

1 **STATE OF NEW HAMPSHIRE**2 **SITE EVALUATION COMMITTEE**3 **September 22, 2020 - 1:00 p.m.**4 **DAY 3**5 *(Electronically filed on 10-14-20)*6 *[Remote Hearing conducted via Webex]*7 **IN RE: SEC DOCKET NO. 2019-02**
8 **SITE EVALUATION COMMITTEE:**
9 **Application of Chinook Solar,**
10 **LLC, for a Certificate of**
 Site and Facility.
 (Hearing on the Merits)11 **PRESENT:** **SITE EVALUATION COMMITTEE:**12 Chairwoman Dianne Martin Public Utilities Commission
13 *(Presiding as Presiding Officer)*14 Wildolfo Arvelo, Dir. Div. of Econ. Dev./Dept. of
 Business & Economic Affairs
15 Rene Pelletier Water Div./Dept. of
 Environmental Services
16 Benjamin Wilson, Dir. Div. of Historical
 Resources/Dept. of Natural
17 William Oldenburg & Cultural Resources
 Dept. of Transportation
18 Susan Duprey Public Member19 *Also Present for the SEC:*20 Michael J. Iacopino, Esq., *SEC Counsel*
 *(Brennan Lenehan Iacopino & Hickey)*21 J.D. Lavalley, Esq., *SEC Counsel*
 *Asst. Atty General, NH Dept. of Justice*22 Corrine Lemay, *SEC Remote Hearing Host*23
24 COURT REPORTER: *Steven E. Patnaude, LCR No. 52*

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APPEARANCES: **Reptg. Chinook Solar, LLC:**
Douglas L. Patch, Esq. (*Orr & Reno*)
Susan Geiger, Esq. (*Orr & Reno*)

Reptg. Counsel for the Public:
Heather Neville, Esq.
Assistant Attorney General
N.H. Department of Justice

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I N D E X

PAGE NO.

**WITNESS PANEL: MICHAEL LEW-SMITH
 JEFF PARSONS**

Direct examination by Ms. Neville	9
Cross-examination by Mr. Patch	36
Interrogatories by Dir. Wilson	51
Interrogatories by Mr. Oldenburg	51
Interrogatories by Mr. Pelletier	55
Interrogatories by Ms. Duprey	61
Interrogatories by Dir. Arvelo	66
Interrogatories by Mr. Iacopino	69

WITNESS: DAVID S. REYNOLDS

Direct examination by Ms. Neville	77
Cross-examination by Mr. Patch	102, 133
Interrogatories by Dir. Wilson	122
Interrogatories by Mr. Oldenburg	123
Interrogatories by Chairwoman Martin	127
Interrogatories by Mr. Iacopino	130

* * *

STATEMENT BY MR. IACOPINO ON REMAINING ISSUES	137
DISCUSSION RE: SUBDIVISION PLAN	138
DISCUSSION RE: MEMORANDA/WRITTEN CLOSINGS	148
DISCUSSION RE: DELIBERATIONS FORMAT, etc.	152, 160
DISCUSSION RE: ADMISSION OF EXHIBITS	160

E X H I B I T S

EXHIBIT NO.	D E S C R I P T I O N	PAGE NO.
APP 87	Final Wildlife Assessment accepted by N.H. Fish & Game	<i>premarked</i>
APP 88	Applicant's Request to Waive Certain Decommissioning Plan Requirements	<i>premarked</i>
APP 89	Letter to SEC with Statement on Subdivision Issue	<i>premarked</i>
APP 90	Applicant's Response to Hearing Record Request #4	<i>premarked</i>
APP 91	New Hampshire Supreme Court - <i>Public Service Company of New Hampshire v. Town of Hampton & a., 120 N.H. 68 (1980)</i>	<i>premarked</i>
APP 92	Applicant's Response to Hearing Request #7	<i>premarked</i>
APP 93	Applicant's Response to Hearing Request #3	<i>premarked</i>
APP 94	Applicant's Response to Hearing Request #2	<i>premarked</i>
APP 95	Applicant's Response to Hearing Request #6	<i>premarked</i>
APP 96	Applicant's Response to Hearing Request #5	<i>premarked</i>
APP 97	Applicant's Response to Hearing Request #8	<i>premarked</i>

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P R O C E E D I N G

CHAIRWOMAN MARTIN: Okay. Good afternoon, everyone. We're here this afternoon in Docket 2019-02, which is the Chinook Solar, LLC, Application for a Certificate of Site and Facility. We are here today to continue the hearing on the Application.

We made the findings required for a remote hearing at the initial hearing in this matter. But I do want to remind everyone that, if there is a problem during the hearing, please call (603)271-2431 immediately so that we'll know that there is a problem. And, in the event the public is unable to access the hearing, the hearing will be adjourned and rescheduled.

Okay. Let's take a roll call attendance of the Committee. When each Committee member identifies him or herself, please also state if anyone else is with you, and, if so, identify that person as well.

My name is Dianne Martin. I am the Chairwoman of the Site Evaluation Committee. I am at the Commission Offices in Concord. And I am alone.

1 Mr. Arvelo.

2 DIR. ARVELO: Thank you. Will Arvelo.

3 I am in my home, working alone.

4 CHAIRWOMAN MARTIN: Okay.

5 Mr. Pelletier.

6 MR. PELLETIER: Yes. Rene Pelletier,
7 Department of Environmental Services. I'm in the
8 den, all alone, with no friends.

9 CHAIRWOMAN MARTIN: Okay. Ms. Duprey.

10 MS. DUPREY: I am Susan Duprey, public
11 member. And I am home alone.

12 CHAIRWOMAN MARTIN: All right. Thank
13 you. Mr. Oldenburg.

14 MR. OLDENBURG: Bill Oldenburg,
15 representing Department of Transportation. And I
16 am in my office alone.

17 CHAIRWOMAN MARTIN: All right. Thank
18 you. Mr. Wilson.

19 DIR. WILSON: Ben Wilson, Director of
20 the Division of Historical Resources, State
21 Historic Preservation Officer. And I am in my
22 office alone.

23 CHAIRWOMAN MARTIN: Okay. Thank you.

24 And welcome back, Mr. Eaton.

1 MR. EATON: Tom Eaton. I'm in my home.
2 I'm a public member. And I am alone.

3 CHAIRWOMAN MARTIN: All right. Thank
4 you. Attorney Iacopino. You're on mute.

5 MR. EATON: Yes. Tom Eaton. I am at
6 home. And I am alone.

7 MR. IACOPINO: Sorry about that. Mike
8 Iacopino. I am at my home in Weare, New
9 Hampshire. And I am alone for now. I can't
10 promise I will be alone the whole time, my wife
11 or grandchild may step through.

12 CHAIRWOMAN MARTIN: Or your cat.

13 MR. IACOPINO: Or my cat.

14 CHAIRWOMAN MARTIN: Okay. Attorney
15 Lavallee.

16 MR. LAVALLEE: Good afternoon.
17 Attorney Lavallee. I'm here at the Attorney
18 General's Office, in Concord.

19 CHAIRWOMAN MARTIN: And let's take
20 appearances. Attorney Patch.

21 MR. PATCH: Doug Patch, from the law
22 firm of Orr & Reno, on behalf of Chinook Solar,
23 LLC.

24 CHAIRWOMAN MARTIN: Okay. Attorney

1 Geiger.

2 MS. GEIGER: Susan Geiger, from the law
3 firm of Orr & Reno, representing Chinook Solar,
4 LLC.

5 CHAIRWOMAN MARTIN: All right. Thank
6 you. And Attorney Neville.

7 MS. NEVILLE: Hi. Heather Neville,
8 Assistant Attorney General, here as Counsel for
9 the Public.

10 CHAIRWOMAN MARTIN: All right. Thank
11 you. We have additional exhibits that were
12 prefiled and premarked, "Appellant" -- I'm sorry
13 -- "Applicant Exhibit 87" through "95".

14 And the plan for today is to hear
15 Counsel for the Public's presentation of
16 evidence. For planning purposes, I'm planning to
17 take a break around 3:00 again today, like we did
18 last time, for about fifteen minutes.

19 Are there any other matters we need to
20 address before we proceed?

21 *[No verbal response.]*

22 CHAIRWOMAN MARTIN: Okay. I don't see
23 any. Attorney Neville. And, Mr. Patnaude, if
24 you would swear in the witnesses.

[WITNESS PANEL: Lew-Smith|Parsons]

1 (Whereupon **Michael Lew-Smith** and
2 **Jeff Parsons** were duly sworn by the
3 Court Reporter.)

4 MS. NEVILLE: Okay. Good to go? So,
5 where we have a panel, I am going to ask,
6 Mr. Lew-Smith, if you wouldn't mind answering
7 these questions first, and then I'll jump over to
8 Mr. Parsons.

9 **MICHAEL LEW-SMITH, SWORN**

10 **JEFF PARSONS, SWORN**

11 **DIRECT EXAMINATION**

12 BY MS. NEVILLE:

13 Q Would you please state your name for the record?

14 A (Lew-Smith) I'm Michael Lew-Smith.

15 Q And share the name of your employer?

16 A (Lew-Smith) Arrowwood Environmental.

17 MS. NEVILLE: Mr. Parsons, where I'm
18 just asking all of these questions of Mr.
19 Lew-Smith, do you want to mute yourself? And
20 I'll let you know when I'm going to ask you the
21 questions.

22 WITNESS PARSONS: Yes.

23 BY MS. NEVILLE:

24 Q Mr. Lew-Smith, would you briefly describe your

[WITNESS PANEL: Lew-Smith|Parsons]

1 position with Arrowwood Environmental?

2 A (Lew-Smith) I am a managing partner with
3 Arrowwood Environmental and Senior Ecologist. I
4 do work on various natural resources, including
5 wetlands, vernal pools, natural communities, rare
6 plants, and wildlife habitat.

7 Q And would you briefly share a description of your
8 qualifications?

9 A (Lew-Smith) Yes. I have a Bachelor's degree in
10 Natural *[indecipherable audio]* --

11 *[Court reporter interruption.]*

12 MS. NEVILLE: We're having a hard time
13 with your audio right now.

14 CHAIRWOMAN MARTIN: Let's go off the
15 record for a minute please, Steve.

16 *[Brief off-the-record discussion*
17 *ensued.]*

18 CHAIRWOMAN MARTIN: Let's go back on
19 the record, Steve.

20 Okay. Attorney Neville, if you want to
21 go ahead, you can.

22 MS. NEVILLE: Okay.

23 BY MS. NEVILLE:

24 Q Mr. Parsons, would you state your name for the

[WITNESS PANEL: Lew-Smith|Parsons]

1 record?

2 A (Parsons) Jeff Parsons.

3 Q And who is your employer?

4 A (Parsons) Arrowwood Environmental.

5 Q Would you briefly describe your position with
6 Arrowwood Environmental?

7 A (Parsons) Sure. I'm a managing partner. I do
8 work largely in the field of wildlife studies. I
9 study individual species, groups of species, and
10 do mapping of wildlife habitat, for both
11 commercial interests and public interests, such
12 as towns and regions.

13 I also work in wetland ecology, and in
14 the assessment of the effects of hazardous
15 materials.

16 Q Thank you. Would you briefly describe your
17 qualifications?

18 A (Parsons) Sure. I did four years of schooling in
19 wildlife biology. I received a Bachelor of
20 Science in Zoological-Anthropology from the
21 University of Michigan, and a Master's of Science
22 in Natural Resource Planning from the University
23 of Vermont. I have been working in this field
24 for a little over 30 years.

[WITNESS PANEL: Lew-Smith|Parsons]

1 Q And could you state the purpose of your testimony
2 here today?

3 A (Parsons) Yes. We were asked to assess, that's
4 Arrowwood was asked to assess materials submitted
5 by the Applicant related to impacts on natural
6 resources. And we reviewed other materials
7 available to us, to see or determine if the
8 Project would have an unreasonable adverse effect
9 on natural resources.

10 In particular, we looked at four
11 different resource groups: Significant wildlife
12 habitat, aquatic resources, natural communities,
13 and the species and habitats that are considered
14 rare, threatened and endangered under state and
15 federal law.

16 Q And you've submitted prefiled testimony as part
17 of CFP Exhibit 1, correct?

18 A (Parsons) Yes. That is correct.

19 Q And your report is CFP Exhibit 2, correct?

20 A (Parsons) Yes.

21 Q And, after you filed your -- or, after we
22 submitted your prefiled testimony and report, the
23 Applicant addressed many of the items identified
24 as concerning in that report, correct?

[WITNESS PANEL: Lew-Smith|Parsons]

1 A (Parsons) That's correct.

2 Q Given the timing of the Applicant's supplemental
3 testimony, you did not submit any supplemental
4 testimony of your own, correct?

5 A (Parsons) That's also correct.

6 Q Okay. So, I want to take a few minutes to walk
7 through certain areas the Applicant addressed in
8 supplemental testimony, based on your original
9 report. Okay?

10 A (Parsons) Okay.

11 Q So, I'm going to ask Mr. Lew-Smith a variety of
12 questions, but jumping ahead, you primarily
13 handled information related to deer wintering
14 areas, correct?

15 A (Parsons) Yes. Several different significant
16 habitat resources. Deer wintering areas was one
17 of those.

18 Q Was a deer -- was a deer wintering habitat
19 assessment performed and submitted as part of the
20 Application?

21 A (Parsons) A separate Wildlife Habitat
22 Assessment, including the assessment of deer
23 wintering areas, was not part of the Application
24 materials that we reviewed. The only specific

[WITNESS PANEL: Lew-Smith|Parsons]

1 habitats that are addressed within the materials
2 are that for bats, and I think it's very specific
3 to particular species of bats, and a particular
4 turtle. Neither of which are resources that I
5 addressed in my work.

6 So, no. Deer wintering areas weren't
7 assessed.

8 Q Okay. And you visited the site, correct?

9 A (Parsons) Yes.

10 Q Do you recall when you made your site visit?

11 A (Parsons) I believe it was June 8th.

12 Q Okay.

13 A (Parsons) Of this year, sorry.

14 Q And are you able to share observations you made
15 regarding the forest structure at the site?

16 A (Parsons) Sure. By the time I visited the site,
17 with consultants for Chinook, much of the area
18 had been subjected to quite extensive logging.
19 So, we wandered pretty much from the south, all
20 the way up through the middle of the proposed
21 Project area, and to the far north. And most of
22 the forests that remained on the site consisted
23 of a mix of broad-leaved deciduous trees, such as
24 maple, and needle-leaved evergreen trees, such as

[WITNESS PANEL: Lew-Smith|Parsons]

1 hemlock or spruce. Most of the forest resources
2 were quite small and surrounded by areas that had
3 been cut.

4 The only area that had what I
5 considered on the ground, in the field, to be
6 mature needle-leaved evergreen forest was a
7 forest in the north part of the Project. Its
8 boundaries, I could not determine if they were
9 all within the area that is going to be
10 undisturbed as a result of the Project. But this
11 forest, or some of it, was going to be disturbed,
12 I should say. This forest consisted of a mature
13 eastern hemlock dominated treed forest.

14 Q And I just want to be clear. That forest you
15 just spoke of, is it or is it not going to be
16 part of the impacted area?

17 A (Parsons) I think much of it will be unimpacted.
18 But I'm not absolutely sure if all of it will be
19 unimpacted.

20 Q Okay. During your site visit, did you observe
21 the presence or absence of any deer occupation on
22 the site?

23 A (Parsons) Well, in the work that I do, you can
24 determine the presence of deer when you're not at

[WITNESS PANEL: Lew-Smith|Parsons]

1 the site by finding indicators that tell one that
2 deer were present at other seasons of the year.

3 In the southern region, and that area
4 is shown in our report, there was an area that
5 contained extensive winter browse by white-tailed
6 deer on fairly young broad-leaf deciduous trees.

7 The browse was of the type of -- the type of
8 browse -- or, it was of a height that would
9 suggest or strongly suggest that it was -- it was
10 eaten by white-tailed deer as opposed to moose.

11 White-tailed deer generally don't browse on woody
12 plants during the growing season, they prefer,
13 you know, non-woody herbaceous plants during the
14 growing season. So, when you find areas that
15 have been heavily browsed, woody plants that have
16 been heavily browsed by species of herbivores
17 that are the size of the deer, it's indicating
18 that deer are utilizing these areas in the winter
19 for feeding habitat. And that was an area in the
20 southern part of the Project.

21 There were no areas in the southern
22 part of the Project that were dominated by
23 evergreen needle-leaf trees that form the basis
24 for the most important aspect or resource within

[WITNESS PANEL: Lew-Smith|Parsons]

1 a deer wintering area.

2 However, in the north, we did find
3 signs of winter deer use during the winter.
4 There were winter trails through the eastern
5 hemlock forest. Some minor amounts of browsing
6 and winter scat were also observed. But we did
7 not go fully into the forest. I believe it's
8 because we believed or we thought that most of it
9 was not going to be disturbed as a result of this
10 Project anyways.

11 So, in the north part, as opposed to
12 the south, we found forest structure that was
13 appropriate as potential deer wintering area. In
14 the south, we did not find forest structure.
15 Instead, we found evidence of deer coming on to
16 the property, most likely, perhaps from off-site,
17 to utilize the young hardwoods as food during the
18 winter.

19 Q So, is it your opinion that there are deer
20 wintering areas that will be impacted by this
21 Project?

22 A (Parsons) It is my opinion that there is small
23 areas that may potentially have the forest
24 structure to be utilized by deer in the northern

[WITNESS PANEL: Lew-Smith|Parsons]

1 part of the Project areas. But they were not
2 mapped by the Applicant's consultants. The exact
3 delineation of those forest habitats were not
4 delineated. So, it's impossible to know if they
5 are overlapping the area of disturbance as a
6 result of this Project.

7 Q And why do you think it's important for this
8 Committee to consider deer wintering areas?

9 A (Parsons) Deer are a culturally and economically
10 significant species in the State of New
11 Hampshire. As many of you know, deer and deer
12 hunting is an activity that's been culturally
13 carried on in New Hampshire for hundreds of
14 years. And it -- you know, that hunting
15 activity, largely hunting, but also viewing
16 activity, transfers, I know studies have shown in
17 other states, tens to hundreds of millions of
18 dollars to rural communities where this hunting
19 takes place. I have no idea if those same
20 figures apply to New Hampshire.

21 But I do know that these deer habitats
22 in rural parts of New England certainly benefit
23 from the money spent by residents and
24 nonresidents alike in their pursuit of

[WITNESS PANEL: Lew-Smith|Parsons]

1 white-tailed deer during the hunting season.

2 Q Okay. In the report we submitted, your report is
3 dated "July 1, 2020". It's "Counsel for the
4 Public Exhibit 2". Deer wintering areas are
5 discussed at Bates stamp CFP-23. Are you able to
6 briefly summarize what your conclusion was
7 regarding the deer wintering areas?

8 A (Parsons) Yes. My conclusion was that they were
9 resources that were not addressed by the
10 Applicant or their consultants. That, because of
11 that, it's impossible to know, because there was
12 no delineation and determination of the real
13 extent of that habitat at the Chinook site. So,
14 our conclusions were that it was impossible to
15 know how much of the resource was being impacted
16 by the Project.

17 Q And, subsequent to the report being filed, did
18 you review supplemental testimony from the
19 Applicant that addressed deer wintering areas?

20 A (Parsons) Yes, I did.

21 Q And can you respond briefly?

22 A (Parsons) Yes. Our conclusion has not changed.
23 The Applicant has stated that the State of New
24 Hampshire Fish & Game Department, at their

[WITNESS PANEL: Lew-Smith|Parsons]

1 pre-Project meetings, did not ask for information
2 regarding deer wintering areas at the Project
3 site.

4 But it's our -- it's our understanding
5 of the SEC rules that what needs to be addressed
6 are significant habitat resources, not what the
7 Fish & Game Department specifically asked for.
8 Because of that, we think it's an omission that
9 they did not address deer wintering areas in
10 their work.

11 Q So, in the Applicant's supplemental response, you
12 read the portion where the Applicant intends to
13 set aside the areas not impacted on this site,
14 and it will not be disturbed. I believe it was
15 342 acres that were going to be conserved. Is
16 that right?

17 A (Parsons) Yes. I read that.

18 Q And does that alleviate any of the concerns you
19 have?

20 A (Parsons) It alleviates them to a limited degree.
21 We still do not know if there is a net loss in
22 deer wintering areas, because an initial
23 inventory of potential deer wintering areas
24 and/or the presence of white-tailed deer on the

[WITNESS PANEL: Lew-Smith|Parsons]

1 site was not conducted by the Applicant or its
2 consultants.

