not.

21 Q. Can you address the adequacy of the
22 October -- actually, now they're the November
23 AMM protocols -- with respect to the turtles
24 in the construction zone?

1 MS. CONNOR: And if we can go
2 back to that exhibit, which would be part of
3 124, APP85736.

4 A. (Lew-Smith) So, yeah, there's been some
5 positive steps for avoiding impacts to these
6 threatened and endangered species, as well as
7 some -- I still have some concerns.

8 The first bullet point says to avoid and
9 minimize impacts to open water and mucky
10 substrates in all seasons to the greatest
11 extent practicable; the reason, of course,
12 being that turtles often inhabit mucky
13 substrates, open-water wetlands. This is a
14 concern, as we'll note in a couple minutes.
15 Most upland areas, they're going to fence off
16 or do sweeps to exclude turtles from
17 construction sites so they don't get run
18 over, right. I haven't seen any
19 specifications on if that's going to happen
20 or how that's going to happen in the
21 wetlands. And I believe there are a number
22 of cases where they will be constructing in
23 the wetlands within the range of these
24 turtles. So I'd like to see more

1 clarification on that.

2 A couple bullet points down, in mapped
3 turtle habitat, install temporary
4 construction work zone fencing around the
5 work pads. Again, this is a really positive
6 step. I haven't seen what the mapped turtle
7 habitat is, so I don't -- I can't speak to
8 whether or not that's sufficient.

9 The other -- so I think the intention
10 with this was to put a fence around the
11 construction zones, have someone sweep, and
12 if there's any turtles in that area you
13 remove them, okay, and then the construction
14 can take place. And you either do daily
15 sweeps of that, or you have basically a gate
16 that at night when construction is done you
17 seal it off so turtles can't get in, okay.

18 In terms of avoiding direct impacts to
19 adult turtles, that's a really good strategy,
20 okay. It's a little -- I would like some
21 clarification, because one of the bullet
22 points says this will happen in all work
23 zones, another bullet point says that if this
24 doesn't happen, we'll just do a daily sweep,

1 okay. So now I'm not sure what's happening
2 and what's not happening. Certainly it would
3 be easier to locate a turtle if it's in a
4 confined area and you can, you know, walk
5 back and forth and do your sweep that way.

6 Q. Let me turn to the next page.

7 A. (Lew-Smith) Yes, next page, please.

8 So the other concern about the impacts
9 to these threatened and endangered species is
10 nesting sites. They lay their eggs usually
11 in loose, sandy soil so they can dig in it
12 and lay their eggs and then they leave.
13 Predation is high mainly because of these
14 subsidized predators like skunks and raccoons
15 that thrive where people thrive. It didn't
16 use to be that turtle rates were so low.
17 Used to be a lot more turtle eggs survived
18 because there wasn't as many skunks and
19 raccoons around. But now that's not the
20 case, and so a number of baby turtles that
21 grow up to be adult turtles is low, in part
22 because of all the development around. And
23 it's somewhat a bottleneck for the
24 populations to recover, okay. So turtle

1 nesting sites are important for that reason.
2 But they're also really difficult to find,
3 okay. You can find them if a raccoon's
4 already dug them up, right, 'cause you see
5 the egg shells.

6 One thing they've mentioned in here,
7 which is really good, is if they're going
8 to -- if they find one, they'll fence it off
9 so that no construction vehicles will run
10 over it, okay. The problem is, of course,
11 they're hard to find. And so I think you
12 can't rule out the fact that there will be
13 impacts to turtle nesting sites.

14 What I would like to see is some
15 mitigation for that. And it's very simple.
16 There's been research done about how to
17 create nesting sites. And you can either
18 truck in some sand -- but in this area we
19 probably won't need sand; there's a lot of
20 sand here. Some of the best nesting sites
21 are areas where you just till up the
22 vegetation, okay. What happens a lot is
23 vegetation will grow in, and it gets really
24 dense. The turtles can't put their nests

1 there, all right. But if you do some simple
2 things, like having some conservation zones
3 where you till up vegetation, then they start
4 to use those alternative nest sites, okay.
5 It could potentially mean more recruitment
6 from the young. But just as important, it
7 means that nesting females potentially don't
8 have to travel as far to get to an
9 appropriate nest site. And that's important
10 because one of the major forms of mortality
11 for female turtles of both species is road
12 mortality, traffic mortality, getting hit by
13 cars.

14 Q. The very last bulletin that I want to just
15 briefly address says "contractor training on
16 recognizing protected turtles and taking
17 appropriate actions to protect them as
18 required."

19 Given the fact that Fish & Game has
20 indicated that even their own herpetologists
21 have difficulty locating wood turtles, is it
22 realistic to think that a contractor can be
23 trained to locate these wood turtles?

24 A. (Lew-Smith) I think it might be difficult. I

1 think it's important, though, because if
2 someone's up on an excavator and they happen to
3 see one, then the training would help them to
4 know to stop their machine and get out and
5 remove the turtle. But in terms of them
6 actually conducting the sweeps, I think that
7 might be difficult.

8 Q. Would it be far more effective if an
9 environmental monitor who has that training
10 with turtles did the sweeps?

11 A. (Lew-Smith) Absolutely.

12 Q. I want to turn to APP85735.

13 CHAIRMAN HONIGBERG: Off the
14 record.

15 (Discussion off the record.)

16 BY MS. CONNOR:

17 Q. I want to address the new AMMs with regard to
18 snakes. And you mentioned before that
19 seasonal restrictions -- actually, the Fish &
20 Game had mentioned that seasonal restrictions
21 might be better as opposed to sweeps.

22 A. (Lew-Smith) For turtles, yeah.

23 Q. Oh, okay. But not for snakes? What
24 protections do these AMMs provide for snakes,

1 and is it adequate, in your opinion?

2 A. (Lew-Smith) Similar to the turtle protocol.
3 Fence-off an area, sweep, remove snakes, close
4 it off. One of the major differences is the
5 hibernaculum. So we're talking the black racer
6 and the Eastern hognose snake, threatened and
7 endangered species. The black racer hibernates
8 in groups, okay, so a lot of snakes will
9 hibernate together. And there's at least one
10 known hibernacula for this species occurring in
11 the right-of-way, and the AMMs take steps to
12 avoid impacts to that hibernacula. They're
13 also covering holes so that snakes don't fall
14 in. Overall, I think that the AMMs outlined
15 here will do enough to protect those two
16 species of snake in the right-of-way.

17 MS. CONNOR: We're now going to
18 turn to birds, so maybe this is a good time to
19 switch because it's going to be a different
20 witness.

21 CHAIRMAN HONIGBERG: We'll take
22 a ten-minute break.

23 MS. CONNOR: Thank you.

24 (Recess was taken at 2:38 p.m.)

1 and the hearing resumed at 2:57 p.m.)

2 CHAIRMAN HONIGBERG: Ms. Connor.

3 BY MS. CONNOR:

4 Q. Mr. Parsons, we're going to deal with
5 feathers here. We have up on the screen from
6 Applicant 124A the most recent AMMs with
7 regard to bald eagles, raptors and blue
8 herons. And these AMMs are relatively
9 similar. Can you address the adequacy of
10 these AMMs with regard to these particular
11 birds?

12 A. (Parsons) Sure. Some of the buffer distances
13 or isolation distances for species have
14 changed, but I don't really have any problem
15 with these changes. The bald eagle buffer
16 distance is 660 feet, as are the active raptor
17 nests, and the Great blue heron nest buffers
18 are 330 feet. I don't have any trouble with
19 two of the buffers, and I don't have any
20 trouble with any of the dates. The dates seem
21 quite encompassing of potential nesting birds
22 and give a fair amount of leeway, even. So I'm
23 pleased with that.

24 The active Great blue heron nest

1 receiving a 330-foot buffer is a little
2 bit -- or there's quite a bit of recent
3 scientific information that suggests 330 feet
4 may be insufficient. There are two provinces
5 in Canada and the state of Minnesota that
6 have adopted 800- to 1,000-foot buffers.
7 Generally that's in the case of having more
8 than one Great blue heron nest at a location.
9 So there is some recent information that
10 suggests 330 feet is insufficient and that
11 the indirect impacts of construction
12 activities on Great blue heron nests at those
13 distances can cause a failure to fledge the
14 young herons, or even a failure to produce
15 eggs in the first place.

16 Q. With regard to the active raptor nests, the
17 new AMMs indicate that the buffer will be
18 around the active nest within or adjacent to
19 the Project area. But that reference to
20 "adjacent to the Project area" doesn't appear
21 with regard to any of the other birds. Does
22 that cause you any concern?

23 A. (Parsons) Yes, it causes me great concern.
24 There is no detail provided on how the

1 environmental monitor will conduct the survey
2 looking for active Great blue heron nests,
3 active raptor nests or active bald eagle nests.
4 And we're talking about distances of up to
5 660 feet, which would be best if they were
6 lateral as well as linear distances within the
7 existing right-of-way. So, instead of just
8 having the distances refer to distances to a
9 nest within the actual right-of-way, they
10 should also refer to these distances being
11 lateral to the right-of-way.

12 Q. The AMMs also indicate that if there's a
13 break in work during the nesting season, a
14 repeat survey may be required, but don't
15 specifically address when, how long after a
16 break a repeat survey would be required.
17 What is your opinion with regard to that?

18 A. (Parsons) Well, it doesn't even describe what a
19 break constitutes, which is the first issue.

20 The second issue is if a break occurs
21 and work proceeds on a section of the line
22 and doesn't reach the end of that section of
23 construction until a month, or five or six
24 weeks later has elapsed since the survey was

1 done, and this is occurring during nesting
2 season for any of these species, there is the
3 potential for Great blue heron, raptors or
4 eagles to establish a nest. And unless
5 there's another re-survey done, these nests
6 may be undetected.

7 There is no information given about how
8 the survey will be done. And it seems as if
9 you want to look as much as 660 feet off the
10 right-of-way, that the survey should specify
11 that it be done by helicopter. And I'm not
12 sure we're going to be able to teach an
13 environmental monitor to do -- one
14 environmental monitor to do all these things;
15 yet, they will have to be trained in spotting
16 these nests from a helicopter.

17 Q. The AMMs with regard to the common nighthawk,
18 which is at Page 4 of the report, APP85734,
19 indicates in the middle bulletin that no work
20 shall be done within a predetermined buffer
21 area around a common nighthawk nest while it
22 is actively being used.

23 Do the AMMs describe what that
24 predetermined buffer area is?

1 A. (Parsons) No, they do not. They suggest that
2 they will determined at a later date by
3 Normandeau and New Hampshire Fish & Game. So
4 at this point it's really hard to determine
5 that the protection for the common nighthawk is
6 sufficient.

7 Q. I want to now switch to the Canada lynx,
8 which is at APP853732 of this document.

9 MS. CONNOR: Can you blow that
10 up a little? Thank you.

11 BY MS. CONNOR:

12 Q. The November 2017 AMM states an environmental
13 monitor is going to survey suitable denning
14 habitat before any clearing takes place
15 between May 1st and July 15th, and if the
16 habitat is determined to be occupied, no
17 clearing will take place. Does this
18 adequately protect denning habitat of the
19 lynx?

20 A. (Parsons) Yeah, I don't have any problem with
21 the dates. They seem protective of the lynx.

22 Q. Are there sufficient details in this AMM with
23 regard to how that survey is going to take
24 place?

1 A. (Parsons) No, there are not. The survey would
2 likely take place on ground that is without
3 snow if it took place in late April or May or
4 June. And it would be quite unusual for there
5 to be snow at that time of the year, so I'm not
6 sure how this environmental monitor would
7 determine the presence of the lynx other than
8 by going into appropriate habitat where lynx
9 may be nesting, which is thickets of brush and
10 searching for the lynx, and that could cause
11 disruption in the breeding and denning of the
12 lynx itself.

13 Q. The AMMs further provide that if construction
14 is to occur during the nesting period where
15 dens have been located, that there shall be
16 no construction activities within 650 feet of
17 the edge. Does that adequately protect the
18 lynx kittens?

19 A. (Parsons) Well, I think what they're referring
20 to here is the pathway's edge, which is one of
21 the areas that's been negotiated between New
22 Hampshire Fish & Game and the Project to retain
23 treed and woody vegetation crossing the
24 right-of-way in valleys and stream site areas

1 where such vegetation won't interfere with the
2 power line. So the only buffers that appear
3 here are the ones that refer to buffers given
4 in the pathway's edge. I do not see any
5 buffers mentioned for the protection of lynx
6 denning areas outside of the areas within
7 1650 feet of the pathway edge.

8 Q. Is that adequate in terms of a buffer?

9 A. (Parsons) No, it does not -- it is not
10 adequate. There are very few sites where they
11 have determined that there is potential denning
12 sites where there's appropriate vegetation, and
13 they should provide buffers for those areas as
14 well. It may just be that they neglected to
15 include that in this paragraph. I'm not sure.

16 Q. Do the November 2017 AMMs provide any
17 protection for the American marten?

18 A. (Parsons) No, they are not mentioned in the
19 latest AMMs.

20 Q. And in your supplemental testimony
21 criticizing the earlier version of the AMMs,
22 did you have concerns regarding the marten?

