STATE OF NEW HAMPSHIRE
SITE EVALUATION COMMITTEE

DOCKET NO. 2015-06

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

POST-HEARING MEMORANDUM OF THE SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

The Society for the Protection of New Hampshire Forests (the "Forest Society"), by and through its attorneys, BCM Environmental & Land Law, PLLC, respectfully submits this Post-Hearing Memorandum.

SOCIETY FOR THE PROTECTION OF NEW HAMPSHIRE FORESTS

By its Attorneys,
BCM Environmental & Land Law, PLLC

Date: January 12, 2017

By: _____

Amy Manzelli, Esq. (17128)
Jason Reimers, Esq. (17309)
Elizabeth A. Boepple, Esq. (20218)
Stephen W. Wagner, Esq. (268362)
Kelsey C. R. Peterson, Esq. (268165)
manzelli@nhlandlaw.com
3 Maple Street
Concord, NH 03301
(603) 225-2585

TABLE OF CONTENTS

GUIDE TO THIS MEMORANDUM

Footnotes (both the numeral of the footnote as well as *supra* and *infra* citations) and the table of contents are hyperlinked.

The first section of this memorandum is an executive summary, which summarizes and contextualizes the Forest Society's position. For the most part, supporting footnotes are not provided in the executive summary, but rather are provided in the argument section.

Beyond that, the structure of this memorandum is built on the standards set forth in RSA 162-H, and the administrative rules associated with each standard. The Forest Society has addressed only those standards most important to the Forest Society's interests, leaving to others to write about numerous further defects less central to the Forest Society, but equally important to the Subcommittee's consideration.

This proposed project raises numerous challenging and sometimes novel questions of law that apply to more than one standard. Rather than set forth these legal issues in their own sections, they are embedded within the standard in which they first arise. To the extent a legal issue applies also to a subsequent standard, the issue is raised in that section also, but in a more summary manner.

EXECUTIVE SUMMARY

For more than one hundred years, the Forest Society has stood as a vanguard of New Hampshire's majestic and breathtaking landscapes and the unique outdoors- and forest-based economy and culture that thrives because of it. The Forest Society and its thousands of members over the last century have endeavored "to perpetuate the forests of New Hampshire by their wise use and their complete reservation in places of special scenic beauty." On behalf of its members and for the future generations for whom it acts as steward of our state's treasured natural, cultural, and historic landscape, the Forest Society opposes the project as proposed because of the unreasonable adverse effects and undue interference the proposed project would wreak on this special landscape, and especially on conserved lands.

As a full-party intervenor, the Forest Society respectfully urges the Chairman and members of the Subcommittee[1] to deny Applicant's request for a Certificate of Site and Facility to construct a 192-mile transmission line from the Canadian border at the edge of the Great North Woods into the heart of the Merrimack Valley.

Applicant proposes to site this proposed project in a way which would pervasively and permanently[2] scar the northern two thirds of our state with towers and transmission lines that cut through unique forest ecosystems and rise well above the tree canopy, making industrial infrastructure starkly visible within too many of New Hampshire's rural landscapes from Pittsburg to Londonderry, only to provide purported benefits that would primarily be enjoyed—not in New Hampshire—but in other states and Canada.

[1] "Subcommittee" as used herein refers to the duly appointed committee of the New Hampshire Site Evaluation Committee. "SEC" as used herein refers to the institution of the New Hampshire Site Evaluation Committee.
[2] According to Applicant, "[a] likely scenario is that the Project, like many transmission lines, will be re-conductored and refurbished over time, keeping it in service indefinitely for all practical purposes." *Applicants' Motion for Clarification of Site 301.08(d)(2)(b) dated March 24, 2017*, SPNF 13, at 106 fn 1.

As demonstrated in this memorandum and throughout the record, the Subcommittee should deny the application for three key reasons:

1. The application as originally filed, and all supplementation to it through the close of the record, is deficient. The Applicant did not provide the Subcommittee with information the law requires it to have provided. Thus, Applicant has not met its burden of proof.
2. Evidence introduced by Counsel for the Public, Intervenors, and public comments affirmatively establishes the proposed project would result in unreasonable adverse effects, undue interference, and would not serve the public interest.
3. Alternatives exist for transmitting electricity from Quebec to southern New England. They would be less damaging to the State of New Hampshire, and likely less expensive to the ratepayers of New England, than the proposed project. Applicant itself chose not to pursue practicable alternatives that would have avoided, or greatly lessened, the damage that would be caused by its current proposal.

Background

Most of the public first learned of the "Northern Pass" in late 2010. As promoted by Northeast Utilities (for Eversource), it would be a partnership in which Hydro-Quebec had sub-contracted Eversource to build a new transmission line to export Canadian hydropower to New England. High natural gas prices, Hydro-Quebec surmised at the time, would make it possible to sell up to 1,200 megawatts of power at a price that would recoup over time the cost to construct the proposed line.

Since 2010, strong public and municipal opposition to the proposal has persisted. It seems so obvious to so many that it would be incongruous to run an industrial transmission line through natural landscapes and dense residential neighborhoods. But, that is exactly what the route chosen by Eversource and Hydro-Quebec (which determined where it wanted to cross the

Canada/US boundary), would do. That route would create 32 miles of new overhead right-of-way in rural northern New Hampshire, and place large-scale transmission towers and lines within an existing right-of-way laid out originally for power distribution on much smaller poles.

Since 2010, Applicant has not reversed public and municipal opposition. The public opposition, in part, has resulted in changes to New Hampshire law, including: changes to the SEC process, clarification that a project like Northern Pass may not use eminent domain, and statutory designation of appropriate transportation corridors that the New Hampshire Department of Transportation (DOT) can lease for use as underground energy corridors. The opposition has also led to unprecedented involvement in this proceeding by individual landowners, cities and towns, and non-government organizations like the Forest Society, Appalachian Mountain Club, and Conservation Law Foundation, among others. The extent of public opposition is overwhelming with 22 of the 31 communities through which the proposed route would be located having sought to intervene in this proceeding,[3] all but approximately eight of the over

[3] Ashland, Bethlehem, Bridgewater, Bristol, Canterbury, Clarksville, Concord, Dalton, Dixville, Deerfield, Easton, Franconia, Millsfield, New Hampton, Northumberland, Pembroke, Pittsburg, Plymouth, Stewartstown, Sugar Hill, Whitefield, and Woodstock.

130 individual intervenors opposed, and members of the public submitting thousands of comments with 92% of them opposed.[4]

Meanwhile, the energy market and business environment has changed since 2010. Other transmission developers have arrived with proposals that arguably would be less expensive, cause fewer adverse impacts and consequently generated little or no opposition—in large part because of their far less impactful route configurations. With natural gas prices now far lower, such transmission projects, including the proposed project, seek to rely on guaranteed contracts. Faced with faster-moving competition and deadlines to bid into various Requests for Proposals, Applicant moved quickly to submit the application in October 2015, a rush which may explain why the application was so inadequate.

Public opposition is not the only unprecedented aspect of the proposed project.

[4] The Forest Society read 1,476 of the public comments and noted the following for each: Date, Title, Name (First, Middle, and Last), Position (Pro, Con, Neutral, Opposed Unless Buried, and Other), Street, Source/Venue (SEC Website Form, Public Hearing, Petition, Letter to SEC), and whether the comment addressed: Criteria Associated with Aesthetics (Existing Character; Significant Factors of Affected Scenic Resource and Distances; Nature and Duration of Public Uses; Scope and Scale of Change; Overall Visual Impacts (Day and Night); Extent of Dominance Over Scenic, Cultural, and Natural Historic Resources; and Avoid, Minimize, and Mitigate), Criteria Associated with Historic (All Potentially Affected Resources; Number of Affected and Extent of Affect; Consider Significance; Extent, Nature, and Duration of Effect; State, Federal, and Local; and Avoid, Minimize, and Mitigate); Criteria Associated with Undue Interference (Land Use, Employment, Economy, Decommission, Municipal and Regional Planning Commissions and Municipal Governing Bodies), Criteria Associated with Public Interest (Welfare of Population, Private Property, Location/Growth of Industry, Overall Economic Growth of State, Environment of State, Historic Sites, Aesthetics, Air/Water, Use of Natural Resources, and Public Health and Safety), Criteria Associated with Public Health/Safety (General Effects; Avoid, Minimize, and Mitigate; and Proximity and Collapse), Air Quality, Water Quality, Criteria Associated with Natural Environment (Significance of Affected (Size, Prevalence, Dispersal, Migration, and Viability); Nature, Extent, and Duration of Effects; Fragmentation or Other Alteration (Habitat and Resources); Analyses and Recommendations of Gov Agencies; and Avoid, Minimize, and Mitigate; Post-Construction Monitoring and Reporting; and Adaptive Management), Criteria Associated with Financial Capability (Applicant's Experience in Securing Funding, Applicant's and Advisors' Overall Experience, and Applicant's Assets and Liabilities, and Financial Commitments), Criteria Associated with Technical Capability (Applicant's Experience Designing, Constructing, and Operating; and Experience and Expertise of Contractors or Consultants); Criteria Associated with Managerial Capacity (Applicant's Experience Managing Construction and Operation; and Experience and Expertise of Contractors or Consultants). The comments read spanned several years, in four batches, as follows: 1) 11/4/10 through 7/6/11; 2) 7/1/13 through 11/11/15; 3) 3/1/16 through 6/23/16; and 4) 6/15/17 through 12/15/17. From the data collected from the 1,476 read comments, the Forest Society extrapolated to conclude that the results of the 1,476 read comments would be the same as the results of all public comments. In the case of opposition, 1,358 opposed the proposed project, which is 92% of 1,476. (This is consistent with the figure noted at a public comment hearing, that comments were "running roughly 11 or 12 to 1 against" the proposed project. Tr. 7/20/17, Public Comment Hearing, at 7 (Honigberg).).

Geographically, the transmission line would span a serpentine route of 192 miles, bisect 31 municipalities, erect more than 1,200 new and relocated towers[5] at heights up to 160 feet,[6] and require 20 to 25 concurrently-active work sites,[7] 1,200 new crane pads,[8] and use of 84 private roads to access the right-of-way.[9]

Aesthetically, the proposed project would be visible from 224 scenic byways, 183 designated rivers, 1,338 conservation/public lands, 218 great ponds, 1,311 public rivers, 12,313 scenic drives/public roads, 1,158 recreational trails, 83 access sites to public waters, 242 other recreational sites, 85 listed historic resource locations, 1,290 potential historic resources and 488 other community resources.[10] The proposed project's presence would pervade New Hampshire.

Environmentally, the proposed project would impact more than 6 million square feet of wetlands,[11] result in 800 separate wetland restoration sites,[12] cut 731 acres of trees,[13] and could cause extinction in New Hampshire of endangered species.[14]

Each of the three key reasons why the Subcommittee should deny the application has several components, as follow.

1. Application Deficient; Applicant did not Meet its Burden

The application is replete with deep flaws that pervade almost all legal standards. Notwithstanding the fact Applicant submitted tens of thousands of pages, reflecting the magnitude of this proposed project, Applicant has not submitted adequate information for

[5] Tr. 5/1/17, Morning Session, at 146 (Johnson).
[6] *David Taylor (Dewberry) Pre-filed Testimony (Aboveground)*, CFP 129, at 2805.
[7] Tr. 5/3/17, Afternoon Session, at 41 (Bowes).
[8] Tr. 5/1/17, Morning Session, at 146 (Johnson).
[9] CFP 129, at 2804.
[10] *Kavet and Rockler Supplemental Pre-Filed Testimony*, CFP 148, at 6312 (Ex. B: Supplemental Report: Economic Impact Analysis and Review of the Proposed Northern Pass Project (4/17/17)).
[11] Tr. 6/16/17, Afternoon Session, at 15 (Carbonneau).
[12] *Pre-Filed Direct Testimony of Raymond Lobdell (12/30/16)*, SPNF 63, at 4141.
[13] *Response and Documents to Motion to Compel, PRLAC 1-19*, JT MUNI 191, at 7403. Note this figure includes only trees that are 20 feet or more in height.
[14] Tr. 6/1/17, Afternoon Session, at 92-93 (Johnson); Tr. 7/14, Morning Session, at 110-19 (Barnum).

approval. Applicant still has not produced enough information to show the actual route of the proposed project in its entirety, let alone produced a clear construction plan. Throughout the hearing, Applicant continued to file critical information necessary for the Subcommittee, Counsel for the Public, and Intervenors to have in advance of the hearing to effectively conduct cross-examination. All were consequently deprived of that opportunity. Applicant did not respond in a timely way to discovery requests. And despite the fact that Applicant had a role in drafting the new SEC rules and knew of their impending implementation in advance of this proceeding, the original application did not include key information that could have and should have been included to address the new rules. Even now, at the time of final briefing, an unacceptable volume of basic questions remain unanswered:

- On what side of the road would the line be buried and where would blasting occur?
- What would be the effects to thousands of unanalyzed scenic and historic resources?
- Which tourism destinations would be adversely affected?
- What would be the full scale of impacts on wetlands, including wetlands that extend beyond the boundary of the right-of-way?
- What would be the effects in Candia, Raymond, Auburn, Chester, Londonderry and Derry?

In sum, has Applicant met its burden of proof? For the multiple reasons set forth in this memorandum, the answer is "no." Applicant has not produced a preponderance of evidence that the proposed project: 1) would not result in unreasonable adverse effects on aesthetics, historic sites, and the environment; 2) would not unduly interfere with orderly development of the region; or 3) would serve the public interest.

Much of Applicant's failure results from Applicant's witnesses consistently employing myopic methodologies in which their analysis of effects—be it on aesthetics, tourism, orderly

development, or wetlands—was based on the most narrow (and often unlawfully narrow) interpretation of the pertinent rules. Only with blinders on and working in their own silos were Applicant's witnesses able to conclude that the 192-mile transmission line would not have *any* undue interference or *any* unreasonable adverse effects. Instead of attempting to determine a route for the proposed project that would limit adverse impacts, Applicant instead has put forward testimony that simply overlooks the unreasonable adverse effects, undue interference, and lack of service to the public interest of its own preferred route.

2. Unreasonable Adverse Effects, Undue Interference, and Lack of Service to the Public

The overall record of evidence presented by all parties, as well as the immense volume of public comments, affirmatively establishes that the proposed project would result in unreasonable adverse effects and undue interference that cannot be sufficiently avoided, mitigated, or minimized, and that the proposed project would not serve the public interest.

More particularly, for the following five principal reasons, based on the record, Applicant has not met its burden of proof and therefore the proposed project should not receive a Certificate of Site and Facility.

First, the proposed project would have an unreasonable adverse effect on aesthetics and historic sites. Concerning aesthetics, Applicant has not satisfied its burden. Its witnesses did not comply with applicable rules and employed a flawed, subtractive methodology that eliminated potential scenic resources from their analysis. Beyond that, the overall record demonstrates there would be unreasonable adverse effects on scenic resources. Concerning historic and archaeological sites, Applicant has not met its burden because its analysis of adverse effects was unlawfully narrow and incomplete; it erroneously relies on the Section 106 process to satisfy the SEC standards. Additionally, Applicant submitted otherwise flawed reports and testimonies on these topics.

Moreover, Applicant's assessment of effects on aesthetics and historic sites does not assess impacts to these resources on the 60 miles of underground corridor where the precise location of the line in the ground remains unknown. Also, Applicant has not made any assessment whatsoever of the portion of the proposed project through the six southern New Hampshire municipalities between Deerfield and Londonderry.

Second, the proposed project would unduly interfere with orderly development of the region, including affected communities and conserved lands. Applicant's land use witness could not show that the proposed project would not unduly interfere with the prevailing land uses of the affected communities, including the 31 host communities, a special sub-set within the broader category of affected communities. The proposed project would unduly interfere with the prevailing land uses of the affected communities. The witness did not generate for the Subcommittee the information required by Site 301.09 and instead employed a flawed, constricted methodology that eliminated effects. When considering the very large volume of evidence on this topic, the proposed project would unduly interfere with the prevailing land uses of the Great North Woods, including lands permanently conserved by the Forest Society and many other organizations and agencies.

Lands with significant conservation values, including views of and from those lands, are preserved in perpetuity by virtue of public purposes under both state and federal law. Those public purposes for which land trusts such as the Forest Society permanently protect such lands constitute a deliberate element of the orderly development of the region—one of the ways society balances development and preservation of natural resources. Land trusts are legally and ethically bound to uphold those public purposes by defending existing conserved lands, individually and as a larger mosaic of protected resources, from the adverse impacts of private development such as the proposed project.

The proposed project would also unduly interfere with the economy and employment of the affected communities because of its potential negative, long-lasting effects on tourism and real estate values.

As for tourism, the record shows the proposed project would threaten New Hampshire's unique, highly valuable tourism appeal: outdoor- and forest-based recreation and enjoyment in superior scenic beauty. Applicant's witness for tourism did not offer a report and testimony that could sustain Applicant's burden. The witness was not qualified, performed an incomplete analysis (with unsound methodology), and did not counter the weight of other evidence showing a measurably negative effect on New Hampshire tourism.

As for private property values, the methodology of Applicant's witness suffered from a severe lack of specificity. He considered only single family detached homes within 100 feet of the right-of-way, and did so with an invented method which ignores most changes to view. Applicant's witness did not consider impacts on the value of condo units (except in one belated instance) and prime outdoor recreational attractions in the vicinity of the right-of-way all along the 192-mile proposed project.

And finally with respect to undue interference, the number of affected municipalities opposed to the proposed project, the number of public commenters opposed to the proposed project, along with the tremendous public opposition within the proceeding, requires a finding that the proposed project would unduly interfere with orderly development of the region.

Third, the proposed project would have unreasonable adverse effects on water quality and the natural environment. As to water quality, specifically as to effects on wetlands, Applicant has not met its burden. Applicant's numerous and significant shortcomings include: failure to disclose sufficient information, argues for reliance on a flawed recommendation from the Department of Environmental Services (DES), did not seriously

consider the least-impacting alternative, offered an inadequate analysis of a fully buried route along a state-authorized energy corridor, provided an inadequate assessment of wetland functions and values, erroneously identified permanent wetland impacts as secondary or temporary, ignored proper consideration of impacted vernal pools, and submitted inadequate wetland mapping.

Similarly, as to effects on the natural environment, Applicant did not meet its burden because the application contains insufficient information on impacts to flora and fauna throughout the entire proposed route. Evidence that other Intervenors and Counsel for the Public presented shows the proposed project would result in unreasonable adverse effects to certain protected species.

Fourth, Applicant has not satisfied its burden regarding public safety. With respect to Applicant's decommissioning plan and the lack of information about the risks of the proposed colocation of a portion of the proposed project with a buried natural gas pipeline in a narrow stretch of the right-of-way, including risks associated with structural collapse, Applicant has not proven the proposed project would not have unreasonable adverse effects on public safety.

Fifth, the proposed project would not serve the public interest. The public interest standard is a comprehensive standard. It requires the Subcommittee to balance the potential benefits of the proposed project with the potential adverse effects, as guided by the purposes of the statute. Applying this standard, in accordance with the factors articulated in the rules, Applicant has not demonstrated the project as proposed meets the balance test set forward in the purpose statement of RSA 162-H. The proposed project would not serve the public interest.

3. Alternatives Could Have Avoided or Significantly Minimized Adverse Impacts

First, the manifestation of multiple alternative transmission proposals that would deliver roughly the same purported energy benefits to the region (and, using Applicant's argument, some

minimal benefit to New Hampshire), demonstrates that the proposed project offers no unique benefits. Even assuming that importing more hydropower to New England would be beneficial, this proposed project would arguably be the most expensive way to do so and most detrimental to New Hampshire.