3 Secondly, we have no information
4 regarding the extent of potential deer wintering
5 areas that are found within this, what is it,
6 roughly 340 acres of land under control by
7 Chinook that they are willing to put into
8 permanent protection, or I assume it's permanent
9 protection.

10 So, there's no way of assessing whether
11 or not the Applicant has met their burden, in
12 terms of there being an undue adverse impact on
13 deer wintering areas as a result of this Project.

14 Q And have you made a recommendation regarding any
15 condition or restriction that could be put in
16 place to further protect deer wintering areas or
17 white-tailed deer, in general?

18 A (Parsons) Yes. It is pretty much standard
19 practice within some northern tier states, and in
20 the State of Vermont, that construction
21 activities in and around deer wintering areas do
22 not occur during the period when deer may be
23 utilizing these habitats.

24 Deer wintering areas are -- function

[WITNESS PANEL: Lew-Smith|Parsons]

1 because they provide a habitat that is accessed
2 behaviorally by deer, who undergo a short-term
3 local migration to these evergreen-dominated tree
4 communities, in an effort to limit its
5 consumption of energy during the winter months.
6 Deer are not morphologically or physiologically
7 adapted to deep snow.

8 So, to overcome that restraint, they
9 move -- well, they behaviorally move to these
10 deer wintering areas that afford them a
11 conservation of energy. And what happens when
12 there is most disturbances in and around a deer
13 yard is it causes the deer to utilize more energy
14 than they normally would during the winter,
15 potentially resulting in enough energy loss by
16 the deer that starvation can occur. And this is
17 quite common in the northern section of New
18 England, including Maine, Vermont, New Hampshire,
19 and into the rest of the northern tier states
20 across the country. That is starvation by
21 white-tailed deer.

22 White-tailed deer is also known as the
23 "Virginia deer". We're at its northern range
24 limits here. And it's replaced by moose, as we

[WITNESS PANEL: Lew-Smith|Parsons]

1 move north into Quebec. So, it has a -- it
2 maintains a tenuous existence here. And thus,
3 it's important that the deer are able to conserve
4 energy when behaviorally that's what they're
5 seeking to do.

6 Q Okay. And I lost my sound for a moment. But did
7 you testify to any seasonal restriction that you
8 may have, if there's construction?

9 A (Parsons) Yes. That there's restrictions within
10 300 feet of identified deer wintering areas
11 during the months -- or, during the time of
12 roughly -- or, December 15th to March 15th.

13 There is an alternative that could be
14 utilized, that we've used in other projects. And
15 that's to have a professional wildlife biologist
16 review the deer wintering areas during the winter
17 to see if deer are actually there. And, if deer
18 are not using these potential deer wintering
19 areas, then some other accommodation could be
20 made regarding construction schedule.

21 Q And without that expert on-site in the winter,
22 was your recommendation "no construction or
23 blasting from December 15th through March 15th"?

24 A (Parsons) Yes. But that does not include logging

[WITNESS PANEL: Lew-Smith|Parsons]

1 activity. Deer have become relatively habituated
2 to logging activity, and they can coexist.

3 Q So, what you just said is "timber harvesting is
4 fine at any time", is that right?

5 A (Parsons) Yes.

6 MS. NEVILLE: Okay. Thank you. I may
7 have questions later on. But, if Michael
8 Lew-Smith's audio is working, I'm going to switch
9 to him. So, Mr. Parsons, could you mute
10 yourself? Thank you.

11 WITNESS PARSONS: Yes.

12 WITNESS LEW-SMITH: Okay. Is that a
13 little better?

14 MR. PATNAUDE: Yes.

15 MS. NEVILLE: Yes. Thank you.

16 BY MS. NEVILLE:

17 Q Okay. So, Mr. Lew-Smith, I'm going to --

18 *[Court reporter interruption and a*
19 *suggestion that Witness Lew-Smith be*
20 *reasked the earlier questions posed due*
21 *to the audio issue earlier.]*

22 BY MS. NEVILLE:

23 Q So, could you state your name for the record?

24 A (Lew-Smith) Michael Lew-Smith.

[WITNESS PANEL: Lew-Smith|Parsons]

1 Q And the name of your employer?

2 A (Lew-Smith) Arrowwood Environmental.

3 Q And could you briefly describe your position with
4 Arrowwood Environmental?

5 A (Lew-Smith) Yes. I'm a managing partner and a
6 Senior Ecologist. I do botanical work, wildlife
7 habitat, natural communities, and rare species
8 inventories, and wetlands work, excuse me.

9 Q Thanks. And could you briefly describe your
10 qualifications?

11 A (Lew-Smith) I've got a Bachelor's degree in
12 Natural Resource Management from the University
13 of Michigan, and a Master's degree in Plant
14 Biology from the University of Minnesota. And
15 I've been doing consulting work for more than 20
16 years.

17 Q And what's the purpose of your testimony here
18 today?

19 A (Lew-Smith) We reviewed a number of natural
20 resource features that were assessed by the
21 Applicant. For my part of the testimony, I
22 reviewed vernal pools, wetlands, streams, natural
23 communities, rare plants, and turtles, rare
24 species of turtles.

[WITNESS PANEL: Lew-Smith|Parsons]

1 Q Okay. And your prefiled testimony has been
2 marked as "CFP Exhibit 1", correct?

3 A (Lew-Smith) Correct.

4 Q And the report is "CFP Exhibit 2", correct?

5 A (Lew-Smith) Correct.

6 Q And, after you submitted your prefiled testimony
7 and report, the Applicant addressed many of the
8 items you had identified as concerning also,
9 correct?

10 A (Lew-Smith) Correct.

11 Q Given the timing of the Applicant's supplement
12 testimony, you did not submit any supplemental
13 testimony yourself, correct?

14 A (Lew-Smith) Correct.

15 Q Okay. So, just as I did with Mr. Parsons, I'm
16 going to walk through a few of those areas the
17 Applicant addressed in supplemental testimony.

18 Mr. Lew-Smith, could you briefly talk
19 about the rare plants, and any issues you may
20 have had identified in your original report from
21 the ground work?

22 A (Lew-Smith) Yes. Yes. Originally, we had
23 concerns that there were no rare plant
24 inventories that were conducted on the Project

[WITNESS PANEL: Lew-Smith|Parsons]

1 site. And, without a rare plant inventory, you
2 obviously can't determine if the Project is going
3 to have any impact on rare plants. And, so,
4 during our assessment, we basically said we don't
5 -- we can't determine if the Project is going to
6 have an unreasonable or adverse impact on the
7 plant -- on rare plants, and neither can the
8 Applicant. So, we felt that was an omission.

9 Q But, subsequent to your report, the Applicant did
10 take action, correct?

11 A (Lew-Smith) Correct. The Applicant had a rare
12 plant inventory conducted on the site. The
13 botanist conducting the inventory did not find
14 any rare plants or plants of special concern. I
15 reviewed the report from the botanist, and feel
16 that it has addressed the concerns that I had
17 regarding rare plants.

18 Q Okay. So, to be clear, the issues you identified
19 in the report regarding rare plants have been
20 sufficiently addressed, in your opinion, by the
21 Applicant, correct?

22 A (Lew-Smith) Correct. They have.

23 Q The next area that I marked down as having been
24 identified by you in your original report are

[WITNESS PANEL: Lew-Smith|Parsons]

1 wetlands. Could you again briefly describe what
2 you identified in your report?

3 A (Lew-Smith) Yes. We, you know, reviewed the
4 wetlands delineation --

5 MS. NEVILLE: Mr. Lew-Smith, we lost
6 you. I can see your video, but we're not hearing
7 you.

8 WITNESS LEW-SMITH: Oh, no. Not again.

9 MS. NEVILLE: Are you still plugged in?

10 WITNESS LEW-SMITH: How about now? Can
11 you hear me?

12 MR. PATNAUDE: I can hear him.

13 WITNESS LEW-SMITH: I'm still plugged
14 in.

15 MS. NEVILLE: So, you guys can hear
16 him?

17 CHAIRWOMAN MARTIN: I can hear him.

18 MS. NEVILLE: So, you can hear me, but
19 now I can't hear you.

20 WITNESS LEW-SMITH: Oh, no.

21 CHAIRWOMAN MARTIN: Let's go off the
22 record for a minute, Steve.

23 *(Off the record and a brief*
24 *off-the-record discussion ensued.)*

[WITNESS PANEL: Lew-Smith|Parsons]

1 CHAIRWOMAN MARTIN: Okay. We'll go
2 back on the record. Go ahead.

3 **BY THE WITNESS:**

4 A (Lew-Smith) Okay. So, regarding wetlands, we
5 reviewed the report and some field delineations
6 were conducted. And felt that largely the
7 *[indecipherable audio] --*

8 *[Court reporter interruption.]*

9 CHAIRWOMAN MARTIN: Can you hold for a
10 minute?

11 MS. NEVILLE: Mr. Lew-Smith, hang on.

12 CHAIRWOMAN MARTIN: Let's go off the
13 record again.

14 *[Brief off-the-record discussion*
15 *ensued.]*

16 CHAIRWOMAN MARTIN: Let's go back on
17 the record and try again.

18 BY MS. NEVILLE:

19 Q Mr. Lew-Smith, could you tell me about wetlands
20 as identified in your report?

21 A (Lew-Smith) Yes. We reviewed the Applicant's
22 Wetland Report and some of the delineations in
23 the field. And we felt that, in relationship to
24 the proposed development, wetlands were avoided

[WITNESS PANEL: Lew-Smith|Parsons]

1 to a large extent.

2 There were two areas that we felt
3 needed to be addressed. One was there was an
4 additional road to one of the arrays, which
5 incurred a number of wetland buffer impacts,
6 that, from our interpretation of the development,
7 seemed unnecessary.

8 Secondly, at the time of our initial
9 report, the final design for one of the wetland
10 crossings had not been released.

11 Q And, then, subsequent to your report of July 1st,
12 the Applicant responded to those issues,
13 correct?

14 A (Lew-Smith) Correct. The updated plan set
15 included the removal of the road that we had
16 concerns about, thereby decreasing wetland buffer
17 impacts in that area. It also showed final plans
18 for one of the wetland crossings. And the final
19 plans resulted in fewer wetland impacts than were
20 initially proposed. And we felt that the wetland
21 crossing, as it was proposed in the final plans,
22 was -- avoided unreasonable adverse impacts to
23 the wetlands.

24 Q Okay. So, to be clear, your opinion today is

[WITNESS PANEL: Lew-Smith|Parsons]

1 that the Applicant has sufficiently addressed the
2 issues you identified in your report of July 1
3 regarding wetlands?

4 A (Lew-Smith) Correct.

5 Q The next topic that I believe was your area of
6 expertise was natural communities. Would you
7 mind speaking to the underlying issues you
8 identified originally in your report?

9 A (Lew-Smith) Yes. The SEC rules request that
10 applicants show how it has mapped or rare or
11 exemplary natural communities, and if there's any
12 impacts to those.

13 The original assessment by Chinook did
14 not include a natural community assessment. And,
15 so, in our report, we felt that, since no
16 assessment had been done, they couldn't state
17 that there was no impact to rare or exemplary
18 natural communities.

19 Q Okay. And, then, the Applicant responded to that
20 issue, right?

21 And, Mr. Lew-Smith, when you respond,
22 could you just keep your voice up. It was
23 trailing off at the end.

24 A (Lew-Smith) Yes. The Applicant, when they had

[WITNESS PANEL: Lew-Smith|Parsons]

1 someone conduct a rare plant inventory, they made
2 some notes about vegetation. But there was --
3 there was no natural community assessment that
4 had been conducted. And there has not been a
5 natural community assessment conducted for the
6 Project.

7 Q So, as you sit here today, could you share what
8 your opinion is specific to the natural
9 communities?

10 A (Lew-Smith) Again, because no assessment has been
11 conducted, it's difficult to say if there's going
12 to be any impacts. The Applicant has claimed
13 that it's unlikely that a rare or exemplary
14 naturally community exists on the site. They
15 also claim that the Natural Heritage Bureau did
16 not request a natural community assessment, and
17 also thought it was unlikely that one existed on
18 the site.

19 It's my opinion that it is unlikely
20 that one exists on the site, in part, because of
21 the extensive forest management activities that
22 have taken place.

23 So, given that it's unlikely, we've
24 entered into a guessing game, in part, because of

[WITNESS PANEL: Lew-Smith|Parsons]

1 the lack of the inventory that was done. And,
2 so, I don't feel that the Applicant has met their
3 burden of proof. It's also difficult, because
4 it's unlikely that one exists.

5 Q So, hypothetically, if one did exist, what would
6 the best approach be, if development was going to
7 occur?

8 A (Lew-Smith) The best approach would be to develop
9 in the areas that are more impacted, that is
10 areas that have been logged off more extensively,
11 and avoid areas that have not been impacted or
12 logged off. And that is essentially what the
13 Project is proposing at this point. Most of the
14 solar arrays and access roads are occurring in
15 areas that are fairly heavily impacted by logging
16 activities.

17 Q So, just one final question about natural
18 communities. Ultimately, as you sit here today,
19 do you have any substantial concerns about this
20 resource being impacted by this Project, this
21 proposed Project?

22 A (Lew-Smith) No, I do not.

23 Q Thank you. So, then, moving onto the next topic,
24 you addressed turtles in your report. Could you

[WITNESS PANEL: Lew-Smith|Parsons]

1 briefly explain to the Committee the original I'm
2 going to call it an "issue" identified in your
3 report of July 1st?

4 A (Lew-Smith) We felt that the -- there were
5 mitigation -- sorry, let me back up. There are
6 two species of turtles that may occur in the
7 wetlands in the Project area. And the Applicant
8 had worked with Natural Heritage to develop a set
9 of mitigation measures to decrease potential
10 impacts to these species.

11 At the time of our report, there were
12 still some questions about the specifics
13 regarding those mitigation measures. Overall, in
14 general, we thought some of the major concepts
15 were good. But during, when we -- at the time of
16 the report, we were still waiting on a few
17 specifics.

18 Q And, after you submitted the report, did Chinook
19 provide -- did the Applicant provide additional
20 information?

21 A (Lew-Smith) They did. As part of the plan set
22 they submitted with the supplemental testimony,
23 they supplied sufficient specificity concerning
24 mitigation measures to avoid impacts on the

[WITNESS PANEL: Lew-Smith|Parsons]

1 species.

2 Q Okay. And other than the topics we just
3 discussed, if you were asked the same questions
4 that were asked in your prefiled testimony, which
5 is CFP Exhibit 1, if you were asked those
6 questions under oath, would your answers and
7 testimony be the same today, with the
8 modifications you just made?

9 A (Lew-Smith) Yes.

10 Q And, Mr. Parsons, could I ask you that same
11 question?

12 A (Parsons) The answer is "yes".

13 Q Thank you. And then, the only other question I
14 wanted to ask is if you had any input to share
15 with the Committee specific to the waiver being
16 requested for decommissioning, any infrastructure
17 potentially could be left underground?

18 A (Parsons) No. I do not.

19 A (Lew-Smith) No.

20 MS. NEVILLE: Thank you. Those are all
21 the questions I have, Madam Chair.

22 CHAIRWOMAN MARTIN: Okay. Thank you.
23 Attorney Patch. I can see you now.

24 MR. PATCH: You can see me now. Yes.

[WITNESS PANEL: Lew-Smith|Parsons]

1 I'm not sure that's a good thing, but we'll
2 proceed.

3 Good afternoon, Mr. Lew-Smith and Mr.
4 Parsons. My name is Doug Patch. As I think you
5 probably remember from the technical session, I'm
6 counsel for Chinook Solar.

7 **CROSS-EXAMINATION**

8 BY MR. PATCH:

9 Q Didn't you -- and I'll ask questions generally.
10 I think more of them may pertain to Mr. Parsons,
11 but either one of you feel free to answer the
12 questions.

13 Didn't you indicate in your prefiled
14 testimony that the Project will not have an
15 unreasonable adverse impact on moose wintering
16 areas?

17 A (Parsons) That's a question for me. This is Jeff
18 Parsons.

19 Yes. It was our conclusion that the
20 Project did not have a negative -- an undue
21 adverse impact on moose wintering areas.

22 Q And did you have the same conclusion with regard
23 to the hard mast stand resources?

24 A (Parsons) Yes. We did. But I think I felt a

[WITNESS PANEL: Lew-Smith|Parsons]

1 little more sure about the answer regarding moose
2 than I did about the mast resources, because so
3 much of the forest was gone. I think, when I was
4 on-site, I scientifically felt pretty strongly
5 that the type of natural community that would
6 have been an important mast-producing forest
7 previous to the logging activity was not likely
8 present on the site. So, --

9 Q Okay. And you reached a similar conclusion, no
10 unreasonable adverse impact on wildlife
11 corridors, correct?

12 A (Parsons) That's correct.

13 Q And then, streams, vernal pools, and you've
14 already talked about, Mr. Lew-Smith, I think
15 about wetlands, but the conclusion on all three
16 of those, you know, is "no unreasonable adverse
17 impact", is that correct?

18 A (Lew-Smith) That's correct. Yes.

19 Q And also, that the Project would have no
20 unreasonable adverse impact on Blanding's and
21 wood turtles. And I think the proviso was, if
22 conditions are incorporated into the proposed
23 plans, conditions which the Applicant, at that
24 point, when you submitted your testimony, had

[WITNESS PANEL: Lew-Smith|Parsons]

1 agreed to with the New Hampshire Fish & Game
2 Department, and which have since been, I think as
3 you noted, included in the plans filed with the
4 Alteration of Terrain Bureau with DES, is that
5 correct?

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

7 Q So, those recommendations, which have been marked
8 as "Applicant's Exhibit 84", where they're
9 presented separately, and perhaps included in 82
10 as well. But are you familiar with those
11 specific recommendations?

12 A (Lew-Smith) I'm not sure about the exhibit number
13 you're referring to. I've got --

14 Q Okay. Then, --

15 A (Lew-Smith) I'm sorry.

16 Q Take for a minute that I'm correct on the exhibit
17 number, have you looked at the Fish & Game
18 recommendations that were included in the plans
19 filed with DES?

20 A (Lew-Smith) Regarding the turtles?

21 Q Yes.

22 A (Lew-Smith) Yes.

23 Q Okay. And those recommendations address the
24 issue that you had raised in your prefiled

[WITNESS PANEL: Lew-Smith|Parsons]

1 testimony, is that correct?

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

3 Q You've already gone through the wetland buffer
4 impact and the change in the road. So, I won't
5 go there. With regard to -- and you said, I
6 believe, in your direct testimony, that, in light
7 of the subsequent study that the Applicant has
8 done, that, in terms of rare, threatened and
9 endangered plants, you know, that your position
10 at this point at least is that the Project would
11 not have an unreasonable adverse effect to those,
12 is that correct?

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

14 Q It sounds like you still have an issue with
15 exemplary natural communities, based on what you
16 said in your direct testimony. So, I'd like to
17 ask you a few questions about that.

18 I mean, the Natural Heritage Bureau in
19 New Hampshire is the State agency that's
20 responsible for protecting exemplary natural
21 communities, correct?

22 A (Lew-Smith) Correct.

23 Q And, to the best of your knowledge, did they ever
24 suggest that more should have been done to study

[WITNESS PANEL: Lew-Smith|Parsons]

1 or document the exemplary natural communities in
2 this area?

3 A (Lew-Smith) No.

4 Q And I think you said that "it's unlikely that one
5 exists" in the area that is planned for
6 disturbance of the Project, correct?

7 A (Lew-Smith) I'm sorry, your audio cut out. Could
8 you repeat the question?

9 Q Okay. And I believe that you said on direct
10 examination that "it's pretty unlikely that an
11 exemplary natural community exists" in the area
12 that is going to be disturbed for the Project, is
13 that correct?

14 A (Lew-Smith) Correct.

15 Q Are you familiar with the Memo of Understanding
16 that the Applicant and the Town have signed? And
17 not that you're familiar with all of the aspects
18 of it, but I'll focus on the one that I think is
19 related to this. That is the provision under
20 which the Applicant has agreed with the Town to
21 set aside the 300 plus acres that will not be
22 disturbed for the Project, that will be under
23 their control, for the purposes of a conservation
24 easement. Are you familiar with that?

[WITNESS PANEL: Lew-Smith|Parsons]

1 A (Lew-Smith) Yes.

2 Q And, so, to the extent that there's any concern
3 about exemplary natural communities in this area,
4 that will certainly have a positive effect, at
5 least in terms of the acres that are subject to
6 that conservation easement, correct?