23 A. (Parsons) I had general concerns about the lack
24 of avoiding prime and important marten habitat

1 in the placement of the right-of-way in the
2 northern 32-mile section. And I also had
3 concerns regarding the commitment of Northern
4 Pass to ensure that recreational vehicles will
5 not be used along these rights-of-way during
6 the winter months, which pose a potential
7 hazard to marten in terms of competition for
8 food and potential predation.

9 Q. Last two areas that I want to talk about, and
10 I'll link them together, are deer wintering
11 areas and moose concentration areas. These
12 AMMs indicate that they will allow clearing
13 at any time provided twiggy [sic] slash is
14 left behind. Does that provide adequate
15 protection for deer and moose?

16 A. (Parsons) Well, I guess I applaud the
17 lengthening of the prohibition of actual
18 construction that has been codified in this
19 version of the AMMs. The leaving of twiggy
20 debris and slash will probably be utilized by
21 deer. However, wild deer certainly have become
22 accustomed to the sound of chainsaws, which
23 would accompany the clearing of the vegetation.
24 That is not to say they don't experience a

1 slight displacement. So you would expect, in
2 my experience working with deer wintering areas
3 over the last 30 years, deer tend to be
4 displaced from the immediate chainsaw areas not
5 by a great distance, but by, you know, 100 feet
6 or so. So there will be a slight loss in
7 functional deer yard use in the areas where
8 chainsaws will be used, but I'm not that
9 concerned about that.

10 And I'm less concerned for moose
11 concentration areas. Moose can venture out
12 of winter cover into deeper snow because
13 their stomach is much higher than that of
14 whitetail deer. So they don't seem to be as
15 bothered by having to move into less than
16 perfect winter conditions or the winter
17 conditions they could choose if they had
18 their way.

19 Q. Thank you. I want to turn now to just a few
20 comments made by the Applicant's
21 environmental panel when they testified in
22 June of 2017.

23 On Day 16, in the Morning Session,
24 Page 92, Mr. Magee testified that even if the

1 project impacted a hundred percent of the
2 wild lupine, it would not be unreasonable
3 because the impact is temporary.

4 Can one of you address Mr. Magee's
5 characterization of the impact to the wild
6 lupine would be entirely "temporary"?

7 A. (Lew-Smith) Yeah, it's been a little confusing,
8 I think, with the temporary versus permanent
9 impacts. And from what I gathered, what
10 they're talking about is actual -- the
11 permanent impact is something where you're
12 taking away habitat, all right. You put a pole
13 there, and where the pole is there's no more
14 habitat. And a temporary impact is, you know,
15 a work area. So those permanent and temporary
16 impacts are really a description of the
17 construction activity; it's not a description
18 of the impact on the resource. And I feel
19 like, by design or not, the Applicant has used
20 those interchangeably, okay: If I run a
21 bulldozer over a patch of lupine plants and it
22 churns them all up and kills them, I'm calling
23 that temporary impact, right, because I'm not
24 paving it, I'm not putting a pole there.

1 They're calling it a temporary impact because
2 they're saying, well, it will grow back
3 probably, right. To me, that's not an accurate
4 description of the actual impact we're talking
5 about, okay. If you have -- if you run
6 bulldozer over lupine plants and it kills those
7 plants, that's a permanent impact on those
8 plants. Now, it's true that they may grow
9 back, okay, from their underground roots. But
10 there hasn't been any studies on that. They
11 haven't supported that with any detailed plans.
12 So, really, those are permanent impacts.

13 Q. In the afternoon of Day 19, Page 88, Mr.
14 Magee testified in response to the panel
15 questioning that you could transplant wild
16 lupine. Is that correct?

17 A. (Lew-Smith) Well, you could transplant it, but
18 I don't think it would do very well.
19 Transplanting wild plants in general is
20 difficult, and there's a low success rate.
21 Some plants transplant better than other
22 plants. Lupine is adapted to sandy soils and
23 has a long, deep tap root. So, getting a lot
24 of that tap root when you transplant it is very

1 difficult. So I would suggest that you could
2 transplant them, but it wouldn't be very
3 successful.

4 Q. Am I correct that there have been recent
5 amendments to the construction zone at the
6 Concord lupine patch that adopted some of
7 Arrowwood's recommendations to reduce the
8 amount of impact to the wild lupine?

9 A. (Lew-Smith) Yes, and it's a big step in the
10 right direction. In particular, there were
11 some structures in work areas that were right
12 in the middle of a lupine patch that got moved,
13 and that decreased the impacts to lupine
14 significantly. Looking at the plans they
15 supplied, it also appears that lupine impacts
16 could be decreased more by moving an access
17 road that goes in between two different work
18 areas. From the plans and having been to the
19 site, it appears to me that a road could be
20 shifted and decrease impacts even more.

21 Q. On Day 16, in the morning, Page 138, Mr.
22 Magee characterized the impact to the
23 licorice goldenrod by this project again as
24 "temporary." Does that fall into the same

1 category of the discussion we just had about
2 the lupine?

3 A. (Lew-Smith) Yes, it does.

4 And if I can say about this licorice
5 goldenrod, you know, there's been a lot of
6 attention paid to the lupine, which is good
7 because it's a state threatened plant, and
8 there's federally listed species, insect
9 species associated with it, but the goldenrod
10 is also a state endangered plant. This is
11 one of the largest populations I believe
12 that's currently known of this plant in the
13 state. Since the beginning of our analysis,
14 we suggested minimizing impacts by moving an
15 access road. During the environmental
16 panel's testimony, they suggested that they
17 would look into moving the access road to
18 minimize impacts at this location, and it
19 appears that that has not happened. In this
20 particular circumstance, there's currently
21 disturbance. There's basically a gravel road
22 and a parking lot that could be used for
23 access. Instead, the current access road
24 cuts through what's remaining of the licorice

1 goldenrod population.

2 So, again, it feels like there's
3 minimization work that could be done and
4 hasn't been done.

5 MS. CONNOR: For purposes of the
6 record, the sheet referring to the goldenrod
7 that he is referring to is Applicant
8 Exhibit 200, Sheet 312.

9 BY MS. CONNOR:

10 Q. On Day 16, in the morning, Page 149, Mr.
11 Magee, in response to my questions, indicated
12 he was not concerned about impacts to the
13 threeawn because it will probably come back.
14 Can you address that?

15 A. (Lew-Smith) So, threeawn is a species of grass
16 in the state, and it's also state endangered.
17 The largest population known in the state was
18 documented along the right-of-way. This is a
19 different type of circumstance because this is
20 an annual, and it thrives on kind of a moderate
21 level of disturbance, okay. So the
22 right-of-way has actually created good habitat
23 for this species, okay. Having said that,
24 given it's a state endangered plant and this is

1 the largest population known in the state, it
2 would be good if there were some mitigation,
3 avoidance or minimization measures. And there
4 has been none, despite our requesting that they
5 look at this site.

6 Some typical things that could be done
7 is maybe setting aside a conservation area
8 for the species or collecting seed and
9 seeding areas that aren't going to be
10 disturbed, or shifting access areas, work
11 areas, roads to lessen the impact, okay. So
12 we haven't seen any avoidance, minimization
13 or mitigation at this site at all.

14 Q. On Day 16, in the Morning Session, Page 156,
15 Mr. Magee said that if a known population of
16 small whorled pogonia occurs within
17 five miles of the right-of-way, they ran the
18 model and did the inventory. Can you address
19 the measures with regard to the small whorled
20 pogonia?

21 A. (Lew-Smith) Again, so this is a small orchid
22 that is a federally listed orchid. It's
23 federally threatened and state threatened.
24 Most of the population of this orchid in the

1 world is in New Hampshire. The survey
2 methodology that was used -- well, let me back
3 up and say there's some scientists that have a
4 come up with model to predict where the orchid
5 prefers to grow. The survey methodology used
6 here was to take any known location of the
7 orchid within five miles of the right-of-way,
8 run the survey model, and if there were some
9 appropriate habitat along the right-of-way,
10 that got surveyed. What that does, though, by
11 just using the five-mile distance, is that it
12 excludes most of the range of that plant in New
13 Hampshire, okay. So the plant is known from
14 all, except for Coos, Sullivan and Cheshire
15 counties in the state, but if it's not found
16 within five miles of the right-of-way, it
17 wasn't inventoried for. To me, an appropriate
18 methodology would have been to survey, to run
19 your model for the right-of-way within the
20 entire range of the species in the state, and
21 that was not done.

22 Q. Go ahead.

23 A. (Lew-Smith) So, in the U.S. Forest Service
24 biological opinion, they had mentioned that

1 they thought that it would affect, but may not
2 adversely affect the species. But one of the
3 points they made was that surveys would be done
4 before any clearing takes place. And I have
5 not seen anything to suggest that further
6 surveys are going to be done. In fact, Mr.
7 Magee, during his testimony, said that no
8 further surveys are scheduled or will be done.
9 And so I guess I'd also like a clarification on
10 the record about what exactly is going on.

11 Q. Last question from me. Day 16, Afternoon
12 Session, Page 72, Dr. Barnum testified that
13 there was no need for seasonal construction
14 restrictions in areas where marten breed
15 because, quote, "Marten change their den
16 sites pretty regularly," and "the disturbance
17 of the Project could induce her to move a
18 little sooner than she might have been
19 planning to anyhow, but it's a behavior that
20 she's adapted to and that she's perfectly
21 capable of."

22 Mr. Parsons, do you agree with Dr.
23 Barnum's representation that there's no need
24 for a seasonal restriction with regard to

1 marten breeding because they can just pick up
2 their kits and move?

3 A. (Parsons) I did a little research and looked
4 into the literature regarding marten when they
5 have young, and I discovered that for the first
6 7 to 12 weeks they generally do not move their
7 young. And so I got concerned, because if this
8 project moves into an area where marten do have
9 young before that time, there's the potential
10 that the young could die or that the young may
11 suffer, you know, nutritional deficits or all
12 kinds of things that could harm the marten if
13 they had to move before the marten was old
14 enough to actually move with its mother.

15 MS. CONNOR: I'm pleased to
16 report I'm done.

17 CHAIRMAN HONIGBERG: My
18 understanding is that Ms. Manzelli is going
19 next.

20 CROSS-EXAMINATION

21 BY MS. MANZELLI:

22 Q. All right. Good afternoon, gentlemen. My
23 name is Amy Manzelli, here representing the
24 Forest Society.

1 Let me start with some questions about
2 Transition Station No. 5 in Bethlehem along
3 Route 302. Are you aware that the Applicants
4 may seek to relocate Transition Station
5 No. 5?

6 A. (Lew-Smith) No, we're not.

7 Q. Okay. So, just to confirm, you have not been
8 provided any information about the area to
9 which Transition Station 5 might be
10 relocated?

11 A. (Lew-Smith) Not that I'm aware of, no.

12 Q. Therefore, if Transition Station 5 were to be
13 relocated, you couldn't say either way
14 whether the new location would have
15 increased, decreased, or no change at all on
16 environmental impacts?

17 A. (Lew-Smith) Correct.

18 Q. Let me ask you some questions about vernal
19 pools. First, I want to look at your
20 materials so I can set the context to ask a
21 couple questions. And I understand you have
22 your prefiled testimony in front of you.
23 These are Exhibits CFP 136 and 137; correct?

24 A. (Lew-Smith) Correct.

1 Q. Okay. So, on Page 6 of 4 [sic] in CFP 136,
2 and this is your original prefiled testimony
3 dated December 30th, 2016, starting on Line 6
4 you state, quote, "Avoidance and minimization
5 of adverse impacts has been proposed in some
6 cases, but in other instances, avoidance and
7 minimization appears possibly but has not
8 been proposed. For this reason, the Project
9 does not represent the best practical and
10 most effective measures available to avoid,
11 minimize or mitigate the adverse direct and
12 indirect impacts," I think "to," but the word
13 "to" is missing, "vernal pools." Did I read
14 that correctly?

15 A. (Lew-Smith) Yes.

16 Q. And then you also say in the report that
17 accompanied this, on Page 29 of your report,
18 "Given these issues, there is not enough
19 information to conclude that the Project will
20 not have an unreasonable adverse effect on
21 the significant wildlife habitat." Did I
22 read that correctly?

23 A. (Lew-Smith) Yeah. Where on the page is that?

24 Q. It's Page 29 of the report. The section is

1 Section 5.1.4. lower case C, Roman III, and
2 it's titled "Conclusions."

3 A. (Lew-Smith) Yeah, I was just --

4 Q. It's the very last sentence of that section.

5 A. (Lew-Smith) Okay. Yeah, I have it. Thank you.

6 Q. Okay. So my first question about your
7 opinion of vernal pools is have you seen any
8 additional or new information to change your
9 opinion?

10 A. (Lew-Smith) I believe there was some work to
11 avoid a couple vernal pools, primary impacts to
12 a couple vernal pools. I haven't seen -- there
13 was -- there is still a number of vernal pools
14 that I believe, from my eyes, could have been
15 avoided, have not been avoided, and nothing has
16 changed in that regard.

17 Q. So is it your opinion that the Project, if
18 approved and built as currently proposed,
19 would have an unreasonable adverse impact on
20 vernal pools?

21 A. (Lew-Smith) Yes, because not all measures were
22 taken to avoid and minimize impacts to that
23 resource.

24 MS. MANZELLI: Dawn, could you

1 please turn the ELMO on? I can't tell if it's
2 on.