Second, Applicant could have proposed a permittable project consistent with state statutes establishing formal energy corridors on pre-approved transportation corridors (such as I-93), but chose not to. This was despite unprecedented public involvement and opposition to the proposed project, including scores of municipalities, businesses, conservation organizations, and thousands of individuals. Applicant had ample opportunity over the past eight years to create a more balanced project by seeking greater public dialog, input, and acceptance. Rather, its outreach to the communities and people of the affected municipalities traveled a one-way street.

Either way, the more durable benefits Applicant purports to bring could be delivered through alternative ways that would not permanently scar New Hampshire's natural, historic, and cultural landscape.

Another Concern: Excessive Delegations

The SEC has limited legal authority to delegate its duties. Applicant's delegation requests are unprecedented in their breadth and have been the subject of questions and confusion. These requests trigger the thorny issue of to what extent the SEC process preempts statutory authority for municipal regulation of local roads.

To a great degree Applicant's requested delegations are a result of important missing elements of the proposed project that are unknown (but should be known) at this time. If granted, the Subcommittee would unlawfully be delegating the SEC's mandatory statutory duty to assess all potential impacts of the proposed project to determine if the Applicant has satisfied the required statutory findings to be granted a certificate.

Conclusion

The Northern Pass proposal is designed to serve the desires of Applicant and its Canadian partner that would have exclusive use of the proposed transmission line. As such, it serves primarily private benefit, not public. In doing so, Northern Pass would extract too heavy a toll on New Hampshire and her residents to satisfy legal standards. As proposed, this massive proposal does not strike the required balance of benefits against adverse impacts. Northern Pass would not serve the greater good of the State and its communities.

The Forest Society respectfully urges that the Subcommittee to deny the requested Certificate of Site and Facility for the proposed project.

ARGUMENT

I. The Proposed Project Would Have Unreasonable Adverse Effects on Aesthetics and Historic and Archeological Sites

New Hampshire is home to some of the northeast's most diverse, verdant, and spectacularly beautiful landscapes. From the wild and remote forests of the Great North Woods, to unspoiled vistas of hillside farms, river valleys and mountain lakes, to historic villages and town centers—the proposed project would touch it all. Beyond mere scenery, these scenic and historic landscapes of New Hampshire are one of the state's most valuable assets, providing the lifeblood for a thriving outdoor-based tourism industry and culture. The purposes of RSA 162-H:1 make clear it is the Subcommittee's responsibility to ensure these precious elements of New Hampshire are not forever scarred by one of the largest utility lines ever proposed in the state's history.

Applicant has deliberately chosen to limits its—and by extension the Subcommittee's—field of view, in an effort to minimize the visual impacts of the proposed project. Applicant has endeavored to create a view for the Subcommittee of merely a few, scattered impacted scenic, historic, and cultural landscapes, with only marginal potential adverse effects that can be simply mitigated.[15] Evidence presented by the Forest Society, Counsel for the Public, and other intervenors, which encompasses a broader view consistent with legal requirements, shows that the proposed project would have unreasonable adverse effects on New Hampshire's scenic and historic resources. Applicant exceeds credulity when it asks this Subcommittee to accept that this proposed project would have virtually no effect on the iconic landscapes of New Hampshire: the

[15] Even for the Applicant, it is difficult to argue there is any way to mitigate the potential impact of the proposed project on such sites as the Moose Path/Connecticut River Scenic Byways. *See NPT Line Visual Impact Assessment*, APP 1, Appx. 17, at 14336–37; *see also* Tr. 8/30/17, Morning Session, 17, 22–28 (Baker; Widell) (Ms. Widell missed potential sites because of too narrow a definition, such as Moose Path Trail, Woodland Heritage Trail, Northern Forest Canoe Trail, Paddlers Trail (CT River), Trophy Stretch (CT River), and Republic of Indian Stream).

Great North Woods, the White Mountains, the Lakes Region, the Merrimack Valley, and more than thirty towns and village centers all along the way.

A. The Proposed Project Would have Unreasonable Adverse Effects on Aesthetics

1. Applicant's Witnesses for Aesthetics did not Comply with SEC Law

Applicant's aesthetics witnesses, Terrence J. DeWan and Jessica Kimball ("DeWan"),[16] took a minimalist approach. The methodology they employed and their restrictive interpretation of the SEC rules allowed them to dramatically winnow down the resources they evaluated in their Visual Impact Assessment (VIA) rather than, as the rules intend, conduct a comprehensive review of the visual impacts to all scenic and historic resources. Many of the resources that DeWan excluded are integral to the landscapes of New Hampshire. The Granite State landscape is made of scenic, cultural, and historic resources so rich and textured it exceeds credulity to accept what Applicant is selling here—namely, the proposed project would have no unreasonable adverse effect to *any* of these historic and scenic resources.

First, DeWan's analysis violates Site 301.05(b)(4)[17], which requires a visibility analysis "for proposed [e]lectric transmission lines longer than 1 mile [that are] located within any rural area . . . extend to . . . [a] radius of 10 miles if the line would be located in a new transmission corridor or in an existing transmission corridor if either or both the width of the corridor or the

[16] Unless noted otherwise, "DeWan" and/or "DeWan's analysis" shall refer to the work of the collective Terrence J. DeWan & Associates.

[17] It is well-settled in New Hampshire law that administrative rules have the force and effect of law. *See, e.g.*, *Portsmouth Country Club v. Town of Greenland*, 152 N.H. 617, 621 (2005) ("We agree that rules adopted by State boards and agencies may not add to, detract from, or in any way modify statutory law. Administrative agencies may, however, properly be delegated the authority to fill in details to effectuate the purpose of the statute. Rules and regulations promulgated by administrative agencies pursuant to a valid delegation of authority have the force and effect of laws.") (quoting and citing *Opinion of the Justices*, 121 N.H. 552, 557 (1981)).

height of the towers, poles, or other supporting structures would be increased."[18] As noted, Applicant had a role in drafting the new rules and knew of the forthcoming 10-mile requirement. Yet, despite that, Applicant let DeWan choose to first consider only 3 miles out.[19] Then, when the current, 10-mile rule came into legal effect, Applicant accepted the applicability of the new rules to the proposed project, yet at the same time let DeWan extend his review only to, at most, 5 miles, and only in certain discrete areas.[20]

The following colloquy illustrates Mr. DeWan's restrictive visual assessment, even in light of the regulatory changes:

> Q:Did you visit every town and village center within the 2800 square mile area surrounding this Project?
>
> A (DeWan): We certainly did when we did our initial study looking. Going out three miles because that was our initial understanding. When we went out looking at everything within ten miles, we were guided by a recognition that once you get beyond a certain distance, you're not going to see this Project. So did we visit every town center within ten miles, I would say no.
>
> …
>
> Q: Site Rule 301.05 requires you to conduct a visibility analysis of the areas of potential visual impact at a radius of ten miles. Right?
>
> A (DeWan): That's correct.[21]

The Subcommittee should not allow DeWan and Applicant to supplement their own judgment, without having sought or obtained a waiver, and in the face of an unambiguous legal requirement. Without having complied with this legal requirement, Applicant has not provided the Subcommittee with enough information to consider aesthetic effects.

---

[18] N.H. CODE ADMIN. RULES Site 301.05(b)(4).
[19] *Pre-Filed Testimony of Terrence DeWan and Jessica Kimball*, APP 16, at 305.
[20] *Project Visual Impact Assessment - Supplemental Report*, APP 93, at 53825.
[21] Tr. 8/31/17, Afternoon Session, at 119–120 (DeWan).

2. Applicant's Flawed Methodology Eliminated Potential Scenic Resources

Time and time again over the course of the hearings, it became clear that because of his chosen geographic limitation in direct contravention of the SEC rules, DeWan missed numerous resources. The aesthetics witness for Counsel for the Public, Michael Buscher, James Palmer, Jeremy Owens ("TJ Boyle"),[22] and the Forest Society's aesthetic witness, Harry Dodson of Dodson & Flinker, both found DeWan's flawed methodology resulted in eliminating sites and devaluing the scenic resources he did identify thus diminishing and minimizing the overall impacts.[23]

a. DeWan Did Not Identify all Impacted Town and Village Centers

Town and village centers that possess a scenic quality that would be impacted by the proposed project are one example of a type of resource that DeWan repeatedly missed in its idiosyncratic analysis. Aside from including the three town and village centers listed on the National Register,[24] DeWan identified only one additional town and village center: Plymouth Town Common.[25] But, when conducting a visual assessment in accordance with the SEC rules, TJ Boyle[26] identified 38 additional town and village centers that possess a scenic quality impacted by the proposed project.[27] The major disproportionality between the four that the

[22] Unless noted otherwise, "TJ Boyle" and/or "TJ Boyle's s analysis" shall refer to the work of the collective TJ Boyle & Associates, including the contributions of Michael Buscher, James Palmer, and Jeremy Owens.
[23] *See Visual Impact Assessment: Northern Pass Transmission Project*, SPNF 69, at 4256; *Prefiled Direct Testimony of Buscher, Palmer and Owens (TJ Boyle)*, CFP 138.
[24] Deerfield Center Historic District, Tr. 9/11/17, Afternoon Session, at 29–31 (DeWan) (citing *Revised Photo Simulations, Private Property Revised Photosimulations and Leaf Off Photosimulations 9/29/16*, APP 71, at 36337 and *DeWan NPT Scenic Resource Spreadsheet Subarea 1-6*, CFP 462 at 13217); Central Square Historic District in Bristol, CFP 462 at 13213; Concord Civic District, CFP 462 at 13216.
[25] *See* Tr. 9/11/17, Morning Session, at 24–26.
[26] Unless noted otherwise, "TJ Boyle" and/or "TJ Boyle's s analysis" shall refer to the work of the collective TJ Boyle & Associates, including the contributions of Michael Buscher, James Palmer, and Jeremy Owens.
[27] CFP 138; Tr. 9/11/17, Morning Session, at 25–26; *Supplemental Prefiled Direct Testimony of Buscher, Palmer and Owens (TJ Boyle)*, CFP 139, at 5420.

Applicant's witness identified and the 38 that Counsel for the Public's identified exemplifies Applicant's overly (and sometimes unlawfully) narrow approach.

b. DeWan Did Not Identify Scenic Roads Beyond Those Designated as a Scenic Byway and Did Not Consider Private Property Views

Excluding roads as scenic unless they were designated as a Scenic Byway is a misreading of the plain language of the statute. As TJ Boyle summarized:

> The definition and categories of "scenic resource", on 102.45(a), specifically includes "designated" components. It then goes on to include, on number -- on item (c), "scenic drives". To us, it was very clear that a "scenic drive" is not a "scenic byway", because that would fall under the "designated" category. And it is completely appropriate to look at visual impacts from any roadway that would be considered to have a scenic quality, which I would contest includes the majority of roads in New Hampshire.[28]

Site Rule 102.45(c) references drives and rides that possess a scenic quality as part of the definition of scenic resources. Following the plain language and structure of the rule, subsection (c) must be referencing roads other than roads designated because "designated roads" is specifically listed in subsection (a).[29]

However, on cross-examination, after Mr. DeWan first maintained his position, Attorney Connor (representing Counsel for the Public) walked Mr. DeWan through a series of private property views that if taken from a public road, he admitted, could be considered scenic resources, but that he did not complete visual effects rating forms for any of those locations and resources.[30]

---

[28] Tr.10/12/17, Morning Session, at 30 (Buscher); N.H. CODE ADMIN. RULES Site 102.45(a)
[29] N.H. CODE ADMIN. RULES Site 102.45(a)–(c); *see also Bovaird v. N.H. Dep't of Admin. Servs.*, 166 N.H. 755 (2014) (Interpreting a statute requires looking to the plain language of the statute, "in the context of the overall statutory or regulatory scheme and not in isolation."); *Franklin v. Town of Newport*, 151 N.H. 508, 510 (2004) (Interpreters must "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.").
[30] *See* Tr. 9/11/17, Morning Session, at 25–26 (DeWan).

Defending his approach, Mr. DeWan further testified that in his "professional opinion, the common practice, e.g., in Maine, Vermont, and New York, requires the identification and evaluation of roads that have been officially designated."[31] TJ Boyle sharply rebuked DeWan:

> Well, I'll first talk about Vermont. Roads are probably the most essential component of conducting a VIA. We look at every, and are required, to look at every single road, specifically, roads that a corridor is going to cross. We have similar experience in doing VIAs in New York. And I would contest the same thing is clear in the State of Maine, under Rule 315. It does not designate that only scenic byways should be reviewed.[32]

DeWan also erred in not considering a site a scenic resource if there was not public access to it. As an example, DeWan stated that the Boston, Concord & Montreal Bridge in Bridgewater, eligible for the National Register of Historic Places, was not a scenic resource because there is no public access, as he defines it.[33]

DeWan's conclusions reflect a fundamental misapprehension about New Hampshire law and tradition. New Hampshire presumes that all land is open to the public for viatic[34] purposes and hunting, among other things, unless the landowner takes affirmative steps (such as posting) to close it. This is part of a proud New Hampshire tradition of neighborliness. It also means that the public is able to "see the view" in a lot more places than Applicant is willing to admit. This openness is also reflected in New Hampshire's property tax law where owners are entitled to a reduced property tax rate for affirmatively opening their land, listing the land as "Current Use – Recreational."[35] Nearly 1.5 million acres in New Hampshire enjoy this status.[36]

---

[31] *Prefiled Supplemental Direct Testimony of Terrence DeWan and Jessica Kimball*, APP 92, at 53745.
[32] *See* Tr. 10/12/17, Morning Session, at 31 (Buscher).
[33] Tr. 9/11/17, Afternoon Session, at 25 (DeWan).
[34] Of or relating to traveling, a road, or a way.
[35] RSA 79-A:1 ("It is hereby declared to be in the public interest to encourage the preservation of open space, thus providing a healthful and attractive outdoor environment for work and recreation of the state's citizens, maintaining the character of the state's landscape, and conserving the land, water, forest, agricultural and wildlife resources. It is further declared to be in the public interest to prevent the loss of open space due to property taxation at values incompatible with open space usage"). See also generally RSA 79-A (settling forth New Hampshire's current use taxation).

During cross-examination, Mr. DeWan stated, '"public access,' to us, is a right that's granted to the general public that allows the public to go onto a piece of property without being questioned."[37] Mr. DeWan went on to rely on the SEC's decision in the 2015 Antrim Wind Energy, LLC docket to suggest this "precedent" adopted his definition of public access.[38] Not only are past SEC decisions not binding precedent on the present Subcommittee,[39] Antrim II does not stand for the proposition Mr. DeWan suggests.

The property in question in Antrim II is private or perhaps quasi-private property, but the critical element here is the "viewpoint."[40] The particular view of the project under discussion in Antrim II could be accessed and seen only from that private property.[41] If the view can be accessed only from a private property, then that may well not meet the definition under Site 102.45. However, here, Applicant, through DeWan, urges a much broader reading of the public-right-of-access reference, one which eliminates from consideration scenic resources that do *not* require a viewpoint exclusively from private property. Antrim II did not adopt this unlawfully narrow interpretation of the public access requirement in Site 102.45.

Here again, DeWan's minimalist approach excluded scenic resources, leaving the Subcommittee lacking from Applicant proof that the proposed project would not unreasonably affect aesthetics.

---

[36] Based on 2016 data from the State of New Hampshire, out of New Hampshire's total land mass of 5,742,659 acres, 1,491,829 of them enjoy the status of Current Use-Recreation. Considering all types of current use, all told, more than half of New Hampshire's land enjoys current use status. (3,008,456.44 acres in current use out of New Hampshire's total land mass of 5,742,659 acres. See https://www.revenue.nh.gov/mun-prop/property/equalization-2016/documents/cu-alpha.pdf (last visited 1/10/17).

[37] Tr. 9/15/17, Afternoon Session, at 77 (DeWan); *see also* Tr. 10/16/17, Morning Session at 131-32 (Way) (discussing the previous discussion of this section of the Antrim II decision as it relates to the public-access reference of the rules).

[38] Tr. 9/15/17, Afternoon Session, at 78-79 (DeWan).

[39] *See infra* Appx. A.

[40] SEC Docket No. 2015-02, *Decision and Order Granting Application for Certificate of Site and Facility*, at 117–18 (3/17/17).

[41] *See id.*

c. DeWan Unlawfully Interpreted the Definition of Historic Resources to Include Only Historic Sites Eligible for or Included on the National Register

As another example of DeWan's narrowing approach, DeWan employed the same incorrect interpretation used by Cherilyn Widell, Applicant's witness with respect to historic resources[42] (a category within the scenic resource definition: "historic sites that possess a scenic quality").[43] He, too, limited the historic sites he considered to only those that are eligible for or are listed on the National Register.[44] When specifically asked on cross-examination whether he included in their analysis other historic sites that possess a scenic quality that are not designated or eligible, DeWan (by Ms. Kimball) responded that "[the historic sites] had to be eligible," in other words, "somebody had to put them on a list."[45] When asked to confirm this was their methodology even though the definition of historic sites under the SEC is broader, Ms. Kimball responded simply, "We rely on databases."[46] These explanations are unpersuasive. As discussed more thoroughly in the subsequent subsection concerning historic sites, the plain language of Site 102.23 clearly shows the definition is broader than Applicant has interpreted it to be.