7 A (Lew-Smith) I don't think anyone knows. Because
8 the natural communities haven't been mapped,
9 you're impacting a certain natural community, a
10 hemlock hardwood forest. The conservation
11 easement is going to include largely wetlands,
12 which are different natural communities. It may
13 also include some hemlock hardwood forests, but
14 we don't know how much. We don't know what
15 condition it's in. So, the specifics of it, I
16 just don't know.

17 I will say that it's certainly not bad.
18 It's a good thing that they're conserving that
19 much land.

20 But, if you're asking me to make a
21 direct correlation between natural community lost
22 and natural community conserved, I can't do that.
23 And I don't think the Applicant can do that.

24 Q But you can't say that there's a natural

[WITNESS PANEL: Lew-Smith|Parsons]

1 community lost, if the Project is approved and
2 the 150 or so acres are disturbed for the
3 Project, can you? You can't say there's a
4 natural exemplary community lost in that area,
5 can you?

6 A (Lew-Smith) I can say "a natural community was
7 lost", because you took what was a hemlock
8 hardwood forest and you converted it to a solar
9 array.

10 Q Well, but that's -- I thought that was in the
11 northern section that won't be disturbed by the
12 Project area?

13 A (Lew-Smith) Any place where there's a solar
14 array, prior to the Project, there was a natural
15 community there.

16 Q Which presumably was disturbed by the extensive
17 logging that has taken place there over the
18 years?

19 A (Lew-Smith) Certainly. But logging is a
20 temporary disturbance that, because it's a
21 temporary disturbance, it's still a natural
22 community. It's just a disturbed natural
23 community.

24 Q Okay. But, even a solar project is a temporary

[WITNESS PANEL: Lew-Smith|Parsons]

1 disturbance, isn't it? Are you familiar with the
2 other provision in the MOU that pertains to what
3 will be done with the land, once the Project is
4 decommissioned?

5 A (Lew-Smith) Certainly, a solar array of this
6 nature is a temporary disturbance. But it's --
7 the area stops functioning as a natural community
8 when it's a solar array.

9 Whereas, if it's logged, even early
10 successional processes are occurring in that --
11 in that logged area in a forest. And, so,
12 it's -- there's a continuity there that is lost
13 when there's a solar array.

14 Q Of course. But, again, you know, as you've said,
15 it's extremely unlikely there's an exemplary
16 natural community in the area that will be
17 disturbed, correct?

18 A (Lew-Smith) Correct.

19 Q I think Mr. Parsons might -- my other questions
20 relate primarily to you. But I want to make sure
21 I understand what you said on direct, which is
22 somewhat different, obviously, than what you said
23 in your prefiled testimony, and understanding
24 that a number of things have happened since then.

[WITNESS PANEL: Lew-Smith|Parsons]

1 So, I appreciate that.

2 But, if I understand you correctly,
3 when you -- when you made the recommendations in
4 your testimony about the two things that the
5 Applicant could do in order to mitigate the deer
6 wintering area issue, the first one -- let me
7 just make sure I have the correct citation. But
8 I believe it's in your testimony. It's on Page 4
9 of 10 in CFP 1. And that's where you said that
10 the first thing that could be done to mitigate
11 the deer wintering area issue is to "protect the
12 remaining mature coniferous forest, especially in
13 the north, within the Project parcels but outside
14 of the Project limits of disturbance."

15 And that's, in fact, what the
16 Applicant's doing in the MOU, correct?

17 A (Parsons) Correct.

18 Q And the second thing that you said, in that
19 testimony that could be done to mitigate, which I
20 thought it was interesting, let me back up for a
21 second, this was not included in your report, the
22 second thing. It was included in your testimony,
23 but not your report. Is there a reason why the
24 "restricting Project construction activity from

[WITNESS PANEL: Lew-Smith|Parsons]

1 December 15th to March 15th" was not actually in
2 the report, but it was in your testimony? And
3 I'm looking at the conclusions that were on
4 Page 9 of your report. I didn't see anything
5 there about the construction activities.

6 A (Parsons) I think it was, on my part, an
7 omission, is all.

8 Q Okay. But, anyway, that was the second thing.
9 Those are the two things that you said that the
10 Applicant could do to mitigate the deer wintering
11 area issue, correct?

12 A (Parsons) Correct.

13 Q And, if I understood you correctly, in response
14 to a question that Ms. Neville asked you, then
15 the limit on construction activity does not apply
16 to tree-clearing or logging, correct?

17 A (Parsons) Correct.

18 Q So, I mean, I think we had initially thought that
19 there would be a conflict between that mitigation
20 measure you suggested, and the one that Fish &
21 Game has put in writing and submitted in its
22 recommendations to DES, with regard to actually
23 doing logging or tree-clearing from November 1st
24 to I think it's the middle of March, which is in

[WITNESS PANEL: Lew-Smith|Parsons]

1 those recommendations.

2 So, is that true, that they're no
3 longer in conflict? That, actually, what Fish &
4 Game is recommending on doing tree-clearing
5 during the winter months to protect the bats is
6 not in conflict with your recommendation?

7 A (Parsons) Well, if the current recommendation by
8 New Hampshire Fish & Game, and maybe I have this
9 wrong, is to do the forest management/logging
10 activities during the winter, then it would --
11 and this is to benefit the bat, then it would be
12 in conflict with my recommendations that -- oh,
13 I'm sorry. I guess, for tree harvesting, it's
14 not in conflict. I stand corrected.

15 Q Okay. I'm just going to read to you from Exhibit
16 84, I think it's kind of buried in Exhibit 82 as
17 well, but this is from the recommendations that
18 Fish & Game submitted.

19 And the first one, under "Protection
20 for Bats", it says: "Tree clearing for the
21 Project shall occur between November 1 and March
22 31 to avoid potential impacts to roosting bats
23 during the summer season when they are active
24 throughout the landscape."

[WITNESS PANEL: Lew-Smith|Parsons]

1 So, is your understanding now that that
2 would not be conflict with the construction
3 activity limitation that you're recommending?

4 A (Parsons) That's correct. Dr. Reynolds and I
5 actually discussed this, to come to some
6 understanding of what the various restrictions
7 that, you know, apply to the bats and to deer
8 wintering areas. And we've reached that
9 conclusion.

10 Q Okay. And just a few more questions then. I
11 mean, deer, I think you had said, when you were
12 talking about sort of the areas that you focus
13 on, you talked about rare, threatened and
14 endangered species. And deer are not rare,
15 threatened or endangered species in New
16 Hampshire, are they?

17 A (Parsons) No. I think you misunderstood me. I
18 did not address rare, threatened and endangered
19 species.

20 Q No, and I perhaps didn't ask the question
21 correctly. I think, when you were talking about
22 your qualifications, I think you said one of the
23 things that you typically do is to "evaluate
24 habitats, especially for rare, threatened and

[WITNESS PANEL: Lew-Smith|Parsons]

1 endangered species"?

2 A (Parsons) No. I didn't say that. That was
3 Michael.

4 Q Oh, I'm sorry. You're right. Okay. Yes. I
5 apologize.

6 But, in any event, just so the record
7 is clear, deer are not rare, threatened or
8 endangered species, are they?

9 A (Parsons) No, they are not. That's why it's
10 important that the SEC rules separate the two
11 out, and ask for, you know, important information
12 regarding rare, threatened and endangered species
13 and critical habitats, as well as significant
14 wildlife resources for non-rare, threatened and
15 endangered species.

16 Q And the State agency in New Hampshire that's
17 responsible for managing the deer population is
18 the New Hampshire Fish & Game Department,
19 correct?

20 A (Parsons) That's correct.

21 Q And they have not made any recommendations in
22 what's been submitted by the Department of
23 Environmental Services with regard to deer
24 wintering areas, have they?

[WITNESS PANEL: Lew-Smith|Parsons]

1 A (Parsons) No, they haven't.

2 Q And, in fact, and I think you noted this in the
3 report, or it was noted in the report that
4 Arrowwood did, that the Fish & Game Department,
5 in all the consultations that the Applicant had
6 with them, never expressed any concern about deer
7 in this Project area, did they?

8 A (Parsons) No, they did not bring it up. Of
9 course, the Applicant made conclusions that there
10 were no deer wintering areas on the Project site
11 at at least one of these meetings.

12 Q But Fish & Game didn't challenge that? Fish &
13 Game didn't ask them to do any more on this, did
14 they?

15 A (Parsons) No. They did not.

16 MR. PATCH: Okay. Okay, I think that's
17 all the questions I have. Thank you, both. I
18 appreciate -- I appreciate your answers.

19 WITNESS PARSONS: Thank you.

20 WITNESS LEW-SMITH: Yes. Thank you.

21 CHAIRWOMAN MARTIN: Okay. Let's take
22 questions from the Committee members at this
23 point, starting with Mr. Wilson.

24 MR. IACOPINO: Madam Chair, may I

[WITNESS PANEL: Lew-Smith|Parsons]

1 interrupt for just a moment?

2 CHAIRWOMAN MARTIN: Of course.

3 MR. IACOPINO: It was my understanding
4 that Ms. Neville's other witness had a time
5 constriction. I don't know if that's still the
6 case. And understood we were going to go to that
7 witness at around 2:00 p.m. or later. Is that
8 still the case?

9 MS. NEVILLE: Well, I know Dr. Reynolds
10 was not able to be here before 2:00. I don't
11 know if he's here. But I don't know how many
12 questions there might be, if we just wrap these
13 up quickly.

14 MR. IACOPINO: Okay. I'm sorry. I
15 understood that there was a reason why we had to
16 actually do him exactly at 2:00. That it was he
17 couldn't be here till 2:00. My apologies.

18 CHAIRWOMAN MARTIN: Okay. And we'll
19 see how many questions we get, and we can check
20 back in with you, Attorney Neville, in case you
21 have an issue with regard to time related to that
22 witness.

23 Okay. I apologize. Mr. Wilson.

24 DIR. WILSON: Thank you. I just have

[WITNESS PANEL: Lew-Smith|Parsons]

1 one question for Mr. Parsons.

2 BY DIR. WILSON:

3 Q And I don't know if it's necessarily germane to
4 the testimony today. But is there any known
5 benefit to solar arrays acting as a shelter for
6 animals or animals using these for shelter during
7 certain seasons of the year?

8 A (Parsons) I'm afraid there isn't. There is no
9 information along those lines that I know of,
10 sir. So, I just have not seen anything.

11 Q *(Dir. Wilson nodding in the affirmative).*

12 A (Parsons) Doesn't mean it doesn't exist, but --

13 DIR. WILSON: I have no further
14 questions.

15 CHAIRWOMAN MARTIN: Okay. Thank you.
16 Mr. Oldenburg.

17 MR. OLDENBURG: Thank you. I just have
18 a question or two for Mr. Parsons, concerning the
19 deer wintering areas.

20 BY MR. OLDENBURG:

21 Q And, in your report, on Page 4, it basically says
22 "Deer are negatively impacted by human
23 activities", "Deer move to avoid humans, loud and
24 sharp noises", etcetera.

[WITNESS PANEL: Lew-Smith|Parsons]

1 So, why would they -- why do they do
2 that, but harvesting timber and logging
3 operations are okay? Because I don't know of any
4 louder or sharper noises that exist in the forest
5 besides logging operations. So, why would the
6 deer be okay with that, but not other
7 construction activities?

8 A (Parsons) Sure. That's a great question.
9 There's some anecdotal information that deer
10 become habituated to the sounds of chainsaws.
11 When I say "sharp and irregular", the types of
12 noises that have the greatest negative impact on
13 deer and cause them to flee and/or increase the
14 amount of stress hormones that they have in their
15 body, which is an extra energy expenditure, tend
16 to be things such as dynamite, clanging of
17 hammers against loud objects, sounds that are
18 unpredictable in nature. And those are the types
19 of activities associated with construction
20 activities.

21 Secondly, deer have learned to become
22 habituated to logging operations, because, when
23 they cut down trees, and they leave the tops, the
24 deer will move in at night and eat the tops of

[WITNESS PANEL: Lew-Smith|Parsons]

1 trees at logging operations. So, it's a
2 cost/benefit assessment. And, with the logging
3 operation, as with those two development
4 activities, there's also a benefit that adds in
5 the other column to somewhat offset the cost.

6 That being said, there is more than
7 likely at least a partial displacement of deer
8 during the activity when skidders are running
9 through the woods and chainsaws are running.
10 But, because there's a benefit to the tops of
11 trees left, in the evenings, primarily, the deer
12 will, you know, they may be 100 feet away, and
13 then come back in in the evening to browse on
14 those tops.

15 So, logging operations have generally
16 been accepted by the scientific community,
17 although there is no real good research done on
18 this. But the anecdotal information suggests
19 that it's compatible with the presence of deer in
20 their yards, given some minor displacement.

21 Q Okay. The only other question I had was, right
22 after that statement on Page 4, you say in your
23 report: "The Vermont Fish & Wildlife Department
24 maintains a 300 foot protective buffer around its

[WITNESS PANEL: Lew-Smith|Parsons]

1 deer wintering yards to protect and buffer the
2 deer from negative impacts."

3 Are we just trying to put a New
4 Hampshire -- a Vermont rule into New Hampshire?
5 It sounds like we're using the Vermont Fish &
6 Game rules and putting them in New Hampshire Fish
7 & Game's mouth, sort of?

8 A (Parsons) The 300 foot buffer found in Vermont is
9 a buffer that is argued by scientists back and
10 forth at Act 250 hearings. So, there's some
11 airing out of the scientific literature regarding
12 the use of those buffers.

13 Other states don't have the same
14 protective measures for deer yards. But they
15 have found that, when deer yards are compromised
16 or when development occurs next to them, that the
17 deer populations in regions can decrease as a
18 result. Other states seem to be willing to allow
19 that to happen; Vermont, not so much.

20 And the 300 foot -- excuse me -- buffer
21 I don't believe is set in stone. Science is not
22 set in stone. As we -- as more information is
23 unveiled about the efficacy about different size
24 buffers, we would hope that, you know, that

[WITNESS PANEL: Lew-Smith|Parsons]

1 buffer distance would change.

2 Right now, and for the last fifteen
3 years, in the state where these types of issues
4 are adjudicated more than in other states, there
5 hasn't been any reason to change that buffer.

6 Do I have total faith in that buffer?
7 No, I do not. Is it probably the best buffer
8 being utilized in northern tier states to protect
9 white-tailed deer at a critical season? I
10 believe it is.

11 MR. OLDENBURG: Okay. Thank you. I
12 have no more questions.

13 CHAIRWOMAN MARTIN: Okay.
14 Mr. Pelletier. Mr. Pelletier, do you have any
15 questions?

16 MR. PELLETIER: A question for Mr.
17 Parsons. Yes, a question for Mr. Parsons.

18 CHAIRWOMAN MARTIN: Okay. Go right
19 ahead.

20 MR. PELLETIER: Can you hear me?

21 WITNESS PARSONS: Yes.

22 BY MR. PELLETIER:

23 Q Yes. I'm wondering, you know, I think about all
24 of the activities that take place within the

[WITNESS PANEL: Lew-Smith|Parsons]

1 state, whether it would be huge box stores or
2 whether it would be a housing development, and
3 where deer yards are involved. When you get a
4 large parcel, like this one in Fitzwilliam, would
5 one assume or could one assume that the yards
6 would move to another location within that large
7 parcel? Or, what actually, if the yards are
8 disrupted, like we've had conversations about,
9 what would you expect would take place with that?
10 Let's say 20 or 30 of them yarded up. What would
11 you expect the result would be of this kind of
12 activity?

13 A (Parsons) Well, I think that, if the habitat is
14 not totally saturated with deer, that deer move
15 around from functional mature evergreen forests
16 to functional mature evergreen forests. With
17 the, you know, the choices being secondarily
18 dictated by how easy deer can move to these areas
19 in winter, and how much they're indirectly
20 impacted by the presence of humans.

21 I would think that, within this parcel,
22 deer yards are a shifting mosaic, right, that
23 responds to the maturing of evergreen forests, in
24 particular, and not just within the parcel, but

[WITNESS PANEL: Lew-Smith|Parsons]

1 the surrounding area.

2 So, if you were to impact, either
3 completely destroy or indirectly negatively
4 impact the deer yards on the parcel or on the
5 parcel controlled by the Applicant, you would
6 expect the deer to try to move to different
7 areas. And, if the populations are too
8 extensive, they would overutilize those
9 resources. When you pack deer into smaller
10 areas, they are subject to greater stress
11 between, you know, individual deer, as well as
12 the fact that deer, when tightly packed, transmit
13 deer diseases to a much greater degree. That,
14 combined with the fact that, you know, this is an
15 area that is not without paved roads. And, if
16 you're forcing deer to cross paved roads, you're
17 subjecting them to potential negative impacts
18 from humans. As well as with the fact, when deer
19 are moving out of their home range, they're
20 potentially more vulnerable to inclement weather
21 and predators, primarily inclement weather and
22 predators. So, those are the concerns that one
23 has when thinking about destroying deer yards and
24 forcing deer to go into other areas.

[WITNESS PANEL: Lew-Smith|Parsons]

1 It is far enough south that, in some
2 years, and I would guess it's many years, the
3 deer are not dependent upon the presence of deer
4 wintering areas to the degree that they might be
5 in the north part of New Hampshire, the north
6 part of Vermont, and the north part of Maine.

7 That being said, if a deer is dependent
8 upon the presence of appropriate forest structure
9 one out of three years, that can have quite a
10 large impact on local deer populations through
11 starvation. As a general rule, it's thought that
12 severe winters can bring as much as 30 percent of
13 local herd starvation. And we know that, you
14 know, that probably applies more to central and
15 northern New Hampshire. It would be impossible
16 to say what it is in southern New Hampshire, but
17 it can be substantial.

18 MR. PELLETIER: I guess, Madam Chair,
19 if I might, one final question?

20 CHAIRWOMAN MARTIN: Okay.

21 BY MR. PELLETIER:

22 Q When one goes out and evaluates deer yards, is
23 there any way that one can identify how -- what
24 the longevity has been of that site? Is this

[WITNESS PANEL: Lew-Smith|Parsons]

1 something that could move year to year, because
2 one identified a site in this particular case?
3 Is it the assumption that they have been doing
4 that for years? Or, is there any way for us to
5 figure out if the migration moves from season to
6 season, or, once they establish a yard, it's a
7 yard forever? How does that work?

8 A (Parsons) Well, once you establish a yard, it's
9 not a yard forever. However, when a forest
10 structure gets mature enough that it decreases
11 the amount of snow that reaches the ground,
12 because snow is caught in the canopy, and when
13 the presence of evergreen needles provide a
14 thermal benefit and a separation between the cold
15 upper atmosphere, that's when a deer yard really
16 becomes functional.

17 If it's a species, such as hemlock,
18 that can live for 250 to 400 years, and let's say
19 it begins being a functional deer yard at 40 or
20 50 years, or even younger, they you can have a
21 deer yard last for quite a long period.

22 If you have, such as this site now has,
23 the maturity of the site has small areas of
24 conifers mixed in with hardwoods, and I'm

[WITNESS PANEL: Lew-Smith|Parsons]

1 exempting the area to the north that I saw that
2 was a very good functional eastern hemlock deer
3 yard, so these other areas have very small areas
4 where there's conifer stands. And those areas
5 may just have a couple of deer scat in them, and
6 may not be something you want to protect, or that
7 any state would protect.

8 So, it all depends on the size, and the
9 isolation, and the persistence of the mature
10 forest cover. Those little woodlots that have a
11 few conifers, you can tell that they are not
12 being used very often.

13 And the easiest way to tell the
14 longevity of a deer yard or whether or not it's
15 been used in multiple years, going back, you
16 know, five, ten, fifteen, twenty years, is the
17 woody browse and the bark stripping by the deer,
18 because that doesn't leave the tree. The tree
19 shows bark-stripping activity, which is when deer
20 are -- they're ruminants. So, they're eating
21 bark, because there's no other food. It's very
22 difficult to digest. They don't get much out of
23 it. But, because they're ruminants, their
24 stomach will process that material and they will

[WITNESS PANEL: Lew-Smith|Parsons]

1 get minor amounts of energy from it. And, so,
2 you have probably seen this where the bark is
3 stripped by a deer on a tree.

4 So, that type of evidence, as well as
5 the browse on mainly hardwood young trees, can
6 last for a long time. And you can look at a site
7 and know that deer have been utilizing it for 20,
8 25 years. Sorry for being so long-winded.