3 MS. GAGNON: It's on.

4 MS. MANZELLI: Okay.

5 BY MS. MANZELLI:

6 Q. All right. I'd like to ask you some
7 questions about a letter that will be marked
8 as SPNF 263. This is a September 26, 2017
9 letter from the U.S. Environmental Protection
10 Agency. And because it's difficult for me to
11 leaf through the pages on the ELMO, I did
12 bring hard copies if you'd like those.

13 A. (Lew-Smith) Sure.

14 (Ms. Manzelli distributes document.)

15 Q. So my first question is: Are you familiar
16 with this document?

17 A. (Lew-Smith) I don't think I've seen this
18 document.

19 Q. Okay. Let me then give you a few minutes to
20 review that. And I did give you four copies,
21 so if you want to share with your colleagues.

22 (Witnesses review document.)

23 Q. So my first question to the panel about the
24 letter is for what part of the regulatory

1 process did EPA issue this letter? In other
2 words, how does this letter fit into the
3 state New Hampshire Department of
4 Environmental Services process, the federal
5 Environmental Impact Statement process, et
6 cetera?

7 A. (Lew-Smith) Well, it fits into the federal
8 Environmental Impact Statement process, and
9 likely also the Army Corps of Engineers
10 permitting process.

11 Q. And how does it fit into the Army Corps of
12 Engineers permitting process?

13 A. (Lew-Smith) I should say I'm only -- I don't
14 have direct experience with this permitting
15 process. But in general, certain wetland
16 impacts are regulated by the Army Corps of
17 Engineers. And you often have to go through
18 their permitting process, which often involves
19 federal EPA and federal Wildlife Service
20 commenting on their application process.

21 Q. Do you agree with me that this letter shows
22 that EPA has concluded that it is practicable
23 to route this project differently than what
24 the Applicants currently propose, and that

1 doing so would reduce environmental impacts?

2 A. (Lew-Smith) I guess I would need a little more
3 time to review it thoroughly.

4 Q. Take your time.

5 (Witness reviews document.)

6 A. (Lew-Smith) It does say that further work to
7 determine the practicability of the hybrid
8 alternative is clearly warranted. So...

9 Q. And let me represent, for purposes of my
10 questions to you, that the "hybrid
11 alternative" referred to here is the
12 alternative explored in the Environmental
13 Impact Statement that would call for the new
14 right-of-way located in the northern portion
15 of the route, instead of being a new overhead
16 right-of-way, that that portion of the
17 Project would be buried. That's my -- let me
18 represent that's what the "hybrid
19 alternative" means.

20 So is this letter then saying the hybrid
21 alternative would have less environmental
22 impact?

23 MR. WALKER: Objection. The
24 document speaks for itself.

1 CHAIRMAN HONIGBERG: Ms.
2 Manzelli.

3 MS. MANZELLI: I'm looking for
4 this panel's expertise in how this document
5 fits into the alternatives that might be
6 practicable for this Applicant, in this
7 project, in this venue.

8 CHAIRMAN HONIGBERG: That wasn't
9 the question. Sustained.

10 BY MS. MANZELLI:

11 Q. Now, in terms of the word "practicable" with
12 respect to wetlands, that's a legally defined
13 term; right?

14 A. (Lew-Smith) I'm not aware of that.

15 Q. Okay. Now, you're familiar with the
16 recommendation from the New Hampshire
17 Department of Environmental Services that the
18 wetlands permits for this project be
19 approved?

20 A. (Lew-Smith) Yes.

21 Q. Now, representing that this letter here from
22 EPA is suggesting that the new right-of-way,
23 instead of being an overhead route, should be
24 buried, isn't that at odds with the

1 recommendation from the New Hampshire
2 Department of Environmental Services?

3 A. (Lew-Smith) Well, I think they're two different
4 permitting agencies that have their own
5 requirements. I don't feel necessarily
6 comfortable digging into the weeds here. We
7 analyze vernal pools strictly as wildlife
8 habitat, so we didn't do an analysis of overall
9 wetland impacts on the Project.

10 Q. Fair enough. Thank you.

11 Let's talk about possible additional
12 wetland impacts and delegation. It's
13 possible that if this Subcommittee approved
14 the Project, that after such an approval the
15 Applicant could create more wetland impacts,
16 including vernal pool impacts, as a result of
17 identifying the additional storage sites,
18 laydown areas, staging areas, and off-
19 right-of-way access roads that may not be
20 identified yet; correct?

21 A. (Lew-Smith) I have heard that discussed.

22 Q. Now, is it true that you, sitting here today,
23 you have no way of knowing how insignificant
24 or significant these possible additional

1 impacts could be?

2 A. (Lew-Smith) That's correct.

3 Q. Do you agree that the Applicant is requesting
4 that if this Subcommittee does not -- excuse
5 me -- does approve the Project, that the
6 Subcommittee's approval includes delegating
7 to New Hampshire DES the authority to approve
8 possible additional wetland impacts?

9 A. (Lew-Smith) That is my understanding, yes.

10 Q. And do you agree that such additional
11 permitting would be without any review of
12 this Subcommittee or the Site Evaluation
13 Committee?

14 A. (Lew-Smith) I believe so.

15 Q. And do you agree that would be without any
16 public hearing?

17 A. (Lew-Smith) As I understand it, yes.

18 Q. And that no information about these
19 additional wetland impacts would be provided
20 to the parties in this case?

21 A. (Lew-Smith) As I understand it, yes.

22 Q. Now, could the Applicants have done more to
23 specifically identify all wetland impacts so
24 that these wetland impacts could be reviewed

1 and considered as part of this SEC process?

2 A. (Lew-Smith) It appears so.

3 Q. I want to talk a little bit about temporary
4 wetland impacts. You testified earlier
5 today, if I understood it correctly, and
6 please let me know if I didn't, that with
7 respect -- I think you were talking about the
8 lupine plants at this point -- that if timber
9 mats were in place for as long as two months,
10 that they would be starting to do more harm
11 than good; is that correct?

12 A. (Lew-Smith) Correct.

13 Q. Okay. Now, do you have -- was that limited
14 to lupines, or was that a broader opinion
15 relating to water resources or other
16 environmental, possible environmental
17 impacts?

18 A. (Lew-Smith) When I talked about it, I was
19 referring specifically to rare plants.

20 Q. Okay. With respect to water resources,
21 including vernal pools, are you aware that --
22 do you believe that many of the proposed
23 wetland impacts that are proposed to be
24 temporary could in fact be permanent?

1 A. (Lew-Smith) Yes, some of them could be
2 permanent.

3 Q. And would that primarily come from access
4 roads and pads used to cross those water
5 resources?

6 A. (Lew-Smith) Yes.

7 Q. I'd like to refer you to page -- the same
8 page we looked at before, Page 29 of the
9 report that accompanied your original
10 prefiled testimony. So we're looking at
11 CFP 136, Page 29. This is the same section
12 titled, "Conclusions," except instead of the
13 last sentence, I want to look here at the
14 first sentence which states, "The data
15 collection methodology used for vernal pools
16 appears to be sufficient in terms of type of
17 data collected, amount of data and time of
18 year. However, the ranking protocol for
19 determining quality of the pools was an
20 inappropriate methodology and was
21 inconsistently applied. This has resulted in
22 a lack of reliable data," and it goes on.
23 Did I read that correctly?

24 A. (Lew-Smith) Yes.

1 Q. Okay. So I believe I correctly understand
2 that that section of your report was limited
3 to vernal pools; correct?

4 A. (Lew-Smith) Correct.

5 Q. Do you have any opinions about the
6 methodology the Applicants' consultants used
7 to assess other water resources?

8 A. (Lew-Smith) I do not.

9 Q. Are you aware -- let me step back.

10 Am I correct that the rationales used in
11 the U.S. Army Corps of Engineers Highway
12 Methodology Manual are an important part of
13 the assessment of wetland functions and
14 values?

15 A. Yes.

16 MR. WALKER: Objection. She's
17 getting into questioning that could have and
18 should have been asked earlier.

19 CHAIRMAN HONIGBERG: It got
20 answered "Yes." So let it go.

21 MR. WALKER: Yeah.

22 BY MS. MANZELLI:

23 Q. Are you aware that the Applicants'
24 consultants testified earlier in this hearing

1 that they did not document any rationales in
2 connection with their assessment of functions
3 and values?

4 A. (Lew-Smith) I'm not aware of that, no.

5 Q. Do you agree that not documenting any
6 rationale as part of their wetlands
7 assessment is problematic, including that it
8 makes it impossible to try to scientifically
9 reproduce the assessment?

10 A. (Lew-Smith) I don't feel like I've studied
11 those assessments enough to make an opinion on
12 it at this point.

13 Q. Would you be able -- if someone were to hire
14 you to go out into the field and reproduce
15 the Applicants' assessment of wetlands, would
16 you be able to do so without any knowledge
17 whatsoever of the rationales underlying that
18 assessment?

19 A. (Lew-Smith) Again, could you rephrase the
20 question? I'm having a little trouble
21 understanding what exactly it is you're asking.

22 Q. Sure. I can try.

23 So my understanding is that it's a
24 foundational part of developing a wetlands

1 assessment to identify the rationales using
2 the manual that support the function and
3 value that you are assigning to a particular
4 wetland. So that's my understanding that I'm
5 starting with. Is that accurate?

6 A. (Lew-Smith) It's an important part, yes.

7 Q. Okay. So my question is: Let's say that
8 part isn't there, as the Applicants'
9 consultants have testified they did not
10 document their rationales in any way. And
11 let's say you wanted to go out into the field
12 and verify or refute the accuracy of the
13 Applicants' wetland functions and value
14 assessment. So my question is: Would you be
15 able to do that with no rationales in hand?

16 A. (Parsons) We're going to confer real quick.
17 (Off-the-record discussion among panel members)

18 A. (Lew-Smith) Again, since I haven't really
19 looked at their assessment, it's really hard
20 for me to make an opinion on that to answer
21 that question.

22 Q. Okay. If you were going to undertake an
23 assessment of the functions and values of the
24 wetlands that may be impacted by this

1 project, would you anticipate that you would
2 document the rationales that you used to
3 support your assessment?

4 A. (Lew-Smith) No, not always.

5 Q. Not always. And under what circumstances
6 would you not document them?

7 (Off-the-record discussion between Mr.
8 Parsons and Mr. Lew-Smith.)

9 A. (Lew-Smith) You know, typically on smaller
10 projects we wouldn't bother to document them.

11 Q. And is this a smaller project?

12 A. (Lew-Smith) No.

13 Q. Do you believe that the Applicants'
14 consultants have provided enough information
15 with respect to water resources for DES to
16 determine if they -- if water resources have
17 been adequately restored after --

18 MR. WALKER: Objection. I'm
19 sorry. Objection. It could have been and
20 should have been in his report.

21 CHAIRMAN HONIGBERG: I don't
22 think that's the only problem with the
23 question. Ms. Manzelli.

24 MS. MANZELLI: Well, I

1 respectfully incorporate by reference the
2 argument set forth in a Motion for Rehearing to
3 be filed today which in sum says that the
4 information --

5 CHAIRMAN HONIGBERG: That you
6 get to ask witnesses about what other agencies
7 would do, whether something is adequate for
8 another entity? That was your question. Was
9 the information sufficient for DES? That was
10 the question. That objection is sustained.

11 MS. MANZELLI: That was part of
12 the question. The question was limited to
13 restoration.

14 CHAIRMAN HONIGBERG: That
15 objection is sustained.

16 MS. MANZELLI: May I state my
17 response in full for the record?

18 CHAIRMAN HONIGBERG: You should
19 ask your next question. You apparently have a
20 document you're filing that apparently will
21 state your position and will be on the record.

22 MS. MANZELLI: Okay. Fair
23 enough.

24 BY MS. MANZELLI:

1 Q. Have you seen any detailed, site-specific
2 restoration plans for each impacted water
3 resource?

4 A. (Lew-Smith) I have not.

5 Q. Thank you. I have no further questions.

6 A. (Lew-Smith) Thank you.

7 CHAIRMAN HONIGBERG: Off the
8 record.

9 (Discussion off the record)

10 CHAIRMAN HONIGBERG: Ms. Pacik.

11 MS. PACIK: Thank you. I'm
12 going to try not to use any exhibits because I
13 lost all my people.

14 CROSS-EXAMINATION

15 BY MS. PACIK:

16 Q. My name's Danielle Pacik. I am the attorney
17 for the City of Concord, and I'm also the
18 spokesperson for Municipal Group 3 South. I
19 just have a couple questions, the first one
20 following up on some of Attorney Manzelli's
21 questions about vernal pools.

22 I also wanted to ask about one of the
23 statements in your prefiled testimony which
24 is in Counsel for the Public Exhibit 136,

1 Page 6, Line 2. You state that the data
2 collection methodology used for
3 identification of vernal pools is sufficient,
4 but the ranking protocol used was
5 inappropriate and inconsistently applied.

6 In terms of the methodology used to
7 identify vernal pools, I just want to confirm
8 you did not go out and do any of your own
9 field work to confirm that all vernal pools
10 were identified; is that correct?