However, even if the site was "on a list," DeWan nevertheless found reasons to eliminate properties from consideration of visual impact. For example, when questioned on cross-examination by Attorney Connor (for Counsel for the Public) about the Lancaster North Road Historic Agricultural District, Ms. Kimball testified that while it was eligible for listing on the National Register and, therefore, met their criteria for a historic resource, they did not consider it

---

[42] *See infra* Part I.B.1.
[43] N.H. CODE ADMIN. RULES Site 102.45(e); *see infra* Part I.B.1; Tr. 8/31/17, Afternoon Session, at 108–09 (Kimball and DeWan) ("We relied on those that are on the National Register, on the State Register, and all those determined by the New Hampshire DHR to be eligible for inclusion in the National Register that could be spatially identified. . . . They had to be determined eligible.").
[44] Tr. 8/31/17, Afternoon Session, at 108-109 (Kimball; DeWan).
[45] *Id.*
[46] *Id.* at 109.

because the property was not publicly accessible, despite being *visible* from the both sides of a public road.[47] In sum, the process used by DeWan, like many of Applicant's witnesses, is one of narrowing and exclusion, not broadening and inclusion.

d. DeWan Almost Entirely Omitted Cultural Landscapes From its Analysis

DeWan almost entirely ignored and excluded cultural landscapes. To the extent cultural landscapes were considered at all, it was as a forced afterthought, much the way Applicant's witness for historic resources treated these significant features in New Hampshire's landscape.[48]

In its 12/21/17 letter to the SEC,[49] the New Hampshire Department of Historic Resources (DHR) wrote that it had "determined that eleven cultural landscapes are eligible for listing on the National Register of Historic Places in the project's area of potential effect."[50] And, perhaps more importantly, DHR reported for the first time that seven of these identified cultural landscapes[51] would in fact be adversely affected.[52] Not only that, but DHR also reported that the

[47] Applicant's aesethics and historic witnesses were not consistent on this point, contradicting each other on many occasions. DeWan disagreed that a scenic view from a public road, which therefore has public access, would qualify as a scenic resource. Tr. 8/31/17, Afternoon Session, at 96–97 (DeWan); *see also* Tr. 9/12/17, Morning Session, at 55 (DeWan). Ms. Kimball agreed with Mr. DeWan, that scenic views from public roadways were not scenic resources. Tr. 9/12/17, Morning Session, at 62 (Kimball). Ms. Widell disagreed, stating that it was possible to find an adverse impact on scenic resources for areas that are not public. Tr. 9/26/17, Afternoon Session, at 104 (Widell).
[48] *See infra* Part I.B.1.
[49] Letter Dr. Richard A. Boisvert, Deputy State Historic Preservation Officer, DHR, to Pamela Monroe, Administrator, SEC (12/21/17), available at https://www.nhsec.nh.gov/projects/2015-06/letter-memos-correspondance/2015-06_2017-12-21_ltr_dhr_findings_effect.pdf.
[50] *Id.* In the letter, DHR references its letter of 8/25/17 in which DHR gives a relatively detailed overview of each site, including the characteristics and historic features found therein and states "[i]ntroducing additional and taller tower structures, electrical lines, and new clearing in rights-of-way *may* adversely impact the landscape's rural character, resulting in an Adverse Effect finding." SPNF 223, at 7235–56 (emphasis added). While DHR's determination of adverse effects in the context of Section 106 is helpful information for the Subcommittee to have, it is information that the Applicant should have provided, and should have done so in the context of SEC laws, not in the context of Section 106.
[51] *Id.* (listing Gale River Cultural Landscape, Ham Branch River Cultural Landscape, Harvey Swell Cultural Landscape, North Road-Lost Nation Road Cultural Landscape, Upper Ammonoosuc River Cultural Landscape, Buck Street-Bachelder Road Cultural Landscape, Route 3 Tourism Development Cultural Landscape).
[52] *Id.*

proposed project would have adverse effects on seven historic districts,[53] five recreation related sites,[54] and four agricultural related sites[55] *all* of which are also scenic resources.[56]

While the assessment DHR is conducting arises out of the Section 106 process, the standard of which differs from that which applies here,[57] Applicant's failure to ensure that an assessment of these resources was done as part of its application reinforces the position of the Forest Society: Applicant did not meets its burden and in fact seems to have intentionally minimized disclosure of the extent of potential impact on the iconic landscape of New Hampshire. Given the DHR's determination, that sites running the entire length of the proposed route would be adversely affected, and the fact that these sites also meet the definition of a scenic resource, Applicant clearly did not correctly analyze cultural landscapes.

e. DeWan Further Narrowed and Excluded Potential Adverse Impacts by Viewing Resources Only From Self-Identified Key Observation Points and Failing to Adequately Consider Different Perspectives of the Varied Users

"The expectations of the typical viewer," an enumerated factor to consider when assessing the "characterization of the potential visual impacts of the facility,"[58] is one aesthetic element that would, on its face, seem to be a subjective element. DeWan, however, would have the Subcommittee believe such an experience can be reduced to a numerical, quantifiable equation he could devise without actually conducting any research study of actual user

[53] *Id*. (listing Oak Hill Agricultural District, Deerfield Center Historic District, Nottingham Road Historic District, Webster Avenue Historic District, Plymouth Downtown Historic District, North Woodstock Village Historic District.).
[54] *Id*. (listing The Rocks, Dummer Pond Sporting Club, The Weeks Estate, Maple Haven Campground, Montaup Cabins).
[55] *Id*. (listing Windswept Farm, Maple View Farm, Benjamin Teele Barn, Lower Intervale Grange #321).
[56] *See infra* Part I.B for a more detailed discussion about these resources.
[57] Section 106 is an iterative process that first determines if a site is eligible for or is listed on the National Register. NH's definition of historic resources is broader. The next step to determine whether there is an adverse effect is also more narrowly defined in the section 106 process and not the same as the unreasonable adverse effect standard here. *See infra* Part I.B.1.b.
[58] N.H. CODE ADMIN. RULES Site 301.05(b)(6)(a).

expectations about any given resource, the result of which purports to show the proposed project would not have unreasonable adverse effects.[59] Along with common sense and experience, Mr. Dodson, TJ Boyle, and well over 1,000 public commenters[60] and at least 20 intervenor groups all say otherwise.

The following line of questioning between Heather Townsend[61] and TJ Boyle, by Mr. Buscher, illustrates this point (through discussing the Pemigewasset River):

> Q: … I was wondering about your choice of the location of the viewer in this? Is it at the level of the water?
>
> A (Buscher): It was -- I actually took these photos. And I was sitting in a kayak when I took these photos.
>
> Q: … Why did you make that choice?
>
> A (Buscher): That's the way that users are really going to experience it…. And it is probably the most appropriate way to understand the experience from a user.
>
> …
>
> Q: … How do you understand the difference of a recreational user, as opposed to someone who is, say, going by in a car, of a specific view?
>
> A (Buscher): So, just to begin, there's obviously, some differences in the physical mode of transportation, and the timing and experience associated with that. If you're paddling down a river, you're, obviously, going at a much slower rate. Your duration within the visual exposure to that portion of the Project is going be extended. Your choice to conduct that activity is going to be most likely more associated with a recreation or a desire to enjoy that resource. Whereas, driving, it might be to enjoy that resource, but it just might be to get from Point A to Point B.[62]

[59] APP 1, Appx. 17, at 14316–18.
[60] Out of the 1,476 public comments read, 1,011 commenters oppose the proposed project, at least in part, because of the adverse effects it would have on aesthetics. *See supra* Footnote 4.
[61] In her capacity as temporary spokesperson for the Ashland to Deerfield Non-Abutting Property Owners group. Tr. 10/12/17, Morning Session, at 85 (Townsend).
[62] Tr. 10/12/17, Morning Session, at 89–90; 92 (Buscher).

In contrast, DeWan not only did not place himself in the shoes of the typical viewer, but he repeatedly stated that his obligation was to assess the aesthetic impact of what would be one of the most massive linear industrial structures ever to be introduced across New Hampshire landscapes, significantly longer and taller than the Phase II line, only from key observation points without need of inquiry of any viewer expectation.[63] While Site 301.05(b)(7) does provide that the VIA should include photosimulations from representative key observation points, *these are mere technical requirements* for the VIA of limited value with an extended linear proposed project like this one. The assessment of scenic resources must be done from myriad vantage points. Otherwise the rule requiring inclusion of expectation of the typical viewer, Site 301.05(6)(a), would be superfluous.[64]

By not including the expectation of the typical viewer, DeWan, with its depersonalized approach, significantly reduced the potential for assessing the real-world impacts the proposed project would have on the aesthetics across much of New Hampshire. This means the information Applicant provided the Subcommittee through DeWan is missing the perspectives and voices of the many different types of people who experience the superior scenic beauty New Hampshire offers.

As Mr. Dodson stated, DeWan did not look at New Hampshire's landscape in broad perspective: the "distinctive regional character and scenic resources of the various landscapes through which the project passes is ignored."[65] The "fact that the Great North Woods has a character that is distinct from other landscapes, such as the White Mountains, is not discussed.[66] Because "a significant proportion of views of the Project occur along linear features such as

[63] *See* APP 1, Appx. 17, at 14318 (describing methodology concerning key observational points).
[64] *Weare Land Use Ass'n v. Town of Weare*, 153 N.H. 510, 512–13 (2006) (a statute cannot be interpreted to "produce such an illogical result" as to render another statute meaningless).
[65] SPNF 69, at 4252.
[66] *Amended Pre-Filed Direct Testimony of Harry Dodson*, SPNF 62, at 4120.

roads or over wide areas such as lakes, views will not be limited to one key observation point but will be made of a wide range of multiple views from a variety of angles and locations."[67]

DeWan's VIA consistently discounted the public's experience, as demonstrated, for example, in the following exchange with Attorney Connor (for Counsel for the Public):[68]

> Q: Sir, you didn't find a single scenic resource at which the public's future use and enjoyment would be impacted by this Project on either a medium or high impact, did you?
>
> A (DeWan): I believe we gave the majority of them a low evaluation for continuing use and enjoyment.[69]

As yet another example of this point, DeWan categorized town forests and conservation areas as having "Low Cultural Value," which largely eliminated them from an individual VIA analysis.[70] DeWan did so despite the fact, which DeWan acknowledged, that the greatest outdoor recreation activity that New Hampshire residents participate in regularly is wildlife viewing (42 percent of residents surveyed), an activity which DeWan agreed would likely be performed at town forests and conservation areas.[71]

DeWan further eroded credibility of its VIA by cherry-picking viewing sites that minimize the potential adverse effect of proposed towers. As but one example, Mr. Dodson illustrates this point using two vantage points near to each other in Deerfield Center.[72] The first shows the viewpoint DeWan chose, and the second is the one selected by Mr. Dodson. The distinction between the two viewpoints clearly illustrates how DeWan's minimized the impact by using a longer and more cluttered view while Mr. Dodson's simulation brought the structure into

---

[67] *Supplemental Prefiled Direct Testimony of Harry Dodson*, SPNF 66, at 4224.
[68] Tr. 9/11/17, Morning Session, at 91 (DeWan).
[69] *Id*.
[70] Tr. 9/11/17, Morning Session, at 40 (CFP cross-examination of DeWan) ("And yet you have categorized Town Forests and conservation areas as having Low Cultural Value which by and large eliminated then from an individual Visual Impact Analysis, correct? (DeWan): That's how we categorized those types of resources.").
[71] *Id.*
[72] SPNF 69, at 4311–14.

context from a viewer standing within the historic Deerfield Center. Members of the Subcommittee were invited to make similar comparisons for themselves on the several bus tours. As Subcommittee members and others on these tours experienced, a two-dimensional photo conveys what the photographer chooses to convey by the vantage point chosen.

Finally, DeWan's credibility with respect to expectation of the typical viewer was significantly eroded at numerous points during his cross-examination. For example, in his testimony, Mr. DeWan stated that one could simply look the other way if one found a structure impinging on the enjoyment of a scenic resource like fishing on Big Dummer Pond:[73]

> Q: So, that analysis is similar to downtown Deerfield, people will still presumably go to church, and you're assuming that their future enjoyment of the church, with the new change, is going to not be affected at all or have a low impact?
>
> A (DeWan): I know some people consider fishing to be a "religion," but I wouldn't want to compare the two that way. But the observation here is that people go there for a particular motive. And the motive being primarily fishing is not going to change. When they're out on the lake, yes, you're going to be seeing the transmission line in a certain portion of your view. And I guess, if somebody didn't want to see it, they would simply turn the boat around or go on the other side of the island.[74]

When asked by Attorney Connor (for Counsel for the Public) about DeWan's conclusion regarding diminished viewer experience in scenic areas like Big Dummer Pond, TJ Boyle, by Mr. Palmer, swiftly explained the clear flaws in DeWan's suggestion that outdoor enthusiasts, including people who enjoy fishing, can just turn their heads:

> Q: Based upon your experience, does the public require an extended exposure to a transmission line in order to have an adverse impact?
>
> A (Palmer): So, there's a whole area of cognitive research that is called -- that involves very brief exposures, it's called a "gist." And, in about a twentieth of a second you will form an aesthetic opinion that is very similar to the opinion that you will have if you've been given however long you want to look at a view. So,

[73] Tr. 9/11/17, Morning Session, at 44–45 (DeWan).
[74] *Id*.

> you don't need ten seconds, or five seconds, or even a full second to form an aesthetic opinion. In many of their road crossings, for instance, are going to be repeatedly visited by people, so that the exposure is significant -- the aesthetic impact of the exposure is significant.[75]

In adopting RSA 162-H, the legislature clearly intended to have siting decisions made through a balancing process, recognizing that it was unlikely that no utility—or its opponents—would ever have a perfect case to make. Some of this case, then, comes down to contrasting the attitude of parties and their witnesses. Thus, for example, DeWan testified that, having reviewed one of the most extensive and visually-intrusive applications in New Hampshire history, he could not find a single example of a "high" visual impact.[76] This defies credibility and the apparent expectation of the legislature. This level of certainty—rising to arrogance—should give the Subcommittee pause as to DeWan's credibility.

The Subcommittee should not turn its head from the numerous, deep flaws in DeWan's methodology and, by extension, Applicant's failure to meets its burden of proof. The Subcommittee should attend to evidence presented by the Forest Society and many other parties to this case providing examples of where effects on aesthetics would be unreasonably adverse.

For example, as the Forest Society documented in its testimony, the Forest Society's property known as Kauffmann Forest in Stark, which hosts one-mile of the existing Eversource right-of-way Applicant proposes to convert for use by its proposed project, is part of a larger mosaic of conserved lands that set in the Upper Ammonoosuc River Valley. The Eversource right-of-way parallels Route 112 for about eight miles between Dummer and Groveton, *one of the most scenic drives in Coös County*. The existing poles in the right-of-way are below tree canopy averaging about 40 to 45 feet in height. The project proposes to remove the existing 115

[75] Tr. 10/12/17, Morning Session, at 54–55 (Palmer).
[76] Pre-filed Testimony of Terrence DeWan and Jessica Kimball, APP 16, at 324 ("None of the overall visual impacts to scenic resources that we observed were characterized as high.").

kV conductors and poles, to make room for the new transmission lines and the newly relocated 115 kV line, both of which would have towers exceeding 100 feet in height. The scenic drive on Route 110 would never be the same. The permanently conserved lands in the larger mosaic would be permanently scarred. This is precisely the kind of adverse effect on aesthetics the framers of RSA 162-H had in mind when they wrote that no project can have an "unreasonable adverse effect" on aesthetics.

3. The Proposed Project Would Have Unreasonable Adverse Effects on Aesthetics

Contrary to Applicant's conclusion, the proposed project would have unreasonable adverse effects on aesthetics, with new and relocated industrial structures towering high above tree canopy heights along a line slicing through New Hampshire's cultural and historic landscapes.

Taking into account Site 301.14(a), which sets forth the criteria to consider when assessing the project's unreasonable adverse effects, TJ Boyle, Mr. Dodson, and Ms. O'Donnell[77] all reached the same conclusion: the proposed project would have an unreasonable adverse effect on the iconic landscape of New Hampshire.[78] "The project will be an incongruous, dominant, and prominent feature given its scope and scale, the numerous scenic resources impacted at close range, and of relatively long duration, and the permanence of the project on the landscape."[79]

[77] Ms. O'Donnell's review of the project differed from TJ Boyle and Dodson & Flinker. Her assessment report focused on above ground historic sites and cultural landscapes. *See Prefiled Direct Testimony of Patricia M. O'Donnell on Behalf of Counsel for the Public*, CFP 140, at 5429–5744. Further reference to Ms. O'Donnell's report is included in the historic sites section. *See infra* Part I.B.
[78] SPNF 62, at 4117; CFP 138, at 3712–14; CFP 140, at 5431.
[79] SPNF 69, at 4253.

In reaching their respective conclusions, neither TJ Boyle nor Mr. Dodson undertook the task of creating a visual impact assessment (VIA), correctly leaving to Applicant the burden of proof in accordance with the SEC rules. They each, however, critiqued DeWan's VIA and extensively reviewed DeWan's viewshed maps. In so doing, each independently found more sites that would be impacted: 57 for Dodson & Flinker[80] and over 18,000 for TJ Boyle[81]. Additionally, Mr. Dodson, while employing a similar methodology to DeWan's, modified it to "reflect a broader range of issues and aesthetic criteria identified in the SEC rules."[82] Assessing more accurately things like cultural value, Mr. Dodson also recognized the specific, distinctive regional character and scenic resources of the various landscapes of New Hampshire by dividing the proposed project route according to New Hampshire's tourism regions: Great North Woods, Connecticut River Valley, White Mountain Foothills, Concord Metropolitan Area, and Merrimack Valley.[83] Mr. Dodson's methodology recognized and captured some of the unique landscape characteristics of each area—a distinction absent from DeWan's VIA.

All of the aesthetics evidence taken together: Applicant's failure to adequately identify sites, including the resultant failure to assess those unidentified sites; and failure to distinguish between the varied and rich differences amongst the diverse landscapes through which this massive industrial project would be built, along with the evidence set forth by others, leads inexorably to Applicant not meeting its burden of proof. Consequently, the application should be denied.

[80] SPNF 69, at 4255, 4442–47.
[81] CFP 138, at 3709.
[82] *See* SPNF 69, at 4254.
[83] *See id*. at 4251.

B. The Proposed Project would have Unreasonable Adverse Effects on Historic Sites and Archaeological Resources

Historic sites and archeological resources are integral components of New Hampshire's iconic landscape and valuable heritage. It is the combination of beloved historic and archeological assets woven together with New Hampshire's magnificent natural beauty that forms the fabric of the Granite State's landscapes.

Applicant has not met its burden to prove the proposed project would not have an unreasonable adverse effect on them. Applicant's analysis of historic sites is unlawfully narrow and otherwise flawed and incomplete. The methodology employed by Applicant's witnesses for historic resources did not use New Hampshire's broad definition of what qualifies as a historic resource. They did not review the significantly larger area of potential effect. They did not conduct an assessment of cultural landscapes until after the hearings began. And even if all potentially impacted resources had been identified, they did not establish a plan for avoidance, minimization, or mitigation of adverse effects.

The Subcommittee should reject Applicant's exclusive reliance on the Section 106 process' Programmatic Agreement amongst the federal agency (United States Department of Energy (USDOE)), Applicant, New Hampshire State Historic Preservation Officer, Vermont Historic Preservation Officer, and Advisory Council on Historic Preservation for Issuing A Presidential Permit for the Northern Pass Transmission Line Projects International Border Crossing to satisfy the criteria of Site 301.14(b).[84]

[84] No government agency except this Subcommittee will determine if Applicant has met the requirements of RSA 162-H. While the Subcommittee should consider the input of appropriate federal agencies, no decision of another agency, taken alone or together with others, is dispositive of the Subcommittee's decision here because no other agency applies the broad, multi-faceted RSA 162-H standard.

1. Applicant's Methodology for Analyzing Impacts to Historic Sites was Unlawfully Narrow

The methodology used by Applicant's witnesses for historic and archeological resources, Cherilyn Widell[85] and Victoria Bunker,[86] was fundamentally flawed because they applied the definition of historic properties for the Section 106 process—not the New Hampshire definition of historic sites, which is significantly broader than the Section 106 definition.

a. Applicant's Interpretation of Historic Resources is Erroneous

Site 102.23 provides that "'[h]istoric sites' means 'historic property,' as defined in RSA 227-C:1, VI, namely 'any building, structure, object, district area or site that is significant in the history, architecture, archeology or culture of this state, its communities, or the nation.' The term includes 'any prehistoric or historic district, site, building, structure, or object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the secretary of the Interior,' Pursuant to 36 CFR §800.16(l)(1)."

The meaning of this definition becomes clear through application of the standard tools of statutory interpretation. When construing statutes and administrative regulations,[87] the Subcommittee (like a court) must look first to the language used and, where possible, ascribe the plain and ordinary meanings to words used.[88] It must interpret "disputed language of a statute or

[85] *Pre-filed Testimony of Cherilyn E. Widell*, APP 18, at 353 (stating the purpose of her testimony is to provide assessment of potential effects of the proposed project on above-ground historic sites). Ms. Widell also states that her "background and training meets the Secretary of the Interior's professional qualification standards, 36 CFR Part 61, for both historian and architectural historian." *Id.* at 352. She does not. Tr. 8/29/17, Morning Session, at 62–63 (Widell) (admitting on cross-examination that she did not actually have the professional qualifications for an architectural historian).

[86] Dr. Victoria Bunker's pre-filed testimony states that she provided testimony with respect to archeological resources. APP 17, at 332.

[87] See supra Footnote 17 (discussing the force and full effect of administrative rules on this agency).

[88] The SEC uses the same rules of statutory interpretation as the courts use. See, e.g., SEC Docket No. 2015-01, Request of SEA-3, Inc., *Order on Pending Motions*, at 8–9 (8/10/15) (applying canons of statutory construction to interpret the authority of counsel for the public); SEC Docket No. 2010-01, Application of Groton Wind, LLC, *Decision Granting Certificate of Site and Facility with Conditions*, at 37–38 (5/6/11) (applying canons of statutory construction to interpret the orderly development standard before the current administrative rules existed); SEC

regulation in the context of the overall statutory or regulatory scheme and not in isolation."[89] In doing so it shall "construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result."[90] It "cannot consider what the legislature might have said or add language that the legislature did not see fit to include."[91] It "must give effect to all words in [the] statute and presume that the legislature did not enact superfluous or redundant words."[92] Finally, when one statute references another, those statutes must be read together.[93]

Here, the plain language of Site 102.23 demonstrates that the definition is much broader than Applicant has interpreted it to be. The first sentence references and quotes RSA 227-C:1, VI, which includes "'*any* building . . . *that is significant* in the history . . . of this *state, its communities, or the nation.*'"[94] The language of the quoted statute is broader and goes far beyond a definition consisting only of eligibility for or actual listing on the National Register of Historic Places.