9 CHAIRWOMAN MARTIN: All right. Thank
10 you. Ms. Duprey, do you have questions?

11 MR. PELLETIER: Thank you.

12 MS. DUPREY: I have a question for
13 Mr. Parsons.

14 BY MS. DUPREY:

15 Q So, I take it that what your argument is, is
16 that, even though the State doesn't regulate deer
17 yards, that our regulations do through some sort
18 of broad language, is that correct?

19 A (Parsons) That's correct.

20 Q And I guess I'd like to be better persuaded that
21 the State of New Hampshire has overlooked
22 something here. I've lived here for 40 years,
23 actually longer, and I have three sons who are
24 deer hunters. And my observation has been that

[WITNESS PANEL: Lew-Smith|Parsons]

1 the State pays really quite a lot of attention to
2 this. If we look at moose, and how many can be
3 shot in a year. And my personal experience is
4 that deer are incredibly persistent. No matter
5 what you do to try to get them to go away, or
6 even drop dead, for that matter, doesn't seem to
7 work.

8 And, so, I feel like New Hampshire does
9 a good job of paying attention to this. And that
10 it has, I assume, made the determination that
11 this isn't necessary.

12 Why should I not consider what you're
13 asking here to be overzealousness?

14 A (Parsons) In my experience, in talking to the
15 head of New Hampshire Fish & Game's Deer Program,
16 they don't feel that they have regulations, apart
17 from what I talked to them about, that regulate
18 deer wintering areas. They are very anxious to
19 regulate these areas, but they don't feel they
20 have the jurisdiction.

21 I feel that only under the SEC -- well,
22 you know, from what I've seen, only under the SEC
23 regulations, an interpretation of the rules, are
24 significant wildlife habitats of non-rare,

[WITNESS PANEL: Lew-Smith|Parsons]

1 threatened and endangered species protected.

2 You know, I think, if I understand
3 correctly, the SEC identifies or reviews projects
4 that are meant to bring a public benefit to the
5 people of New Hampshire. And the rules were
6 written to recognize that, and to make sure that
7 resources that the public of New Hampshire
8 benefits from, such as the white-tailed deer, I
9 can think of no species that the people of New
10 Hampshire engage with more, either through
11 wildlife viewing activities, hunting,
12 photography, maybe I'm missing some, than
13 white-tailed deer.

14 So, that's a brief answer. Well, to be
15 more specific, the SEC rule states "significant
16 wildlife resources" are those that are critical
17 to or within the life cycle of a species. And
18 the life cycle of the white-tailed deer in New
19 Hampshire, at least periodically, but regularly,
20 to the point where it would impact the population
21 of deer, and probably does, to some extent, if
22 you do not protect deer yards, that that makes it
23 significant and critical within the life cycle of
24 the white-tailed deer.

[WITNESS PANEL: Lew-Smith|Parsons]

1 Would the same thing be true in
2 Virginia? No, it wouldn't. But it is true in
3 the northern New England states, and, you know,
4 the states in the Midwest and other places where
5 the white-tailed deer lives, the upper Midwest,
6 Wisconsin, Michigan, New York, and Minnesota in
7 particular.

8 Q So, if the State deems this so important through
9 the SEC regulations, why would it have limited it
10 to this Project? Whereas any other project does
11 not have to take this into consideration? That
12 doesn't seem quite right.

13 A (Parsons) Well, if you mean other projects, such
14 as the Northern Pass Project, which we worked
15 on, --

16 Q I don't mean that. I, obviously, don't mean
17 that, not an SEC project. I mean a large
18 shopping center or something else, a large
19 housing development suddenly. I mean, this is
20 the only example that I am aware of where deer
21 yarding would be taken into consideration. And,
22 if the State felt it was so important to put it
23 here, then why wouldn't they have broaden, which,
24 first of all, I'm not persuaded about the

[WITNESS PANEL: Lew-Smith|Parsons]

1 jurisdiction of the Fish & Game Department, but
2 leaving that aside, why wouldn't they broaden the
3 jurisdiction or given it to someone else?

4 A (Parsons) Sure. I do know that they actively
5 work to preserve deer yards on a volunteer basis.
6 A large amount of energy is spent with timber
7 companies in maintaining deer yards within the
8 lands that they control.

9 I think that there is a, right, a
10 Libertarian streak in New Hampshire that may not
11 exist in Vermont, that only in the cases of SEC,
12 where projects are thought to bring or intended
13 to bring a public benefit do they seek or have
14 they put on regulations that suggest, strongly
15 suggest, and, in my interpretation, scientific
16 interpretation, include resources, such as deer
17 wintering areas.

18 In Vermont, we have something called
19 "necessary wildlife habitat", that protect
20 wildlife that is decisive to the survival of the
21 species. And you would think it would apply to
22 all kinds of species, but it doesn't. It only
23 applies to a few, where you can show that it's
24 decisive to the survival of that species.

[WITNESS PANEL: Lew-Smith|Parsons]

1 You couldn't say "trash cans are
2 decisive to the survival of raccoons", because,
3 even though it may seem that way, it doesn't make
4 sense, right?

5 And I see this regulation as similar.
6 It only applies to species where you can show a
7 habitat resource that's critical within the life
8 cycle of that species to it's continued survival.
9 And I believe that applies to deer wintering
10 areas.

11 MS. DUPREY: Okay. Thank you. That's
12 all, Madam Chair.

13 CHAIRWOMAN MARTIN: Okay. Thank you.
14 Mr. Eaton, do you have questions?

15 MR. EATON: Madam Chair, I have none.

16 CHAIRWOMAN MARTIN: All right. Thank
17 you. And Mr. Arvelo?

18 DIR. ARVELO: I just have one or two
19 questions for Mr. Parsons, really related to the
20 questions that Mr. Pelletier was asking, just a
21 little bit more follow-up on that.

22 BY DIR. ARVELO:

23 Q So, Mr. Parsons, if you're testifying that there
24 are potential yard areas, wintering yard areas in

[WITNESS PANEL: Lew-Smith|Parsons]

1 the northern part of the Project, and if there
2 was impact in that area by the Project, could,
3 and I'm trying to -- what I'm trying to get at
4 is, are you familiar with the set aside of land
5 for conservation, the 300 plus acres, in terms of
6 their make-up of coniferous trees that could
7 support additional wintering yards, if there were
8 to be an impact in that one area that you talked
9 about? And can deer move into that other area
10 that's going to be set aside for conservation,
11 and if the make-up of the trees there coniferous
12 enough or are there enough trees there that would
13 support wintering yards?

14 A (Parsons) If, indeed, I think it's -- while I
15 wholeheartedly think that wildlife, and probably
16 deer, will benefit from that 340 plus acres that
17 will be put into permanent easement, my
18 contention is is that we don't know how many
19 acres are being lost and how many acres are being
20 provided within that 342 acres. And that's it.

21 I'm not -- I don't think I could say
22 that "none of it would be potential deer yard",
23 because I think I saw some of it that would be.
24 It's just that it hasn't been delineated and

[WITNESS PANEL: Lew-Smith|Parsons]

1 outlined, so we don't know what the cost/benefit
2 is.

3 But, if you're asking me if some of
4 that is appropriate deer wintering habitat, and
5 there's some lost as a result of disturbance of
6 the Project, could deer move into that wintering
7 habitat? It could. But the same provisos that I
8 talked about before would apply. Could be
9 overpopulated and exceed the capacity of the deer
10 yard to support them in winter. There could be a
11 greater transmission of diseases. These are the
12 things that happen when populations get too high.
13 That's how chronic wasting disease is spread, by
14 deer sharing the same feeding area within a deer
15 yard. And chronic wasting disease is a serious
16 problem, not here yet in New Hampshire.

17 So, they certainly could move. The
18 effects of which we can't really determine. But
19 that's all I can say, because I don't have
20 numbers.

21 DIR. ARVELO: Thank you.

22 WITNESS PARSONS: Yes.

23 DIR. ARVELO: Madam Chair, those are
24 all my questions.

[WITNESS PANEL: Lew-Smith|Parsons]

1 CHAIRWOMAN MARTIN: Okay. Thank you.
2 All of my questions have been answered.

3 So, Attorney Iacopino, do you have any
4 questions?

5 MR. IACOPINO: Yes. Thank you, Madam
6 Chair. Let me start with Mr. Parsons.

7 BY MR. IACOPINO:

8 Q First, I just want to make sure that I understand
9 the avoidance, minimization, and mitigation
10 conditions that you've suggested. The first one
11 that I understood is that there should be no
12 construction, blasting, rock-hammering, during
13 the winter period, from November 30th through
14 March 31st, but tree-clearing is okay. Am I
15 correct with that?

16 A (Parsons) No. It was actually December 15th.

17 Q I'm sorry, which? What date?

18 A (Parsons) The beginning of --

19 *[Court reporter interruption due to*
20 *indecipherable audio.]*

21 CHAIRWOMAN MARTIN: Can we pause for a
22 minute? Attorney Iacopino, you may have to mute
23 *[indecipherable audio]* --

24 MR. IACOPINO: Okay.

[WITNESS PANEL: Lew-Smith|Parsons]

1 BY MR. IACOPINO:

2 Q Did you say "December 15th"? Oh, I'm sorry.

3 A (Parsons) Yes.

4 Q Okay. All right. The other thing that you
5 mentioned, with respect to a possible avoidance
6 or minimization measure, was to have an
7 environmental monitor inspect where there are
8 known deer yards. Did I get that correctly?

9 A (Parsons) Part of it. I'm not sure -- you'll
10 have to mute. I'm not sure an environmental
11 monitor would have the skill set necessary to
12 determine if deer are utilizing a deer wintering
13 area.

14 I guess, if they covered enough ground
15 within the conifer-dominated forest near where
16 they wanted to log, they might be able to show
17 that -- I mean, they would be able to show, I
18 guess, if there's snow on the ground, that deer
19 were not present. And that logging might be able
20 to move forward.

21 Q I guess what I'm trying to figure out is the
22 timing on that. Would that be a daily inspection
23 or some sort of that, something like that?

24 A (Parsons) No. You want to turn off your mike.

[WITNESS PANEL: Lew-Smith|Parsons]

1 It would not be a daily inspection. And there
2 are some problems with this methodology, because
3 deer may not move in, once you allow them,
4 logging to happen on December 15th. So, the deer
5 may not use potential deer yards all winter, if
6 that's the course you took.

7 I think it's the mitigative measure of
8 less preference than a ban.

9 CHAIRWOMAN MARTIN: Go ahead.

10 BY MR. IACOPINO:

11 Q Is there any -- is there any type of avoidance or
12 minimization methods that are used to actually
13 sort of create, say, a manmade deer yard,
14 somewhere perhaps off in the northern portion of
15 the hemlock forest?

16 A (Parsons) We regularly have projects -- I
17 shouldn't say "regularly", I have, in the past,
18 had projects where, as part of the mitigation for
19 a potential impact on a deer wintering area, it
20 was proposed that a younger hemlock forest would
21 be allowed to grow up into an older one.

22 I don't believe there was ever -- I've
23 ever heard of a proposal to actually plant the
24 trees, because if you had to plant a 15 year-old

[WITNESS PANEL: Lew-Smith|Parsons]

1 20-foot hemlock and create a whole forest out of
2 those plantings, it would be prohibitively
3 expensive.

4 So, taking a young forest, and
5 protecting it and letting it grow up, has
6 potential.

7 Q Then, I guess my last question for you, Mr.
8 Parsons, is, if I understand part of your concern
9 here is that you couldn't quite delineate where
10 the limits of disturbance were going to be when
11 you inspected the northern forest area?

12 A (Parsons) Well, we could probably -- or, we could
13 determine the limits of disturbance, because we
14 had a GPS technician with Dana and myself. But
15 it was the fact that I couldn't tell whether the
16 forest extended into the area of disturbance
17 without doing a lot of extensive work, and that
18 was not done.

19 Q Okay. Thank you. My next question is for Mr.
20 Lew-Smith.

21 Mr. Lew-Smith, I want to ask you just
22 about incremental effort here. With respect to
23 the natural and exemplary communities, it appears
24 that the Applicant did a desktop survey, then

[WITNESS PANEL: Lew-Smith|Parsons]

1 they went to the Heritage -- the Natural Heritage
2 Bureau, and then they actually had a
3 subcontractor, I guess, go out and do an
4 inspection of the property, which was attached to
5 Mr. Valteau's supplemental testimony, and where
6 that particular subcontractor created tables of
7 the various types of shrubs and ferns and grasses
8 and whatnot that were observed in the area.

9 And I guess my question is, in terms of
10 what you -- why you are saying that they have not
11 met their burden of proof, what is the
12 incremental effort that you think is required at
13 this point with respect to what's been done to
14 identify natural and exemplary communities?

15 A (Lew-Smith) Right. So, like I mentioned in my
16 direct testimony earlier, they have some notes on
17 vegetation, which is what they presented and what
18 you referred to there. And that's different than
19 an active natural community survey and
20 assessment. The natural communities in New
21 Hampshire, it's right here, there is a book about
22 the natural communities of New Hampshire, which
23 this is called "The Nature of New Hampshire",
24 written Dan Sperduto and Ben Kimball, which lays

[WITNESS PANEL: Lew-Smith|Parsons]

1 out vegetation types or natural communities, and
2 they're classified based on the vegetation. And,
3 in order to actually do a natural community
4 assessment, you apply this classification to the
5 vegetation on a particular site, first off.
6 Okay. That was never done.

7 Second, you -- so, what I'm getting at,
8 there's a methodology here for doing --
9 performing a natural community assessment, which
10 just wasn't undertaken as part of the review that
11 the Applicant did.

12 And I can go through that, what that
13 methodology is, if that's helpful. But I also
14 don't want to burden you with the statistics, if
15 it's not what you're looking for.

16 Q Well, it is my question. Is what is it that you
17 are saying that they should have done, especially
18 given what they have already done, and the fact
19 that Natural Heritage Bureau, the Applicant's
20 consultants, and even yourself, think that it's
21 unlikely for there to be natural -- or, I'm
22 sorry, natural and exemplary communities within
23 this Project?

24 A (Lew-Smith) So, it's our position that you

[WITNESS PANEL: Lew-Smith|Parsons]

1 shouldn't have to guess at these things. Right?
2 Like, "it's unlikely", "we think it might not
3 be". Just get the data, do the analysis, and
4 then you know. And that's what didn't happen.

5 So, the process is to start with a
6 desktop review, that part was done. Then, you
7 have to get in the field, characterize the
8 vegetation, so you can classify it. Fit it into
9 the known classification that's used in New
10 Hampshire.

11 Once you have that, then you assess the
12 community condition, and that takes into account
13 disturbance, invasive species, age classes,
14 diversity, all these different components, to get
15 an idea about what kind of condition that
16 community is in.

17 Then, you take a look at the size of
18 the community. And you also take a look at the
19 landscape context of the community. Is it in a
20 completely forested matrix? Or, is it kind of
21 surrounded by development? And how does that
22 impact community functioning?

23 So, once you do all that, then you can
24 assess it relative to other examples in the

[WITNESS PANEL: Lew-Smith|Parsons]

1 state. Okay? And, through that analysis, that's
2 how you determine if it's an exemplary natural
3 community.

4 MR. IACOPINO: Thank you, Mr.
5 Lew-Smith. I don't have any further questions,
6 Madam Chair.

7 CHAIRWOMAN MARTIN: All right. Thank
8 you. Attorney Neville, do you have redirect?

9 MS. NEVILLE: I don't. Thank you.

10 CHAIRWOMAN MARTIN: Okay. And,
11 Attorney Patch, anything further from you?

12 MR. PATCH: No thank you.

13 CHAIRWOMAN MARTIN: Okay. The
14 witnesses are excused.

15 At this point, it's almost three
16 o'clock. Attorney Neville, timingwise with your
17 witness, can we take the break now?

18 MS. NEVILLE: Yes. Absolutely. I
19 would appreciate it. And I thank Attorney
20 Iacopino. The witness says that he has cleared
21 his schedule. So, he is available.

22 CHAIRWOMAN MARTIN: Okay.

23 MS. NEVILLE: Thank you.

24 CHAIRWOMAN MARTIN: You're welcome.

[WITNESS: Reynolds]

1 So, we will take a fifteen minute recess, and
2 return at 3:10.

3 *(Recess taken at 2:56 p.m. and the*
4 *hearing resumed at 3:15 p.m.)*

5 CHAIRWOMAN MARTIN: All right. Then,
6 back on the record. Attorney Neville.

7 MS. NEVILLE: Thank you.

8 CHAIRWOMAN MARTIN: You may proceed
9 with your witness, Mr. Reynolds. Steve, if you
10 would do the honors.

11 *(Whereupon **David S. Reynolds** was duly*
12 *sworn by the Court Reporter.)*

13 **DAVID S. REYNOLDS, SWORN**

14 **DIRECT EXAMINATION**

15 BY MS. NEVILLE:

16 Q Okay. Would you please state your name for the
17 record?

18 A David Scott Reynolds.

19 Q And could you share the name of your employer?

20 A I have two employers. I work for St. Paul's
21 School, in Concord, New Hampshire. And I also
22 work for myself, North East Ecological Services.

23 Q And would you briefly describe the job you do for
24 yourself?

[WITNESS: Reynolds]

1 A So, I'm a managing partner of North East
2 Ecological Services. As a consultant, I have
3 been doing that for about 25 years. Most of my
4 work involves conservation biology and population
5 biology of temperate bats. My clients are
6 government agencies. I'm trying to do data gap
7 analysis on information about species of concern,
8 and development clients, who are handling some
9 type of state, federal regulation in regards to
10 bats.

11 Q Okay. And could you please state your
12 qualifications?

13 A I earned my undergraduate degree at McGill
14 University, in Montreal, in Biology -
15 Environmental Science. And I earned a Ph.D. at
16 Boston University in Physiological Ecology,
17 studying population biology of bats. Since then,
18 I've been a Certified Wildlife Biologist by the
19 Wildlife Society, and President of the North East
20 Bat Working Group, a group of research and agency
21 folks who study bat-related issues and
22 conservation priorities throughout the
23 northeastern North America.

24 Q And you were retained and worked with Arrowwood

[WITNESS: Reynolds]

1 Environmental for this Project, correct?

2 A Yes, I was.

3 Q As a consultant?

4 A Yup. Under my specialization of bats.

5 Q Okay. And could you share what the purpose of
6 your testimony is here today?

7 A So, I was asked to work with Arrowwood
8 Environmental to assess material submitted by the
9 Applicant related to the impacts of the Chinook
10 Project, the proposed Project, on habitat issues
11 and conservation issues relating to bats and bat
12 resources. I was asked to place this information
13 in the context of the other materials available
14 to us, and basically to review it in the context
15 of the SEC requirements to assess unreasonable
16 adverse effects.

17 Q And you submitted prefiled testimony, which is
18 contained within CFP Exhibit 1, correct?

19 A Yes, I did.

20 Q And your report is incorporated into CFP Exhibit
21 2, correct?

22 A Yes. I don't know the exhibit numbers, but I
23 believe so, yes.

24 Q Okay. After you submitted your prefiled

[WITNESS: Reynolds]

1 testimony and report, the Applicant attempted to
2 address or addressed many of the items you
3 identified in your report and testimony, correct?

4 A Yes. It's my understanding they submitted a
5 supplemental testimony, as well as a supplemental
6 Bat Survey Report.

7 Q And, given the filing of those supplemental
8 submissions by the Applicant, you did not submit
9 any supplemental testimony or report here,
10 correct?

11 A That is correct.

12 Q And I want to take a few minutes to walk through
13 certain areas the Applicant addressed or
14 attempted to address in supplemental testimony
15 subsequent to your report, okay?

16 A Sounds good.

17 Q All right. So, the first issue that I am
18 identifying is significant wildlife species of
19 bats. And, if you could just lay some groundwork
20 for the Committee, to understand what you talked
21 about in your report, I believe it was all
22 non-Northern long-eared bats?

23 A I'm not sure of the question.

24 Q Can you --

[WITNESS: Reynolds]

1 A Was it in regards to the significant wildlife
2 species of bats?

3 Q Yes. But I think you specifically honed in on
4 the non-Northern long-eared bats as significant.

5 A Oh. I think, yes, and my concern, so I guess I
6 would invert the wording of it, the Applicant
7 focused on one species of bat, the northern
8 long-eared bat. But, based on the SEC criteria,
9 the 2020 criteria of significant wildlife
10 species, all eight species of bats in New
11 Hampshire are significant wildlife species. All
12 eight are identified, either federally or at the
13 state level, as endangered, threatened or species
14 of concern. So, they really should have
15 addressed all eight species of bats in their
16 desktop analysis, as well as their bat survey.