11 A. (Lew-Smith) That's correct.

12 Q. Okay. And so if I were to represent to you
13 that Dr. Van de Poll, who was hired by the
14 City of Concord, identified a vernal pool in
15 Concord that was missed, you would have no
16 reason to dispute that; is that correct?

17 A. (Lew-Smith) That's correct.

18 Q. Okay. And same, just to confirm. I think
19 this is accurate based on your discussion
20 with Attorney Manzelli. But you also did not
21 do anything to confirm that wetlands were
22 appropriately delineated by the Applicants;
23 is that correct?

24 A. (Lew-Smith) That's correct.

1 Q. Okay. Going to the Karner blue and some of
2 the other rare and threatened butterflies and
3 moths in the area, I just wanted to ask a
4 couple of questions.

5 We had seen Counsel for the Public --
6 I'm not sure. I believe it was Counsel for
7 the Public Exhibit 602 which showed a chart
8 of the different numbers of Karner blue over
9 the years and how the population changed on
10 an annual basis; is that right?

11 A. (Amaral) Yes. I think you're referring to the
12 figure in the New Hampshire Fish & Game report
13 from 2016.

14 Q. Yes, that's correct.

15 A. (Amaral) Okay.

16 Q. Okay. So my question is: In terms of the
17 Frosted Elfin, your report stated that only
18 10 to 20 individuals were found annually in
19 New Hampshire; is that right?

20 A. (Parsons) Yes, although I'm not sure of the
21 upper number, if it was 20 or 30.

22 Q. Somewhere between 10 and 30. Is that fair to
23 say?

24 A. (Parsons) That's fair to say.

1 Q. I'm sure your report has it. I just don't
2 have the page right in front of me. But
3 that's a lot less than the Karner blue; is
4 that correct?

5 A. (Parsons) That's correct.

6 Q. And in terms of that chart that we saw with
7 the population of the Karner blue going up
8 and down each year, would that also apply to
9 the Frosted Elfin in terms of population
10 increase and decrease on an annual basis?

11 A. (Parsons) I'm afraid we don't have that
12 information. We don't have the numbers in
13 order to put together a graph like that for
14 Frosted Elfin.

15 Q. And is that because there's just such a small
16 population?

17 A. (Parsons) And I don't think it's gotten the
18 attention that the Karner blue has.

19 Q. Okay. So they just haven't been counted?

20 A. (Parsons) That's correct.

21 Q. As you sit here today, do you know whether or
22 not there's more than -- when you say 10 to
23 30 individuals, does that mean there's 10 to
24 30 Frosted Elfin in the entire state of New

1 Hampshire?

2 A. (Parsons) I believe so.

3 Q. Okay. And do you know whether there's more
4 now in 2017 than the number that you had
5 provided in your report?

6 A. (Parsons) I do not.

7 Q. Okay. What about the persius Duskywing
8 Skipper? Your report didn't indicate many of
9 those individuals are in New Hampshire. Do
10 you have any estimate?

11 A. (Parsons) No, I do not believe that there were
12 any available at the time we did the report. I
13 don't believe there are any available now.

14 Q. Do the populations of the Frosted Elfin and
15 Duskywind -- Duskywing Skipper, do you know
16 whether they go up and down on an annual
17 basis?

18 A. (Parsons) I'm afraid I do not.

19 Q. Is the population of the persius Duskywing
20 Skipper less than the Karner blue?

21 A. (Parsons) I do not believe we know that. We
22 know that the species has not been seen for
23 several years in the state of New Hampshire,
24 but I'm not sure there's been a very

1 comprehensive effort to locate and identify and
2 enumerate the Duskywing Skipper.

3 Q. In terms of the Frosted Elfin, the ones you
4 had previously mentioned were 10 to 30 of
5 them in the state of New Hampshire, those are
6 in Concord; is that correct?

7 A. (Parsons) Yes, but that --

8 Q. And are those in the area of the proposed
9 project where it would be constructed?

10 A. (Parsons) Down to the level of square feet and
11 feet on the ground, I'm not sure. But it's
12 certainly within the vicinity, the direct
13 vicinity.

14 MS. PACIK: Okay. Thank you. I
15 have no further questions.

16 CHAIRMAN HONIGBERG: Ms. Pacik,
17 your peeps have left; right?

18 MS. PACIK: It appears so.

19 CHAIRMAN HONIGBERG: Ms. Saffo.

20 CROSS-EXAMINATION

21 BY MS. SAFFO:

22 Q. Good afternoon. I, too, just have a couple
23 of questions regarding the prefiled
24 testimony. Yours is dated December 30, 2016,

1 your original one before you supplemented it;
2 correct?

3 A. (Lew-Smith) December 30th, yes.

4 Q. Yes. And did you have the opportunity to
5 review the construction plans provided by the
6 Applicant in December before writing your
7 final report?

8 A. (Lew-Smith) I believe so. It's hard to say
9 definitively because there's been plans and
10 then updates to plans.

11 Q. That's actually going to be my point, that by
12 the time you submitted your testimony, there
13 had been just the initial release of plans;
14 correct?

15 A. (Lew-Smith) Correct.

16 Q. And then they've been updated since that
17 time; correct?

18 A. (Lew-Smith) Correct.

19 Q. Now, as far as the 52-mile underground route,
20 are you familiar with the status of those
21 plans?

22 A. (Lew-Smith) Well, I'm familiar that there is a
23 number of state watch species up there.

24 Q. Okay. And what do you mean by "state watch

1 species"?

2 A. (Lew-Smith) So if a species isn't listed as
3 threatened or endangered, the state puts it on
4 kind of "watch" list. And there's really two
5 categories. One is the "watch" list, and
6 another is "indeterminate," which means there's
7 really not enough information to know where
8 that should be, if we should keep watching it
9 or if the population is stable. So there's a
10 number of species out there that are state
11 watch or indeterminate.

12 Q. And so where -- do you have a current
13 understanding as to where the route is going
14 to go on the 52-mile underground route,
15 meaning to the right side of the road or left
16 side of the road? Do you have a sense of
17 that at this time?

18 A. (Lew-Smith) I haven't looked at it recently.

19 Q. There's been some discussion about how the
20 initial application and plans indicated it
21 was going to go underneath the roadway. Is
22 that something you were generally familiar
23 with for a period of time?

24 A. (Lew-Smith) No, we're not familiar with that.

1 Q. Okay. Now, at this time, what did you --
2 what is your understanding of the
3 right-of-way for the underground route?

4 A. (Parsons) My understanding was that it was an
5 existing right-of-way, I think in most
6 locations adjacent to the roadside. Some of it
7 was at relatively high elevations within the
8 Green [sic] Mountain National Forest. That's
9 about it.

10 Q. Yeah. So when you were considering wetland
11 impacts, for example, and the animals that
12 would be impacted by the wetlands impacts,
13 was it your understanding that the
14 underground route would be primarily in
15 disturbed areas, areas already disturbed?

16 A. (Parsons) Yes.

17 Q. So if that changes, if now portions of the
18 underground route will be in areas that are
19 not currently disturbed -- for example, 6
20 feet off the disturbed area or up to 20 feet
21 off the disturbed area -- would that be
22 something you would need to know to consider
23 impacts on wetlands?

24 A. (Parsons) We would certainly need to know to

1 assess the impacts. We would need to know the
2 construction techniques, whether, you know,
3 they're near wetlands, whether they're thinking
4 about directional drilling to avoid the
5 wetlands, how far into the forest they're
6 going, what type of forest it was.

7 Q. Okay.

8 A. (Lew-Smith) So I would like to clarify.

9 Q. Sure.

10 A. (Lew-Smith) We, as a panel, weren't tasked with
11 assessing impacts to wetlands.

12 Q. Yes.

13 A. (Lew-Smith) So, more specifically, if there
14 were impacts to rare plants or wildlife
15 associated with that movement, then that's
16 something that we would look at.

17 Q. And to consider those impacts, would it be
18 helpful to know where the trench is going to
19 be dug?

20 A. (Lew-Smith) Yes.

21 Q. And do you -- as of this date, has anybody
22 told you definitively where the trenches are
23 going to be dug?

24 A. (Lew-Smith) No. From our perspective, it's

1 more, you know, when we assess the impacts, we
2 relied on their calculations of impacts. So
3 that's what we relied on.

4 Q. As disclosed to you in their plans and
5 reports.

6 A. (Lew-Smith) Correct.

7 Q. So if they're going to change those plans and
8 reports, that's information that would be
9 helpful to you, correct --

10 A. (Lew-Smith) Correct.

11 Q. -- to consider impacts into the future;
12 correct?

13 A. (Lew-Smith) Correct.

14 Q. So be fair to say it might be a different
15 impact if at one time they're saying they're
16 going to be to the left of the road and now
17 they're switching and it's going to be to the
18 right side of the road if the habitat is
19 different on the other side of the road?

20 A. (Lew-Smith) Correct.

21 Q. Now, your supplemental report was in April,
22 correct, April 17, 2017; correct?

23 A. (Lew-Smith) Supplemental testimony, yes.

24 Q. Yeah. And if since that time we've learned

1 that along the roads for 52 miles, when they
2 do do the trenching they're going to be
3 backfilling with flowable thermal backfill,
4 also known as fluidized thermal backfill,
5 would that make a difference in your opinion?

6 A. (Lew-Smith) That was beyond our scope.

7 Q. Okay. So I would just note that if in a
8 wetland area -- do you think there would be
9 an impact on the species that you have been
10 discussing today if that wetland area came in
11 contact with substances such as coal fly ash?
12 Are you familiar with what coal fly ash is?

13 A. (Lew-Smith) Again, this is really beyond our
14 scope.

15 Q. Okay. So, certainly, if any item, a car
16 flipping over and causing oil or anything is
17 introduced into a wetland that would be
18 considered a chemical or something non-
19 natural, could that impact that wetland and
20 then impact the species in turn?

21 A. (Lew-Smith) Yes.

22 Q. So to put it another way, you considered that
23 some species need wetlands, but you didn't
24 inventory the wetlands, for example?

1 A. (Lew-Smith) That's correct.

2 Q. And you relied on, as we discussed, Northern
3 Pass's inventory of the vernal pools.

4 A. (Lew-Smith) That's correct.

5 Q. I'm looking at Page 7 of 14 in your original
6 prefiled direct testimony. And Line 5, you
7 noted, quote, "Lacking documentation of an
8 analysis by NPT, it is not possible to
9 determine the nature, extent and duration of
10 potential effects of the Project..." and at
11 that point you were talking about some bird
12 species; correct?

13 A. (Parsons) That's correct.

14 Q. So, summarizing this in a different way,
15 without this documentation it's hard for you
16 to do your job; correct?

17 A. (Parsons) Correct.

18 Q. I believe that's it. One second. I believe
19 my other questions were already addressed,
20 but I'm just double-checking.

21 (Pause)

22 Q. And on Page 22 of 23 of your supplemental
23 testimony, you talked about the Project going
24 forward with an independent environmental

1 monitor; correct?

2 (Witness reviews document.)

3 Q. Page 22 of 23, Line 9?

4 A. (Lew-Smith) Of the supplemental?

5 Q. Yes.

6 A. (Lew-Smith) Oh, sorry.

7 Q. I think I have that right. Maybe I don't.

8 A. (Lew-Smith) I'm sorry. What page again?

9 Q. Page 22.

10 A. (Lew-Smith) Page 22.

11 Q. Line 9.

12 A. (Lew-Smith) Yes, that's correct.

13 Q. And that person could be -- so if an
14 independent environmental monitor finds that
15 there's going to be impacts that were not
16 planned, how do you -- do you have a proposal
17 for how they would stop the process?

18 A. (Lew-Smith) We don't really have a proposal.
19 But as we mentioned in the testimony, though,
20 they should have authority to stop work if
21 there's permit conditions that aren't being
22 met.

23 Q. And earlier you were talking about the
24 difference between temporary conditions that

1 really have permanent impacts, such as I
2 think the example you gave us earlier today
3 was if you plow over lupine, but you're not
4 going to pave it, there's still a pretty
5 significant impact to the lupine. Do you
6 recall that testimony?

7 A. (Lew-Smith) Yes.

8 Q. Similarly, if you're building a concrete --
9 if you're putting cables permanently into
10 areas that are wetlands and then covering it
11 with concrete and then putting on top of that
12 a permeable substance, that would change the
13 nature of the wetland permanently; correct?

14 A. (Lew-Smith) Again, I would have to look at
15 specifics. But it would certainly change the
16 nature of the wetland. In broad terms, that
17 impact could be significant or it could be
18 minor, depending on where in the wetland and
19 how much the wetland was impacted and the
20 hydrology of the wetland, et cetera.

21 Q. And we would need that information so you
22 could assess that impact.

23 A. (Lew-Smith) Correct.

24 MS. SAFFO: Thank you. No

1 further questions.

2 CHAIRMAN HONIGBERG: I don't see
3 Ms. Birchard or Mr. Plouffe. I don't see Ms.
4 Percy or Mr. Cunningham. I don't see Mr. Van
5 Houten. That brings us to Ms. Menard. Mr.
6 Draper? So you're switching positions? Oh,
7 okay. Mr. Draper.