Moreover, reading the quoted section of statute in context, RSA 227-C:1, VII also illustrates the very broad meaning that lawmakers intended historic sites to have in New Hampshire law. That section's definition of "historic resource" references, for example, any object within a historic property that "enhances an understanding and appreciation of New Hampshire history", "[a]ny object, or group of objects, and the district, area, or site they define,

---

Docket No. 2009-01, Motion of Campaign for Ratepayers Rights, et al., *Order Denying motion for Declaratory Ruling*, at 8 (8/10/09) (applying canons of statutory construction to interpret the undefined term "sizable addition"). *Bovaird*, 166 N.H. at 759.

[89] *Bovaird*, 166 N.H. at 759.

[90] *Franklin v. Town of Newport*, 151 N.H. 508, 510 (2004).

[91] *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180, 183–84 (2014).

[92] *Hodges v. Johnson*, 2017 N.H. LEXIS 232, *25 (N.H. 2017) (citing *Winnacunnet Coop. Sch. Dist. v. Town of Seabrook*, 148 N.H. 519, 525–26 (2002)).

[93] *State v. Patterson*, 145 N.H. 462, 464 (2000) ("The language of RSA 318-B:28-a referencing RSA 651:5 signifies that the two statutes must be read together.")

[94] N.H. CODE ADMIN. RULES Site 102.23 (emphasis added).

which may yield significant data but whose value and significance has yet to be determined by the division of historical resources, as well as properties that are Register eligible."[95]

Finally, the last sentence of Site 102.23 states that the meaning of historic sites "*includes* 'any . . . object included in, or eligible for inclusion in, the National Register of Historic Places maintained by the Secretary of the Interior."[96] The use of "includes" demonstrates the sentence referencing the National Register of Historic Places is meant to be illustrative of the broader meaning of "historic sites" not its exclusive meaning. It does not mean Applicant need identify and Subcommittee need consider only those historic sites and archeological resources deemed eligible for or included on the National Register.

During cross-examination of Counsel for the Public's witness, Patricia O'Donnell, Attorney Walker, on behalf of Applicant, relied on SEC deliberations from the Antrim II to support Applicant's narrow interpretation of "historic sites."[97] Attorney Walker asked Ms. O'Donnell to respond to Dr. Richard Boisvert's[98] statement that "[i]t is important to note that, for purposes of this application process, the definition of 'Historic Sites' in the SEC rules follows the definition of 'Historic Properties' in the federal regulations, i.e. eligible for listing on the National Register of Historic Places.'[99]

By this question, Applicant appears to be suggesting SEC precedent supports their interpretation of "historic sites." This suggestion is without merit. First, SEC deliberations, especially statements made in deliberations, are mere *dicta* at best; they are not binding

[95] RSA 227-C:1, VII.
[96] N.H. CODE ADMIN. RULES Site 102.23 (emphasis added).
[97] *See* Tr. 11/2/17, Morning Session, at 46–48 (O'Donnell; Walker).
[98] Then acting in his capacity as a member of the SEC, now Deputy State Historic Preservation Officer at DHR.
[99] Tr. 11/2/17, Morning Session, at 46–48 (Walker) (quoting SEC Docket No. 2015-02, Deliberations Day 1 Morning Session, at 85–86).

authority.[100] This is particularly true where the SEC did not in their written decision adopt or reference Dr. Boisvert's statement.[101] Second, the whole statement from which the quote was taken acknowledges the significant differences between the SEC process and the Section 106 process, such as the definitions for adverse effects.[102] Third, it is true the SEC definition of "historic sites" "follows" the federal definition, but that does not mean, and it does not appear Dr. Boisvert was suggesting, the SEC definition is exactly the same or as narrow as the federal definition. As discussed above, the federal definition is *included* in the state definition, which also includes "area or site that is significant in the history, architecture, archeology or culture of this state, its communities, or the nation."[103]

To make a similar point, Applicant, again through Attorney Walker, points to a 1/15/16 policy memorandum from DHR to argue "DHR equat[es] the identification of sites under the 106 process with the SEC rules."[104] In neither this policy memorandum nor elsewhere in this record, has DHR made the representation that the SEC process for evaluating historic sites is the same as the section 106 process. To the contrary, DHR has made clear its role in the SEC process is limited to updating the SEC on the 106 process. In the first paragraph of the policy memorandum, DHR states that their policy is to "conduct[] a preliminary review of the materials [of an application for certificate before the SEC] to determine whether they contain sufficient material for the DHR's purposes *under Section 106* …."[105] By this paragraph, DHR makes clear its analysis is limited to the Section 106 process, acknowledging its distinction from the SEC

[100] *See infra* Appx. A.
[101] *See* SEC Docket No. 2015-02, *Decision and Order Granting Application for Certificate of Site and Facility*, at 124–25 (3/17/17) (does not reference Dr. Boisvert's opinions concerning the definition of historic resources).
[102] SEC Docket No. 2015-02, Deliberations Day 1 Morning Session, at 85-86.
[103] N.H. CODE ADMIN. RULES Site 102.23.
[104] Tr. 11/2/17, Morning Session, at 50 (Walker).
[105] *DHR Policy Memorandum Agency Review of Application before the New Hampshire Site Evaluation Committee*, APP 116, at 59848 (emphasis added).

process. Attorney Walker also cited to the first paragraph of the second page of the memorandum. This paragraph also does not equate the two processes. It acknowledges that DHR reviews SEC applications for certification under the Section 106 regulations and notes that the SEC rules include reference to the Section 106 process.

Applicant's exceedingly narrow interpretation of historic sites clearly contravenes both the plain language of the law and the intent of New Hampshire lawmakers.

b. Section 106 Does Not Satisfy SEC Requirements

Ms. Widell concedes that Applicant's witnesses followed only the Section 106 process and federal definitions of finding an adverse effect.[106] Ms. Widell did not apply the broad New Hampshire definition of historic sites. Instead, she interpreted Site 102.23 to include exclusively sites that are eligible for or are on the National Register of Historic Places. This creates a gaping void in the application. [107] Applicant's failure to use the correct definition led to "[t]he Applicant's failure to include the valued cultural landscapes of New Hampshire that are conserved and protected throughout other means than historic designation, such as a town forest, state parks, historic graveyards, public waters, and other types of resources,"[108] including that Applicant did not conduct a site-specific analysis based on adequate historic research. Thus, Applicant's analysis necessarily does not comply with the rules and understates the extent of adverse effects the proposed project would have on historic resources.

[106] Tr. 8/2/17, Afternoon Session, at 134 (Widell) ("The standards that we used to determine which properties were eligible for consideration that had significance and integrity, those were the standards that are used by the National Park Service for the Section 106 process by the Advisory Council. And further, we also then used the definition for finding an adverse effect from 36 CFR, Part 15, and applied it. We used those tools that assist you in determining how to find visual adverse effect from Vermont and Virginia. But the assessment report that I based my finding of no unreasonable adverse effect absolutely was consistent with Section 106.").
[107] Tr. 8/3/17, Morning Session, at 9–13 (Widell)*;* Tr. 8/30/17, Morning Session, at 17 (Widell).
[108] CFP 140, at 5434.

Ms. Widell further compounded the error by suggesting that the Subcommittee be satisfied with Applicant's assurance that any adverse effects can be minimized through a Programmatic Agreement with a mitigation plan that *may* be required under the Section 106 process[109]—a process that is not yet complete and, as noted by DHR, does not do much of what the SEC process does. DHR specifically stated what the Section 106 process *does not* do:

> Section 106 of the National Historic Preservation Act is a consultative regulation, rather than a permitting one. It directs *federal* agencies to consider the effects of projects on historic resources through a consultative process of identifying potentially affected historical resources, assessing whether effects are adverse, and then resolving any adverse effects through measures that avoid, minimize, or mitigate effects, if present. *Unlike review by the NH Site Evaluation Committee, a Section 106 review does not make a judgment as to whether the adverse effects presented by a project are unreasonable.* Under Section 106, as long as the federal agency has resolved adverse effects, if present, through avoidance, minimization or mitigation and concluded its responsibilities under regulations at 36 CFR 800, the review is complete.[110]

The distinction between the Section 106 process and this pending SEC proceeding is critically important. Yet, Applicant's historic resource witnesses routinely blurred the lines between the two proceedings; from erroneously utilizing the narrower definition of historic sites found within the federal process to not identifying whether an adverse effect is unreasonable with respect to individual properties, to reliance upon the Programmatic Agreement for federal consultation.

As discussed in the final section of this memorandum, delegating to DHR at this time, in reliance on the Section 106 process, and without specific identification of the route alignment, would not be lawful. Such a delegation would exceed the limitations imposed by the statute on delegation. It would take away from the Subcommittee its non-delegable mandatory duty to

---

[109] *See, e.g.*, Tr. 8/29/17, Morning Session, at 55 (Widell) (citing to the Programmatic Agreement as part of an answer concerning mitigation); Tr. 8/29/17, Afternoon Session, at 9–12 (Widell) (stating the Programmatic Agreement would set forth mitigation and discussing the mitigation process as part of the Programmatic Agreement).

[110] Letter from Dr. Richard A. Boisvert, State Archaeologist and Deputy State Historic Preservation Officer, DHR, to Members of the Northern Pass Transmission Subcommittee (8/25/17), CFP 443, at 12227 (emphasis added).

assess whether the proposed project would have unreasonable adverse effects on historic resources. The fact that Applicant's approach, near exclusive reliance on Section 106 and not providing a final route alignment, has left the Subcommittee without sufficient information to make the determination regarding historic resources justifies denial of the project. Overreaching delegation to an agency using federal consultative standards far narrower than SEC law would be neither appropriate nor lawful. Unsubstantiated assurances from Applicant's witnesses to rely on the Section 106 process do not protect these many, many important historic assets, so important to the people of New Hampshire, the way the RSA 162-H intends for them to be protected.[111]

c. Applicant Applied too Constricted an Area of Potential Effect

Beyond employing a narrower definition for historic sites, Applicant used an excessively constricted geographic range to identify historic sites than Site 301.05 compels. Specifically, Applicant again relied exclusively on the Section 106 process in which DHR, in consultation with the USDOE (the lead federal agency on the Presidential Permit) agreed to establish a one-mile Area of Potential Effect ("APE").[112] However, that was done exclusively for the Section 106 process. This is a significant flaw in Applicant's analysis, as follows.

First, the Section 106 process is a completely different administrative process than the one at hand. It is the presence of federal agencies (DOE, US Forest Service, and U.S. Army Corps of Engineers ("Army Corps")) in the federal licensing proceedings that triggered the Section 106 process. The Section 106 process serves a separate and completely different purpose than that established by the New Hampshire legislature with the SEC proceeding. As the preamble to the Programmatic Agreement correctly states: "Portions (the majority) of the

[111] RSA 162-H:1; 16, IV.
[112] Programmatic Agreement Among the U.S. Dep't of Energy, the N.H. State Preservation Officer, and the Advisory Council on Historic Preservation for Issuing a Presidential Permit for the N. Pass Transmission Line Project's Int'l Border Crossing, APP 204, at 68668–75 (preamble).

proposed Project will also require state siting authorization from the New Hampshire Site Evaluation Committee (NH SEC)… the NH SEC review is conducted as a separate, independent process from the federal review under Section 106 and is governed by NH state law."[113]

Applicant's conflation of the SEC process into the Section 106 process and suggested abdication of the SEC's independent consideration and oversight by entirely deferring to the Section 106 process directly contravenes state law. It has also led Applicant to use the narrower definition of historic sites (eligible for or listed on the National Register of Historic Places) and using the narrower geographic range of a one-mile APE. As the witness for Counsel for the Public for cultural landscapes, Patricia O'Donnell, testified, "the Section 106 process does not consider the New Hampshire statutes, the SEC definitions of historic sites and cultural landscapes, or the values placed on these resources by local communities through planning and zoning guidance or through direct citizen identification of historic places, areas or objects."[114]

Perhaps even more dispositive to the question of whether or not the Section 106 process could be adequately utilized for making a determination of whether the project would have an unreasonable adverse effect pursuant to RSA 162-H:16, IV(c), the Section 106 process is designed to establish compensatory mitigation.[115] It never engages in the unreasonable adverse effects assessment, and therefore reliance on the Section 106 process would lead to an unlawfully incomplete assessment of effects. This is clearly beyond the scope of permissible delegation.[116] For all of these reasons, the Subcommittee cannot, as a matter of law, simply defer to or rely on the Section 106 process.

[113] *Id.*
[114] CFP 140, at 5434.
[115] *Id.*
[116] *Id.;* Tr. 8/29/17, Morning Session, at 83–84 (Widell).

Here, Site 301.05 sets forth the parameters for Applicant to conduct a visual impact assessment—an assessment that specifically includes "a narrative and graphic description… of the physiographic historical and cultural features of the landscape . . . ."[117] The deficiency of the one-mile APE compounds the problem created by Applicant's use of a narrowed historic sites definition with the resulting effect that historic sites and cultural landscapes[118] were either not identified or not adequately assessed for adverse effects.

Again, Ms. O'Donnell showed that result in her prefiled testimony and supplemental testimony, illustrating how many additional sites would be adversely impacted. For example, in the 192-mile corridor, using the one-mile APE, Ms. Widell found an astonishingly small number of properties (194) with more than "minimal views," out of which she found only 12 as having adverse effects.[119] Ms. O'Donnell's numbers are significantly higher and more reflective of New Hampshire's iconic combination of natural features and historic alterations to the natural environment. Ms. O'Donnell found 3,024 locations.[120]

O'Donnell's prefiled testimony cited the Town of Whitefield, as one example, in which thirty-seven valued, historic places, areas, and objects were identified by the community (another example of why using the Section 106 definition proved to be far too limiting).[121] These sites shape the character of the town. Applicant's constricted, one-mile APE eliminated assessing the real visual impact this proposed project would have on historic sites.

---

[117] N.H. CODE ADMIN. RULES Site 301.05(b)(4) (describing the area for "[e]lectric transmission lines larger than 1 mile shall extend to a 2 mile radius if located within any urban cluster;… A radius of 10 miles if the line would be located in a new transmission corridor or in an existing transmission corridor if either or both the width of the corridor or the height of the towers, poles, or other supporting structures would be increased").
[118] *NH DHR Summary and Status dated 8/25/17*, CFP 443, at 12220 ("The National Park Service defines cultural landscape as, 'a broad geographical area that is a reflection of human adaptation and use of natural resources and is often expressed in the way land is organized and divided, patterns of settlement, land use, systems of circulation, and the types of structures that are built. The character of a cultural landscape is defined both by physical materials, such as roads, buildings, walls, and vegetation, and by use reflecting cultural values and traditions'").
[119] APP 18, at 357.
[120] *Patricia O'Donnell (Heritage) Pre-filed Supplemental Testimony dated (4/17/17)*, CFP 141, at 5764.
[121] CFP 140, at 5431–32.

d. Applicant's Project-as-a-Whole Approach Results in Insufficient Information for Approval

Applicant, through not only Ms. Widell but also through nearly every other witness, approached measurement of adverse effects by looking at the project as a whole, rather than looking at individual effects. It appears that the SEC has never implemented such a project-as-a-whole standard in any prior linear project, nor does there appear to be any support in the law for such an approach.

The impact of a proposed project should not be examined as a whole in the manner Applicant proposes. The SEC itself has noted that reviewing a project requires "minute analysis of the site-specific impacts" over the length of the project.[122] For example, in its decision on the Portland Natural Gas Transmission System ("Portland Natural Gas") application, the SEC required applicants to relocate two sections of proposed pipeline to the proposed alternate locations because those sections, analyzed for impacts with specificity, did not meet the requirements of RSA 162-H:16, IV (1996).[123] In those two locations, the SEC did not approve Portland Natural Gas's preferred route due to failure to meet one or more of the standards.[124] A discussion of this case is important because of Applicant's heavy reliance on its unprecedented project-as-a-whole approach.

In the Portland Natural Gas Transmission System docket, the SEC evaluated impacts on orderly development on a town-by-town basis.[125] With regard to aesthetics, too, the SEC considered effects on individual towns rather than looking at the project as a whole.[126]

[122] SEC Docket No. 1996-01; 1996-03, *Decision*, at 9 (7/16/97).
[123] *Id.* at 16–17, 18.
[124] *Id.* at 16, 18.
[125] *Id.* at 12.
[126] *Id*. at 18–19.

First, in the Town of Shelburne, the SEC did not approve the Portland Natural Gas's preferred route on a section of pipeline that would add 5.7 miles of new right-of-way on the north side of the Androscoggin River, apart from most existing development in town, run along an unpaved, privately-owned logging route, run through Leadmine State Forest, cross the Appalachian Trail at a location not currently used as a utility crossing, and be visible from the observation area of "scenic Reflection Pond."[127]

The Town argued that locating the pipeline in such an area would undermine Town planning efforts, affect aesthetics and the environment, and unnecessarily fragment property and habitat.[128] The Appalachian Mountain Club and Appalachian Trail Conference both expressed concerns that the Portland Natural Gas preferred route would "change the remote experience currently enjoyed by hikers in the area," including on the Appalachian National Scenic Trail.[129] The Town also "stressed that the importance of the scenic viewshed should not be under-rated, and directly linked the viewshed to the economy and employment of the area generated by tourism."[130] The North Country Council filed a detailed report on the various route options and found that Applicant had overrepresented the benefits and underrepresented the costs of Portland Natural Gas's preferred route, and advocated for a different alternative route through Gorham.[131]

The SEC found that the preferred route would impact the aesthetic value of "one of the most pristine panoramic views (over Reflection Pond) located in the North Country," have a large impact on tourism, unreasonably and permanently impact the natural environment, and

[127] *Id.* at 13.
[128] *Id*.
[129] *Id.* at 16.
[130] *Id*.
[131] *Id.* at 16–17.

impact orderly development and land use of the area.[132] Due to these findings, the SEC did not approve Portland Natural Gas's preferred route through Shelburne.[133]

Second, the SEC did not approve Portland Natural Gas's preferred route on the southern section through the Town of Newton.[134] The SEC decided that a short section of pipeline failed on a single standard, undue interference, because of the Town's plans to build a library on a single parcel.[135] Allowing the pipeline to "bisect Newton's 'library parcel' would not be consistent with orderly development in Newton."[136] This single failure was sufficient for the SEC to not approve the preferred route and to require instead rerouting to use an existing right-of-way.[137]

Further, other cases also do not support Applicant's position on how effects should be considered. Quite opposite of the proposed project, in the 1989 Tennessee Gas Pipeline Company docket, the SEC noted, "[s]ince the energy to be transported by this facility will be used solely to benefit New Hampshire citizens, and negative aspects, especially the inevitable environmental cost, must be considered in light of the desire for access to the cleanest possible forms of energy.[138]

Turning back to the present case, Ms. Widell used the project-as-a-whole approach and did not analyze whether "minute," site-specific impacts would have unreasonable adverse effects.

---

[132] *Id.* at 16.
[133] *Id*.
[134] *Id.* at 18.
[135] *Id.*, at 17–18. Newton also raised concerns about local recreational trails and the crossing of two designated scenic roads, environmental issues and endangered species, and wetland impacts. It appears that the SEC decided to require rerouting based on orderly development alone.
[136] *Id.*
[137] *Id.*
[138] SEC Docket No. EFEC 89-01, at 6 (8/30/1989).