17 Q And, at the time you submitted your report, how
18 many species had they surveyed?

19 A For their analysis, they had only looked at the
20 northern long-eared bat. The survey that they
21 conducted is a general bat survey. So, for the
22 most part, it addresses most of the bat species
23 that are on the landscape, the general survey
24 methods they use for most species. The one

[WITNESS: Reynolds]

1 species, which I'm sure will come up later, that
2 has unique habitat requirements and sampling
3 requirements was the eastern small-footed bat.

4 Q And, when you raised the concern that you just
5 identified, did the Applicant take any responsive
6 measures in supplemental testimony or reports?

7 A No, they didn't. I mean, basically, they argued
8 that the northern long-eared bat was the only
9 species that was brought up in consultation with
10 New Hampshire Fish & Game, which I'm sure was a
11 true statement. But I was going by the SEC
12 guidelines, that species of -- significant
13 wildlife species was -- my charge was to look at
14 the impact of this Project on all significant
15 wildlife species.

16 Q Okay. And, to be fair, the Applicant submitted
17 letters, correct, from the New Hampshire Fish &
18 Game and U.S. Wildlife --

19 A Fish & Wildlife Service.

20 Q Thank you. And those two agencies identified
21 what, if you recall?

22 A So, they put in I think a letter request for
23 known occurrences of threatened or endangered
24 species to the U.S. Fish & Wildlife Service and

[WITNESS: Reynolds]

1 the Natural Heritage. I believe all they got
2 back from Fish & Wildlife and Natural Heritage
3 was potential for northern long-eared bats. So,
4 that was the focus of their survey efforts.

5 And I believe they filed memos and
6 minutes from Fish & Game meetings that only
7 referenced the northern long-eared bat. But I
8 didn't see, and I wouldn't have expected to see,
9 a letter from Fish & Game that said, you know,
10 "these other species are not a concern." I think
11 they were told to focus on that species in
12 particular.

13 Q Okay. And you raised a concern in your initial
14 report about "inadequate data to conclude an
15 absence". Can you flesh that out for me?

16 A Sure. So, like I said, they did, and one of the
17 Committee members referred to, you know,
18 "incremental effort" earlier on, so they did an
19 incremental effort for this as well. They
20 started with the desktop survey, where they
21 looked at, and I won't put too many words into
22 their mouth, but essentially looked, without
23 doing any work in the field, about likely impacts
24 or species to be impacted. And I think that

[WITNESS: Reynolds]

1 would include the consultations they did with
2 Fish & Game and U.S. Fish & Wildlife.

3 They were instructed to do a
4 wildlife -- a bat acoustic survey. They were
5 instructed to follow the U.S. Fish & Wildlife
6 guidelines for that survey. At the time that the
7 survey was conducted, the appropriate guidelines
8 were the 2016 guidelines for the Indiana bat,
9 which is a federally endangered species, who's
10 been monitored by all regions of Fish & Wildlife
11 in which it's found. So, there are good sampling
12 protocols. There's -- a lot of research has been
13 done since the '80s to make the 2016 survey
14 guidelines the best available methodology. So,
15 they followed that guideline. It's since been
16 adopted to be the guideline for the northern
17 long-eared bat as well.

18 And that basically tells them the
19 minimum amount of sampling effort they need to do
20 for a project of a given size, how the sampling
21 equipment should be maintained, how the sampling
22 equipment should be deployed, what habitat should
23 be used, how it should be analyzed, and what to
24 do in the event that there are call signatures

[WITNESS: Reynolds]

1 that are consistent with the species of concern.

2 So, they did their survey in 2016, I
3 believe. But they did not meet the minimum
4 requirements of that survey. They were about, I
5 believe, thirty something percent short of the
6 minimum requirement. I had other concerns about
7 both how they chose habitats. But that point is
8 moot, because the whole basis of determining
9 presence or absence by that guideline, is that,
10 if you do at least the minimum amount of survey
11 work, and you follow the automated protocols, you
12 get a statistical outcome called a "MLE", a
13 "Maximum Likelihood Estimator". And, if that MLE
14 value is less than 0.05, meaning -- it means that
15 there's less than a 5 percent chance that, given
16 that sampling effort, the species that was being
17 surveyed for was on the landscape. So, you have
18 less than a 5 percent chance that you did what's
19 called a "Type 1 error". That they were present,
20 but you failed to document them using the
21 appropriate methodology.

22 Because they didn't meet the minimum
23 sampling effort, that whole approach goes out the
24 door. And, so, if you don't do an appropriate

[WITNESS: Reynolds]

1 survey, the guidelines state that you must assume
2 presence. So, given that they didn't do that,
3 they essentially had to assume the presence of
4 all those species on the landscape as present.

5 Q But then, after your report, but in supplemental
6 testimony, another survey was conducted,
7 correct?

8 A Correct.

9 Q And do you have an opinion on that subsequent
10 survey?

11 A I have not had time to go through the actual
12 details of it, in terms of the sampling effort.
13 So, they boosted up the sampling effort to meet
14 the newer guideline requirements, the 2020
15 guidelines. I believe they met those sampling
16 requirements, and pretty much followed similar
17 acoustic monitoring protocols. So, they have at
18 least met the sampling effort, so that you can
19 evaluate the validity of the MLE values.

20 Q And, so, while we're on this topic, did you have
21 any concerns related to eastern small-footed
22 bats, and how that might fit into the sampling
23 effort?

24 A So, yes. So, I think they tried to address two

[WITNESS: Reynolds]

1 of my concerns with the new survey protocols.
2 One, to survey adequately, in terms of effort,
3 and they did that. And then, they targeted a
4 habitat feature that had been brought up in one
5 of our meetings, I forget the actual number.
6 But, when I was on-site with Dana Valleau, and
7 during conversations we've had with counsel,
8 there's one or two features on the landscape that
9 seems potentially likely roosting habitat. So,
10 they targeted some of those for the acoustic
11 monitoring. So, they both increased the overall
12 sampling effort, and then actually incorporated
13 some sampling effort targeted towards the eastern
14 small-footed bat.

15 Q And, so, are you -- do you have an opinion today,
16 as you sit here, about the presence of eastern
17 small-footed bats, based on those results?

18 A I'm happy they met the minimum survey
19 requirements. I don't think, again, that they
20 surveyed properly. I think their choices of
21 microphone deployment, and with the exception of
22 that one feature, really didn't sample the site
23 well. And, even in the case of that one feature,
24 I don't think the people who did the survey fully

[WITNESS: Reynolds]

1 understand the technology they're using. Because
2 they put the microphones outside of the capture
3 radius of the microphones, so that the feature
4 they were actually sampling was too far away to
5 be -- to capture many of the bats that would have
6 been using that feature had they been in it.

7 That being said, it was a much better
8 survey than the initial survey. You know, I
9 would have loved to have had time to review it in
10 more detail. But I'm happier with what -- they
11 should have done this survey the first time. It
12 would have been a much easier process.

13 Q If the presence of eastern small-footed bats, if
14 you do not feel comfortable saying whether or not
15 they are on the site, what could be done to
16 address eastern small-footed bats?

17 A So, I think Mr. Lew-Smith sort of referenced
18 this, too, to one of the questions that were
19 asked earlier, about, you know, "what could you
20 do and what could the Applicant have done?" And
21 his response was something to the effect of, you
22 know, "we shouldn't have to be guessing." And
23 that's sort of where I feel we are.

24 I don't know that they're there. The

[WITNESS: Reynolds]

1 report -- the supplemental report implies that
2 they were not found there. But there's, you
3 know, without getting into too many of the
4 details, there's over 150 calls that were
5 eliminated as not being eastern small-footed
6 bats, with no real justification.

7 So, they could be on the landscape;
8 they might not be. What we do know is that that
9 region of New Hampshire is probably the best
10 documented area for eastern small-footeds, I'll
11 say, in the Northeast. At least it's the most
12 published set of sites, with research I have
13 done, and Jacques Veilleux has done at Franklin
14 Pierce University.

15 So, we know they're there. We know the
16 little brown bat is there. We know that, unlike
17 almost any study that's been done that I'm aware
18 of in the last five or six years in the
19 Northeast, that *Myotis* bats, which include those
20 two species, as well as the northern long-eared
21 bat, are actually the most abundant bats detected
22 at the site, which you never see anymore. There
23 was something unique happening at this site.
24 And, so, I think, even though the data are

[WITNESS: Reynolds]

1 ambiguous, I think some precaution needs to be
2 taken.

3 There's not much the developer can do
4 for a house-roosting bat, like the little brown
5 bat. You know, it's not their regulatory burden
6 to control how they're utilizing people's houses
7 in the Fitzwilliam area. There's not much they
8 can do there, except for maintain some good
9 wildlife habitat, which I think they're invested
10 in doing.

11 There's not much they can do, given the
12 current state of the Project site, to improve
13 northern long-eared bat habitat. And there's
14 some data to support them not being abundant at
15 that site regardless. But that leaves a lot of
16 ambiguity about the small-footed bat.

17 And my proposal is, it's sort of been
18 given several different names, so I don't
19 particularly care what the name is, but,
20 essentially, this is a geomorphic bat that
21 uses -- that uses rock features in multiple
22 stages of its life cycle. And my proposal was
23 that, if you're going to mess around with the
24 rock features on that Project site, that

[WITNESS: Reynolds]

1 site-specific and temporally-linked surveys
2 should be done to make sure those bats are not in
3 those features before they're altered, and that
4 would include blasting.

5 Q So, what you just testified to, the "Rock Feature
6 Monitoring Plan" I'll call it, is that something
7 that would be incorporated into a potential
8 blasting plan?

9 A Yes. I think that's up to somebody. I mean, I
10 think it's a place where it could be. The
11 problem with a blasting plan is, my understanding
12 from other projects, is those are often
13 developed -- the details of which are developed
14 well after SEC approval. So, I guess there would
15 be -- have to be some type of agreement. And,
16 so, the term, you know, "programmatic agreement"
17 got brought up. I think that scares some people.
18 I don't know what the full details of a
19 programmatic agreement are.

20 But, yes. I think, if there's a
21 potential to remove a rock feature or to blast,
22 then there needs to be some type of effort done
23 to be confident that there's no impact to
24 roosting bats. Because you won't be able to see

[WITNESS: Reynolds]

1 them on the landscape, and they're pretty much
2 defenseless in that substrate.

3 Q Okay. And I just want to make sure I clearly
4 understand what the Rock Feature Monitoring Plan
5 might be. I think you testified to it. But can
6 you explain to me again, somebody would go out to
7 the site before blasting or a modification to
8 rock features?

9 A So, yes. Assume the construction, blasting,
10 bulldozing would occur during the day. So, I
11 would propose that, prior to, you know, the night
12 before or two nights before, or for two
13 sequential nights before that was done, a
14 microphone is put out, very similar to the effort
15 that was done both in 2016 and this past summer,
16 and sample the face of that feature, to see if
17 bats are coming out of that feature as they merge
18 in the night.

19 They will do their thing on the
20 landscape. They will return there in the
21 morning. And, so, if you go back there in the
22 daylight hours, it's very unlikely you're
23 actually going to see them in the rock feature,
24 but they could be there. And, when you start

[WITNESS: Reynolds]

1 blasting, which I'm not sure there's a lot of
2 exposed material at this site, but those rock
3 features in particular, you'll never know you
4 killed them. There will be no evidence of it.

5 So, I think it would be a minimal
6 effort. It's not labor-intensive, it's not
7 equipment-intensive. It's a small imposition, to
8 make sure they're not impacting one of the least
9 known bats in North America.

10 Q And, again, that would be if there was need to
11 impact rock structures, right?

12 A Oh, yes. Only if they need to blast or remove or
13 relocate a major rock feature.

14 Q And you went to the site, correct?

15 A Yes, I did.

16 Q Do you recall when you went to the site?

17 A The summer, I don't have the date.

18 Q Okay. But this past summer?

19 A Yes.

20 Q Did you see many rocky features?

21 A We just saw two. And we stopped at one of them
22 in particular, and that was one of the features
23 that, you know, subsequently had their
24 subcontractor survey. There was another feature

[WITNESS: Reynolds]

1 that was earlier on that I didn't get a feature
2 number for.

3 But, yes. There's not an abundance of
4 those features. I don't think it's a huge
5 impact. It's my understanding that the Applicant
6 doesn't think they would need to touch any of
7 them. So, it may not be any impact whatsoever.
8 But I think the system should be in place should
9 those conditions change, that those species are
10 protected.

11 Q And those species are the eastern small-footed
12 bats, correct?

13 A Yes. Sorry. A single species, the eastern
14 small-footed bat.

15 Q Okay. And then you also identified little brown
16 bat impacts, correct?

17 A Yes.

18 Q And do you recall, like are you able to flesh it
19 out a little bit for us, to just give some
20 ground -- like a baseline for the Committee right
21 now on what your issue was related to little
22 brown bats?

23 A Yes. And my issue with little brown bats, you
24 know, has relatively little to do with the

[WITNESS: Reynolds]

1 Project. But, you know, one, this is -- this is
2 my bat. This is the one I've studied for 20
3 something years, I'm very passionate about. And
4 they have seen anywhere from a 96 to a 98 percent
5 decline in the last decade due to a disease
6 called "white-nose syndrome". So, there is a big
7 issue with little brown bats.

8 Unfortunately, they went from being the
9 most common bat in the Northeast, particularly in
10 southern New Hampshire, such as this area, to
11 being virtually nonexistent. We no longer have
12 any little brown bats that are known to hibernate
13 in the State of New Hampshire. They have all
14 disappeared. Most sites that used to have, you
15 know, 30 to 40 percent of the captures of this
16 species, we haven't seen them in a summer
17 capture -- I haven't seen them in a summer
18 capture in probably seven years. So, they're
19 functionally extinct, or what we would call
20 "extirpated" from the region. They're still
21 doing well out West. It's found throughout
22 North America. But they're gone from our
23 landscape.

24 But, yet, they represent anywhere from

[WITNESS: Reynolds]

1 11 to 17 percent of the sample population at this
2 site. So, I think they're actually holding on in
3 southern New Hampshire. We don't know whether
4 it's something about where they're hibernating,
5 because it's a disease that is transferred during
6 hibernation. So, if they're hibernating
7 somewhere nearby that is clean, and they're only
8 letting other clean bats in, then they may be
9 persisting. It could be a genetic resistance
10 that's developed. We don't know. But what's
11 happening in southern New Hampshire is great
12 news. It's unique. I would say it's unique.
13 It's great news. It's not common. So, it would
14 be nice to protect them.

15 Is there much this Project can do to do
16 that? Not really. It's, I think, just being
17 good stewards of the landscape, you know,
18 maintaining a rural character, so that people are
19 tolerant of bats in their outbuildings and barns,
20 and, you know, not converting old barns into, you
21 know, artist sheds and, you know, tofu farms and
22 other, you know, examples of suburbia, would all
23 help protect the species.

24 Q So, what I'm understanding is that the little

[WITNESS: Reynolds]

1 brown bats are primarily a house-roosting
2 species, is that accurate?

3 A Yes.

4 Q So, the Applicant has sufficiently documented the
5 species, correct?

6 A Yes, they have.

7 Q And you do not have concerns about this Project
8 on little brown bats, correct?

9 A No. There's nothing. They did nothing --
10 whatever they do at the Project site is not going
11 to change the trajectory of their fate. And
12 their protection of habitat in that area will not
13 hurt the bat in any way, that species.

14 Q Okay. And we talked about eastern small-footed
15 bats. Do you want to say anything more about the
16 potential Rock Feature Monitoring Plan?

17 A No. Just that I don't know how such a plan would
18 get developed. I think it should be developed in
19 consultation with, you know, wildlife people. It
20 shouldn't be just a DES survey, a DES issue.

21 My understanding of most blasting plans
22 is they're really focused on water protection and
23 not blowing people up, but there is no wildlife
24 component. So, you would need somebody to

[WITNESS: Reynolds]

1 provide the best science for the wildlife
2 component of it. And it would just need to be
3 done in a timely manner, under appropriate
4 sampling conditions. And, you know, someone
5 would need to be given the authority, you know,
6 the "no go" authority, that, if the monitoring
7 identified potential risk, that there was a
8 series of events that would occur until that risk
9 could be properly assessed.

10 Q And, if there was such a Rock Feature Monitoring
11 Plan, is there a certain time of year where you
12 would need to implement that plan or is it
13 year-round?

14 A I mean, it would be easiest for the Applicant to
15 do that during the summer, because they're going
16 to have the best sampling opportunities. I
17 assume that would be consistent with their
18 construction schedule.

19 But, no. I mean, there wouldn't be any
20 time limits. The hard part -- I don't think any
21 of the features at this site are likely being
22 used in the winter. So, if they were going to do
23 only winter modifications, they probably wouldn't
24 have to do the monitoring plan. But, if they're

[WITNESS: Reynolds]

1 going to do any modification during the active
2 season, I think they should have a monitoring
3 plan. It would be easiest for them to do it in
4 the peak summer months.

5 Q So, is the bat active season May 15th through
6 August 15th?

7 A Yes. That's good. That's -- they're a little
8 bit shifted earlier than that, but I think that
9 would be a fine -- that's fine.

10 Q Well, what would you say is the best? I don't
11 want to put words in your mouth.

12 A No, I mean, I think that would be consistent for
13 some of the other limitations and restrictions
14 they're going to have. Yes, any time May -- May
15 through August would be when they're most likely
16 on the landscape. And they're going to have the
17 most seasonal weather for sampling in the, you
18 know, late June to August time schedule.

19 Q There was a question raised on a different day in
20 this hearing wondering if there's any evidence
21 that bats are impacted by sounds coming from
22 transmission lines. Do you have an opinion as to
23 that?

24 A I mean, I guess, if any species would -- group of

[WITNESS: Reynolds]

1 species would be good to look at the impacts of
2 nondetectable sounds or at least nonaudible
3 sounds to our hearing spectrum, it would be bats,
4 because they rely on ultrasound so much.

5 But, to my knowledge, there is no real
6 impact. There's been one or two studies that
7 looked at radar, you know, high energy systems.
8 I know from research I have done, at a variety of
9 either energy development sites or just other
10 places, that there are certain mechanical systems
11 that interfere with our microphones. And, if
12 they interfere with our microphones, they're
13 probably interfering with the bats, because the
14 bat -- the microphones are trying to hear the
15 same thing the bats are trying to hear. But I've
16 sampled under transmission corridors many, many
17 times, and never really had any evidence that
18 there's anything in the ultrasonic acoustic range
19 that would impact bats.

20 Q Okay. And other than what we just discussed, if
21 you were asked the same questions today that you
22 were asked in prefiled testimony under oath,
23 would your answers and testimony be the same
24 today?

[WITNESS: Reynolds]

1 A Can you clarify that again?

2 Q Other than what we've already talked about,
3 because I know there was supplemental reports and
4 testimony submitted, I want to make sure, other
5 than what we've just identified, your opinions
6 that are contained within the prefiled testimony
7 and report submitted in July are still current
8 and accurate?

9 A Yes. None of my opinions have changed since the
10 original filing.

11 Q Are there any remaining issues specific to bats
12 that you believe is important for this Committee
13 to consider for this Project?

14 A I do not believe so.

15 MS. NEVILLE: Thank you. Those are all
16 the questions I have, Madam Chair.

17 CHAIRWOMAN MARTIN: Okay. Attorney
18 Patch.

19 MR. PATCH: Okay. Good afternoon,
20 Dr. Reynolds. My name is Doug Patch. You may
21 remember from the technical session, I'm the
22 counsel to Chinook Solar. And I have a few
23 questions for you.

24 **CROSS-EXAMINATION**

[WITNESS: Reynolds]

1 BY MR. PATCH:

2 Q I want to start with the written testimony that
3 you submitted. I mean, isn't it true that you
4 found, through your analysis, that the Project is
5 "unlikely to have a population-level impact on
6 *[five species of bats, that included]* the
7 silver-haired bat, the eastern red bat, the hoary
8 bat, the big brown bat, and the tri-colored bat,
9 *[so long as]* tree removal and construction
10 activities are conducted in accordance with best
11 management practices", which you said the
12 Applicant had already outlined in its
13 Application. Is that correct?

14 A Correct.

15 Q And didn't your testimony also indicate that the
16 Project -- it's unlikely that the Project will
17 contribute to unreasonable decline of little
18 brown bats, and I think you've said this in your
19 direct testimony today as well?

20 A Correct. And, again, I do agree with that. I do
21 want to highlight, and again it's not related to
22 this Project, but there is something unique about
23 Fitzwilliam that we're not sure what's going on.
24 But I don't think the -- I don't think the

[WITNESS: Reynolds]

1 developer -- I don't think your client really can
2 do much about that, positively or negative.