8 And Ms. Townsend, you have
9 questions, too?

10 MS. TOWNSEND: I have a couple
11 questions.

12 MR. DRAPER: Could I have the
13 ELMO, please?

14 CROSS-EXAMINATION

15 BY MR. DRAPER:

16 Q. So I just wanted to bring up that I collected
17 these on a walk down to a beaver pond very,
18 very close to the right-of-way. And one of
19 the amazing things that happened was I heard
20 a mating call of a wood frog. Does that seem
21 unusual?

22 A. (Lew-Smith) At this time of year, yeah, it's
23 unusual.

24 Q. I was totally shocked. I mean, I went all

1 over trying to find it. Never did see it,
2 but it had to have been there.

3 So this beaver pond is within 200 meters
4 of the right-of-way, and that is why I chose
5 this particular site. Looking at these
6 specimens, is it unusual -- yes, is it
7 unusual to have these individuals swimming
8 about in November? Can you make -- I mean,
9 I'm not sure what you can see on your screen.
10 Can you --

11 A. (Lew-Smith) Oh, yeah, we can see them.

12 Q. Okay.

13 A. (Lew-Smith) Thanks for the entertainment, by
14 the way.

15 Q. I work hard at this.

16 A. (Lew-Smith) Given the weather we've had, it's
17 not unusual, no.

18 Q. But like other years, have you seen anything
19 like this?

20 WITNESS LEW-SMITH: Do you want
21 to speak to local conditions here?

22 A. (Amaral) I have to admit, I've never looked for
23 tadpoles in November.

24 Q. Nor I.

1 A. (Amaral) I think they probably burrow down in
2 the mud when conditions are harsh and they
3 become somewhat more active on mild days.
4 So...

5 Q. Can you identify what those, what kind they
6 are?

7 A. (Amaral) No, I can't.

8 Q. These I think -- oh, go ahead.

9 A. (Lew-Smith) I think they're likely green frogs.

10 Q. Yeah, I worked really hard. 'Cause last week
11 I found some gray tree frogs, and I've never
12 seen those winter over in my beaver pond.

13 But they were still about the same stage, but
14 they were tree frogs. And these, I couldn't
15 find them, of course, when I needed them.

16 But anyways, I'll just move on because I
17 wanted to keep building on the kind of -- I
18 think it's kind of unusual to find them
19 swimming around. Did you see backswimmers in
20 there? Would they be swimming at this time?

21 A. (Lew-Smith) I mean, if you saw them swimming,
22 they'd be swimming at this time.

23 Q. I won't go anywhere with that. But isn't it
24 unusual to have them at this time of year?

1 A. (Lew-Smith) Honestly, I haven't studied that
2 species in this locale, so I can't really say.

3 Q. It is also funny how when we aren't asked to
4 look for these things, we don't see them.
5 And so I don't know if they are there or
6 weren't there. But I know when I've gone out
7 with students looking for these in the
8 winter -- in November, and I really want to
9 find them, I can't find them. And I was
10 lucky 'cause I was hoping to show you these.

11 So can you tell if any of these are from
12 a vernal pool?

13 A. (Lew-Smith) It's likely the green frogs are not
14 from a vernal pool.

15 Q. Correct. Yeah.

16 MR. DRAPER: Could you put
17 something white underneath? I don't know if
18 you can -- because there are very small things
19 swimming around. I think the white might help.
20 I'm not sure. Don't spill it.

21 BY MR. DRAPER:

22 Q. Okay. Do you see the guys that look like
23 pickerel?

24 A. (Lew-Smith) Yes.

1 Q. Would those be in a vernal pool?

2 A. (Lew-Smith) I mean, they look like midge
3 larvae.

4 Q. That's what I think they are, too.

5 A. (Lew-Smith) There's lots of different species,
6 and which species this is I'm not sure. And if
7 it overlaps with the species that occur in
8 vernal pools, I'm not sure.

9 Q. What I was trying to get at, I think these
10 are phantom midges.

11 A. (Lew-Smith) Yeah.

12 Q. And they wouldn't be in a vernal pool because
13 they do usually take two seasons, I think.

14 But what I was getting at is, one of the
15 things that's unusual about vernal pool
16 organisms -- let me see if I can -- I tend to
17 get talking more than where I want to go.

18 What I was trying to make the point of
19 is there's definitely a difference between a
20 wetland and a vernal pool, correct, in the
21 species adaptations?

22 A. (Lew-Smith) Yes.

23 Q. In that vernal pools, isn't it true the
24 species have to have a very narrow window of

1 success usually? I mean, there usually is a
2 very narrow window of success because of
3 the...

4 A. (Lew-Smith) Yeah, if you could be a little more
5 clear in your question.

6 Q. Yeah, it wasn't well stated.

7 If you're an organism that lives in a
8 vernal pool, you have many things that are
9 working against you to have a good survival
10 rate.

11 A. (Lew-Smith) Yes.

12 Q. So what I was trying to get to is you
13 mentioned in your testimony, your
14 supplemental testimony on Page 7, Line -- or
15 7 of 23, Line 7, about... it was just
16 basically a point that you had a problem with
17 vernal pool mitigation. I was wondering if
18 you had ever seen vernal pool mitigation like
19 a replacement of a vernal pool on an
20 elevation of more than like a diagonal of 30
21 degrees, roughly 30 degrees with blasting and
22 replacing that vernal pool. Is that a
23 possibility of making it work?

24 A. (Lew-Smith) Very slim possibility.

1 Q. Thank you.

2 MR. DRAPER: Let's put up this
3 other picture.

4 BY MR. DRAPER:

5 Q. Have you seen enough of these guys?

6 A. (Lew-Smith) Sure.

7 Q. Could you see fairy shrimp?

8 A. (Lew-Smith) No.

9 Q. No. I was hoping -- there were fairy shrimp.
10 That's what I was getting at with the vernal
11 pool was that there were some fairy shrimp
12 and I think a couple of copepods that were --
13 that was great. I was happy to see them. I
14 wish I had an ELMO at home we could have
15 used.

16 So would you identify this guy?

17 A. (Lew-Smith) Yeah, that's a spotted salamander.

18 Q. And does he need a vernal pool?

19 A. (Lew-Smith) Yes.

20 Q. And what is the part of the -- what makes it
21 difficult frequently for these spotted
22 salamanders in finding their vernal pool?
23 That's probably a lousy question, too.

24 How about -- go ahead.

1 A. (Lew-Smith) There is a fair bit of road
2 mortality that happens. So these critters lay
3 their eggs in a vernal pool. They're there for
4 a couple weeks doing their thing, and then they
5 leave and spend the rest of their lives outside
6 in the forest around vernal pools. So there's
7 a migration that happens. And you've probably
8 all seen it. Warm rain in the spring, lots of
9 frogs and salamanders on the road. That's them
10 moving into the breeding pools. So, traffic
11 mortality in certain places can be significant.

12 Q. And how long usually does that migration
13 last?

14 A. (Lew-Smith) Well, I mean, it can be just one or
15 two nights, you know, depending on the weather.
16 Sometimes it's strung out over a couple weeks.
17 And then there's also the fall one sometimes.

18 Q. Have you ever seen that?

19 A. (Lew-Smith) The fall one?

20 Q. Yeah.

21 A. (Lew-Smith) Not as big as the spring one.

22 Q. But have you seen one?

23 A. (Lew-Smith) Yeah.

24 Q. I've tried so hard. Never got one. That's

1 good. Maybe we can go there sometime.

2 So what I was wondering, with the
3 current weather situations we're having now,
4 would that put any more pressure on these
5 organisms searching for vernal pools?

6 A. (Lew-Smith) Do you mean specifically the warm
7 weather we've been having?

8 Q. Well, the unpredictability of the warm
9 weather and the dry weather and the -- I
10 mean, have you seen any changes in amphibian
11 population because of these weather events
12 that we've been having?

13 MR. WALKER: Objection, Mr.
14 Chairman. We're getting into an area that
15 could have been covered and should have been
16 covered in his prefiled testimony.

17 MR. DRAPER: Well, we haven't
18 had -- I'm sorry.

19 CHAIRMAN HONIGBERG: Mr. Draper,
20 what would you --

21 MR. DRAPER: I didn't mean to be
22 a -- what I was trying to address was the fact
23 that we've already had two weather events in
24 between since their last testimony. And I'm

1 kind of feeling like -- I'm just asking if
2 they've seen any changes in amphibian
3 populations.

4 CHAIRMAN HONIGBERG: I'll
5 overrule the objection and allow them to
6 answer. I'll ask you, Mr. Draper, if you
7 could, to keep your questions focused if you
8 can.

9 MR. DRAPER: I'm sorry. I get
10 excited.

11 A. (Lew-Smith) So I don't think you're going to
12 see any impacts on populations based on weather
13 events that aren't, say, catastrophic. Climate
14 is a different thing. And I honestly -- I
15 mean, I haven't studied it specifically.
16 Things are going to change with climate,
17 though.

18 Q. And do you think that might be more focused
19 like on amphibians that we would see those,
20 that they'd be a canary in the coal mine;
21 they might be the first ones we see the major
22 changes on?

23 A. (Lew-Smith) Potentially.

24 Q. Thank you. I'm trying to be focused.

1 I had a -- on the same funny thing with
2 climate. The climate of the political things
3 that we're having going on, do you find it
4 more difficult to even address talking about
5 climate change because of that?

6 A. (Lew-Smith) Personally, no.

7 MR. WALKER: Objection.
8 Relevance.

9 CHAIRMAN HONIGBERG: Yeah, Mr.
10 Draper.

11 MR. DRAPER: Well, I was just
12 feeling like I do think that we haven't been
13 talking much about climate change, and I was
14 just wondering if it was political or --
15 because we certainly are having it.

16 CHAIRMAN HONIGBERG: Well, it's
17 not really part of what they've been talking
18 about in this case, so...

19 MR. DRAPER: Well, it's just
20 questioning whether or not they were feeling
21 any pressure. That's all I was asking. It
22 wasn't like --

23 CHAIRMAN HONIGBERG: That's a
24 little far afield, so I'm going to sustain the

1 objection and ask you to move on.

2 BY MR. DRAPER:

3 Q. Okay. How about this species here?

4 A. (Lew-Smith) Smooth green snake.

5 Q. Was that mentioned at all in your report?

6 A. (Lew-Smith) No.

7 Q. Is that a threatened species?

8 A. (Lew-Smith) Not that I'm aware of.

9 Q. Oh, it's not?

10 A. (Lew-Smith) I think it's not listed as
11 threatened.

12 Q. Maybe listed?

13 A. (Lew-Smith) It's not listed threatened or
14 endangered in the state.

15 Q. Okay. Is there a watch for it or anything?

16 A. (Lew-Smith) There may be --

17 Q. 'Cause I thought --

18 (Court Reporter interrupts.)

19 A. (Lew-Smith) It's not listed as threatened or
20 endangered. It may be listed as a special
21 concern or --

22 Q. I'm sorry. Do these lists change frequently,
23 or are they --

24 A. (Lew-Smith) Occasionally.

1 Q. -- or are they updated more often now than
2 they were, like, ten years ago?

3 A. (Lew-Smith) I don't know.

4 Q. Okay. All right. I'd like to -- oops.

5 Is there anything that you have reviewed
6 on this project since your last testimony
7 changed your conclusions? You've actually
8 kind of mentioned that you've seen, actually,
9 the Applicant has adapted some better
10 tactics. But have you seen anything else
11 that has changed that -- say it again.

12 Has anything you've reviewed on this
13 project since your last testimony changed
14 your conclusions or added to your concerns?

15 A. (Lew-Smith) From my perspective, I've addressed
16 most of those already today.

17 A. (Parsons) I think we all have.

18 Q. Super. Thank you. And the last one I'd like
19 to ask each one of you: What do you think is
20 the biggest challenge facing threatened and
21 endangered species today in New Hampshire?

22 A. (Parsons) People.

23 A. (Lew-Smith) I'm going to echo that. It's
24 really development related to people.

1 A. (Amaral) Human population growth, yes, and
2 habitat loss.

3 A. (Reynolds) For bats, it's infectious diseases
4 right now.

5 Q. Super. I thank you very much.

6 CHAIRMAN HONIGBERG: Now Ms.
7 Menard.

8 CROSS-EXAMINATION

9 BY MS. MENARD:

10 Q. Good afternoon everyone. I am here as a
11 member of the Deerfield Abutters. Most of
12 our questions today have to do with some of
13 the most recent submissions over the weekend,
14 but I would like to lead with two questions
15 about herons.

16 It was mentioned earlier that the buffer
17 zone for herons is sitting at 330 feet
18 currently.

19 MS. MENARD: And Bob, if you
20 could put up the first exhibit.

21 BY MS. MENARD:

22 Q. Again, this is from Applicant's Exhibit 124A.
23 Do you feel that herons would have a
24 higher tolerance for construction noise than

1 the other raptors that have been put into a
2 660-foot buffer zone around their active
3 nests?

4 A. (Parsons) I don't think I can answer that
5 question precisely. Yeah, I know that we
6 implement a similar buffer in Vermont and that
7 it appears to be sufficient. And I've not come
8 across, other than the recent literature that I
9 delved into in the last past week where larger
10 buffers were asked for and that there were some
11 implications of having human activities, in
12 particular, construction activities, closer
13 than -- or further away, sorry -- excuse me --
14 than the 330 feet. That was the first time I
15 had come across literature that suggested that
16 330 feet was insufficient.