For example, Ms. Widell's supplemental prefiled testimony claims that Scott Newman (a witness for Deerfield Abutters) misapplied the law by finding two historic resources in the town of Deerfield would suffer unreasonable adverse effects from the project,[139] erroneously claiming SEC rules require a finding that the "project as a whole" would have unreasonable adverse effects.[140] During cross-examination about her supplemental prefiled testimony, Counsel for the Public highlighted Ms. Widell's misunderstanding of the law, and eventually Ms. Widell confirmed that neither the plain language of Site 301.14(b) nor RSA 162-H:16, IV(c) reference "the project as a whole."[141]

Ms. Widell was clear in her testimony that she did not make site-specific determinations of unreasonableness of adverse effects. When asked if there was "any set of circumstances that [she] believe[d] that a particular property along this route might have, might experience an unreasonably adverse effect," Ms. Widell replied: "A particular property? I did not apply unreasonable adverse effect to an individual property. I applied it to the entire route…."[142] She went on to confirm she did not consider, of the 12 properties she identified as would have an *adverse* effect from the proposed project, whether any of them would have *unreasonable adverse* effects.[143] Despite being shown that her interpretation of the law is not supported by the plain language of the statute or the rule, at no time did Ms. Widell alter her conclusion that no

[139] *Supplemental Pre-filed Testimony of Cherilyn Widell, UPDATED – Supplemental Pre-Filed Testimony of Cherilyn Widell*, APP 95, at 63061 (see footnote 4, discussing prefiled testimony of Scott Newman).
[140] Tr. 8/3/17, Morning Session, at 86 (Widell and Counsel for the Public) ("Q: Is there any set of circumstances that you believe that a particular property along this route might have, might experience an unreasonably adverse effect? A (Widell): A particular property? I did not apply unreasonable adverse effect to an individual property. I applied it to the entire route and the adverse effects that were found that would be caused by the Project.").
[141] *Id.*; Tr. 8/29/17, Morning Session, at 46 (Widell); Tr. 8/29/17, Afternoon Session, at 23-24 (Widell); Tr. 9/11/17, Afternoon Session, at 26–28, 50, 79–81 (Widell). During this line of questioning, Ms. Widell admitted that her opinion is that "[t]he assessment of unreasonable adverse effect is for the Project as a whole," an opinion she backed up in her supplemental testimony with citations to Site 301.14 and RSA 162-H16, IV(c), with which she claimed familiarity. APP 95, at 63064–66.
[142] Tr. 8/3/17, Morning Session, at 86 (Widell and Counsel for the Public).
[143] *Id.* ("Q: So you went and found 12 of them had an adverse effect, and you stopped there. I'm not going to look and think about whether any of them might be unreasonable. A (Widell): I looked at it in its entirety based on the criteria that are in the SEC rules.").

unreasonable adverse effect be measured only with respect to the proposed project as a whole. Consequently, Applicant has not provided any site-specific analysis of whether any individual historic resources would have unreasonable adverse effects.

Ms. Widell was not the only of Applicant's witnesses to ignore individual adverse effects and fall back on the argument that the Subcommittee need consider only the proposed project as a whole. This flaw is discussed with respect to other witnesses in the subsequent sections. Suffice to say here that Applicant's proposed project-as-a-whole approach, another narrowing strategy, disregards past interpretations and practice of the SEC, is not supported by the statute or rules, and is a big part of how Applicant has put the Subcommittee in the position of not having enough information to approve the application.

e. Applicant Did Not Complete Effects Tables Compliant with DHR Policy and Did Not Consider Cultural Landscapes in Its Initial Assessment

Ms. Widell and Preservation Company[144] further erred by not completing effects tables compliant with DHR's policy and did not consider cultural landscapes when they did their initial assessment. Effects tables were only begun long after the application was filed and they were not even completed until after the hearing was half over.[145] This begs simple questions: How could Ms. Widell conclude that there would be no unreasonable adverse effects in her prefiled testimony when effects assessments were not completed and were not reviewed by DHR? Further, how could such conclusions be reached when those that were completed when the application was filed, were not done in accord with DHR guidelines?

[144] The bulk of the identification work was done by Preservation Company, which was not a witness in this case.
[145] *See, e.g.*, Tr. 8/2/17, Afternoon Session, at 113–14 (Widell) (When asked if she had done additional work since she submitted her supplemental prefiled testimony, Ms. Widell responded, "Yes, there has been significant work in the preparation of inventory forms, cultural landscapes and effects tables, all of which have been submitted.").

DHR has raised concerns about the dearth of information in the report prepared by Preservation Company and submitted by Applicant, stating in a 12/2/15 letter to the SEC, "[t]he Application notes that little historic research was completed for the Project area, for individual properties or for potential historic districts."[146] Reflecting on Applicant's methodology and the flaws identified above, DHR concluded that "[g]iven that, as well as the methods used to identify resources, the DHR cannot agree with the Application's assessment of effects to historical resources."[147]

f. Ms. Widell Initially Did Not Evaluate Effects of Burial on Historic Resources

Applicant only reviewed potential adverse effects on aboveground historic resources along the buried portion of the proposed route as a result of criticisms during the adjudicative hearing that resulted in Ms. Widell's admissions that construction activities (removing a stonewall, downgrading slopes, removing ledge, removing mature trees and bushes, installing a splice vault underground, installing a manhole cover near a historic property, etc.) might affect the characteristics that make an historic resource valuable.[148] As but one example of a historic site that was not assessed for potential impact due to this oversight, a Pratt Truss Bridge in Plymouth, one of New Hampshire's historic bridges, was given no attention.[149]

Applicant did finally identify and assess effects on aboveground historic resources along the conceptual underground route, but not until the historic and archaeological witnesses took the

[146] *NHDHR Letter Re Revised Application Review dated 12/2/15*, CFP 420, at 11867; *see also* Tr. 8/2/17, Afternoon Session, at 36, 124–25 (Widell).
[147] CFP 420, at 11868; *see also* Tr. 8/2/17, Afternoon Session, at 131–32 (Widell).
[148] Tr. 8/3/17, Morning Session, at 99–111 ("Q: Do you agree that the underground work can have direct effects on historic structures? A (Widell): Yes."). She also confirmed she had no idea what kind of impact would occur from dust, noise, blasting, and other effects that would occur from burial regardless of where exactly the underground portion of the proposed project would be installed.
[149] Tr. 8/31/17, Morning Session, at 20–26 (Widell). Ms. Widell attempted to justify ignoring historic bridges by talking about the historic significance being tied to the engineering rather than its visual significance. But when pressed, she admitted that vibrations could create a direct impact on these aging gems.

stand a second time. The individual inventory forms and effects table for those 50-plus sites were made available on the eve of the recall of the Widell-Bunker panel and only then in hard copy viewable at Donovan Street (the venue for the hearings) or at DHR.[150] This aspect of the process prevented meaningfully review.

g. Applicant's Analysis of Archaeological Resources Does Not Provide Sufficient Information to Approve

As with historic sites, Applicant has also narrowly defined archaeological resources as only those that are eligible for or are listed on the National Register. Applicant's assessment of impacts to archeological resources also does not provide enough information for the application to be approved because: 1) Applicant has not yet fully identified all resources,[151] 2) Applicant has not assessed those resources that have been identified, relying instead on anticipated assessment through the Section 106 process,[152] and 3) adverse effects would be avoided, minimized, or mitigated only after plans for such are prepared at some indeterminate time in the future.[153]

As with Applicant's historic witness, Applicant's archaeologic witness, Dr. Bunker, testified that the Subcommittee should place full reliance on the Programmatic Agreement, entered into as part of the consultative, federal Section 106 process.[154] But, Dr. Bunker went on to confirm the Programmatic Agreement is, in part, a plan for various plans that have not yet been written, including plans for training construction personnel and putting monitors into place,

---

[150] The record available for all parties still does not contain the cultural landscape reports in a digitally accessible format.
[151] *See* Letter Dr. Richard A. Boisvert, Deputy State Historic Preservation Officer, DHR, to Pamela Monroe, Administrator, SEC (12/21/17), available at https://www.nhsec.nh.gov/projects/2015-06/letter-memos-correspondance/2015-06_2017-12-21_ltr_dhr_findings_effect.pdf.
[152] *Id.*
[153] *Id.*
[154] *See, e.g.*, Tr. 8/31/17, Afternoon Session, at 11 (Bunker); Pre-filed Direct Testimony of Victoria Bunker, Ph. D. [on Behalf of the Applicant], APP 17, at 341–44.

and that if any game-changing archeological effects were to be found during construction, those not-yet-written plans would address what to do.[155]

Site 301.14(b), (1) through (3) require the Subcommittee consider—and thus Applicant provide—"all of the … archeological resources potentially affected," "the number and significance of any adversely affected . . . archaeological resources," and the "extent, nature, and duration of the potential adverse effects." Applicant simply has not provided all of this information. Site 301.14(b), (5) requires the Subcommittee consider the "effectiveness of the measures proposed by the applicant to avoid, minimize, or mitigate unreasonable adverse effects on . . . archaeological resources, and the extent to which such measures represent best practical measures." Logically, the Subcommittee cannot perform this consideration because Applicant has not provided the Subcommittee with such information. New Hampshire's archaeological resources are too precious for the Subcommittee not to demand Applicant at least provide the information required by law so that the Subcommittee is in a position to undertake the required considerations.

2. The Proposed Project would have Unreasonable Adverse Effects on Historic Properties

The proposed project would abrade the very fabric of New Hampshire's landscapes by creating unreasonable adverse effects on aboveground historic properties from Pittsburg to Deerfield, six historic railroads, and seven cultural landscapes including iconic agricultural vistas and town centers.[156] While these resources are grouped as historic, due to the nature and variety,

[155] *See, e.g.*, Tr. 8/31/17, Afternoon Session, at 11 (Bunker) (testifying that the Programmatic Agreement would address what to do if unexpected human remains found); *id.* at 38–39 (Bunker) (discussing supplemental agreements the Programmatic agreement anticipates); *see also* Pre-filed Direct Testimony of Victoria Bunker, Ph. D., APP 17, at 341–44.

[156] *See* Letter Dr. Richard A. Boisvert, Deputy State Historic Preservation Officer, DHR, to Pamela Monroe, Administrator, SEC, at Table 1 (12/21/17), available at https://www.nhsec.nh.gov/projects/2015-06/letter-memos-correspondance/2015-06_2017-12-21_ltr_dhr_findings_effect.pdf.

they encompass so much of what is special about the landscapes of New Hampshire: historic buildings situated in village and town centers; vernacular farm buildings with their fields, woodlots and meadows; recreational and tourism-related sites from grand hotels and estates to campgrounds and parks situated on pristine ponds and lovely lakes; railroad lines reflecting the rise of both industrial development and tourism; cemeteries and burial grounds with old stone walls and plot markers; and so much more.

Site 103.14 sets forth criteria relative to findings for unreasonable effects on both aesthetics and historic resources.[157] The criteria for each are tailored for the type of resource but also contain similar considerations, i.e., the impact on the resource.[158] While Applicant urges the Subcommittee to assess unreasonable adverse effects on the totality of the historic sites, the project as a whole, as noted previously that approach is not supported by the unambiguous language of Site 301.14,[159] by any other law, and not by prior SEC cases.[160] Individual properties and/or districts that such an approach neglects, to name a just a few but by no means all, include The Weeks Estate, the Dummer Pond Sporting Club, The Rocks property, Oak Hill Agricultural District, Deerfield Center Historic District, Woodstock Cemetery, Gale River Cultural Landscape, and Pemigewasset Valley Branch Railroad. The impacts on each of these alone would justify a finding of unreasonable adverse effects. The extensive reach and variety of such irreplaceable resources all the way along the proposed project leads only to one conclusion: this proposed project would have unreasonable adverse effects on historic and archeological resources and the application should be denied.

---

[157] N.H. CODE ADMIN. RULES, Site 301.14(a) (aesthetics); (b) (historic).
[158] N.H. CODE ADMIN. RULES, Site 301.14(a) includes consideration of the "scope and scale of the change in the landscape visible from affected scenic resources;" while Site 301.14(b) includes consideration of "the extent, nature and duration of the potential adverse effects on historic sites and archeological resources."
[159] *Id.* at (b) ("the committee shall consider (1) all of the historic sites and archeological resources potentially affected by the proposed facility and any anticipated potential adverse effects on such sites and resources").
[160] *See supra* Part I.B.1.d.

a. Applicant's Witness and DHR Conclude the Proposed Project would Have Adverse Effects on Historic Resources

The aboveground portion of the proposed route contains properties that Applicant's own historic witness believes would be adversely impacted by the proposed project. For example, Applicant's witnesses concluded the Franklin Falls Dam recreation area would be adversely impacted because most of the proposed structures would be partially silhouetted against the sky and be substantially visible in views from the historic resource[161] and that DeWan's proposal to substitute monopoles "[w]ill likely not eliminate visual impact on the historic resource."[162] Ms. Widell could think of no recommendation for this location that would lessen the adverse effect.[163]

On top of Applicant's findings of adverse effects that cannot be mitigated, DHR found numerous additional sites would have adverse effects. DHR has not yet concluded whether mitigation could adequately address the impacts.[164] For example, "Historic districts are located throughout the area of potential effect,"[165] including rural agricultural landscapes, recreational resources, town centers and villages, burial grounds and cemeteries, hiking trails, and railroads.[166] "Many" of these historic districts would "be adversely affected by the project due to the introduction of modern visual elements out of keeping with the historic setting of districts."[167] "The DHR disagrees with a number of applicant's effect assessments for historic

[161] Tr. 8/3/17, Morning Session, at 124–26 (Widell).
[162] Tr. 8/3/17, Morning Session, at 124–129 (Widell).
[163] *Id.* at 126 ("Q: Okay. Thank you. Is there anything else that you can think of to recommend at this location to make a difference, that would make a difference? A (Widell): No..").
[164] *See* Letter Dr. Richard A. Boisvert, Deputy State Historic Preservation Officer, DHR, to Pamela Monroe, Administrator, SEC, at 1-7 (12/21/17), available at https://www.nhsec.nh.gov/projects/2015-06/letter-memos-correspondance/2015-06_2017-12-21_ltr_dhr_findings_effect.pdf
[165] *Id.* at 3.
[166] *August 25, 2017 New Hampshire Division of Historical Resources Letter to New Hampshire SEC Subcommittee*, SPNF 223, at 7236–42.
[167] *See supra* Footnote 159.

districts … primarily due to the applicant using a limited directional views versus the DHR using a holistic visual analysis of the district."[168]

Some of DHR's findings and conclusions are consistent with those offered by witnesses for Intervenors' and Counsel for the Public. For example, DHR calls out the Weeks Estate, the jewel in the crown of Weeks State Park that sits atop Mount Prospect with "360 degree views of the Presidential Range, and Pliny Range of the White Mountains, the Pilot Range, Percy Peaks, the Connecticut River Valley and the Green Mountains of Vermont."[169] The historic stone observation tower on this National Register-listed property, from which these panoramic views are laid out for the observer in all of the splendor and majesty the conservationist, John Wingate Weeks, saw and sought to protect, is an "important character defining feature."[170] The proposed project would be visible, and as DHR stated: "[w]hile the applicant recommended a finding of no adverse effect … DHR is concerned that iconic views from the property will be impacted by the project." DHR therefore recommends a contrary finding—a finding that there would be an adverse effect.[171]

Another type of unique cultural landscape concerning DHR is New Hampshire's railroads. The six different historic rail lines (or portions thereof) that would be adversely impacted by the project tell the story of both the industrial development of New Hampshire's economy and employment by the early 20th century and the ever-increasing importance of tourism to New Hampshire's economy and employment.[172] According to DHR, the impacted

[168] *See id.* It is important to note here that it was not until the day before the record in this case closed that DHR issued its letter identifying 11 cultural landscapes, of which eight would be adversely affected by the proposed project. Because of this timing, the Forest Society had no meaningful opportunity to cross-examine the Applicant's witnesses regarding this, nor did the Applicant's witnesses re-evaluate given DHR's determination.
[169] *See id*.
[170] *Id.* at 3.
[171] *Id.*
[172] SPNF 223, at 7241.

railroads "[a]ll share a common characteristic – they are associated with the significant theme of tourism in the state, transporting passengers to important tourist centers and landmarks as well as providing an opportunity for passengers to enjoy the sweeping views and vistas that New Hampshire's natural environment provided."[173] The six railroad lines that would have adverse effects range from Dummer/Stark/Northumberland to Canterbury/Concord,[174] reflecting the geographic range of the story they tell about the history of New Hampshire.

Again, as with the sweeping vistas found in the views from the Weeks Estate, the indelible mark the proposed project would put on the historic character of these rail lines could not be mitigated. Here again, each of these on its own would have an unreasonable adverse effect but the number and significance as well as the extent, nature and duration of all of them together can lead only to a finding of unreasonable adverse effects.

As Ms. O'Donnell articulated, the "extent of the proposed project is massive with proposed monopoles and trellis frames rising above any future tree canopy, dwarfing all nearby historic sites and visually impacting all historic sites and cultural landscapes with visibility to the proposed project." This is precisely the impact under Site 103.14 that reaches a finding of unreasonable adverse effects.

C. Applicant's Assessment Cannot Satisfy its Burden Because the Assessment was Completed even Through the Route of the Proposed Project is Still Unclear

Finally, with respect to adverse effects to aesthetic, historic, and archeological resources (as well as nearly all other standards), Applicant cannot satisfy its burden of proof because

---

[173] *Id.*

[174] *See* Letter Dr. Richard A. Boisvert, Deputy State Historic Preservation Officer, DHR, to Pamela Monroe, Administrator, SEC, at Table 1 (12/21/17), available at https://www.nhsec.nh.gov/projects/2015-06/letter-memos-correspondance/2015-06_2017-12-21_ltr_dhr_findings_effect.pdf (identified as Northern Railroad, Boston, Concord, & Montreal Railroad, Maine Central Railroad, Pemigewasset Valley Branch Railroad, Grand Trunk Railroad, and White Mountain Railroad).

Applicant's witnesses concluded there would be no unreasonable adverse effects even though the underground route was and remains undefined. "So we're now in September 2017 and we still don't know if this project is going on the right side of a scenic byway or the left side of a scenic byway."[175] Today, in fact, this information remains unknown to all parties and the Subcommittee.

1. Applicant has Yet to Complete an Accurate Survey

First, Applicant has yet to complete an accurate survey of the boundary of the state right-of-way, according to DOT, which required from Applicant an "accurate location defined by ground survey."[176] DOT characterized what Applicant had produced as the "majority of the right-of-way shown in the plans is approximate location only."[177] Going into the eighth year of the proposed project, Applicant was just recently working out with DOT what it means to have "accurate locations defined by a ground survey" and planned to submit their interpretation to DOT the Monday following cross-examination.[178] At the time of cross-examination (9/29/17), Applicant's witness estimated that it would take an additional 4.5 to 5 months for Applicant to wrap up the survey process, including:

- DOT to provide guidance on what was required for "accurate locations defined by a ground survey;"
- Applicant to conduct that work and submit the completed right-of-way boundary survey;
- Applicant to update and resubmit the withdrawn the exception requests, and work with DOT to get all of them approved;

[175] Tr. 9/15/17, Afternoon Session, at 168 (Saffo).
[176] *NHDOT Response to Survey dated August 11, 2017*, APP 220, at 83332; *DOT Letter to NPT dated 8/11/17*, CFP 493, at 13504–05.
[177] APP 220, at 83332; CFP 493, at 13504–05.
[178] Tr. 9/29/17, Morning Session, at 130 (Johnson).