3 Q Okay. And you've had a chance to look at the
4 subsequent survey that was done in August of this
5 year. And, for the record, it was attached to
6 Mr. Valleau's supplemental testimony. I believe
7 it was Attachment B to his supplemental
8 testimony. You've had a chance to look at that
9 report that was done?

10 A Yes, I have.

11 Q And, for example, on Page 12, it says "Large
12 stands of forest in the northern and southern
13 limits of the LOW", which is defined earlier as
14 the "Limit of Work" area of 158 acres, --

15 A Can you repeat the page number? Sorry to
16 interrupt you.

17 Q Yup. It's Page 12.

18 A Thank you.

19 Q Under 4.3, "Little Brown Bat and Tri-Colored
20 Bat". And it says "Large stands of forest in the
21 northern and southern limits of the LOW had
22 undergone logging activities in 2019. Any
23 additional clearing required within the LOW would
24 not be considered a significant habitat loss in

[WITNESS: Reynolds]

1 the context of the broader landscape and common
2 logging activities in the region and would likely
3 not have a negative impact on the species
4 populations." Did I read that correctly?

5 A Yes. To clarify, and even expand, the bats are
6 in a lot of trouble for a variety of reasons
7 throughout North America. But, for at least for
8 the eight species we have here, habitat loss is
9 not the primary issue for any of them. It's
10 either this white-nose disease, which has
11 decimated five of the species, or it's larger
12 scale stuff, like wind power, that's impacting
13 three of them.

14 But, yes. That's a true statement.
15 And I think it's general for broader than just
16 those two species.

17 Q I mean, I've been involved in solar projects, and
18 I think you may have submitted testimony on -- I
19 mean, on wind projects, and you've submitted
20 testimony on wind projects probably. But a
21 passive solar system like this, as compared to a
22 wind -- a wind electric generating system that
23 includes turbines, I mean, there's a huge
24 difference in terms of impact to bats, isn't

[WITNESS: Reynolds]

1 there?

2 A Yes. Yes, I think -- I think the big concern for
3 wind is among three species, all of which you
4 have already mentioned that I had stated I did
5 not think were at risk in this Project, the
6 migratory tree bats, the hoary bat, the eastern
7 red bat, and the silver-haired bat.

8 You know, these types of projects are a
9 different type of impact. You know, wind power
10 is really a mortality/migratory issue. And, you
11 know, these types of development projects are,
12 you know, a habitat alteration issue.

13 So, they're different impacts. But,
14 like I said, habitat alteration for our eight
15 species is not a big issue locally.

16 Q Okay. And, in your testimony, I'm looking at
17 Pages 7 to 8, didn't you also indicate that
18 "given the Applicant's proposal to conduct tree
19 removal during the non-active season", which I
20 think you indicated was "November through March",
21 which is recognized in the recommendations from
22 Fish & Game, and given the Applicant's proposal
23 to "conduct construction activities in accordance
24 with U.S. Fish & Wildlife Service best management

[WITNESS: Reynolds]

1 practices...the Project is unlikely to have
2 population-level impacts on the northern
3 long-eared bat." That was your testimony.

4 A Correct. Yes. That time window is a
5 prescription of the 4(d) ruling for the U.S. Fish
6 & Wildlife Service. That's not anything I made
7 up, or the developer. That's, if you conduct
8 your tree removal activities during that time
9 period, the general consensus is it's unlikely to
10 impact that population.

11 Q And that's part of the recommendation that has
12 been submitted by Fish & Game through DES in this
13 particular case, isn't it? Have you looked at
14 that recommendation?

15 A Yes. I believe they have recommended that same
16 time window.

17 Q Yes. And that's the only recommendation that the
18 Fish & Game Department made relative to bats, is
19 that correct?

20 A As far as what's -- yes, what's in the testimony,
21 correct, or what's in the appendices.

22 Q Okay. And what's in the actual recommendation
23 that Fish & Game made, as part of the Alteration
24 of Terrain Bureau recommendation to the Site

[WITNESS: Reynolds]

1 Evaluation Committee, is that correct?

2 A Can you rephrase the question or restate the
3 question?

4 Q Well, I'm looking at what has been marked as
5 "Applicant's Exhibit 84", and that's the total of
6 the Fish & Game recommendations that are made
7 relative to this Project. And the first one is
8 "Protection for Bats". And it says "Tree
9 clearing for the Project shall occur between
10 November 1 and March 31 to avoid potential impact
11 to roosting bats during the summer season when
12 they are active throughout the landscape." Is
13 that your understanding of what Fish & Game
14 recommended relative to bats?

15 A Yes, it is.

16 Q And that's, in fact, the only thing they
17 recommended relative to bats, correct?

18 A As far as I know. Correct.

19 WITNESS REYNOLDS: Sorry. I'm just
20 about to lose power. I've got to -- you can
21 talk, but I've got to jump off screen for a
22 second just to plug my computer in, but I can
23 hear you.

24 MR. PATCH: Okay.

[WITNESS: Reynolds]

1 BY MR. PATCH:

2 Q And I believe Ms. Neville asked you this
3 question, but you conducted a site assessment,
4 and I had it as June 17th of this summer. And
5 whether or not that's the date, but you did a
6 site assessment, correct?

7 A Yes. That sounds accurate.

8 Q And part of that you looked at rock or stone
9 features on the site, correct?

10 A Correct.

11 Q And I think you explained why those are of
12 interest or relevant to your assessment. I don't
13 know if you want to do that briefly again?

14 A Just that this one particular species, the
15 eastern small-footed, is a rock-roosting species.
16 It's the only species like it we have in the
17 Northeast. And, although the survey that the
18 Applicant did initially, in 2016, although it was
19 technically targeted at the northern long-eared
20 bats, most of the other bats are using the
21 landscape in a pretty similar way. So, even
22 though it's a targeted survey, it hits the
23 community pretty fairly. The one species that
24 has the smallest home range, the more

[WITNESS: Reynolds]

1 *[indecipherable audio] --*

2 *[Court reporter interruption.]*

3 **BY THE WITNESS:**

4 A So, what makes this species unique is a really
5 small home range, their unique habitat
6 requirements, that they're bound to these rock
7 features. And, in some cases, like in Surry, New
8 Hampshire, they appear to be bound to those rock
9 features year-in and year-out throughout the
10 season. So, it's just a unique habitat
11 requirement, which requires, if you have an
12 inclination that they're present on the
13 landscape, you have to sample in a unique way.

14 BY MR. PATCH:

15 Q And isn't it true that, during that assessment,
16 when you visited the site, that you only found,
17 really, I think you said "two rock features", but
18 the only one that I saw a photograph of, in the
19 response to a data request we asked, was Feature
20 168, which is actually attached, Attachment C, to
21 Mr. Valteau's supplemental testimony. So, -- but
22 you're saying you found "two". And, were those
23 both pretty much the same? I don't know if you
24 have that paragraph in front of you, but it's a

[WITNESS: Reynolds]

1 photograph, basically, of what looks to me like a
2 rock pile.

3 A Yes. The other one we had found earlier. And,
4 again, just to clarify, it was a walk-through
5 survey. So, we weren't there looking for rock
6 features. Essentially, the only direct request I
7 had was that we visited each of the sampling
8 sites where the microphones were placed. So,
9 Dana was taking us around, you know, path of
10 least resistance to each of the -- to each of the
11 sites.

12 The other site we -- the rock feature
13 we saw, I saw, because we stopped for a little
14 bit, because he found an error in the wetland
15 delineation. And, so, his crew was addressing a
16 wetlands boundary, was moving the wetlands
17 boundary. So, while they were doing that, I just
18 walked around a little bit, and there was another
19 rock pile. It wasn't as well exposed as the
20 feature that I took the picture of and that Dana
21 testified to.

22 So, I mean, there are other features.
23 There's rock walls. But, as I said in the
24 technical session, you know, Dana knows those

[WITNESS: Reynolds]

1 sites and those features well. So, he knows
2 really what's on the landscape. They have been
3 well-documented, is my understanding.

4 Q And they were actually, the features that you
5 talked about, I think you've already indicated
6 this, but just to confirm this, they were
7 selected for the acoustic detection deployment
8 that was done when they conducted the August
9 survey, correct?

10 A Correct.

11 Q And Mr. Valleau, in the prior testimony to this
12 Committee, described these rock features as
13 "anthropogenic", which I had to ask him what he
14 meant by that, because it wasn't a term I was
15 familiar with. But, if I understand correctly,
16 that means they were manmade. Is that fair?

17 A Correct. So, this species will use natural
18 features. In New Boston, New Hampshire, there's
19 a -- there's a exposed stone face called "Joe
20 English Hill", and they're roosting in that
21 feature, and in the talus material that's fallen
22 at the bottom of it. So, that's a natural rock
23 feature that they're using. And, in Surry, New
24 Hampshire, and, you know, an example of this rock

[WITNESS: Reynolds]

1 feature, there are piles of rocks that they're
2 using.

3 So, they will use, particularly out
4 West, the western species that's most similar to
5 this is using natural features a lot. For the
6 Northeast, for the Eastern Shore, this is found
7 in about nineteen states, where I see them,
8 they're typically quarries, they're typically
9 jumble piles, talus slopes. It's mostly found in
10 rock features -- in anthropogenic features.

11 Q And, so, back to the August report that's
12 attached to Mr. Valleau's supplemental testimony,
13 and back to Page 12, where we were before. This
14 time it's under the heading "Eastern Small-footed
15 Bat". But I wanted to read to you a couple of
16 sentences, three sentences from that section of
17 the report. Where it says "The most promising
18 rock features in the Project Area were
19 identified, one by North East Ecological Services
20 and one by Tetra Tech, and surveyed for 2.5 to 6
21 detector nights each. No eastern small-footed
22 bat passes were recorded at these locations.
23 While they may serve as suitable habitat, these
24 features are not unique or even preferential

[WITNESS: Reynolds]

1 within the broader landscape." Did I read that
2 correctly?

3 A You read it correctly. I don't agree with it.
4 But you did read it correctly.

5 Q Okay. Could you explain what you don't agree?

6 A Well, starting backwards, it is suitable, this is
7 suitable habitat, but these are relatively unique
8 features. And I don't know of other activities
9 that would have created these rock piles outside
10 of the Fitzwilliam, and neither does the
11 developer. So, these are fairly unique regional
12 features.

13 And, like I said a few minutes ago,
14 this species has the smallest home range of any
15 species of bat in the area. So, you know, some
16 of these bats may not leave the Town of
17 Fitzwilliam on a given night. So, if that rock
18 pile or if one of those rock piles was a
19 significant feature, that may be the only feature
20 that defines about six months of its life. I
21 don't know that that's the case. I'm just -- I
22 don't think you can make the statement that these
23 are "abundant features".

24 I know that they concluded there were

[WITNESS: Reynolds]

1 no eastern small-footed bats recorded at these
2 locations. But I also am not overly confident in
3 how that conclusion was reached. The sites that
4 were targeted for -- the rock features that were
5 targeted acoustically had the highest rates of
6 bat activity of any of the sites. They were just
7 determined by the contractor to not be
8 small-footed bats. So, there are clearly bats
9 there.

10 Their microphones, particularly the
11 microphone at the -- let me find the -- I believe
12 it was Site Number 4 was the rock feature that we
13 had identified in technical session, the
14 microphone was placed 20 meters away from the
15 rock pile. The detection range of that
16 microphone is, for a 100 decibel signal, is less
17 than 17 meters. So, the microphone was outside
18 of the detection range of the rock feature.

19 So, there are concerns with the
20 confidence of their statement. I think those
21 concerns can be alleviated by more targeted
22 survey work prior to any need to modify them.
23 And, if you don't need to modify those features,
24 then no additional work needs to be done. But I

[WITNESS: Reynolds]

1 still don't think the new survey properly
2 assessed those features.

3 Q Well, and I thought I heard you say that these
4 were not "unique" features. And I guess I'm
5 trying to understand that. You're saying that a
6 couple of piles of rocks "are not unique
7 features" or they "are unique features", I'm
8 sorry? Because there are piles of rocks,
9 presumably, in numerous places around southern
10 New Hampshire. And, so, I don't understand why
11 these are considered to be so unique?

12 A Well, the rock feature that is pictured is
13 probably about eight feet tall, probably ten to
14 twelve feet in diameter, of medium to large size
15 rock, a lot of pore spaces. People tend not to
16 do that very often. Stonewalls, clearly,
17 stonewalls are super abundant in the Northeast,
18 and I'm not particularly worried about stonewall
19 features.

20 But, yes, the rock -- the rock piles I
21 saw were not super common. Are they unique? No.
22 But are they common and abundant on the
23 landscape? I would argue "no" as well.

24 Q Okay.

[WITNESS: Reynolds]

1 A The fact there's only two of them on this whole
2 Project site means they're not abundant.

3 Q The report also went on to say that "Given no
4 NLEBs or eastern small-footed bats were detected
5 while following the summer survey protocol and by
6 targeting rock features that may serve as
7 potential roosting locations, it is unlikely that
8 the Project will negatively impact the NLEB or
9 eastern small-footed bat." I mean, I take it you
10 don't agree with that either?

11 A Where was that statement from?

12 Q I believe it's the same page. I'm just trying to
13 find the exact quote, but I had it in my notes.

14 A It's from the supplemental report?

15 Q Yes.

16 A No. I mean it's --

17 Q It's actually Page 11. It's under "Conclusion".
18 It's the last sentence under "Conclusion", under
19 4.0, on Page 11.

20 A And, like I say, so, I mean, I don't want to get
21 stuck in the weeds of how the data were analyzed.
22 I don't need to disparage another consultant.

23 What I find problematic, without having
24 the time to analyze myself, is that (1) the sites

[WITNESS: Reynolds]

1 that had the most activity were the rock-related
2 sites; (2) that the genus of bat to which we're
3 focusing on, these three species, the northern
4 long-eared bat, the little brown bat, and the
5 eastern small-footed bat, are all very similar in
6 size, and unfortunately very similar in how they
7 echolocate. But that genus represents at least
8 16 percent of all the bat activities. And,
9 despite hundreds of files that were classified
10 within that genus, none were qualitatively
11 identified as northern long-eareds or eastern
12 small-footed bats, even though the classification
13 error rate for those species is somewhere in the
14 order of 30 to 40 percent.

15 So, I think it's just a very dogmatic
16 statement to say that there's no evidence for
17 either of those species, when anyone who's done
18 this knows that the error rate for identifying
19 these species is extremely high. And, when you
20 have two or three calls, you don't really have to
21 worry about whether one of them is misidentified.
22 But, when you have closer to 200 calls, you've
23 got to be a little bit more cautious in your
24 interpretation of the data.

[WITNESS: Reynolds]

1 Q And, so, you had some discussions with the New
2 Hampshire Fish & Game Department, didn't you, as
3 part of your -- the research and the analysis
4 that you did for Counsel for the Public in this
5 case?

6 A Yes, definitely not in terms of the analysis. I
7 think I just reached out through an email, but I
8 don't remember. It would have been in discovery
9 that you had requested. I think I -- I think I
10 had one email that I sent to Fish & Game, and I
11 got one response back. It was fairly short. It
12 was a general -- it was a very general email,
13 very general response.

14 Q So, with regard to a blasting plan or a
15 programmatic agreement, there's nothing that Fish
16 & Game has suggested in any of the meetings that
17 you've been part of, or to the best of your
18 knowledge the Applicant's been part of, or in the
19 Final Recommendation of it, is there?

20 A Well, I think the Fish & Game wasn't involved in
21 the -- in any component of the blasting plan,
22 because it is done through the DES. So, I don't
23 think they were an invited party to any
24 development or would be an invited party to any

[WITNESS: Reynolds]

1 development of that plan.

2 I did not ask them if they thought it
3 was a good idea. So, their silence on the issue
4 is not that I brought it up and they didn't think
5 it was worth adding to, it just was never brought
6 up. Because that's not a wildlife -- the
7 blasting plan is typically, from what I gather,
8 not focused on wildlife. They focus on eastern
9 small-footed bats, I do acknowledge that. But,
10 again, as I said at the very beginning, you know,
11 I perceive my charge as meeting the criteria of
12 the SEC, not meeting the criteria or the concerns
13 of the Fish & Game. That my job is to provide
14 the SEC with the information that they have asked
15 for, and that includes the eastern small-footed
16 bats.

17 Q But the New Hampshire Fish & Game Department is
18 the State agency in New Hampshire that's
19 responsible for protecting the bat population,
20 isn't it?

21 A Correct. Yes.

22 Q And is there anything that you're aware of that
23 would have prevented them, if they felt that a
24 programmatic agreement or a blasting plan was

[WITNESS: Reynolds]

1 necessary, is there anything that would have
2 prevented them from recommending that to the
3 Department of Environmental Services or to this
4 Committee?

5 A Not to my knowledge, but I don't think they have
6 jurisdiction for a blasting plan. That's, I
7 mean, I don't know they have ever got involved in
8 New Hampshire. I believe they've gotten
9 involved -- their Maine counterparts have gotten
10 involved on projects in Maine.

11 But, no. I don't believe they either
12 feel that's their purview or that they felt was
13 an issue to address.

14 Q I mean, isn't it the latter? Isn't it that
15 they --

16 A You would have to ask them. I grant you that
17 that is definitely an option. That is a
18 possibility. I just -- I didn't ask them, and
19 they didn't reply.

20 Q And, again, the only recommendation that Fish &
21 Game has submitted, ultimately to this Committee,
22 to DES, and they were notified of this Project
23 and notified of their ability under the Site
24 Evaluation law to be able to submit

[WITNESS: Reynolds]

1 recommendations, the only one they have done is
2 with regard to the limit on log clearing that
3 we've gone over before. Is that your
4 understanding?

5 A Yes. But I do not know how much they have gotten
6 involved since the report, and particularly since
7 testimony, where I highlighted their -- the
8 Applicant's initial failure to address those
9 features. So, their lack of concern could have
10 been -- come from the fact that those potential
11 concerns weren't identified in the original
12 monitoring survey.

13 Q Are you familiar with the new rule that the
14 Department of Environmental Services has adopted,
15 it's identified as 1503.19(h), which requires
16 that the New Hampshire Fish & Game Department
17 provide input to the Department of Environmental
18 Services under these circumstances?

19 A Is that -- no, I am not.

20 MR. PATCH: Okay. I have no further
21 questions. Thank you, Dr. Reynolds.

22 WITNESS REYNOLDS: Thank you.

23 CHAIRWOMAN MARTIN: Okay. Thank you.

24 Committee members. Mr. Wilson, do you have

[WITNESS: Reynolds]

1 questions?

2 DIR. WILSON: I have one quick question
3 for Dr. Reynolds. Hopefully, it's quick.

4 BY DIR. WILSON:

5 Q I'm assuming that, in your study of bats, you
6 look at their feeding on the insects and whatnot.
7 Do you know of any studies that show that large
8 solar arrays have an impact on insect
9 populations, and therefore could have an effect
10 on bat populations?

11 A Definitely don't know of any studies. I would --
12 you could argue that a solar -- ground-mounted
13 solar arrays would shift the habitat from a, you
14 know, forest-based habitat to a field-based
15 habitat. So, you would probably see a
16 corresponding shift in insects, that you could
17 argue either way, of negatively or positively
18 influence -- I think it would negatively impact
19 some bats and positively influence other bats.

20 Unlike counsel's -- you know, I don't
21 think they're going to run into the solar arrays
22 and get killed. It's going to alter the habitat,
23 that may influence how they use the habitat. But
24 it's not going to be a direct impact, like you

[WITNESS: Reynolds]

1 could argue for a wind development site.

2 DIR. WILSON: I have no further
3 questions.

4 CHAIRWOMAN MARTIN: Okay.
5 Mr. Oldenburg.

6 MR. OLDENBURG: Thank you. A few
7 questions.

8 BY MR. OLDENBURG:

9 Q So, if I understand this right -- so, this is
10 like "bats for dummies" version. So, the tree
11 cut moratorium from November 1st to March 31st,
12 the trees are what the bats roost in in the
13 summer, correct, and they hibernate elsewhere.
14 So, we don't want to cut the trees during the
15 summer, because they roost in the trees, correct?

16 A Correct. That guideline is for tree-roosting
17 species, like the northern long-eared bat or the
18 Indiana bat.

19 Q Okay. So, the eastern small-footed bat are
20 rock-roosting bats, correct? So, these piles of
21 rocks is where they hang out?