17 Q. Okay. So you're using that study as a reason
18 to expand and recommend that the buffer zone
19 be expanded.

20 A. (Parsons) Yes, and it wasn't just a study. It
21 was several -- it was three documents. Two
22 from provinces in Canada, one from the state of
23 Minnesota, might have been Wisconsin, that were
24 literature reviews of development activities

1 and a whole series of different activities and
2 existing buffer zones and potential impacts.
3 And as a result, they suggested that 800 to
4 1,000 feet may be a better buffer distance to
5 use than the 330 feet.

6 Q. And in the studies, did they get into the
7 specifics about whether the construction
8 activities, was it due to like helicopters
9 flying near a nesting heron, or were there
10 other types of construction activities that
11 were delved into in terms of a creation of
12 disturbance?

13 A. (Parsons) If they did, I did not come across
14 that in the article.

15 Q. Okay. Thank you. On Page 6 of a document
16 that has come out, this has to do with the
17 avoidance and minimization measures. And
18 I've actually labeled and put numbers next to
19 a couple of the bullet points just to direct
20 our attention. And looking at number 1, this
21 for turtles is a concern to us, "avoid and
22 minimize impacts to open water and mucky
23 substrates to the greatest extent
24 practicable." And my question -- I need a

1 background question first, and that is: Do
2 you know whether or not --

3 MS. MENARD: And Bob, would you
4 mind putting up the map, please?

5 BY MS. MENARD:

6 Q. This is a pond in Deerfield. And in terms of
7 the wetland designation question, does it
8 matter that, in terms of when you're
9 assessing wetland impacts to an area, whether
10 or not a pond is labeled or not? We had some
11 discussion with Ms. Carbonneau back on
12 June 23rd in the morning that was -- I had
13 raised this question about why wasn't the
14 pond labeled as a wetland, a designated
15 wetland area. The answer given was that the
16 primary wetland is in the right-of-way, and
17 so that is why the wetland was labeled, and
18 the pond area is just part of that wetland
19 area.

20 So what type of impacts would you
21 anticipate to a pond area, given the
22 construction of that lattice tower?

23 A. (Lew-Smith) It's a little difficult because I
24 haven't reviewed these plans or the pond, and

1 it's hard for me to tell. As I understand it
2 from what you're saying, there is wetland
3 that's adjacent to the pond that's being
4 impacted. And I can't tell if the pond itself
5 is being impacted from this construction.

6 Q. Okay. Fair enough. The fact that the pond
7 wasn't labeled as a PUB, which is a -- if
8 there were ponds in other sections of the
9 right-of-way and it has a label as a distinct
10 wetland type, does that omission in any way
11 cause AMMs measures to be overlooked or not
12 considered? So let me just back up a minute.

13 You can see clearly the wetland area
14 DF 28 is labeled and it was identified.

15 A. (Lew-Smith) Yes.

16 Q. And there are measures, you know, after they
17 do their calculations, there are measures
18 that, you know, they know what certain
19 impacts are created on certain types of
20 wetlands. But the pond area is an open body
21 of water. And we've just read that there
22 needs to be special considerations for an
23 open body of water with muddy substrates.
24 The fact that this wasn't acknowledged or

1 labeled or categorized, does that -- my real
2 concern is, is there something that's going
3 to impact this pond that is just off
4 everybody's radar?

5 A. (Lew-Smith) Certainly if there's a proposed
6 work area in the open water of the pond itself,
7 I would want those impacts avoided if at all
8 possible. That's what we would push for, and
9 push it into the wetland, the other part of the
10 wetland that does not have open water. I guess
11 that's as far as I can --

12 Q. Certainly.

13 A. (Lew-Smith) Given what I know about it, that's
14 as far as I can go.

15 Q. Thank you.

16 Is it your understanding that -- again,
17 this is a different topic relating to
18 turtles. Is it your understanding that the
19 plan sheets are going to have nesting
20 habitats mapped out?

21 A. (Lew-Smith) It's my -- no. It's my
22 understanding that mapped turtle areas will be
23 mapped out. And as I understand it, that's
24 areas within the range of the species that's

1 appropriate habitat.

2 Q. Okay. So they will be mapped all-exclusive
3 of nesting areas, feeding areas and other
4 habitat uses.

5 A. (Lew-Smith) That's my understanding.

6 Q. Okay. Thank you.

7 You had mentioned earlier that you would
8 be a proponent of creating nesting sites for
9 turtles as mitigation?

10 A. (Lew-Smith) Correct.

11 Q. Do you know, in terms of nest fidelity for
12 turtles, if they are seeking favorites sites?
13 And let's say there may be a few favorite
14 sites that they would head to in any given
15 nesting season. You know, you're suggesting
16 creating these sites so they wouldn't have to
17 travel so far. Do you know how long it would
18 take to establish turtles actually using
19 them?

20 A. (Lew-Smith) So the studies that I have read
21 have indicated that there's fairly low fidelity
22 to nests, which means if another appropriate
23 nest -- if a turtle comes across an appropriate
24 nest that they didn't use last year, there's a

1 potential they would use that again -- or use
2 that for the first time.

3 Q. Okay. On Page 7 of the AMM, Appendix 126,
4 there's a section that talks about
5 environmental monitors sweeping for and
6 moving any observed turtles out of harm's
7 way, and it's going to happen at the
8 beginning of the workday, prior to
9 construction vehicles entering the site, and
10 again when the majority of the vehicles are
11 leaving the site.

12 What is your understanding of why it is
13 practicable to only sweep for turtles during
14 the times identified by the Applicant?

15 A. (Lew-Smith) Well, I think that it's coupled
16 with training of construction personnel about
17 the importance of the turtles and, for that
18 matter, snakes that live in the area. In my
19 mind, it's likely sufficient to reduce impact
20 to adult individuals. Certainly traffic, as
21 I've mentioned, is cause of mortality for these
22 species. The way I kind of envision
23 construction traffic happening along the
24 right-of-way is not, you know, a lot of cars, a

1 lot of moving fast that would hit turtles. So
2 it's my understanding that if you have the
3 construction personnel that are trained to
4 identify, avoid, you know, these reptiles, that
5 if they see one, they're not going to hit the
6 accelerator, right. They're going to know to
7 not run over it. So that was my rationale for
8 saying that seems sufficient.

9 Q. Isn't it true that turtles may be present at
10 other times during the day?

11 A. (Lew-Smith) Yes.

12 Q. Do you agree that turtles could be injured or
13 run over at any time during the construction
14 activity, so not just rush-hour traffic into
15 the construction site and out when the
16 monitors have done their job?

17 A. (Lew-Smith) Well, this goes back to the fencing
18 of the work areas. It's my understanding that
19 if the work areas are fenced, and this is just
20 about construction access roads, the most
21 likely time for them to be injured is when the
22 construction traffic is coming and going. But
23 yes, it could happen at any time during the
24 day.

1 Q. A couple questions about the monitor
2 qualifications. And in our -- again, back in
3 our conversations with the environmental team
4 on Day 19, June 23rd, there was a discussion
5 about what qualifications the monitor would
6 have. And the answer was given that the
7 monitor would be have to be qualified to hold
8 a handling permit issued by Fish & Game. And
9 if we go to Page 9 of the AMM measures, it
10 reads that all environmental monitors for the
11 Project who will handle listed reptiles must
12 be listed on the collector's permit. And
13 then if you go down to the bottom of that
14 page, it states that listed species that are
15 encountered at any time by persons other than
16 the environmental monitor, a designated
17 member of the construction team, and it
18 carries over to this next page... so, work
19 crew members may be designated on behalf of
20 the environmental monitor.

21 Do any of you happen to know if a
22 collector's permit, or the permit listed here
23 in Fish & Game, is that a supervisory-level
24 permit that would allow the transfer off to a

1 crew member?

2 A. (Lew-Smith) I don't know the specifics of it.

3 Q. Okay. Thank you.

4 MS. MENARD: I think that would
5 be in the nature of a request that we might be
6 wanting to follow up with the Applicant after
7 further review of more materials to request and
8 answer a question like that; whereas, this team
9 isn't able to answer that question, maybe the
10 Applicant's experts might be able to answer
11 that question.

12 CHAIRMAN HONIGBERG: Is this
13 based on the information that was filed over
14 the weekend?

15 MS. MENARD: Yes.

16 CHAIRMAN HONIGBERG: Why don't
17 we see what -- if you file something, there
18 will be a response.

19 MS. MENARD: I'm going to hold
20 my questions until we get more information.
21 But after, do it collectively as opposed to
22 piecemealing through specific requests --

23 CHAIRMAN HONIGBERG: I don't
24 know that you can be sure of what will happen

1 after you've reviewed it. If you have
2 questions you feel that you want to ask this
3 panel, I think you should probably ask them.

4 MS. MENARD: Okay. Thank you.

5 BY MS. MENARD:

6 Q. So my question would be: I guess we'll
7 assume that not knowing what a collector
8 permit really means in terms of whether it
9 can be passed off to somebody else, would you
10 agree that the concern of having
11 environmental monitors have full knowledge,
12 full qualification, be mandatory in terms of
13 anyone who's handling endangered species?

14 A. (Parsons) Well, it's certainly -- I mean,
15 that's ideal. I'm not exactly sure what you're
16 asking.

17 Q. What I'm asking is: Do you have any level of
18 concern about who in the construction zone
19 handles the endangered species, in terms of
20 they're found, the environmental monitor
21 isn't around, but somebody is picked for the
22 day and can make decisions and move the
23 endangered species to an appropriate
24 location? Do you have any concerns about --

1 and maybe you don't have experience and don't
2 have an opinion regarding the environmental
3 monitors. Maybe you do. I would like your
4 opinion.

5 A. (Lew-Smith) I guess a lot of it would depend
6 on, you know, the training and who it is that's
7 actually, you know, picking up and moving the
8 species. Ideally it would be the environmental
9 monitor.

10 Q. In discussions with the environmental team,
11 again on June 23rd, both Dr. Barnum and Ms.
12 Carbonneau were asked to comment on a
13 protection zone for turtles, and that
14 literature was presented, work done by JD
15 Condon that suggests that a 300-meter
16 terrestrial buffer zone would only protect
17 14 percent of the adult population; whereas,
18 if you expand that buffer zone out to 1,000
19 meters, it protects 87 percent of the
20 population, and then lastly, 2,000 meters,
21 100 percent of the population if you are
22 protecting resident wetlands, all the upland
23 terrestrial areas. And it was confirmed that
24 the Applicants, they just studied the

1 corridor in terms of their impact assessment,
2 even though there was the recognition of the
3 importance of this upland area.

4 So my question is: Do you think that
5 the Department of Energy's assessment of
6 impacts to wildlife similarly is only
7 evaluating impacts to wetlands within the
8 narrowly defined right-of-way corridor?

9 A. (Lew-Smith) I'm not sure that the Department of
10 Energy made any comments on turtles, or if they
11 have, I haven't seen it. Is that what you're
12 referring to specifically?

13 Q. Yes. Actually, we can -- let's assume that
14 they -- okay. I'm not going to ask you to
15 assume that if you haven't read the
16 Department of Energy's report.

17 A. (Lew-Smith) All right. I'm being reminded of
18 the technical report, not the biological
19 opinion.

20 Q. Yes.

21 A. (Lew-Smith) It's been a long time since I
22 looked at that report.

23 Q. Okay. Understood.

24 Can we take a look at the final

1 Environmental Impact Statement. And this is
2 a little bit lengthy, so I'm going to let
3 folks read this on their own.

4 (Witness reviews documents.)

5 Q. All set? What I'm interested in, what caught
6 my attention is the last sentence which I've
7 underlined. "Populations of most wildlife
8 species are prevalent in the state of New
9 Hampshire." You would agree with that?

10 A. (Lew-Smith) Yes.

11 Q. So my questions, my final few questions have
12 to do with the wildlife species that are not
13 prevalent, such as the endangered species of
14 Blandings and yellow-spotted and wood turtle.

15 So on the next page there's a definition
16 of "mortality" that comes from -- you can put
17 the --

18 MS. MENARD: Bob, can you put
19 that first page up so people know where this is
20 coming from?

21 BY MS. MENARD:

22 Q. This is from the Technical Report of the
23 final Environmental Impact Statement. And so
24 that is Page 122. But we can go to Page 125

1 and just take a look at the definition of
2 "mortality." And it's, by definition,
3 permanent, long-term, and it could lead to
4 localized reduction in wildlife populations.

5 So do you agree that a designation as a
6 threatened turtle species has a recognized
7 population-level concern?

8 A. (Lew-Smith) Yes.

9 Q. And would you agree that an endangered turtle
10 species has an even more heightened level of
11 concern for its population levels?

12 A. (Lew-Smith) Yes.

13 Q. Do you agree that the effects on the
14 Blandings turtle population levels cannot be
15 readily measured due to its life history
16 strategy in terms of trending of the
17 population?

18 A. (Lew-Smith) I guess I haven't seen any studies
19 on population fluctuations in the state, if
20 that's what you're asking. So I don't know.

21 Q. If the species at one time was threatened and
22 it was heightened to endangered, that would
23 be an indicator of the population levels
24 declining; would you agree?

1 A. (Lew-Smith) Yes.

2 Q. What Applicant evidence have you seen that
3 supports their position that project effects
4 will not further reduce an impact to the
5 endangered Blandings turtle population level?