- Applicant to generate and submit updated design drawings, and work with DOT to get it approved.[179]

To date, this has not been completed. While, it appears that Applicant has accomplished the first, Applicant seems to be still in progress with the second, and has not submitted anything for the third or fourth.[180] Applicant Exhibit 222 shows impacts inside the DOT right-of-way according to the survey the DOT rejected.[181] Because Applicant has not provided a DOT-approved survey, Applicant has, therefore, also not provided the final impacts, *i.e.* nothing in APP 222 should be relied upon.[182]

2. The Actual Design of the Underground Route is Not Available in this Docket

Second, the actual design of the underground route remains unavailable.[183] Without this information, as discussed further below, it is likely there would be adverse impacts to historic and archeological sites that have not been identified.[184] The best Applicant was able to provide by way of the actual design of the underground route was "clarity about actual, specific locations of the underground alignment in certain places" and "clarity about the *likely* location of the alignment in the remainder of those places."[185]

Witnesses for Counsel for the Public could not accurately determine whether the proposed project would go into privately-owned property because the right-of-way has not been

[179] *Id*. at 36; 131–33 (Johnson).
[180] NHDOT, *Special Project: Northern Pass*, https://www.nh.gov/dot/media/northern-pass/index.htm#traff (last visited 12/26/17).
[181] Tr. 9/29/17, Morning Session, at 119–20 (Johnson).
[182] *Id*.
[183] For example, it is not clear whether the Gale River Crossing will be a microtunnel (as shown in the most recent plans) or a horizontal directional drilling (as the Applicant's witness conceptualized at the adjudicative hearing but for which no plan or design has been submitted). *See* Tr. 9/29/17, Morning Session, at 38–39; 67–68 (Johnson).
[184] *See infra* Part I.C.3.
[185] Tr. 9/29/17, Morning Session, at 20 (Johnson) (emphasis added).

defined by a ground survey showing accurate locations.[186] Further, Applicant's plan to "establish" prescriptive rights is questionable and leaves in doubt the exact borders of the route.[187] Without providing this information required to make such a determination, Applicant has made it impossible for the Subcommittee to make the determinations the law requires of them, such as probable effects on aesthetic, historic, and archaeological sites.

Again, Applicant asks the Subcommittee to, in effect, trust it would be able to deal with any problems and avoid or minimize any impacts it encounters. The explanation from Applicant's witness Samuel Johnson aptly illustrates this point.[188] During the hearing, Mr. Johnson, pen in hand in hand, gave an explanation, sketching as he talked, of how Applicant would overcome any problem in the construction of the underground section.[189] Applicant calls this sketch its "chalk", referring to it as demonstrative evidence. Such a sketch does not amount to a conceptual plan from a licensed engineer, let alone the level of designed plan needed for approval.[190]

The demonstration seemed intended to convince the Subcommittee to approve the application, in part, because Applicant can solve any type of obstacle that may be present. While Applicant's team may be able to solve some problems encountered in the field, the exercise demonstrated with equal aptness that the current plan on record for the underground alignment is less than conceptual in nature, lacking in any actual details associated with the proposed project.

For example, to avoid the obstacle of a barn being located too close to or in the right-of-way, the sketch (the "chalk") implies Applicant would simply cross to the other side of the

---

[186] Tr. 10/23/17, Afternoon Session, at 66, 152–53 (Taylor). As one example, the Applicant's plans for Exception Request No. 3 show the transmission line being installed through a house, which obviously cannot be accurate. *Group 1 Exception Request 3_rev3.pdf*, CFP 499, at 13555.
[187] *See supra* Part IV.B.2.
[188] Tr. 9/29/17, Morning Session, at 27–31 (Johnson).
[189] *See id.*
[190] *See id.*

road.[191] As was revealed during the hearings, however, such crossing would not be simple. The steps required to undertake such a diversion, would include excavating the trench, removing the spoils, installing the conduit, backfill, putting in temporary pavement, etc., all on only one half of the road, while the other half of the road remained open to traffic.[192] Next, the operations would switch, with the opposite side of the road being worked on and the former side of the road becoming open to traffic.[193] Such diversions would slow construction, elongate the route of the proposed project, and increase the amount of time that roads would have only one lane of traffic open or be closed completely.[194] Without anything more than the hand-sketched chalk, Applicant has not supplied the Subcommittee with any site-specific information about where such road crossings might occur, what the details of them might be, how many there would be, how they may elongate the route, what additional construction impacts abutters would suffer, or any other ramifications of such crossings.

Without providing the actual alignment of the underground route, Applicant has not provided enough information to merit approval.

3. Not-Yet-Filed Exception Requests Demonstrate Lack of Underground Design

Third, the volume and unfinished status of exception requests before DOT also illustrates the incomplete design of the proposed project and the many remaining unknowns about where and how this proposed project would be built. DOT's comments on Applicant's original exception requests seem to suggest the proposed project is not ready to satisfy conditions. "Existing utilities are missing in numerous locations; therefore, this request cannot be adequately

[191] *Id.* at 29.
[192] Tr. 10/23/17, Morning Session, at 83–85 (Taylor).
[193] *Id.*
[194] *Id.* at 84–85.

reviewed."[195] In rejecting Exception Request 10, DOT had to instruct Applicant that "Correct information should be shown on plans." DOT even noted, in rejecting Exception Request 18, that the "[e]xisting NHDOT Right-of-Way appears from the survey report to be the lowest level of accuracy."[196] The only explanation Applicant's witness had for why Applicant chose to use the "lowest level of accuracy" was that it would appear to be an error.[197] DOT also expressed significant concerns about impact to abutters.[198]

As another example that Applicant has not provided the underground alignment, Applicant has made over 100 exception requests in connection with its plan to bury the proposed line along Main Street in Plymouth.[199] Applicant was unaware of the specifics of the obstructions necessitating so many exception requests when it proposed in its original application to bury the line under Main Street (Route 3) in Plymouth.[200] It remained unaware until sometime after when its construction witnesses testified at the hearing in June of 2017.[201]

Again, these are only some examples to illustrate how, after years and the near end of this proceeding,[202] Applicant still has not provided exactly where the proposed project would be located. As a matter of law, a visual and historic analysis cannot possibly provide adequate

---

[195] *DOT Decision,* APP 183, at 65140 (Notice of Decision for Exception Request No: 7); *see also* NHDOT, *Special* Projects: Northern Pass, at 8/8/2017 – NPT Exception Requests and DOT Responses, https://www.nh.gov/dot/media/northern-pass/index.htm#requests (last visited 1/11/18).

[196] APP 183, at 65159 (Notice of Decision for Exception Request No: 18; *see also* NHDOT, *Special* Projects: Northern Pass, at 8/8/2017 – NPT Exception Requests and DOT Responses, https://www.nh.gov/dot/media/northern-pass/index.htm#requests (last visited 1/11/18).

[197] Tr. 9/29/17, Morning Session, at 152 (Johnson).

[198] *Id*.

[199] Tr. 9/29/17, Afternoon Session, at 7–8 (Bowes).

[200] *Id*. at 8–9; *see also* Tr. 10/2/17, Afternoon Session, at 118 (Iacopino) ("Because if you take 30 percent of a hundred yard field, you've got 70 yards to go. If you take 60 percent of a 200-yard field, you've got 80 yards to go. So where are we in that? I'm trying to get a sense of do we have a lot longer ways to go than we've actually come?"). The Applicant's plans contained in APP 47 were only 30% complete, at best. Tr. 10/23/17, Afternoon Session, at 125 (Taylor).

[201] Tr. 9/29/17, Afternoon Session, at 8-9 (Bowes).

[202] Other examples of incomplete or unclear construction plans are discussed throughout the memorandum. *See infra* Parts II.B; III.A.1.; IV.B.2.; and IV.B.3.

information, or anything more than a pre-determined conclusion, if it was made in the absence of knowing where the underground portion of the proposed project would be located—whether on the right side or the left side of the road.

Leaving aside the issue of adequacy as a matter of law, the voids in knowledge about where exactly this proposed project would go in its underground sections make it impossible for Applicant's witnesses for aesthetics, historic, and archeological resources to render informed opinions. As a consequence, Applicant has not met its burden of proof.

D. The Applicant Provided No Assessment of the Proposed Project's Potential Impacts to the Southern Municipalities

The Applicant's analysis of adverse effects on aesthetics and historic resources, as well as many other standards, is insufficient because Applicant has not put forth any evidence of the project's potential attributes or adverse impacts in any of the municipalities south of Deerfield ("Southern Municipalities"), even though the application and Applicant's conduct admit that these Southern Municipalities are part of the proposed project. Given this, the Subcommittee completely lacks any information to make findings with respect to the proposed project in any of the Southern Municipalities, and accordingly, cannot approve the proposed project.

The work required in the Southern Municipalities is part of the proposed project. The Applicant's Project Maps show work in the following Southern Municipalities: Candia, Raymond, Auburn, Chester, Londonderry and Derry.[203] The Applicant's notices of public information sessions include the Southern Municipalities.[204] And as noted next, Applicant's witnesses were very aware of the details of the work required in the Southern Municipalities for the proposed project.

[203] APP 201, at 68131–41.
[204] *Letter from Barry Needleman, Esq. to Martin Honigberg, SEC Chairman, re Notice Provided Pursuant to 162-H:10, and Enclosures (Affidavit of Barry Needleman and Notice),* SPNF 172, at 6420.

Two 345 kV lines run between the Deerfield substation and Scobie Pond substation in Londonderry.[205] As part of the study of interconnecting the proposed project into the Deerfield substation, ISO New England determined that upgrades would be needed south of the Deerfield substation.[206] The Scobie Pond substation would have circuit breakers and capacitor banks added to it.[207] The circuit breakers would be added within the existing approximately 10-acre footprint of the fenced-in area, while the capacitor banks would be added in a new area of the substation which would be about 1-acre in size and would be enclosed with its own, new fence.[208] Along the lines between Deerfield and Scobie Pond substations, ten structures would be increased in height by approximately five to ten feet.[209] To increase the height of the ten structures, which are H-frame, the poles would either be replaced or would be "raised in phases."[210]

Despite the work in the Southern Municipalities being part of the proposed project, Applicant did not target these towns as part of its proposed project outreach, including that Applicant's website for the proposed project does not include these towns in their list of communications.[211] Yet, Applicant's website for the proposed project included a description of the work required in the Southern Municipalities.[212] Most importantly, none of Applicant's witnesses, including those for aesthetic, historic, and archeological resources, put forward any evidence analyzing the adverse effects the proposed project may occasion in the Southern Municipalities. Without this information, the Subcommittee cannot meet the objectives of RSA

[205] Tr. 5/4/17, Morning Session, 57-58 (Johnson).
[206] *Id*. at 57 (Johnson); *Id*. at 58 (Bowes).
[207] *Id*. at 57 (Johnson); *Id*. at 59 (Bowes).
[208] *Id*. at 60–61 (Bowes).
[209] *Id*. at 56–58 (Johnson; Bowes). This would allow the lines to carry more power resulting from the proposed project, which is likely to cause the lines to sag more, without also causing a clearance violation underneath the lines.
[210] *Id*. at 58–59 (Bowes). "Raised in phases" entails bracing each of the wood poles, cutting the pole, jacking it up, and then reattaching the brace at a higher level. *Id*.
[211] *Id*. at 63 (Johnson); *Forward NH Plan / The Northern Pass Webpage: Facilities and Equipment*, SPNF 169.
[212] Tr. 5/4/17, Morning Session, at 63–64 (Johnson); SPNF 169.

162-H:1 or measure the standards required in RSA 162-H:16, and consequently, cannot approve the proposed project.

II. The Proposed Project would Unduly Interfere with the Orderly Development of the Region

For a proposed project to be approved, RSA 162-H:16, IV(b) requires the Subcommittee to find that the site and facility would not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies. The record demonstrates for each of the Site 301.15 criteria that this proposed project would unduly interfere with the orderly development of the impacted region.

A. The Proposed Project Would Unduly Interfere with Prevailing Land Uses of Region

1. Applicant did not Meet its Burden of Proof Because it did not Supply the Subcommittee with Information Required by Site 301.09

Site 301.09 clearly sets forth the information that "[e]ach application shall include" regarding orderly development, which then serves as the basis for the Subcommittee to make its determination pursuant to Site 301.15. As noted previously, rules have the force and effect of law and neither witnesses nor Applicant is allowed to simply disregard such legal requirements.[213] Robert Varney was Applicant's witness with regard to land use, only one component of the orderly development standard. Mr. Varney's report titled Review of Land Use and Local, Regional and State Planning missed at least five categories of information required by Site 301.09. And this missing information is not contained in any other part of the application. Applicant's decision to not provide as part of the application what is legally required means

[213] *See supra* Footnote 75.

Applicant has not even satisfied its burden of production, much less its burden of proof to show that the proposed project would not unduly interfere with orderly development of the region in New Hampshire.

a. Applicant Failed to Produce Master Plans of the Affected Communities and Zoning Ordinances of Host Communities

The "information" required in the opening paragraph of Site 301.09 to be included in an application includes the "master plans of the affected communities." The Application contained no master plans.[214] When asked by Subcommittee Member Weathersby whether he interpreted Site 301.09 as not obligating him "to provide the SEC with the actual master plans," Mr. Varney stated that he "provided a summary of each one."[215] However, Mr. Varney's summary of the host communities' master plans was not included in the application, was initially produced only to other parties during discovery, and finally provided to the Subcommittee as a hearing exhibit.[216]

Moreover, Site 301.09 requires not a *summary* of master plans; it requires submission of the master plans themselves. Thus, even if Applicant had provided Mr. Varney's summaries in the application or subsequently, Applicant would not have complied with Site 301.09. And even if the summaries, rather than the plans themselves, satisfy the substantive requirement of Site 301.09 and producing it to the Subcommittee as a hearing exhibit satisfies the procedural requirement, Mr. Varney summarized the master plans of only the *host* communities, whereas Site 301.09 unambiguously requires the inclusion of "the master plans of the *affected* communities."[217] The term "affected communities" is significantly more inclusive than host

[214] *Review of Land Use and Local, Regional and State Planning*, APP 1, Appx. 41.
[215] Tr. 9/26/17, Morning Session, at 116 (Weathersby; Varney).
[216] Tr. 9/26/17, Morning Session, at 158.
[217] N.H. CODE ADMIN. RULES, Site 301.09 (emphasis added).

communities and includes (1) "host municipalities and unincorporated places"; (2) "municipalities and unincorporated places abutting the host communities and unincorporated places:" and (3) "other municipalities and unincorporated places that are expected to be affected by the proposed facility."[218]

Applicant provided no master plan for any Affected Community, and Mr. Varney's summaries do not mention master plans for any abutting community or other community "expected to be affected by the" proposed project.[219] Mr. Varney's representation that he reviewed the master plans of the communities abutting the host communities does not meet Applicant's burden. Applicant provided no information about any of these master plans, including that Mr. Varney's pre-filed testimonies and report do not mention any of these communities, much less their master plans.[220] As a result, Applicant has not equipped the Subcommittee with the information needed to make its determination.

Also, the "information" required in "[e]ach application" under Site 301.09 includes the zoning ordinances of the host communities. The application contained no zoning ordinances. Mr. Varney prepared *summaries* that were not provided until the Subcommittee made a data request during the hearing.[221] This does not comply with Site 301.09 from either a procedural or substantive perspective. In addition to not providing the zoning ordinances themselves, Mr. Varney's report did not contain "much analysis, or really any analysis, as to whether the Project would be inconsistent with each town's zoning ordinances."[222]

---

[218] N.H. CODE ADMIN. RULES, Site 102.07.
[219] *Id*.; *Meetings with Local Planners*, APP 122, at 60065.
[220] Tr. 9/22/17, Morning Session, at 34; *see also Pre-filed Testimony of Robert Varney - Orderly Development*, APP 20; APP 1, Appx. 41.
[221] Tr. 9/26/17, Morning Session, at 119 (Varney).
[222] *Id*. at 121.

b. Applicant did not Describe the Prevailing Land Uses in the Affected Communities or How the Proposed Project Would be Inconsistent with those Land Uses

Mr. Varney's report does not even purport to describe the prevailing land uses in all "affected communities."[223] When asked whether he "describe[d] the prevailing land uses with regard to the community in its entirety," Mr. Varney responded, "No. We describe the land uses along the Project corridor."[224] This approach does not satisfy Site 301.09(a)(1) for two reasons.

First, Mr. Varney's report discusses only host communities, which are but one subset of "affected communities."[225] Second, nothing in Site 301.09(a)(2) restricts the inquiry to prevailing land uses along the corridor. The plain language of Site 301.09(a)(1) requires "[a] description of the prevailing land uses *in the affected communities*." (emphasis added). Mr. Varney's narrow focus on the proposed project corridor is contrary to the recognition in Site 102.07 and Site 301.09 that a proposed project may affect land uses: near the corridor, within the entire host community, within abutting communities, and in further communities that do not abut the host community. Mr. Varney's narrow focus, as those of other of Applicant's witnesses, enabled him to ignore many effects of the proposed project, perhaps most notably visual effects on prevailing land uses.

Site 301.09(a)(2) requires that Applicant provide "[a] description of how the proposed facility is consistent with such [prevailing] land uses and identification of how the proposed facility is inconsistent with such land uses." The application does not identify a single instance of how the proposed facility is inconsistent with any of the prevailing uses along any of the 192 miles of the proposed project. During cross-examination, Mr. Varney explained this was because he found no single instance where the proposed project would be inconsistent with a prevailing

[223] *See* N.H. CODE ADMIN. RULES, Site 102.07.
[224] Tr. 9/18/17, Afternoon Session, at 123.
[225] *See supra* Footnote 218 and accompanying text.

land use.[226] When asked whether, on behalf of Eversource on three dockets (Northern Pass, Merrimack Valley, and Seacoast Reliability), he had "found any adjacent land uses that are inconsistent with the proposed Eversource transmission line," he answered, "No."[227]

Mr. Varney's refusal to acknowledge even one inconsistent land use along 192 miles with a proposed project of such magnitude and such widespread opposition and concern (nevermind not acknowledging one inconsistent land use amongst three projects) undermines the credibility of his testimony. The Applicant has not provided the information Site 301.09(a)(2) requires, and therefore left the Subcommittee with not enough information to approve the proposed project.