22 A Correct.

23 Q But do they hibernate there?

24 A So, southern New Hampshire has probably the

[WITNESS: Reynolds]

1 greatest -- the best documented population,
2 summer population of the eastern small-footed
3 bats in -- definitely in New England, possibly
4 the East Coast.

5 And, with the exception of some work
6 that Jacques Veilleux has done at Franklin Pierce
7 University, we don't know where they hibernate
8 whatsoever. He has evidence that they're
9 hibernating at the Surry Dam, which is also where
10 they're summering. We do know, from
11 radiotelemetry work, that they tend -- actually
12 have similar evidence at New Boston, that we know
13 they're there in the summer, on the landscape,
14 and we know that they're there in winter nearby,
15 so probably on Joe English Hill.

16 So, we think they stay pretty localized
17 year-round. Do they stay in the same rock
18 features? Don't know. Do they shift the
19 exposure? Do they shift to deeper fissures that
20 are more thermally protected in the winter? Most
21 likely. But, if you got a big feature, and I
22 don't think these features on this site are big
23 enough for that, but I think they're staying
24 local in big features, like a talus slope dam or

[WITNESS: Reynolds]

1 a big talus pile, at the base of Joe English
2 Hill, for example.

3 Q Okay. Because I thought I heard you mention that
4 winter blasting would be okay in that area,
5 because the --

6 A Because, it's my opinion, those features are too
7 small to be able to sustain a hibernating group.

8 Q Okay. And they are, I have looked at the
9 pictures, they're piles of rocks, as you said.
10 So, I mean, if we wanted to avoid them, if
11 this -- if this was an issue, and wanted to avoid
12 them, could we simply, you know, just me thinking
13 out loud, could the SEC put a condition on that
14 there could be no solar panels put, you know,
15 that disturb these rock piles? I mean, there's
16 only two of them, right?

17 A I don't think it needs to be. But that, you
18 know, would need to be verified by Dana, and
19 others. But, yes. I think there would need to
20 be a minimal buffer of impact, not a buffer of
21 habitat protection, but, basically, you don't
22 want to bulldoze right up to it.

23 But, yes. I think, if they just leave
24 those features alone, then the need for a rock

[WITNESS: Reynolds]

1 alteration plan goes away.

2 Q Because if, say, a panel is eight feet by twelve
3 feet, or something like that, you're really
4 talking just a few panels or a few racks worth of
5 panels that wouldn't be placed, right? Is that
6 possible?

7 A Yes. And my understanding -- yes. My
8 understanding, talking to Dana, I'm not even sure
9 there are panels near that one feature that we
10 keep talking about. So, I don't think it's that
11 big of an issue. But I think it needs to be
12 there in case plans change.

13 Q And your concern is disturbing the piles, not
14 working around them. It's the disturbing of the
15 piles directly that would affect the bats?

16 A Yes. That, basically, they'd get crushed.

17 MR. OLDENBURG: Okay.

18 CHAIRWOMAN MARTIN: Can we pause for a
19 few minutes? I apologize for interrupting. Can
20 we pause for a moment? It looks like we lost
21 Ms. Duprey. And I want to make sure she gets to
22 hear all of the testimony.

23 Let's go off the record, Steve.

24 *(Off the record and a brief*

[WITNESS: Reynolds]

1 *off-the-record discussion ensued.)*

2 CHAIRWOMAN MARTIN: Let's go back on
3 record, Steve.

4 MR. OLDENBURG: I have no further
5 questions. Thank you.

6 CHAIRWOMAN MARTIN: Okay. Thank you,
7 Mr. Oldenburg. All right. Mr. Pelletier?

8 MR. PELLETIER: Yes. I'm good. Thank
9 you.

10 CHAIRWOMAN MARTIN: All right.
11 Ms. Duprey?

12 MS. DUPREY: I have no questions, Madam
13 Chair.

14 CHAIRWOMAN MARTIN: Okay. And Mr.
15 Eaton?

16 MR. EATON: My questions were answered.
17 Thank you, Madam Chairman.

18 CHAIRWOMAN MARTIN: And Mr. Arvelo?

19 DIR. ARVELO: No questions at this
20 time.

21 CHAIRWOMAN MARTIN: Okay. I had a
22 couple of questions.

23 BY CHAIRWOMAN MARTIN:

24 Q When we talk about the "Rock Feature Monitoring

[WITNESS: Reynolds]

1 Plan", what qualifications would the monitor need
2 to have?

3 A Well, either the monitor or somebody working for
4 the monitor would need to be qualified to set up
5 the equipment. So, similar to the survey that
6 was done in 2016 and 2020. There would need to
7 be rapid -- for the sake of the developer, there
8 would need to be rapid turn-around for the
9 analysis of the calls, so they would know whether
10 there were bats present, and that those bats were
11 potentially small-footeds. And, then, that
12 developer would -- I mean, that monitor would
13 need to have the "no go" power to stop the
14 bulldozers if there was something potentially
15 found at that site.

16 But the monitor, if it was to be done
17 by a consultant, would basically just need to do
18 what they have already done, just quickly.

19 Q Well, that was going to be my follow-up question,
20 which is, if they were to, in the monitoring,
21 discover that a rock feature did have some types
22 of bats in them, what are the possible options to
23 address that? Is it only the rock feature needs
24 to be left undisturbed and the construction needs

[WITNESS: Reynolds]

1 to be modified? Or, are there potential options
2 for relocation? What are the options?

3 A I mean, I think, from a -- from a simplist
4 perspective, is you could just, assuming that
5 it's not a big enough feature to harbor wintering
6 species -- winter bats, that you would just have
7 to have a, you know, seasonal moratorium on
8 moving that.

9 Could you relocate it and make it still
10 conducive to roosting? It would probably be
11 worth the effort. If you've got to move the
12 rock, you've got to move them somewhere. So, it
13 would be logical to at least try to recreate, you
14 know, a minimal feature to what was lost. But I
15 think it would have to be done out of season, out
16 of the active season.

17 Q Okay. And you testified that, if they could
18 leave the features, and there were a buffer area,
19 then there would be no need for the rock feature
20 monitoring, as it pertains to the two identified
21 features.

22 But, as I understood your testimony
23 earlier, you didn't do a full survey to identify
24 rock features, and you just happened to encounter

[WITNESS: Reynolds]

1 those while on-site looking for other things.
2 So, there could be other features, in addition to
3 those two, right?

4 A Correct. Let me clarify that. I mean, I saw
5 two. Dana knows the site fairly well, Dana
6 Valleau. So, I think he knows what may be on the
7 landscape. But, yes. I wouldn't want to -- I
8 wouldn't want to have it described as just "these
9 two features". I would like it described as, you
10 know, "any large geomorphic feature". And Fish &
11 Game or somebody can help define what that is.
12 But something bigger than a stonewall, and
13 smaller than a side of a mountain.

14 CHAIRWOMAN MARTIN: Okay. I think
15 those are all my questions.

16 Attorney Iacopino, do you have
17 questions?

18 MR. IACOPINO: I think you might have
19 answered this, but I just want to make sure.

20 BY MR. IACOPINO:

21 Q When you talk about this "programmatic
22 agreement", if the monitoring does detect bats in
23 this, the rock formations, it's not a matter of
24 just going in and scaring the bats out of there

[WITNESS: Reynolds]

1 before you remove the rock. It's a matter of
2 either preserving the feature in place or moving
3 it to a different place?

4 A I mean, they're not -- they're not protected, nor
5 is the habitat protected in the State of New
6 Hampshire. So, I think that's where you've got
7 to get Fish & Wildlife involved.

8 As a bat biologist, I would like to not
9 see people banging on the rock pile with hammers
10 trying to drive them out. But they're going to
11 need to go somewhere that night at the end of the
12 day, and there would be no time to create
13 suitable habitat for them.

14 But that's, you know, that's not my
15 call. That's someone who's got the jurisdiction
16 to protect the species.

17 Q Understanding that that is your preference, would
18 the -- what is the effect of removing, say
19 there's several of these rock formations within
20 the Project limits of disturbance, and they are
21 moved, or not moved, but they are destroyed,
22 without any trauma to the bats, from the blasting
23 or whatever else is done to remove the rock
24 formation?

[WITNESS: Reynolds]

1 A I guess I'm not sure of the question. The
2 question is, what would -- what would be the
3 impact of moving them, the rock formations?

4 Q Not of moving them, but the impact of --
5 actually, the impact of removing not the bats,
6 but the formations. Would that have an impact on
7 the species in this region?

8 A And not replacing them with similar?

9 Q Correct.

10 A Yes. Again, I don't -- I don't know the
11 Fitzwilliam area that well. But my suspicion is
12 that, in the absence of localized rockworks and
13 mining, and Army Corps dams, like this is
14 probably not an abundant habitat feature.

15 And, so, I think there's multiple ways
16 a developer could go at this. They could take
17 parts of their project site that have no likely
18 development, that are going to be open and
19 southern-exposed, and they could build some
20 features well in advance, and try to create
21 additional habitat. And, if they do need to move
22 it, there's a place for those bats to go to that
23 would be, you know, a shorter lag time between
24 trying to move the same rocks to a new location.

[WITNESS: Reynolds]

1 I think moving the rocks that need to
2 be moved to a new location is also doable. But,
3 if it's going to create a construction delay, I
4 think there are several options. But I think
5 removing them from the landscape, once they have
6 been determined that they're likely being used by
7 the bats would be pretty harmful to that
8 population, because they're unlikely to have
9 another similar resource nearby.

10 MR. IACOPINO: No further questions,
11 Madam Chair.

12 CHAIRWOMAN MARTIN: All right. Thank
13 you.

14 Attorney Neville, do you have any
15 redirect?

16 MS. NEVILLE: I do not. Thank you.

17 CHAIRWOMAN MARTIN: And, Attorney
18 Patch, any follow-up?

19 MR. PATCH: I do have a couple of
20 follow-up questions, if I could? Pretty brief.

21 BY MR. PATCH:

22 Q But, Dr. Reynolds, is it your understanding that
23 the area in which this Project is going to be
24 built is something that has been extensively

[WITNESS: Reynolds]

1 logged for a number of years, and that there are,
2 essentially, at this point in time anyway, no
3 controls over eliminating rock formations or
4 doing anything with them? So, absent this
5 Project going in there, that could take place at
6 any point in time, couldn't it?

7 A Yes. I mean, I don't know the logging history.
8 Clearly, there's been recent intensive logging
9 efforts done at the Project site. I'm not
10 totally versed on private landowner rights.

11 But, yes. My understanding is those
12 features could get moved without much redress by
13 the current landowners. But, you know, that's
14 not my charge.

15 Q And isn't it true that they could be doing
16 logging during the wintertime, when Fish & Game
17 has imposed -- or, it's been recommended imposing
18 a restriction on logging activities in order to
19 protect the roosting. So, that could take place
20 at any point in time right now, is that correct?

21 A Well, Fish & Game actually prefers that they log
22 in the winter.

23 Q Yes. I'm sorry. Just the opposite then. But
24 they could log in the summertime, they could log

[WITNESS: Reynolds]

1 anytime of year right now, correct?

2 A As far as I know, correct.

3 Q Okay. And, then, are you familiar with the
4 provision in the MOU that provides for
5 establishing a conservation easement for over 300
6 acres, more than twice the size of the disturbed
7 area of the Project? Are you familiar with that
8 provision?

9 A I have heard reference to it, but I don't know
10 the details of the site.

11 Q So, presumably, if there are any rock features or
12 anything else that would be protective of the
13 bats, that would be a better situation than if
14 those 300 plus acres were going to be logged or,
15 you know, some other form of development done at
16 any point in the future, is that fair to say?

17 A Unless the only features being used is the one
18 that's getting removed. I mean, without data, we
19 don't know. I mean, it's not the volume of
20 habitat that's going to be important to this
21 species. It's the quality of habitat. And, if
22 those features are relatively unique, then those
23 features are the key points, not the total
24 acreage.

[WITNESS: Reynolds]

1 Q But, in a conservation easement, there would be
2 no disturbing of any features like that,
3 presumably, right? Or any --

4 A But we don't know if there are any of those
5 features in that easement.

6 Q Okay. But whatever is there would not be
7 disturbed, is that your understanding?

8 A Yes. I guess so.

9 MR. PATCH: Okay. Thank you. No
10 further questions.

11 CHAIRWOMAN MARTIN: Okay. Thank you.
12 The witness is excused.

13 WITNESS REYNOLDS: Thank you.

14 CHAIRWOMAN MARTIN: Attorney Patch, do
15 you have any rebuttal or plan to have rebuttal?

16 MR. PATCH: No, we do not.

17 CHAIRWOMAN MARTIN: Okay. And, so, I
18 think we've heard from everyone's witnesses.

19 I think we have a number of issues that
20 we need to cover, and I note that it's 4:30.
21 Attorney Iacopino, how do you think we should
22 proceed at this point? I'm not sure how long we
23 have the moderator. We need to cover exhibits,
24 whether there will be closings, the question

1 about briefing.

2 MR. IACOPINO: Well, ultimately, it's
3 up to the Committee, how comfortable they feel
4 with the record, in terms of whether they would
5 be happy with just hearing closing arguments from
6 the parties or whether or not they would like to
7 see written memoranda. So, I would leave that up
8 to the Committee, actually, to the Chair to
9 determine.

10 And, with respect to exhibits, I think
11 that we do need to make sure that the exhibits
12 that each party wishes to be part of the record
13 are formally moved into the record. I don't know
14 that there's any objections planned by the
15 parties to the exhibit lists that have already
16 been provided. If there are no objections, that
17 can be taken care of relatively easily.

18 The other issues, I do know that there
19 is some concern over the subdivision request,
20 which I think that that's something that at least
21 one member of the Committee wanted to see
22 addressed from a legal basis from the parties.

23 So, I mean, if we're going to require a
24 memo on that particular issue, Madam Chairwoman,

1 it may be wisest to request the parties close by
2 memo, and then -- and then begin deliberations.

3 I would suggest that, because there are
4 really only a number of -- a limited number of
5 issues that are in dispute, compared to other
6 Site Evaluation cases, that any memoranda be
7 limited to just those areas that are in dispute.
8 We don't need a broad -- a broad advocacy effort
9 by either party with respect to things that they
10 have already agreed on.

11 CHAIRWOMAN MARTIN: Okay. I think I'd
12 like to hear from the Committee as to whether
13 briefing would be helpful.

14 Ms. Duprey, I know you had raised it
15 initially. At this point, if you have taken a
16 look, do you have an opinion about whether you
17 would still like that?

18 MS. DUPREY: You mean on the
19 subdivision issue?

20 CHAIRWOMAN MARTIN: Yes.

21 MS. DUPREY: Yes. I would like it.

22 I read the case. Haven't had a chance
23 yet to go back and to read the statute. And, so,
24 let me just be clear about what my specific

1 concerns are.

2 My concern is that, with respect to
3 other items that are --

4 Can someone mute themselves, because
5 there's --

6 CHAIRWOMAN MARTIN: It's probably me.
7 I apologize.

8 MS. DUPREY: Okay. It was you.

9 I read the case. I understand it. And
10 Attorney Patch was involved in the last case that
11 we sat on, that was a lengthy case. And I
12 believe this issue came up at least tangentially
13 in that case. And I'm wondering, I don't want to
14 be doing something inconsistent with that case.

15 But my concern is, I did go back --
16 first of all, I couldn't find a subdivision plan
17 in the pack, in the materials. Maybe it's
18 there; I couldn't find it. I looked at Exhibit
19 G.1 [Figure G.1?]. And I spent an hour last
20 night trying to figure this out, you know, what
21 this looked like. I see where it is, but I don't
22 see where the subdivision boundary is. And maybe
23 I'm just misreading the exhibit. But I figured,
24 if I was having that much trouble, I wasn't sure

1 how any abutter could figure this out.

2 And I'm not -- I'm not saying that the
3 SEC doesn't have the power to decide this. I'm
4 not sure how I feel about that. I think I'm okay
5 with that.

6 But, with respect to the other bodies,
7 they went through their process, and made a
8 recommendation to us based on their process. And
9 we didn't go through a recommendation here.

10 But the long and the short of all this
11 is, my concern is that we are creating an illegal
12 lot, potentially. Well, a lot that does not
13 comply with the Town's subdivision requirements,
14 which, generally, for most towns are about
15 safety, or frequently are about safety. And, so,
16 then, if this were to all go away at some point,
17 now there is on record a lot that is a buildable
18 lot. And that's what's concerning me about this,
19 it's down the road. There's potentially an
20 unbuildable lot, and -- there's potentially a lot
21 that can be built upon that is really
22 unbuildable, according to the Town's regs. And,
23 I'm interested in understanding that.

24 I'm not looking for some 50 page memo,

1 I really am not. Just a short thing about tying
2 that case to the statute, and addressing my
3 concerns that we haven't found any process.
4 Abutters were not notified the way they would be
5 in a town. So, we haven't really heard, you
6 know, any abutter arguments that they might have
7 about that particular issue.

8 And, you know, God loves an abutter, if
9 they could go through that whole Application and
10 figure this all out, because I know we were told
11 last time "it's in the Application, just look."
12 And, so, maybe I just couldn't -- I'm not smart
13 enough to figure it out.

14 Thanks.

15 CHAIRWOMAN MARTIN: I think --

16 MS. GEIGER: Madam Chairwoman?

17 CHAIRWOMAN MARTIN: Yes.

18 MS. GEIGER: May I speak to this issue
19 please?

20 CHAIRWOMAN MARTIN: You can. And I
21 just want to add a few points, and make sure you
22 hear all the Committee's points, if there are
23 others on this, before you respond.

24 I agree with Ms. Duprey. I was

1 concerned about the notice, and the process or
2 lack thereof related to this that has occurred at
3 the SEC. And then, the statutes and the
4 authority to towns versus the SEC, in this area
5 specifically. So, those were three areas. And I
6 think those overlap with what Ms. Duprey said.

7 Do any other Committee members have
8 specific areas related to the subdivision that
9 they would want addressed?

10 *[No indication given.]*

11 CHAIRWOMAN MARTIN: Okay. Seeing none.
12 Attorney Geiger, go ahead.

13 MS. GEIGER: Thank you.

14 I just want to clarify for the record
15 that the Applicant is not asking the Site
16 Evaluation Committee to grant subdivision
17 approval in this case. And we're not asking you
18 to approve a plat or sign off on a, you know, on
19 the traditional subdivision plan that is filed
20 with the planning board and approved.

21 Accordingly, there is no need for the
22 Subcommittee to decide the issue of whether or
23 not it has the authority to preempt the
24 Fitzwilliam Planning Board with regard to

1 subdivision of the substation property.

2 It was mentioned in the Application.
3 And I agree with Ms. Duprey, that the figure on
4 Page 29 is a representation of the property that
5 will be subdivided. But that's going to occur
6 with the Town of Fitzwilliam. Assuming that a
7 certificate is granted for this Project, what the
8 Applicant will do is submit a properly devised
9 and configured subdivision plan to the
10 Fitzwilliam Planning Board for signature. So, I
11 think this may be a nonissue.

12 It was an issue when the Application
13 was originally filed, because it wasn't clear
14 that the Planning Board or the Town would be
15 cooperative, in the sense of accepting a
16 subdivision plan from this Applicant. But the
17 Applicant has worked with the Town, and
18 understands that, if a certificate is granted,
19 that they can submit a subdivision plan to the
20 Town for signature.

21 And, again, this is all laid out in
22 Attorney Patch's letter. It's Applicant's
23 Exhibit 89. It explains why we need the
24 signature of the Planning Board, because there is

1 a state statute that says that, if you submit a
2 subdivision plan to a register, and the register
3 records it without the signature of the planning
4 board, then that's a misdemeanor.

5 So, that's it in a nutshell. We are
6 not asking for this Committee to opine on the
7 extent to which it preempts the Planning Board's
8 authority with respect to subdivision approval.

9 MS. DUPREY: Madam Chair, could I
10 follow up?

11 CHAIRWOMAN MARTIN: Yes.

12 MS. DUPREY: Under your theory,
13 Attorney Geiger, at least as I hear it, nobody is
14 granting subdivision approval. We aren't, and
15 the Town isn't. So, who is?

16 MS. GEIGER: The Town would be. The
17 Town would be reviewing the subdivision plat
18 that's submitted to divide this property.

19 MS. DUPREY: No, it's not, ma'am. The
20 Town's process for granting a subdivision is laid
21 out in its ordinances and in the state statutes,
22 and this action doesn't comply with it.

23 MS. GEIGER: Well, there is --
24 obviously, the subdivision regulations of the

1 Town of Fitzwilliam contain a provision that
2 allows the Town to approve a subdivision that
3 doesn't -- that doesn't conform with strict
4 specificity to the subdivision regulations.