6 A. (Lew-Smith) I'm sorry. You're asking in my
7 opinion what the Applicant -- how the Applicant
8 says there's no impact?

9 Q. Correct. We have statements made by the
10 Applicant's experts that the population
11 effects of this project on endangered species
12 is not going to be long-term; yet, we have
13 information that says that there can be
14 localized population-level effects. And if
15 that local population-level effect is it, I
16 just wondered if you -- if there was anything
17 that you have seen in either the Department
18 of Energy work or in the technical reports or
19 the Application that can dispel the concern
20 about an endangered local-level population
21 that is threatened by the Project.

22 A. (Lew-Smith) Certainly with both the Blandings
23 and the spotted turtle, because they're
24 long-lived, they take a long time to come to

1 sexual maturity, there's not a lot of
2 recruitment from the eggs that they lay, losing
3 adults can be significant to the population,
4 okay. And the construction of the Project
5 could result in some loss of individuals. From
6 what I've seen with the Project plans and with
7 the newly-adopted practices, it appears to me
8 that the impacts may be adverse, but because of
9 the management practices they're not likely
10 unreasonable. That's as far I can go in terms
11 of detailing potential population decline.

12 Q. Thank you.

13 And one last topic that is also from the
14 Applicant Exhibit 124A. This is a separate
15 document that was a correspondence of various
16 Fish & Game and Northern Pass Transmission.
17 And if we turn to page -- and this meeting,
18 as you can see, happened October 13th. If we
19 could just turn to Page 2.

20 A. (Lew-Smith) Sorry. Can I interrupt really
21 quick to make an amendment to my last
22 statement?

23 Q. Please do.

24 A. (Lew-Smith) That would be that it's not

1 unreasonable if they take the additional steps
2 that I outlined earlier in my testimony today
3 about mitigating and reducing impacts.

4 Q. Thank you.

5 A. (Lew-Smith) Thank you.

6 Q. Mike Marchand, who is Fish & Game, raised a
7 general issue on vegetation management,
8 indicating his desire that Eversource
9 re-dedicate itself to developing a vegetation
10 management plan specifically focused on RTE
11 species.

12 Do you agree that company management
13 plans can change? And I'd like to give you
14 an example. It used to be that they would
15 hand-cut the right-of-way, and that was
16 replaced with mechanical mowing I think in
17 the '90s. So, do you agree that company
18 management may change vegetation plans,
19 management plans?

20 A. (Lew-Smith) Sure.

21 Q. Appendix H is -- and again we'll put the
22 cover sheet up just for a reference. And on
23 Page 9 there's a representation that current
24 vegetative plans do not plan on using

1 herbicides as part of its vegetation
2 management program. The fact that the
3 Company is stating that that is its current
4 management plans, do you agree that that
5 doesn't guarantee future management plans
6 might not change? There's no guaranty.

7 A. (Lew-Smith) I agree.

8 Q. So, if Eversource decides to adopt herbicide
9 use as a vegetative management strategy,
10 would that impact your assessment in the
11 future, as far as, you know, project impacts
12 of future operations in the right-of-way?

13 A. (Lew-Smith) Certainly it would depend on the
14 amount of herbicide and the situation they're
15 using it and where.

16 Q. So your assessment of impacts of operations
17 of the Project are based on the current plans
18 that they are representing here.

19 A. (Lew-Smith) We actually didn't do much
20 assessment of the operational management plan.
21 It was more directly on impacts to the new
22 development. Hold on a second.

23 (Off-the-record discussion among panel members)

24 MS. MENARD: Okay. Thank you

1 very much.

2 CHAIRMAN HONIGBERG: All right.
3 We're going to take a short 10-minute break or
4 so to give everybody a chance to stretch their
5 legs and then return for Ms. Townsend. Go off
6 the record.

7 (Discussion off the record)

8 CHAIRMAN HONIGBERG: Ms.
9 Townsend, whenever you're ready.

10 CROSS-EXAMINATION

11 BY MS. TOWNSEND:

12 Q. I'm Heather Townsend, and I'm representing
13 the Non-Abutting Properties Owners, Ashland
14 to Deerfield. Good afternoon.

15 A. (Panel Members) Good afternoon.

16 Q. On Transcript Day 20 Afternoon, Page 8, in
17 questioning to Dr. Barnum about the lines
18 that cross the Pemi, I asked: I'm wondering
19 whether you consider that having multiple
20 wires at different heights offers a dangerous
21 situation, perhaps more so for being more
22 lines.

23 And Dr. Barnum replied, "Yes. I would
24 agree that given the multiple lines and the

1 crossing of the river, this would be a
2 particularly difficult spot for birds to
3 navigate."

4 Given this difficulty of navigation, do
5 you think that the Applicant's experts
6 adequately investigated the chance of avian
7 collisions along the Pemigewasset?

8 A. (Parsons) I don't remember there being a formal
9 assessment across the -- when lines cross
10 rivers and river valleys. If she stated
11 concerns, I think it's unusual that they didn't
12 do assessments on broader rivers anyways that
13 might have water fowl and loons and herons and
14 things like that that could potentially collide
15 with the wires.

16 Q. All right. Thank you.

17 How about large bodies of water like the
18 Squam or Newfound that are close to the
19 right-of-way?

20 A. (Parsons) I'm sorry. I didn't hear that.

21 Q. Do you think that they did an adequate
22 assessment of larger bodies of water besides
23 the Pemigewasset?

24 A. (Parsons) No. I believe in our assessment of

1 the avian collision work that Normandeau did,
2 we had some serious concerns. And we
3 highlighted them through the use of one target
4 species, and that was Loon. We identified Loon
5 nesting sites in water bodies fairly close to
6 the proposed right-of-way. And indeed, we
7 found several sites that were not identified by
8 Normandeau. So we felt that the methodology
9 was insufficient and there was a greater
10 potential for impact between vulnerable species
11 and water bodies, and in particular, that were
12 nesting close to the proposed right-of-way.

13 Q. Okay. Thank you.

14 On Transcript Day 16, in the Afternoon
15 Session, Page 106 [sic], starting about Line
16 21, in a clarifying exchange between Attorney
17 Connor and Dr. Barnum, Attorney Connor asked,
18 "So the Best Management Practice is going to
19 be to wait until we have a lot of dead
20 birds?"

21 And Dr. Barnum answered, "Correct.
22 Yes."

23 Given your expertise, do you believe the
24 Applicant has offered an appropriate approach

1 to avoidance of avian collisions?

2 A. (Parsons) No, we do not. I believe we stated
3 quite strongly that if potential high-risk
4 areas had been identified by Normandeau in
5 their work, although we did think that they
6 didn't identify sufficient -- all the areas
7 where there was a high risk, that it was
8 prudent to put up line markers at those
9 locations. There was no study detailed on how
10 many birds would have to be found dead where
11 they would look, and it didn't pass the smell
12 test to us.

13 Q. Okay. So, given this contingency that if
14 they found X -- and we don't know the value
15 of X -- number of dead birds, then they might
16 install line markers, I'm wondering whether
17 the installation of the line markers
18 themselves, which are said to cause icing,
19 possible line failure, whether that possible
20 line failure or some other aspect of the line
21 markers themselves might have an impact on
22 natural resources.

23 A. (Parsons) I'm not sure I understand your
24 question.

1 Q. Might the line markers themselves have an
2 impact on natural resources?

3 A. (Parsons) I don't believe so. I mean, they're
4 intended to, in particular, point out the
5 thinnest lines and the ones that are most
6 difficult for birds to see, so that they can
7 see the line markers and avoid the wires
8 altogether. So, no, I don't see any impact
9 from them.

10 Q. In the case where there might be line failure
11 into the river, can you imagine there being
12 an impact on species in the river?

13 A. (Parsons) Yes. I'm just not sure how often
14 that eventuality occurs. I don't have those
15 statistics.

16 Q. But your understanding, like mine, is that
17 part of the reason that they're avoiding
18 putting up the line markers is because
19 they're concerned that there might be icing
20 up and line failure?

21 A. (Parsons) My understanding, and it's my
22 recollection, was that they were concerned
23 about the additional maintenance on the line
24 that may be required. I don't remember them

1 specifically speaking about line failure as a
2 potential.

3 Q. Okay. And then on Transcript Day 20, in the
4 Afternoon Session, Page 19, Ms. Carbonneau
5 was talking about erosion of the
6 Pemigewasset. She said, I believe there's
7 some value in leaving woody vegetation along
8 a steep stream bank to the extent that it
9 doesn't interfere with the line above it.
10 She went on to say, Erosion and bank changes
11 are part of the natural progress of rivers in
12 some cases. There's always some bank being
13 cut and another one that's being formed, so
14 rivers are dynamic. And she admitted that in
15 some cases the right-of-way maintenance
16 activities that have happened over the
17 decades may have contributed to erosion in
18 some locations.

19 MS. TOWNSEND: Can you put up
20 the first? Thank you.

21 BY MS. TOWNSEND:

22 Q. This is a photograph from October 30th, 2017.
23 This photograph is of Route 3, south of
24 Plymouth, where the railroad tracks come

1 close to the road. And it's taken looking
2 northwards. Do you see the dark line just
3 below -- yeah, just above the flooding plain?
4 Would you accept my stipulation that that is
5 the railroad line?

6 [No verbal response]

7 Q. And do you see the dark area beyond -- yeah.
8 Will you accept my stipulation that that's
9 where the river is supposed to be?

10 A. (Parsons) There's no reason for us to suspect
11 that it's anything other than you're
12 suggesting. But this is the first time we've
13 seen this picture, and we didn't address these
14 issues specifically in our work.

15 Q. My question is just there's one more --

16 MS. TOWNSEND: Can you go back
17 to the first one? Okay.

18 BY MS. TOWNSEND:

19 Q. This is taken from the river road. It's in
20 Bristol. Do you see the water that's coming
21 up towards the dirt road there? This is
22 taken from the river road. Will you accept
23 my suggestion that the river is actually
24 supposed to be on the other side of the

1 trees?

2 A. (Parsons) I don't think I can make that out
3 from what I'm looking at in front of me.

4 Q. Okay. My question is: Just given the
5 patterns of flooding that we've been seeing
6 lately and what you understand of the
7 Pemigewasset, do you believe that the
8 Applicant adequately studied the issues of
9 the stability of the banks of the
10 Pemigewasset?

11 A. (Parsons) I'm afraid I didn't look at most of
12 that material because we weren't tasked with
13 addressing that issue.

14 Q. How about water quality? Do you feel that
15 they adequately considered how erosion and
16 flooding might affect water quality on the
17 Pemigewasset and therefore the Merrimack?

18 A. (Parsons) Again, I may have looked at some of
19 that information in a very brief and cursory
20 fashion, but we did not look at that
21 information with any detail.

22 MS. TOWNSEND: And I should add
23 that these exhibits are AD-N-ABTR Exhibit 56,
24 Page 1 and 2. Thank you. That's all I have.

1 CHAIRMAN HONIGBERG: Are there
2 any other intervenors who have questions for
3 this panel? Anybody we missed?

4 [No verbal response]

5 CHAIRMAN HONIGBERG: Mr. Walker.

6 MR. WALKER: Thank you, Mr.
7 Chairman.

8 CROSS-EXAMINATION

9 BY MR. WALKER:

10 Q. Good evening. I think I've met all of you
11 before. But my name is Jeremy Walker -- with
12 the exception of Mr. Amaral, I suppose. My
13 name is Jeremy Walker, and I'm one of the
14 attorneys for the Applicants. A few
15 questions just to start.

16 I've heard many of your answers today to
17 some of the questions that were raised, and
18 you were phrasing your answers as what would
19 be ideal or what you would prefer. I heard
20 Mr. Amaral say that he's an advocate for the
21 species when talking about KBB. And it's
22 fair to say that you have approached much of
23 your review and your opinions in this case
24 from a very protective way of the natural

1 environment; is that right?

2 A. (Lew-Smith) Yes.

3 Q. And you would like ideal protections for the
4 individual species or vernal pools, in your
5 case, Mr. Lew-Smith; correct?

6 A. (Lew-Smith) Certainly. But I don't feel like
7 we have been -- have had our heads in the
8 clouds. We're also looking at the
9 reasonableness of certain approaches to
10 protecting species.

11 Q. Right. And that's my next question. I mean,
12 it's not what ideally you would prefer. The
13 standard in front of the SEC is whether the
14 proposed project would have an unreasonable
15 adverse effect on the natural environment;
16 correct?

17 A. (Lew-Smith) Correct. And that's been our
18 framework, for the most part.

19 Q. And fair to say that when you have made your
20 recommendations with regard to whether it be
21 individual species or vernal pools, you have
22 looked at it without having all information
23 in front of you with regard to other, you
24 know, design constraints or competing

1 interests in the Project; is that right?

2 A. (Lew-Smith) That's correct.

3 Q. I want to make sure I understand the extent
4 of the work that you did with regard to
5 wetlands, Mr. Lew-Smith. You looked only at
6 vernal pools; correct?