Finally, Mr. Varney's report does not discuss construction effects on prevailing land uses, as required under Site 301.09. At the hearing, he stated, "I didn't make a judgment on unduly interfering with land use during construction."[228] As with the other instances in which Applicant did not comply with Site 301.09, this shortcoming deprives the Subcommittee of the information it requires to make a finding in Applicant's favor under Site 301.15(a). Applicant's failure to include sufficient information concerning construction and incorporate it into its analysis of orderly development, and other effects, is discussed further below.[229]

2. Applicant has Also not Met its Burden of Proof Because Applicant's Flawed Methodology Disregarded Effects on Prevailing Land Uses and Orderly Development

Through Mr. Varney's testimony, Applicant claims that the construction and operation of the proposed project would "not have an adverse effect on prevailing land uses."[230] Mr. Varney arrives at this conclusion by emphasizing three core findings of his analysis: (1) that existing land uses would not be physically interfered with; (2) that 83% of the project would be

[226] Tr. 9/18/17, Afternoon Session, at 124.
[227] *Id.* at 110–11.
[228] *Id.* at 10.
[229] *See infra* Part II.B
[230] APP 1, Appx. 41, at 23416.

constructed and operated within preexisting corridors; and (3) for those portions constructed where no there is no existing corridor, the approximately 40 such miles "traverse[] sparsely populated land, primarily forested and managed for timber and recreational uses, which will continue largely uninterrupted."[231]

Mr. Varney's report is not persuasive, in large part, because it contains no actual analysis.[232] In lieu of analysis, Mr. Varney's report simply describes the documents he reviewed, gives a windshield tour of the towns along the proposed route. He then asserts, repeatedly, conclusory statements about existing corridors and sparsely populated areas that amount to preconceived conclusions he brought to the exercise rather than conclusions reached after reasoned and objective analysis.[233]

a. As Long as a Proposed Project would be in an Existing Right-of-Way, Mr. Varney Generally would not Find Undue Interference No Matter the Intensity of the Proposed Project or Development Abutting the Right-of-Way

A review of Mr. Varney's report, testimony, and cross-examination, reveals that his conclusion of no undue interference is backed not by an independent analysis of all the affected communities but largely based on a single preconceived conclusion that Mr. Varney appeared to have accepted prior to conducting his analysis: a transmission line constructed within an existing right-of-way cannot be inconsistent with prevailing land uses because such use is "sound

---

[231] *Id.*

[232] *Pre-filed Testimony of Kenneth Kettenring on Behalf of the Town of New Hampton*, JTMUNI 120, at 5713 ("During a forty-five year career of reviewing technical reports . . . I have seldom seen a report as useless as this one. Reiterating a one-line mantra over a span of thirty pages does not add to the validity of that statement. What is left out speaks much more loudly. The Normandeau Report provides 131 pages of background information, mostly on current land use, but provides nothing that resembles a review of Local, Regional or State Planning."). When asked about Mr. Kettenring's testimony about a New Hampton planning document calling for burial of utilities, Mr. Varney dismissed Mr. Kettenring's opinion, stating, "[h]e's on the local planning board, not a professional planner, a former wetlands permitting person at DES." Tr. 9/26/17, Morning Session, at 141.

[233] In contrast, applicants in Portland Natural Gas provided a detailed analysis of prevailing land uses and effects of several alternatives. SEC Docket No. 1996-01; 1996-03, *Decision*, at 13–14 (7/16/97) (in record as *1996 New Hampshire SEC Decision Portland Natural Gas Transmission System*, SNPF 241, at 7330–31).

planning" and "reinforces local patterns of development."[234] Mr. Varney's strict adherence to this limiting premise, notwithstanding all other evidence, made it a foregone conclusion that he would conclude that the proposed project would not unduly interfere with the prevailing land uses in the affected communities.

According to Mr. Varney, no amount of transmission lines or height would unduly interfere with prevailing land uses, so long as the proposed project would be in an existing right-of-way. Mr. Varney confirmed his adherence to this principle throughout cross-examination. For example, he stated his opinion that there would be no undue interference even if a cleared right-of-way would have five transmission lines at a height of 300 feet tall and within 10 feet of a residence.[235]

Mr. Varney's opinion is not supported by New Hampshire law, which is clear a change of use can occur when the use is generally the same type of use but the intensity of other attributes of it have changed. The SEC process takes the place of most municipal zoning and therefore it is appropriate to look to zoning law for guidance on what constitutes a change in use. In the context of land use, courts consider the "character, nature, and kind" of a use to determine if a use is different from another use.[236]

Many cases make this determination when deciding if a use is the same or different from a previously-existing nonconforming use. In the nonconforming use context, to determine if a use is the same or different from a prior use, courts "consider the extent to which the challenged use reflects the nature and purpose of the prevailing nonconforming use, whether the challenged use is merely a different manner of using the original nonconforming use or whether it constitutes a different use, and whether the challenged use will have a substantially different

[234] APP 1, Appx. 41, at 23426.
[235] Tr. 9/26/17, Morning Session, at 133–34 (Varney).
[236] *Hurley v. Town of Hollis*, 143 N.H. 567, 571–72 (1999).

impact upon the neighborhood."[237] Notably, "[a] great increase in the size or scope of a use has also been considered to be a factor in determining whether the character of the use has been changed, so that the use is no longer a continuing one."[238]

The New Hampshire Supreme Court has found many related uses to be sufficiently different from a prior use they cannot be considered a continuation of the prior use. For example, a 17-unit condominium is a different use from a 17-room motel because the condominium would have a larger footprint and because "the changes … are not required for, nor are they reasonably related to, the continuation of the use that existed …."[239] Other uses that the New Hampshire Supreme Court has found to be different from each other include a change on a site plan from a retail space to a conference center,[240] moving an existing business from a barn to a new, larger industrial-style building on the same property,[241] and a commercial earthen-material stockpiling operation and previous stockpiling incident to a pig farm.[242] In this legal context, it is clear that the land use of the right-of-way would be changing significantly.

It is also clear that the law requires looking at the land use, and changes to it, within *and beyond* the right-of-way. Site 301.09 requires an actual analysis of whether the prevailing land uses of all affected communities would be adversely affected by the proposed project.[243] Such an analysis would include looking at the uses abutting the right-of-way, including looking at how those uses may have changed. Although Applicant put forth no evidence on this point, common sense argues that many abutting stretches, from Concord to Deerfield and points north, that were

[237] *New London Land Use Ass'n v. New London Zoning Bd. of Adjustment*, 130 N.H. 510, 517 (1988).
[238] *Wolfeboro (Planning Bd.) v. Smith*, 131 N.H. 449, 456 (1989).
[239] *New London Land Use Ass'n*, 130 N.H. at 517.
[240] *Harborside Assocs. v. City of Portsmouth*, 163 N.H. 439 (2012).
[241] *Hurley v. Town of Hollis*, 143 N.H. at 571–72.
[242] *Town of Salem v. Wickson*, 146 N.H. 328, 331 (2001).
[243] *See* SPNF 241, at 7330–31 (describing the Portland Natural Gas Transmission System applicant's detailed analysis of prevailing land uses and effects of several alternatives).

raw land when the existing right-of-way was first installed decades ago have now become families' homes, communities' recreation sites, local businesses, and so many other uses. Yet, here again, Applicant has provided the Subcommittee with no evidence.

If the Subcommittee were to accept Mr. Varney's conclusion, Site 301.09 would become meaningless with regard to portions of a proposed project that would be built within an existing right-of-way. Site 301.09 requires so much more than Applicant has provided.

b. Mr. Varney did not Consider Visual Effects on Land Use; He Considered Only Whether the Proposed Project would Physically Interfere With Existing Uses

Mr. Varney ignored the visual component of land use. Visual effects are part of the orderly development analysis and not relevant only to aesthetics. Contrary to Mr. Varney's approach, visual effects cannot be peeled away from land use and ignored. As noted, Site 301.09(a) requires that Applicant "estimate of the effects … [l]and use in the region," including descriptions both "prevailing land uses in the *affected communities*;" and "how the proposed facility is consistent with such land uses and identification of how the proposed facility is inconsistent with such land uses.[244] It is this analysis, in part, that the Subcommittee is to use when it considers "[t]he extent to which siting, construction, and operation of the proposed facility will affect land use."[245]

As noted, "affected communities," is a broadly-defined term, including not only host communities, but also communities abutting host communities, and other communities "expected to be affected."[246] Visual impacts would be one of the most likely impacts to farther away affected communities, and Mr. Varney stated as much.[247] Because Site 301.09(a) land use

[244] N.H. CODE ADMIN. RULES, Site 301.09(a) (emphasis added).
[245] *Id.* at Site 301.15.
[246] *Id.* at Site 102.07.
[247] Tr. 9/22/17, Morning Session, at 35 (Varney).

analysis must include an analysis of affected communities that would not host a project but may nonetheless experience undue interference to their prevailing land uses from the project, Mr. Varney's wholesale disregard of visual effects violates Site 301.09(a). One simply cannot comply with Site 301.09(a) without analyzing the visual impacts to land use in all affected communities. The corollary to this is that the Subcommittee cannot do its job pursuant to Site 301.15 without such information.

As DeWan did in choosing largely to not comply with the 10-mile requirement of Site 301.05(b)(4), Mr. Varney substituted his own approach for what is required by Site 301.09(a). The following response by Mr. Varney illustrates his misapplication of the rule and his steadfast adherence to his self-imposed requirement that an impact on land use must be a physical interference:

> I think the interpretation [of Site 301.09] that most people have had is to look at prevailing land uses along the corridor. And, if there do not appear to be any impacts, then one would then assume, unless there were visual impacts, that there would not be any impacts to affected communities. And, in the testimony that I provided, indicate -- the indication was that there was no significant impact on prevailing land uses along the corridor. That it would not interfere with the continued uses that exist.[248]

To be clear, this is how Mr. Varney claims to have properly applied the rule: he first determined there would be no interference with land use along the corridor; he then relied on that initial determination to extrapolate that there would also be no interference with affected communities, all without actually looking beyond the right-of-way. This is an absurd interpretation of the rule.

Many land uses in affected communities could continue without any physical interference from the proposed project. But Mr. Varney's job—which he did not do—was to *analyze* all of

[248] Tr. 9/22/17, Morning Session, at 37.

the potential effects, which include the potential effect of visual degradation of the prevailing land uses in all affected communities.

This is also a prime example of how Mr. Varney's repeated deflection to DeWan[249] resulted in regulatory requirements falling through the cracks. Mr. Varney was required to look at affected communities, which includes abutting communities and beyond, while DeWan was required to look 10 miles out, which, even if he did, would not capture all affected communities. For example, DeWan would not have analyzed the unincorporated places in the Presidential Range east of Jefferson and Carroll because they are mostly beyond 10 miles from the proposed project, but those unincorporated places fit within the definition of affected communities, which Mr. Varney ignored, in violation of the rule.

DeWan considered scenic resources (albeit an impermissibly narrow subset of scenic resources), but land use and planning are much broader categories. DeWan did not consider visual effects from an "overall planning" perspective.[250] DeWan's charge was not to look at the impacts to prevailing land uses in affected communities from a land use or planning perspective. That was Mr. Varney's job, but he did not do his job when he deferred all things visual to DeWan who, it turns out, was not handling all things visual. Because Mr. Varney did not analyze non-physical impediments, including no consideration of visual effects, and DeWan's analysis

[249] *See, e.g.*, Tr., 9/18/17, Afternoon Session, at 127 (Varney) ("We didn't do an assessment of scenic views or visual impacts. That was conducted by Terry DeWan & Associates.").
[250] Tr. 9/26/17, Morning Session, at 88 (Varney).

was limited to only consideration of visual effects to a subset of scenic resources, many effects to prevailing land use went unexamined.[251]

3. The Proposed Project would Unduly Interfere with the Orderly Development of the Great North Woods

Applicant proposes 40 miles of new right-of-way through Pittsburg, Clarksville, Stewartstown, Dixville, Millsfield, and part of Dummer,[252] part of which is proposed to be aboveground and part of which is proposed to be underground. Some have used the word "dolphining" to describe the nature of this stretch, which transitions from aboveground to

---

[251] Mr. Varney undermined his credibility on the stand. Given the magnitude of the proposed project, one would expect Applicant's witnesses to have done a thorough review. Mr. Varney initially overstated his familiarity with the proposed route. Mr. Pappas asked Mr. Varney whether he had "driven along the whole 60 miles of underground . . . [i]ncluding up near the Connecticut River and the 7 and a half miles [up north along Old County Road, North Hill Road, and Bear Rock Road] …." Tr. 9/18/17, Afternoon Session, at 74 (Pappas) (emphasis added). Mr. Varney replied, "Yes. And probably multiple times over the years." *Id*. This turned out not to be the case, as Mr. Varney later contradicted himself in the following exchange:

> Q: With regard to the Northern Pass have you [dr]iven or walked North Hill Road, Old County Road or Bear Rock Road?
> A (Varney): No.
> Q: Are you familiar with those roads?
> A (Varney): Generally, but haven't been on them recently.
> Q: The Northern Pass would be buried along those roads, correct?
> A (Varney): Yes. That's my understanding.
> Q: But you didn't visit them as part of your analysis for this Project?
> A (Varney): No. I looked at the land use information and Google Earth in looking at the land uses and structures that were along the route.
> Q: When was the last time you were on Bear Rock Road?
> A (Varney): I can't remember.
> Q: When was the last time you were on Old County Road?
> A (Varney): I can't remember.
> Q: When was the last time you were on North Hill Road?
> A (Varney): Can't remember.
> . . . .
> Q: But you're certain you've been on them before?
> A (Varney): I've been throughout that area during my days as a DES Commissioner and worked with those communities.
> Q: Okay. But you don't know whether you've been on those roads in particular.
> A (Varney): Not recently.
> Q: Do you know if you've ever been on—can you say with certainty that you have driven all three of those roads at one time in your life?
> A (Varney): No.

Id. at 105–06. Had Mr. Varney's response to Mr. Pappas stood unchecked, the Subcommittee would have been led to believe that Mr. Varney was personally familiar with the proposed buried route in Clarksville and Stewartstown when he is not.

[252] *NPT Project Maps – August 2017 Supplement*, APP 201, at 67732–829.

underground several times. For aboveground, Applicant proposes 32 non-contiguous miles in Pittsburg, Clarksville, Stewartstown, Dixville, Millsfield, and Dummer. [253] The remaining approximately eight miles of new right-of-way would be constructed underground under or along Route 3, Old County Road, North Hill Road, and Bear Rock Road.[254]

Mr. Varney finds no undue interference with orderly development with the overhead portion because this 32-mile section between Pittsburg and Dummer is "sparsely populated land, primarily forested and managed for timber and recreational use, which will continue largely uninterrupted."[255] This conclusion overlooks the draw of the Great North Woods' sparsely populated land, does not consider that recreational uses in the North Country are uniquely more remote and wilderness-like than, say, a hiking trail in Bow or Bedford, and looks only for a physical interference rather than considering the effect of visual degradation on land use. As Applicant's witness for tourism, Mitch Nichols, testified, the "undeveloped character" of the Great North Woods is part of what draws people there.[256] Mr. Nichols also noted what is obvious to most Granite Staters: New Hampshire "offer[s] superior access to outstanding scenery in year-round outdoor activities and recreation."[257] Mr. Varney's bald assertion that the region's "sparsely populated" nature makes it compatible with an industrial development like the proposed project ignores the significant and increasingly hard-to-find benefits of being a sparsely populated place on the Eastern Seaboard.[258] As discussed below, the Towns of Pittsburg, Clarksville, and Stewartstown understand the importance of this attribute.

[253] APP 201, at 67732–60; 67776–829.
[254] *Id*. at 67740–44; 67760–76.
[255] APP 1, Appx. 41, at 23416.
[256] Tr. 7/19/17, Morning Session, at 59 (Nichols).
[257] Tr. 7/18/17, Morning Session, at 53–54 (Nichols).
[258] *Pre-Filed Testimonies of All CS Intervenors*, CS 1, at Bradley J. Thompson 4 of 6 ("One of the most valued aspects of the Bear Rock area of Stewartstown is its solitude— peace and quiet. Visitors always comment on this.").

As for the approximately 8 miles of underground, which Mr. Varney did not visit, under or along Old County Road in Clarksville and Stewartstown, and North Hill Road and Bear Rock Road in Stewartstown, these are narrow country roads.[259] Widening and "improving" these roads would cause them to lose their country road character. The Great North Woods communities along the proposed route do not have a desire to become developed in the same way that the southern municipalities discussed in Mr. Varney's supplemental pre-filed testimony desire to develop.[260] The North Country towns work with what they have—regionally unparalleled scenic resources and recreational opportunities.

The proposed project would unduly interfere with the Great North Woods region of New Hampshire, permanently and pervasively etching a scar through its reputation and undeveloped character. No municipality in the Great North Woods has come out in support of the proposed project, and many have actively opposed it.[261] Despite the promise of increased property tax revenue, an intense public relations campaign, and other financially lucrative offers from Applicant, these towns prefer their current landscape.[262] That only one of 31 host communities favors the proposed project speaks volumes and is evidence in and of itself that the proposed project would unduly interfere with the orderly development of the region. This is an "overwhelming number of municipalities who believe that this is inconsistent with orderly development of their region."[263] Almost as overwhelming as public commenters; out of the

[259] APP 201, at67762–74; *Photograph of North Hill Road Near Cemetery*, CFP 196, at 9159 (showing North Hill Road near cemetery).
[260] *Supplemental Pre-Filed Direct Testimony of Robert Varney (Land Use and Orderly Development)*, APP 96, at 53920–21 (discussing Londonderry, Bedford, and Concord with respect to the Phase II line); *see also* Tr. 9/18/17, Afternoon Session, at 80 (Varney) (agreeing that "the land use and development in these small rural [northern] towns is different than the development patterns in Concord, Bedford, and Londonderry").
[261] *See* RSA 162-H:16, IV(b) (requiring that the Subcommittee give "due consideration . . . to the views of municipal and regional planning commissions and municipal governing bodies").
[262] Tr. 10/20/17, Morning Session, at 120 (Ellis).
[263] Tr. 9/26/17, Morning Session, at 89 (Bailey).

public commenters opposed to the project, 96% of them are opposed, at least in part, because of undue interference with orderly development.[264]

Mr. Varney stated many times that municipal planners are not qualified to give opinions on orderly development, dismissing this as "just local planning."[265] Even if, assuming for the sake of argument, a single municipal planner cannot speak to the entire proposed project, 30 separate municipalities along 192 miles collectively provide a resounding and reliable representation of their regions—representation that greatly overrides Mr. Varney's review of master plans and zoning ordinances.

a. Pittsburg

Although Mr. Varney notes that tourism and recreation add emerging economic opportunities, he characterizes "this portion of New Hampshire [a]s rural in nature with current and historic land uses revolving around the development of commercial and industrial facilities built to take advantage of plentiful natural resources, such as forestry goods and gravel materials."[266] Specifically with regard to the Halls Stream neighborhood where the new overhead line would enter New Hampshire, Mr. Varney's report attempts to portray the area as commercial and industrial, noting "a large scale log yard and timber processing facility."[267] He also stated "industrial facilities including the Ethan Allen furniture factory are located about 0.3 miles southwest in neighboring Stewartstown, NH."[268] The logging facility is in Quebec,

[264] Out of the 1,476 public comments read, 1,306 commenters oppose the proposed project, at least in part, because of the undue interference it would have. *See supra* Footnote 4.
[265] Tr. 9/21/17, Morning Session, at 47 (Varney); *see also* Tr. 9/26/17, Morning Session, at 91–92 ("Sometimes that seems like a way of discounting the view of the municipality.") (Way).
[266] APP 1, Appx. 41, at 23447.
[267] *Id.*
[268] *Id.*

Canada, however, and the Ethan Allen factory, currently operating at a greatly reduced capacity, is actually in Beecher Falls, Vermont, not Stewartstown.[269]

Mr. Varney's assessment of the economy in Pittsburg is dated. As Stephen Ellis, Chair of the Pittsburg Board of Selectmen testified, "[t]here's virtually no business in Pittsburg that has any manufacturing."[270] Rather, the drivers of the economy and employment are tourism and the construction of second homes, both of which depend on the landscape, as described by the Selectmen of Pittsburg, Clarksville and Stewartstown: "[o]ur scenic resources and landscapes are the essence of who we are. They define our communities and our sense of place. They drive the economy and employment of the area through tourism and the building, maintenance and repair of second homes and vacation properties."[271] During the hearing, Mr. Ellis elaborated on this, stating:

> The tourism economy is by far the largest area that keeps our towns afloat, not only from people visiting our town, but what happens many times is that people come and visit our town, decide to buy some land and build houses for retirement. That keeps our carpenters and plumbers and electricians at work pretty diligently.[272]

Mr. Varney agreed that he did not "address the land uses of second homes and vacation properties in [his] report."[273] Given that second-home land use is one of the two most important land uses in Pittsburg, Clarksville, and Stewartstown, Mr. Varney's lack of consideration of this prevailing land use underscores the fact that his identification and analysis of prevailing land uses in the community is incomplete and unreliable. And Mr. Varney's decision not to meet with Selectboards, especially in Clarksville and Stewartstown, which do not have master plans or

---

[269] *Ethan Allen Furniture Factory - Canaan, Vermont*, SPNF 247, at 7373–75; Tr. 9/19/17, Morning Session, at 10–12 (stating that "[i]t's not critical to me whether or not that fact is exactly correct").
[270] Tr. 10/20/17, Morning Session, at 119 (Ellis).
[271] *November 12, 2015 Letter from Selectmen Pittsburg-Clarksville-Stewartstown to New Hampshire SEC re: Petition for Intervention*, SPNF 231, at 7268.
[272] Tr. 10/20/17, Morning Session, at 118 (Ellis).
[273] Tr. 9/19/17, Morning Session, at 34 (Varney).