5 MS. DUPREY: That's not my issue.

6 MS. GEIGER: Okay.

7 MS. DUPREY: My issue is the process.

8 MS. GEIGER: Okay.

9 MS. DUPREY: And they have not followed
10 the process.

11 The Town -- the Planning Board, on its
12 own, including the Town fathers, the Town
13 councilors have no right to grant a subdivision
14 approval without a hearing, without an
15 application, without abutter notice.

16 And, if we're not granting the
17 subdivision, then they darn well have to be. And
18 they're not following their procedure. So, how
19 do we get around that?

20 MS. GEIGER: I think that's a question
21 for the Town, quite frankly.

22 MS. DUPREY: That's not a question for
23 the Town. That's a question for right here.

24 CHAIRWOMAN MARTIN: Attorney Neville

1 has had her hand up, if we could hear from her.

2 MS. NEVILLE: Thank you. My
3 understanding from the Applicant, and Attorney
4 Patch or Attorney Geiger can correct me, is that
5 they're going to submit to the Town process,
6 whatever that might be, to get subdivision
7 approval.

8 MS. DUPREY: She just said it's just
9 going to get signed off on.

10 MS. NEVILLE: Attorney Geiger, --
11 *[Court reporter interruption due to*
12 *multiple speakers at the same time.]*

13 CHAIRWOMAN MARTIN: If everyone can
14 just wait until the last person has finished
15 speaking, and allow me to recognize folks, that
16 will help keep things without overlapping, and so
17 that Steve is able to hear.

18 Attorney Neville, I did not catch the
19 end of what you were saying, if you could
20 finish.

21 MS. NEVILLE: So, my understanding,
22 from Attorney Geiger and Attorney Patch, is that
23 the Applicant intends to move forward through the
24 Town's process. So that, if a certificate were

1 to issue, they would -- the Applicant would then
2 move forward and go through whatever that Town
3 process is.

4 That's my understanding, and I can be
5 corrected, if I'm wrong. But, I guess, maybe if
6 I pause for a minute, and let that play out.

7 CHAIRWOMAN MARTIN: Okay. Ms. Duprey,
8 you were talking. Did you want to respond to
9 that or hear from Attorney Geiger first about
10 their response?

11 MS. DUPREY: We should hear from
12 Attorney Geiger first.

13 CHAIRWOMAN MARTIN: Okay. Attorney
14 Geiger.

15 MS. GEIGER: Yes. The Applicant, if a
16 certificate is granted, the Applicant will submit
17 to the Fitzwilliam Planning Board a subdivision
18 plan. What the Fitzwilliam Planning Board does
19 with that, in terms of process, I can't sit here
20 and tell you today what they will and will not do
21 with that.

22 CHAIRWOMAN MARTIN: Ms. Duprey.

23 MS. DUPREY: That's not how this works.
24 That's not how the process works. You don't just

1 submit a plan. You submit an application, and
2 somebody has to approve a subdivision, whether
3 it's us or them. And nobody is approving it.

4 What you're suggesting is that you can
5 get a subdivision by submitting a plan and just
6 hoping the Town does the right thing. But that's
7 not really how it works. How it works is you --
8 you, the moving party, brings an application and
9 puts it before the Town, and then it is noticed
10 to the community, there is a hearing, and then
11 the subdivision approval is granted.

12 This is not any recognized process that
13 you are suggested here, or just leaving it to the
14 whim of those folks.

15 I'm not trying to be argumentative or
16 make it a pain-in-the-butt. I just want to -- it
17 just needs to be done right somehow.

18 MS. GEIGER: Well, what I --

19 CHAIRWOMAN MARTIN: Before you go
20 ahead, Attorney Geiger. What I take from this
21 back-and-forth is that there is a need for a
22 memo, which, at a minimum, outlines what exactly
23 is planned for this process, and why it does not
24 require a decision from the SEC on the

1 subdivision. And, to the extent it does involve
2 something from the SEC addressing those areas
3 that Ms. Duprey raised, and that I raised, which
4 overlap, I think would be most helpful. I don't
5 think we're going to get to a point of argument
6 here today without that happening.

7 Okay. If that works for everyone, why
8 don't we have those brief memos filed by
9 Thursday, so that we would have the benefit of
10 those for Friday deliberations.

11 MS. GEIGER: May I please ask, it would
12 be most helpful to me to actually have the
13 wording of the question that the Committee would
14 like to have briefed?

15 CHAIRWOMAN MARTIN: Well, first, I
16 think it would be helpful to have you outline the
17 procedure that you are expecting to occur.
18 Because I think -- I did also look at some of the
19 historical pleadings related to this, and I
20 understand the position has changed with the
21 agreement of the Town in place now.

22 But, at this point in time, if you
23 could outline what the expectation is, and if
24 there's no need for action by the SEC on it, why

1 that is.

2 Ms. Duprey, do you want to outline
3 specifically other things you would like to see
4 in there?

5 MS. DUPREY: Yes. I'd like to
6 understand, from the Applicant's attorneys, how
7 the Town can sign off on a subdivision plan,
8 without going through its process, and how that
9 doesn't violate the Town's ordinances, and the
10 state statutes as well.

11 CHAIRWOMAN MARTIN: Okay. Any
12 additions to that from other Committee members,
13 after hearing all the back-and-forth?

14 *[No indication given.]*

15 CHAIRWOMAN MARTIN: Okay. And Attorney
16 Iacopino had suggested that the parties could
17 close by memo. So, you could include that either
18 in the memo that the Applicants will file or for
19 Counsel for the Public, submit a memo with
20 closings. Does that work for the parties?

21 MS. NEVILLE: Sure.

22 CHAIRWOMAN MARTIN: Okay. So, I
23 think --

24 MR. PATCH: I'm sorry. Just to be

1 clear, so the closing argument we would do in a
2 memo. And you want that by Thursday, is that
3 correct?

4 CHAIRWOMAN MARTIN: Attorney Iacopino,
5 you were suggesting combining those, correct?

6 MR. IACOPINO: Personally, I don't
7 think it makes any difference whether they
8 provide us with two separate memos or one memo
9 addressing all of the issues.

10 But, yes. I was understanding it would
11 be by Thursday.

12 MR. PATCH: Is there any particular
13 time on Thursday? I know, if you're doing
14 deliberations on Friday, we would want to make
15 sure you had sufficient time to be able to look
16 at them, obviously, before you started
17 deliberating? I don't mean to be too picky, but
18 I just --

19 CHAIRWOMAN MARTIN: I suggest noon.
20 Noon, on Thursday. That way Committee members
21 will have some time on Thursday to look at them
22 during the workday.

23 Any other issues that the Committee
24 would like addressed, before we close the record?

1 MR. PATCH: Madam Chair, can I just
2 raise one quick issue?

3 CHAIRWOMAN MARTIN: Yes. Go ahead.

4 MR. PATCH: At some point, and maybe
5 this should be in the memo, I would just like to
6 be heard on the issue of the waiver of the
7 decommissioning requirements. And, so, if you
8 want us to include that in the closing memo, I'd
9 be happy to do that. I just would like
10 clarification.

11 CHAIRWOMAN MARTIN: If you're
12 comfortable with that, and we're doing closings
13 by memo, I think it's appropriate to include
14 that. Unless anyone else on this Committee would
15 like to hear from Attorney Patch orally on that
16 waiver issue?

17 *[No indication given.]*

18 CHAIRWOMAN MARTIN: Okay. I don't see
19 anybody. Ms. Duprey.

20 MS. DUPREY: Madam Chair, is what
21 you're suggesting with our schedule that we will
22 not meet on Thursday? We are going to roll into
23 deliberation on Friday?

24 CHAIRWOMAN MARTIN: Yes. I think

1 that's where we were getting to, if everyone was
2 in agreement on doing the other pieces by memo.

3 MS. DUPREY: If we're rolling into
4 deliberation on Friday, how would you want to
5 conduct it? In the past, the one case that I've
6 sat on, we divided up all the standards.

7 Could Attorney Iacopino suggest some
8 sort of organized fashion for us to do this or do
9 we feel like that's not necessary?

10 I mean, I know there are a number of
11 contested issues, so we have to make findings on
12 them. So, I wasn't sure how you wanted to handle
13 this.

14 CHAIRWOMAN MARTIN: Thank you for that.
15 Attorney Iacopino, do you have a recommendation
16 about dividing it up?

17 MR. IACOPINO: I can have a
18 recommendation to the Chair in a couple of hours.
19 I do have a format for it. Generally, the way
20 deliberations have been conducted in the past,
21 they don't have to be conducted this way, but,
22 generally, the way that the Committee has
23 conducted them is to take the statute and go
24 through each of the criteria in the statute.

1 Oftentimes, individuals have been
2 selected or requested by the Chair to sort of
3 just present what the evidence and the record is
4 with respect to a particular issue. And then,
5 just to start off the conversation on that issue,
6 so that everybody sort of has fresh in their mind
7 what it is they're considering, and what they
8 have to decide to give weight to or not to give
9 weight to. So, that's the process that we have
10 used traditionally.

11 I can get to you, Madam Chair, a
12 suggestion on how that should be done
13 issue-by-issue. It's just going to take me a
14 little time to put it into a format that you'll
15 understand.

16 CHAIRWOMAN MARTIN: I would appreciate
17 that. And go ahead, Ms. Duprey.

18 MS. DUPREY: Having done this in the
19 past, I think it takes a little bit of time to,
20 you know, review the record as it needs to be and
21 organize your thoughts and whatnot. I mean, I'm
22 okay with trying to do this on Friday. But I
23 just feel like we're really compacting this.

24 But whatever you want, I'll try to live

1 up to it.

2 CHAIRWOMAN MARTIN: Okay. Other
3 Committee members, how do you feel about trying
4 to start deliberations on Friday? I think,
5 Attorney Iacopino, remind me, Friday is the last
6 scheduled day we have?

7 MR. IACOPINO: Yes. It is the last
8 scheduled day. But, I mean, obviously, we can,
9 you know, if necessary, and it wouldn't be
10 unusual not to get through deliberations in one
11 with the Committee on these important issues.

12 So, I mean, we can certainly, if it is
13 the Chair and the Committee's desire, we can poll
14 the Committee offline and find other -- another
15 day, or maybe another two days, if that makes the
16 Committee more comfortable, that they will have a
17 better personal understanding of the record and
18 the matters that they have to discuss and decide.

19 CHAIRWOMAN MARTIN: Ms. Duprey.

20 MS. DUPREY: Madam Chair, I would also
21 ask that we take the issues out of order. I did
22 land use last time, which I would ask to do again
23 this time. And we did it last, because we felt
24 that some of the other areas impacted on it, and

1 that it was more logical. And I would ask that
2 we do that again this time as well.

3 MR. IACOPINO: Just for -- just for
4 historical reference, in the past our committees
5 have generally considered that it is probably
6 best to first review State agency input, and then
7 go on to the RSA 162-H:16 factors that require an
8 analysis of whether or not there will be an
9 unreasonable adverse impact in each of those
10 particular areas, followed by orderly
11 development, which is where land use generally
12 comes in, and then followed by a general public
13 safety -- I'm sorry, a public interest
14 determination, because the public interest
15 determination is sort of a conglomeration of all
16 of the other factors that have already been
17 considered.

18 That's the way that the committee has
19 generally deliberated, it's the order they have
20 deliberated in in at least all of our -- probably
21 the last three or four dockets before the
22 Committee, since the amendments to the statute,
23 back in 2016.

24 CHAIRWOMAN MARTIN: Okay.

1 MR. IACOPINO: So, that's generally
2 what I would be preparing for your review and
3 distribution to the Committee, Madam Chair, is
4 essentially in that other.

5 CHAIRWOMAN MARTIN: Okay. Mr. Arvelo,
6 I saw you had your hand up.

7 DIR. ARVELO: Yes. Just, if we're
8 going to be asked to present on specific areas,
9 and Attorney Iacopino just mentioned a process,
10 is that something that we can have in writing for
11 our review, in preparation for this next -- for
12 Friday, or whenever this happens?

13 MR. IACOPINO: I have typically
14 prepared an agenda of the issues for
15 deliberation, and that's the order that they're
16 in. And also, generally, that will also contain
17 the statutory and rule references that apply.

18 So, yes. You can have it in writing.
19 Traditionally, what I've done is I have provided
20 it to the Chair, who has reviewed it to make sure
21 that I've covered everything, and then we
22 distributed it to the Committee. It's generally
23 considered to be an attorney/client privilege
24 document.

1 CHAIRWOMAN MARTIN: Okay.

2 Mr. Oldenburg.

3 MR. OLDENBURG: My suggestion is we
4 keep with tradition, and don't make Mike go out
5 of his comfort zone, and keep going the way we've
6 always done it.

7 CHAIRWOMAN MARTIN: Mr. Arvelo, did you
8 have something else to say?

9 DIR. ARVELO: Just in terms of Attorney
10 Patch and Geiger's memo, is that going to have
11 some sort of confirmation of the process that's
12 going to be followed for the subdivision? I'm
13 just trying to understand what that memo would
14 contain, that would help us consider what we need
15 to consider, as it relates to the subdivision.

16 CHAIRWOMAN MARTIN: Yes. I think, at a
17 minimum, the request is to include an outline of
18 the process --

19 DIR. ARVELO: Okay.

20 CHAIRWOMAN MARTIN: -- that they're
21 following for the subdivision.

22 My impression, from hearing from the
23 Committee and from the historical approach, is
24 that Friday may be too ambitious, in order to

1 have folks actually be prepared to take the roles
2 that they're going to have during deliberations.

3 And, so, I think it makes some sense to
4 cancel Thursday and Friday, and look for two
5 additional dates, to the extent we need to, to
6 reschedule deliberations, to allow for some time
7 in between.

8 Ms. Duprey.

9 MS. DUPREY: I would also just say, I
10 think it's really challenging for the parties to
11 submit memos by Thursday. I'd rather that they
12 had more time to consider what they had to say
13 and get things done. And I think it's a pretty
14 tough request to say "you've got to turn this
15 thing around by Thursday."

16 Thank you.

17 CHAIRWOMAN MARTIN: Attorney Geiger.

18 MS. GEIGER: I would agree. Thank you.
19 I think, we -- if we could get some more -- when
20 the Committee decides when deliberations could
21 be, if you could just let us know what the
22 deadline would be for submitting that memo, you
23 know, a few days in advance, so that the
24 Committee can have it for consideration, I would

1 appreciate that.

2 CHAIRWOMAN MARTIN: Okay. I think that
3 makes sense, in light of the change we're now
4 making to the schedule.

5 Attorney Iacopino, anything else? We
6 do still need to do exhibits.

7 MR. IACOPINO: I'm sorry. I didn't
8 catch what you said at the very end, after "Mr.
9 Iacopino".

10 CHAIRWOMAN MARTIN: I was saying, is
11 there anything else, other than exhibits, that we
12 need to do, in your opinion?

13 MR. IACOPINO: No. I just think we
14 only need to deal with, at this point, given that
15 deliberations won't occur for a little -- for a
16 few days anyway, we will -- all we need to do --
17 all that's left to do today is put the exhibits
18 into the record that are going to be admitted.

19 And I guess the question for the two
20 parties is, does either party object to any of
21 the exhibits that are contained on the party's
22 exhibit list?

23 MR. PATCH: The Applicant does not
24 object to Counsel for the Public's exhibits.

1 MS. NEVILLE: The same statement.
2 Counsel for the Public does not object to any of
3 the exhibits the Applicant has put forward.

4 CHAIRWOMAN MARTIN: Okay. Then, we'll
5 strike ID -- Ms. Duprey, do you need to be heard
6 before we address the exhibits?

7 MS. DUPREY: No.

8 CHAIRWOMAN MARTIN: Okay. I'll just
9 wrap this up and I'll come back to you.

10 We'll strike ID on Applicant's Exhibits
11 1 to 95 and admit them as full exhibits. Counsel
12 for the Public, we will strike ID on Exhibits 1,
13 2, and 4, and admit those as full exhibits.

14 I'd like to hear you on Exhibit 3,
15 which is testimony of a witness who did not
16 appear to swear to it?

17 MR. PATCH: Madam Chair, I just have
18 one issue. You said "Exhibits 1 through 95". I
19 think we actually have 1 through 97. I hope you
20 have all of them. But those include record
21 request responses. Those are the ones that came
22 at the end. So, there should be 1 through 97.

23 CHAIRWOMAN MARTIN: Okay. I apologize,
24 1 through 97 --

1 MR. PATCH: Okay.

2 CHAIRWOMAN MARTIN: -- are admitted as
3 full exhibits.

4 Attorney Neville.

5 MS. NEVILLE: So, I'd say you're right,
6 Mr. Kavet did not testify, so he was not here to
7 swear to it. Being new around the block here, I
8 cannot say what the past practice is. But, if
9 that precludes his prefiled testimony coming in,
10 then I am going to live with that.

11 CHAIRWOMAN MARTIN: Well, I think it
12 could be admitted as documentary evidence, but
13 that doesn't get you where you, I think, want it
14 to be, as far as sworn testimony.

15 So, the parties could also stipulate to
16 the facts contained Exhibit 3, if they're in
17 position to do that. Otherwise, I will exclude
18 it, because it's not -- no witness testified
19 before the Committee here and swore to it.

20 MR. PATCH: If I could just be heard
21 briefly? I believe it covers essentially what's
22 in the Stipulation being marked as Exhibit --
23 Applicant's Exhibit 70 -- 80, I'm sorry. And,
24 so, I don't think there's an awful lot in that

1 testimony, other than something similar to what's
2 in the Stipulation.

3 So, we really don't object to that
4 being marked. But, obviously, that's the Chair's
5 call, in terms of whether or not -- since it was
6 not presented and sworn before the Committee.

7 CHAIRWOMAN MARTIN: Okay. Well, it
8 sounds like it's redundant as well. And, so, I
9 will exclude it.

10 All right. Anything else before we
11 wrap up for the day?

12 Ms. Duprey, I apologize. I forgot you.
13 Go ahead.

14 MS. DUPREY: I was going to ask that
15 Attorney Iacopino, in his outline of the process
16 to you, there are some new members, people who
17 haven't sat on this before. This is a
18 document-heavy case, as these all are. I think
19 it would be useful for Attorney Iacopino to let
20 members know what would be helpful to the rest of
21 us, because we have in the past kind of relied on
22 those people to cover that area, so that they can
23 get their arms around the task.

24 MR. IACOPINO: My agenda will include

1 my analysis of which exhibits are relevant to
2 each of the statutory criteria. However, just a
3 fair warning to everybody, you are the Committee
4 members that make the decision, not me. You
5 might have a different view of whether or not a
6 particular exhibit is or is not relevant to a
7 particular issue. And, if that's the case, you
8 should use your own judgment in that regard.

9 But I will do that. I will segregate
10 the exhibits as part of that agenda.

11 MS. DUPREY: And the statutes and the
12 regs?

13 MR. IACOPINO: Yes. They will be there
14 as well.

15 MS. DUPREY: For each section?

16 MR. IACOPINO: Yes, ma'am.

17 MS. DUPREY: Okay. Thank you.

18 CHAIRWOMAN MARTIN: Okay. Any other
19 Committee members? Oh, Attorney Neville, I
20 apologize. Go ahead.

21 MS. NEVILLE: No, I apologize. So, I
22 assume it's going to be public deliberations.
23 So, there will be a notice that, if somebody
24 wanted to log in, they'd be able to?

1 CHAIRWOMAN MARTIN: Yes. Well, once we
2 get dates, we'll issue new orders of notice
3 related to the deliberations.

4 Anything else from the Committee
5 members? Ms. Duprey.

6 MS. DUPREY: Can we expect that the
7 deliberations are going to be remote?

8 CHAIRWOMAN MARTIN: Yes.

9 MS. DUPREY: I'm leaving the state for
10 a while, and I don't want to have to come back.
11 Okay.

12 CHAIRWOMAN MARTIN: We do not have a
13 plan to change that approach at this point in
14 time.

15 Okay. Seeing nothing else, then we
16 will close the record. And we will issue an
17 order of notice for the new dates.

18 All right. We are adjourned.

19 ***(Whereupon the hearing was adjourned at***
20 ***5:06 p.m., with dates for deliberations***
21 ***to be determined and noticed.)***

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C E R T I F I C A T E

I, **Steven. E. Patnaude**, a Licensed Shorthand Court Reporter, 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.

Steven E. Patnaude, LCR
Licensed Court Reporter
N.H. LCR No. 52
(RSA 310-A:173)