7 A. (Lew-Smith) Correct.

8 Q. No other wetlands that were assessed by you
9 in this case?

10 A. (Lew-Smith) Correct.

11 Q. As far as field work, what field work did you
12 do, if any, with regard to the vernal pools?

13 A. (Lew-Smith) With regard to the vernal pools,
14 none.

15 Q. Did any of you on the panel do any site
16 visits, walk the line, any of that?

17 A. (Parsons) Yes, I did. I did some independent
18 work relating to largely deer wintering areas.

19 Q. And where did you do that, Mr. Parsons?

20 A. (Parsons) I did that near the town of Dummer, I
21 believe.

22 Q. Did you do that all in one day?

23 A. (Parsons) No, I did it over a course of two
24 days.

1 Q. And other than your work near the town of
2 Dummer, were you out doing any field work for
3 your assessment?

4 A. (Parsons) On the ground I walked some of it in
5 the Green [sic] Mountain National Forest. And
6 I drove most of the right-of-way in the Green
7 Mountain National -- I'm sorry -- yeah, White
8 Mountain National Forest.

9 Q. Well, speaking of that, actually, I heard
10 your answer, Mr. Lew-Smith, I think it was in
11 response to Mr. Draper, that you are not
12 familiar with the local conditions that he
13 was talking about when he was showing you his
14 examples. But what is your level of
15 experience assessing vernal pools in New
16 Hampshire prior to this project?

17 A. (Lew-Smith) In New Hampshire, minimal. I have
18 extensive experience in Vermont.

19 Q. Are you familiar with the New Hampshire DES
20 wetlands permitting process?

21 A. (Lew-Smith) Not intimately.

22 Q. Have you ever filed a wetlands permit
23 application in New Hampshire or assisted with
24 the preparation of an application?

1 A. (Lew-Smith) No.

2 Q. And this is your first time testifying before
3 the SEC; correct?

4 A. (Lew-Smith) Correct.

5 Q. Are you familiar with the procedures that are
6 used by the SEC with regard to imposing
7 certain conditions on any certificate that
8 they may issue?

9 A. (Lew-Smith) Yes.

10 Q. And how are you familiar with that?

11 A. (Lew-Smith) Discussed it with the team and with
12 Counsel for the Public.

13 Q. So you understand that they may impose
14 conditions in a certificate that involve the
15 other agencies -- for instance, DES, or NHB
16 or New Hampshire Fish & Game -- in their
17 certificate?

18 A. (Lew-Smith) Yes.

19 MR. WALKER: Dawn, if you could
20 bring up on the screen, please, the SEC Rules,
21 Site 301.14(e)(4)?

22 A. (Reynolds) If I may? You had asked us what on
23 the ground field --

24 Q. Oh, I'm sorry.

1 A. (Reynolds) You skipped two of us.

2 Q. I didn't mean to skip you and Mr. Amaral.

3 A. (Amaral) Yes, I visited the transmission
4 corridor in Concord on two or three occasions
5 during the review process for that project.
6 Prior to that, I've had more than 20 years of
7 experience working at that site and at the
8 Pembroke Army Guard facility site.

9 Q. And your review was related strictly to the
10 KBB?

11 A. (Amaral) Yes.

12 Q. Thank you.

13 A. (Reynolds) I have done independent work at both
14 the Concord and the Pembroke sites for other
15 clients. So I've been at the Pembroke site
16 over the last seven years, and I've been at the
17 Concord site for the last five years. So I
18 have extensive data from those two sites.

19 A. (Lew-Smith) And then with field work relating
20 to rare plants, I did a number of site visits
21 in Concord, Pembroke, Bridgewater. In
22 addition, we had an employee walk the line in
23 other towns. I don't remember which town.
24 But in total, probably eight days or so.

1 Q. Between you and the employee?

2 A. (Lew-Smith) Yes. Correct.

3 Q. Okay. Do you have something on your screen
4 before you?

5 A. (Lew-Smith) Yes.

6 Q. I'll represent to you this is the Site
7 Evaluation Criteria Rule 3.14 with regard to
8 the criteria for determining unreasonable
9 adverse effect on the natural environment.
10 Have you seen this before?

11 A. (Lew-Smith) Yes, though I haven't looked at
12 this particular page in depth.

13 Q. I don't think we actually have the right one
14 up there.

15 MR. WALKER: Dawn, it's
16 301.1(e)(4).

17 A. (Lew-Smith) There we go.

18 BY MR. WALKER:

19 Q. Right. So these are the five criteria. And
20 I want to ask you about this particular
21 criteria, and then I'll let you take a look.

22 A. (Lew-Smith) Could you back it up so I get the
23 preface of this, like what the numbers are
24 and --

1 Q. Sure.

2 (Witness reviews document.)

3 A. (Lew-Smith) Thank you. Okay.

4 Q. And you're aware -- I know you're aware that
5 the DES issued a permit back in March 2017,
6 or issued its approval of four separate
7 permits in this case; is that right? Are you
8 aware of that?

9 A. (Lew-Smith) I was aware they issued approval of
10 permits, yeah.

11 Q. And one of those permits was the Wetland
12 Permit.

13 A. (Lew-Smith) Yes.

14 Q. You're also aware that they approved the
15 Alteration-of-Terrain Permit?

16 A. (Lew-Smith) Yes.

17 Q. The 401 Water Quality Certificate?

18 A. (Lew-Smith) Yes.

19 Q. And the Shoreland Permit?

20 A. (Lew-Smith) Yes.

21 Q. Have you reviewed that decision by the DES?

22 A. (Lew-Smith) Yes, I reviewed that decision.
23 It's been a while, but yes.

24 Q. Well, would you agree that the DES, in that

1 decision in March 2017, found that the
2 Applicants have coordinated with both the
3 Natural Heritage Bureau and New Hampshire
4 Fish & Game regarding impacts and will
5 continue to do so to minimize potential
6 impacts to sensitive plants, species and the
7 natural environment, and sensitive species
8 and habitats? Are you aware of that? I can
9 show you the particular finding if that would
10 help you.

11 A. (Lew-Smith) Well, I mean, do I agree that's
12 what it said as you read it? I don't know how
13 to answer that question necessarily.

14 Q. Sure. Let me just pull up --

15 MR. WALKER: Dawn, if you could
16 pull up the Decision, Finding 13, please, which
17 is Applicant 75, Bates 44455.

18 BY MR. WALKER:

19 Q. And I'll represent to you this is on the list
20 of findings by the DES in the March 1, 2017.

21 A. (Lew-Smith) Okay.

22 Q. Okay. That's with regard to the Natural
23 Heritage Bureau.

24 MR. WALKER: And also, Dawn, if

1 you could bring up Finding No. 17.

2 (Witness reviews document.)

3 BY MR. WALKER:

4 Q. Have you seen that?

5 A. (Lew-Smith) Yes.

6 Q. Do you have any reason to disagree with the
7 findings of the DES in this regard?

8 A. (Lew-Smith) No.

9 MR. WALKER: Dawn, if you could
10 also bring up Condition 7 under that permit,
11 which is Bates 4448.

12 BY MR. WALKER:

13 Q. Have you had a chance to look at that?

14 (Witness reviews document.)

15 A. (Lew-Smith) Okay.

16 Q. So you would agree that pursuant to
17 Condition 7 that we just looked at, the DES
18 is requiring the Applicants here, prior to
19 construction, to notify and coordinate with
20 New Hampshire Fish & Game to finalize the
21 AMMs that we've been talking about today; is
22 that right?

23 A. (Lew-Smith) Yes.

24 MR. WALKER: Lastly, Dawn, if

1 you could pull up Condition 9.

2 BY MR. WALKER:

3 Q. And, again, similar questions. This requires
4 continuing coordination with the New
5 Hampshire Natural Heritage Bureau regarding
6 the need for any additional monitoring
7 requirements or avoidance measures that may
8 be necessary to minimize potential impacts to
9 sensitive species. Have you seen that?

10 A. (Lew-Smith) Yes.

11 Q. Do you have any reason to believe that these
12 steps will not take place?

13 A. (Lew-Smith) No.

14 Q. Now, do you have confidence in this
15 permitting process and the fact that there
16 will be ongoing coordination with these
17 individual agencies with regard to avoidance,
18 minimization and mitigation measures?

19 A. (Lew-Smith) I have confidence that they will
20 continue to work with the agencies involved. I
21 think, as has become apparent from our report
22 and testimony, we don't necessarily always
23 agree that those will result in the best
24 measures that could protect the species in

1 question.

2 Q. Now, why is that? Is it that you lack
3 confidence in one of those particular
4 agencies and their ability to enforce those
5 conditions?

6 A. (Lew-Smith) No.

7 Q. Okay. So why is that? Why do you lack that
8 confidence?

9 A. (Lew-Smith) I said I didn't lack confidence.

10 Q. Oh, I'm sorry. I misheard you.

11 MR. WALKER: Dawn, if you could
12 also pull up Bates 44453, and it's Finding
13 No. 5.

14 BY MR. WALKER:

15 Q. And I'm not going to ask you to read the
16 whole thing, Mr. Lew-Smith.

17 A. Thank you.

18 Q. But with regard to the very first paragraph,
19 it notes that the Applicant has provided
20 evidence which demonstrates that this
21 proposal is the alternative with the least
22 adverse impact to areas in the environments
23 under the Department's jurisdiction, and then
24 it goes on to explain that in detail.

1 Do you disagree with the DES's finding
2 here that this is the proposal with the least
3 adverse impact?

4 A. (Lew-Smith) Yes, I do.

5 Q. You think DES got it wrong.

6 A. (Lew-Smith) I disagree with that statement.

7 Q. If I could turn to --

8 A. (Lew-Smith) If I could explain? I mean, just
9 as an example, this was issued, and after it
10 was issued structures were moved to decrease
11 impacts to wild lupine. So, clearly that
12 wasn't the least environmental impact.

13 Q. Have you reviewed the ongoing -- I understand
14 that there are some communications that you
15 received this weekend. But have you reviewed
16 the ongoing communications between March and
17 September between the DES and the Applicants?

18 A. (Lew-Smith) I've reviewed some of them, yes.
19 I'm not sure I have all of them. But yes.

20 Q. Okay. And I think you just explained that
21 there has been a reduction in the wild lupine
22 impact; correct?

23 A. (Lew-Smith) Correct.

24 Q. Do you know what the reduction is, the most

1 recent reduction, what the numbers are?

2 A. (Lew-Smith) Square footage of impacts?

3 Q. Right.

4 A. (Lew-Smith) I think it's 1,043 square feet.

5 Q. Do you have any reason to -- do you still
6 believe that the impact could be further
7 minimized?

8 A. (Lew-Smith) Yes.

9 Q. Let me ask you with regard to Condition 2 of
10 the final decision.

11 MR. WALKER: Dawn, that's on
12 Page 4447.

13 (Witness reviews document.)

14 BY MR. WALKER:

15 Q. Have you had a chance to review that?

16 A. (Lew-Smith) Yes.

17 Q. You're aware that the AMMs that we've been
18 talking about were submitted to Fish & Game
19 back in March of 2017; correct?

20 A. (Lew-Smith) I believe so, yes.

21 Q. And they have weighed in on those, and there
22 have been some changes made to those;
23 correct?

24 A. (Lew-Smith) Correct.

1 Q. With the Fish & Game's approval of the AMMs,
2 does that provide confidence to you that the
3 impacts will be appropriately minimized,
4 avoided or mitigated?

5 A. (Lew-Smith) Again, there may be some issues in
6 which we disagree with Fish & Game.

7 You know, we were tasked with providing
8 an independent, objective review of the
9 assessment and the impacts, regardless of
10 what other agencies or individuals think, and
11 that's what we're presenting to you. So...

12 Q. And there may be areas where you simply
13 disagree with Fish & Game.

14 A. (Lew-Smith) Yes.

15 Q. Or the DES.

16 A. (Lew-Smith) Yes.

17 Q. Or the Natural Heritage Bureau.

18 A. (Lew-Smith) Yes.

19 Q. And you do so without having, as we talked
20 about earlier, without having additional
21 information about competing interests -- in
22 other words, design constraints or other
23 competing resources; correct?

24 A. (Lew-Smith) Correct. Just as a point of fact,

1 I'm not sure that maybe Fish & Game or other
2 parties have that necessarily as well. I don't
3 know.

4 MR. WALKER: You know, Mr.
5 Chairman, I think this is probably a good time
6 to break, and we can come back tomorrow
7 morning.

8 CHAIRMAN HONIGBERG: Okay.
9 We'll break for the day and resume tomorrow
10 morning at 9:00.

11 (Whereupon the Day 56 Afternoon
12 Session (NO MORNING SESSION) was
13 adjourned at 5:32
14 p.m., with the Day 57 hearing to resume
15 on November 7, 2017
16 commencing at 9:00 a.m.)

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C E R T I F I C A T E

I, Susan J. Robidas, a Licensed
Shorthand Court Reporter and Notary Public
of the State of New Hampshire, do hereby
certify that the foregoing is a true and
accurate transcript of my stenographic
notes of these proceedings taken at the
place and on the date hereinbefore set
forth, to the best of my skill and ability
under the conditions present at the time.

I further certify that I am neither
attorney or counsel for, nor related to or
employed by any of the parties to the
action; and further, that I am not a
relative or employee of any attorney or
counsel employed in this case, nor am I
financially interested in this action.

Susan J. Robidas, LCR/RPR
Licensed Shorthand Court Reporter
Registered Professional Reporter
N.H. LCR No. 44 (RSA 310-A:173)

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