Planning Boards, or in Pittsburg, Clarksville and Stewartstown, which do not have zoning, only increased the likelihood that he did not provide the Subcommittee an accurate read of these towns.[274]

As for Halls Stream, Mr. Varney agreed that the Halls Stream neighborhood is not an industrial neighborhood.[275] Because this would be new overhead right-of-way, the Halls Stream neighborhood currently does not have a view of transmission lines.[276] Applicant proposes to construct four 80-90 foot lattice structures in the immediate vicinity of Halls Stream Road, including one just off the road visible to all users of Halls Stream Road.[277] According to DeWan, as many as ten towers would be visible from portions of the Halls Stream neighborhood, where today there are none.[278]

The Halls Stream area is part of the Indian Stream Republic, as is the entire area in Pittsburg in which the proposed project's 20 towers would be placed.[279] As the Selectmen stated about the Indian Stream Republic: "[t]his land has been untouched for 175 years and we must keep it that way. This is sacred territory to our citizens."[280] At the hearing, Mr. Ellis described the significant efforts that Pittsburg has taken to use the Indian Stream Republic to attract visitors, including obtaining a $200,000 grant to install kiosks throughout town and becoming the first town in the United States to add on to the Pioneer Trail, which is a 27-town trail in

[274] Tr. 9/18/17, Afternoon Session, at 27 (Pappas). Mr. Varney did not meet with any Selectboards, Planning Board, or Zoning Boards. *Id*.; *see also* Tr. 9/19/17, Morning Session, at 109 (Varney) (discussing the current state of master plans, planning boards, and zoning boards in several towns).
[275] Tr. 9/19/17, Morning Session, at 12.
[276] APP 1, Appx. 17, at 14334, 14706.
[277] APP 201, at 67735–39; APP 71, at 36057–58.
[278] APP 1, Appx. 17, at 14706–07.
[279] Tr. 10/20/17, Morning Session, at 126 (Ellis); *Pre-filed Direct Testimony of the Boards of Selectmen from Pittsburg, Clarksville, and Stewartstown)*, MUNI-1-N 1, at 5.
[280] SPNF 231, at 7266–68.

Canada.[281] The Indian Stream Republic is not merely an historical footnote, but, as Mr. Ellis described, "it's also something that we teach our children and it's also something that we use heavily to market our town to get people in to enjoy our beautiful town."[282]

Despite the importance to Pittsburg of the land uses related to the Indian Stream Republic and the Pioneer Trail, Mr. Varney made not one mention of either in his report.[283] This is another example of Mr. Varney not accurately identifying and analyzing prevailing land uses in Pittsburg.

Pittsburg was one of three "areas of most concern" to the North Country Council (NCC) as noted in the summary of Mr. Varney's meeting with the NCC.[284] During the hearing, Mr. Varney claimed that the NCC was specifically concerned about the proposed project going overhead over the Connecticut River,[285] however, his meeting notes do not indicate such a limited focus of the NCC.[286]

In his report, Mr. Varney also glossed over the concerns that the NCC expressed to the USDOE, which included "potential effects on 'landscape attractiveness,' 'rural and community character,' 'tourism industry' and 'real estate values'" and asking the DOE to consider six alternatives, including burial.[287] Mr. Varney's statement that "[t]he Project addresses these concerns by 'siting the line concurrent with exiting [sic] lines'"[288] ignores the 32 miles of proposed new overhead lines from Pittsburg to Dummer. This is another example of Mr. Varney

[281] Tr. 10/20/17, Morning Session, at 125 (Ellis) ("We're the first town in the United States to add on the Pioneer Trail. So if you want to complete it, you've got to come to Pittsburg.").
[282] *Id*. at 125–26 (Ellis).
[283] *See* APP 1, Appx. 41 (report contains no mention of Pioneer Trail or Indian Stream Republic).
[284] *Normandeau Meeting Summaries*, CFP 471, at 13258.
[285] Tr. 9/18/17, Afternoon Session, at 101–02.
[286] CFP 471, at 13258.
[287] APP 1, Appx. 41, at 23428–29.
[288] *Id.* at 23429.

using the fact that 83 percent of the proposed project would be buried or in an existing right-of-way to marginalize the impacts along the new right-of-way.

For the foregoing reasons, the proposed project would unduly interfere with the orderly development of the region in Pittsburg.

b. Clarksville

The proposed project would enter Clarksville under the Connecticut River and emerge under Route 3 at the Forest Society's Washburn Family Forest, a more than 2,000 acre reservation that includes 4.5 miles of frontage along the Connecticut River.[289] In his report, Mr. Varney did not include any discussion of the construction-related impacts to the use of the Washburn Family Forest, the parking lot for which is located along the buried portion. For approximately 1.5 miles through Clarksville, a new overhead line would follow the southern boundary of the Washburn Family Forest, at a distance of approximately 37 to 350 feet from the Washburn Family Forest to the edge of the right-of-way.[290]

Mr. Varney admitted that he did not analyze the uses of the Washburn Family Forest or the potential adverse effects on those uses, though he acknowledged that the Forest is open to the public for fishing, hunting, snowmobiling, hiking and mountain biking.[291] According to DeWan, the proposed project would be visible from parts of the Washburn Family Forest.[292] Mr. Varney agreed that new "transmission towers would not enhance the rural character of the area."[293] The Selectmen of Pittsburg, Clarksville, and Stewartstown are concerned about effects on the Forest, stating that "this above ground segment in Clarksville would forever alter the views from

[289] *Prefiled Direct Testimony of Will Abbott*, SPNH 1, at 6.
[290] APP 201, at 67745–60; Tr. 9/19/17, Morning Session, at 14 (Varney).
[291] Tr. 9/19/17, Morning Session, at 15 (Varney).
[292] APP 1, Appx. 17, at 14338.
[293] Tr. 9/19/17, Morning Session, at 17.

important abutting conservation areas, including the Washburn Family Forest owned by the Society for the Protection of New Hampshire Forests."[294] The sheer beauty of Washburn Family Forest serves as the stunning gateway to Pittsburg as one crosses the Connecticut River on Route 3.[295]

Just beyond the Washburn Family Forest, the proposed new overhead right-of-way would make a sharp turn to the southeast, in the direct viewshed of the Bilodeau family home. The Bilodeau family—parents, daughters, and sons-in-law—built the home themselves in 1986 and have made extensive use of it ever since.[296] The view from their home includes "[a] good part of New Hampshire, Vermont, Jay Peak on a good day, and the border between Vermont and Canada."[297] The Bilodeau home abuts Young Cemetery from which DeWan created a photosimulation.[298] This simulation shows approximately what the Bilodeaus would see, looking in the direction of the Washburn Family Forest. However, given the vantage point from the Bilodeau home, in addition to the monopoles shown in the photosimulation, the Bilodeaus expect they would also see at least one lattice structure and possibly a second lattice structure and Transition Station #3.[299]

For a family that has spent more than 30 years visiting with friends and family, snowmobiling, and raising children at "camp," the proposed project would have both unreasonable adverse effects and undue influence, which would be typical of similar families throughout the region. If the proposed project is constructed, both Bilodeau daughters agreed, "I

[294] SPNF 231, at 7267.
[295] SPNF 69, at 4429.
[296] *Pre-Filed Direct Testimony of Donald and Diane Bilodeau, Dawn Bilodeau Scribner, and Dana Bilodeau dated November 15, 2016*, SPNF 143, at 6138.
[297] *Id*. at 6138, 6144.
[298] APP 1, Appx. 17, at 14344–47.
[299] Tr. 11/17/17, Morning Session, at 112–13.

don't know if I could ever go back up there to, and feel the same way."[300] Dawn Bilodeau quoted her son as saying that camp "is a place to escape reality" and "perhaps one of the best things about it is that it hasn't changed in the past 21 years."[301] When asked whether, other than local distribution lines, Mr. Varney sees "any other structures in this photo simulation that are man-made besides the Northern Pass," Mr. Varney answered, "No, not yet."[302] Further, Mr. Varney testified that the proposed project would be consistent with the orderly development of the region that constitutes the Bilodeaus' viewshed because "[i]t's an overhead corridor through a heavily forested area."[303] Why would the Bilodeaus ever expect that something like the proposed project would ever be constructed just outside their back door?

For the foregoing reasons, the proposed project would unduly interfere with the orderly development of the region in Pittsburg and Clarksville.

c. Stewartstown

After Clarksville, the proposed project would enter Stewartstown in an underground segment and transition to overhead just before Coleman State Park, this being the third segment of new overhead line comprising the total of approximately eight miles of new overhead line proposed for Pittsburg, Clarksville, and Stewartstown. The Selectmen of those three towns describe this 3.5-mile Stewartstown segment as follows:

> [T]he proposed transmission corridor and 29 towers would be starkly visible from some of the most valuable residential and tourism development properties in Stewartstown and Colebrook along Bear Rock Road, Harvey Swell Road, Noyes Road and Diamond Pond Road. In addition, this segment … would ruin views from and along entryways to Coleman State Park. The towers and transmission line would run directly along much of the southern boundary of Coleman State

[300] *Id*. at 117–18.
[301] SPNF 143, at 6140.
[302] Tr. 9/19/17, Morning Session, at 20–21.
[303] *Id*.

> Park and it would cross high above Diamond Pond Road which is the only entryway to the Park.[304]

Coleman State Park is one exceptional example (of many) of the superior scenic beauty that is the cornerstone to this region's tourism and second-home economies. Those who have been there understand the power of this exceptional place. As discussed above, Mr. Varney did not address the land use of second homes in his report, thus ignoring one of the most important prevailing land uses identified by the Selectmen.[305] All or most of these properties also were not evaluated by Mr. Chalmers, as they would not have met his criteria for impact of having the right-of way go through them, or be in very close proximity.[306] Thus, evaluation of these properties so critical to the region fell into a gap of unevaluated impacts not covered in any way by Applicant.

As for the "tourism development properties" the Selectmen noted, Mr. Varney does not discuss any of these aside from noting that "[t]he 45th Parallel Cabins are located about 370 feet north of where the Project crosses Diamond Pond Road."[307] Mr. Varney acknowledged not having evaluated the impact to any specific locations or businesses.[308] As a result of Mr. Nichols not evaluating—or even mentioning—any specific location in New Hampshire in his report, these tourism properties also fell into a gap of unevaluated impacts.[309]

Despite having sections on the prevailing land uses that say "recreation" and "conserved land," Mr. Varney's report does not discuss uses of Coleman State Park.[310] In fact, Coleman State Park is mentioned only three times in his report and only to note the existence of the Park

---

[304] MUNI 1-N 1, at 6; *see also* CS 1, at Bradley J. Thompson 3 of 6 ("To stretch an overhead powerline over Big Diamond Pond Road with tainted views east and west looking out at 5-15 towers is not the welcome mat we should offer for owners of the many camps on Big Diamond Pond (mostly 2nd homes), or the 800 different campers that spent time at Coleman State Park in 2015.").
[305] Tr. 9/19/17, Morning Session, at 34.
[306] *See supra* Part II.D.4.
[307] APP 1, Appx. 41, at 23454.
[308] Tr. 9/18/17, Afternoon Session, at 8.
[309] APP 1, Appx. 45 (report containing no mention of specific tourism locations).
[310] APP 1, Appx. 41 (report contains no mention of uses of Coleman State Park).

and that it is located near the proposed route.[311] At the hearing, Mr. Varney seemed surprised by his own superficial treatment of Coleman State Park, stating confidently, though in error, "[w]ell, I'm sure there's additional material if I looked."[312] There is not.

Perhaps the primary attractions of Coleman State Park are Little Diamond and Big Diamond Ponds—both Great Ponds protected by RSA 4:40-a—and both not mentioned in Mr. Varney's report, much less discuss their uses and any potential adverse effects. Despite not discussing the uses of Coleman State Park in his report, Mr. Varney agreed at the hearing that both lakes have public boat ramps, are used for fishing and boating, and are promoted on the State Parks' website as fishing destinations in the Great North Woods.[313] He also agreed that Little Diamond Pond is a New Hampshire Fish & Game ("Fish & Game") designated trout pond[314] and that Coleman State park has a campground on Little Diamond Pond with cabins and boats for rent.[315]

Currently, no user of Little Diamond or Big Diamond Pond sees transmission lines.[316] If the proposed project is built, 1-10 transmission structures would be visible from almost all of

[311] Tr. 9/18/17, Afternoon Session, at 116–18; APP 1, Appx. 41, at 23425 ("Several State of NH conservation lands, forests or parks are near or intersect the Project area. Examples include Coleman State Park in Stewartstown, Cape Horn State Forest in Northumberland, Franconia Notch State Park in Franconia and the northernmost portion of Bear Brook State Park in Allenstown."); *Id*. at 23454 ("The right-of-way follows along the southern border of Coleman State Park, across snowmobile corridor 18/5, then southeast across Heath Road and east across Diamond Pond Road" and "The right-of-way follows along the southern border of Coleman State Park and across Sugar Hill (elevation 2985 feet), where it enters the northwestern portion of Dixville.").
[312] Tr. 9/19/17, Morning Session, at 23.
[313] Tr. 9/19/17, Morning Session, at 24–25; *New Hampshire Fish & Game Coleman State Land Trapping Map*, SPNF 226, at 7262.
[314] Tr. 9/19/17, Morning Session, at 24; *New Hampshire Fish and Game Department, Designated Trout Ponds in New Hampshire*, SPNF 15, at 123.
[315] Tr. 9/19/17, Morning Session, at 25.
[316] APP 1, Appx. 17, at 14709.

both ponds.[317] Photosimulations by DeWan show the towers would be visible on Sugar Hill ridge as the viewer looks across Little Diamond Pond.[318]

In addition to not mentioning Little Diamond or Big Diamond Ponds in his report, Mr. Varney's superficial treatment of Coleman State Park is exemplified by the exceptionally poor quality of the maps in his report. Rather than being helpful, many of his maps are misleading and confusing. In the Stewartstown section of his report, Mr. Varney directs the reader, "A general depiction of existing land uses along the corridor in Stewartstown is provided on the attached map."[319] However, the map does not depict existing land uses. The land use categories in the map's legends do not correspond to the land use categories discussed in Mr. Varney's report, and many of the land uses depicted on the map are meaningless. Coleman State Park is not labeled or delineated on the map, and the land comprising the Park is shaded as "Unknown, Vacant Land," "Undeveloped Land," and "Forest."[320] Mr. Varney downplayed the significance of the maps, stating, "I believe that they provide a general depiction of the Project location within the community, and that by using the map, along with the text, they can get a good sense of prevailing land uses along the corridor."[321]

One thing that a reader would not learn by reviewing the text along with the map is that the proposed new overhead right-of-way would go between the two noncontiguous parts of

[317] APP 1, Appx. 17, at 14710; Tr. 9/19/17, Morning Session, at 21–22; 24–26 (Varney).
[318] APP 1, Appx. 17, at 14365. In a remarkable attempt to deflect responsibility for the impacts of their own proposed project, the Applicant blamed the Forest Society's land acquisition efforts for the line's proposed location visible from Little Diamond Pond. Tr. 12/11/17, Afternoon Session, at 81 (Needleman). Needless to say, the location and overhead nature of the proposed project are choices made solely by the Applicant.
[319] APP 1, Appx. 41, at 23454.
[320] *Id*. at 23455. In another of the Applicant's attempts to blame someone else for the application's or the proposed project's shortcomings, Mr. Varney blamed the poor quality of the maps on the towns ("unfortunately, the town did not have a good, up-to-date, existing land use map") and the State ("this is the Department of Revenue Administration's map"). Tr. 9/19/17, Morning Session, at 74, 77.
[321] Tr. 9/19/17, Morning Session, at 74 (Varney).

Coleman State Park.[322] Rather than siting an overhead transmission line between the sections of the Park that would be visible to the users of the Park, a more orderly development of this area would be to site the proposed project such that the small area between the two noncontiguous sections of the Park could become part of the Park in the future. The proposed project may physically interfere with that possibility, but Mr. Varney did not consider this.[323]

The credible evidence in the record compellingly argues that the proposed project would unduly interfere with the orderly development of the region in Pittsburg, Clarksville, and Stewartstown, which self-identify as a region.[324]

d. Dixville and Millsfield

After Clarksville, the proposed new overhead transmission line would go through Dixville and Dummer for 24 miles. This is the area of the large block of managed forest owned by Bayroot LLC and managed by Wagner Forest. One prevailing land use in this area, especially near the corridor, is fishing, including remote trout fishing. Fish & Game designates ponds in the State for trout fishing and designates some as remote trout fisheries.[325] According to Fish & Game, the "Department manages selected waters to provide remote trout fishing experiences, meaning anglers have an opportunity to catch fish in a wilderness setting. In most cases remote trout fisheries are sustained through annually stocking trout fingerlings by helicopter."[326] Clearly, significant public funds are invested in these important resources. If constructed, the proposed project would be visible from *every* designated remote trout fishery in Dixville and Millsfield. To be clear, numerous ponds and natural features in and around the Bayroot LLC

[322] *See* SPNF 226, at 7262.
[323] Tr. 9/19/17, Morning Session, at 29–30 (Varney).
[324] SEC Docket, *Letter from Selectmen of Pittsburg, Clarksville, and Stewartstown (3/21/16)*, at 2 (stating that "our issues here in the north country are totally different than those of the intervenors who are south of us.").
[325] SPNF 15 and *Remote Trout Fisheries- Fishing NH Fish and Game Department*, SPNF 242.
[326] SPNF 242, at 7344.

Forest are open to the public and well-known attractions, including the trout ponds and remote trout fisheries.

Nathan Pond is a remote, walk-in trout pond and is the only designated remote trout fishery in Dixville.[327] Nathan Pond is also a designated trout pond which the State Parks promote as a fishing destination in the Great North Woods.[328] The only mention of Nathan Pond in Mr. Varney's report is a reference to "the Nathan Pond Ride the Wilds ATV trail."[329] He does not mention any use of Nathan Pond despite having a section in his report on recreational lands as a land use category and a section on Dixville.[330] At the hearing, Mr. Varney was not aware of Nathan Pond being a designated remote trout fishery.[331]

Users of Nathan Pond currently see no transmission lines, which is part of what makes it "remote."[332] If the proposed project is constructed, 1-5 towers would be visible from the entirety of Nathan Pond.[333] Mr. Varney did not consider whether the view of transmission structures would affect Nathan Pond's current land use as a remote trout fishery, deflecting again to DeWan.[334] DeWan, however, did not consider remote trout fisheries.[335] This is another example of how the narrow foci of various project witnesses resulted in an impact—in this instance, the effects on the current use as a remote trout fishery—going unevaluated, again leaving the Subcommittee with insufficient information to approve.

On cross-examination, Mr. Varney played down the remote quality of Nathan Pond:

---

[327] *Nathan Pond geographic and statistical documentation*, SPNF 89, at 5586.
[328] SPNF 15; *New Hampshire DRED, Fishing in the Great North Woods Region*, SPNF 16, at 129.
[329] APP 1, Appx. 41, at 23457.
[330] *See id*. at 23424, 23456; *see also* Tr. 9/19/17, Morning Session, at 44 (Varney) (admitting that "I probably could have gone into more depth on Nathan Pond in the written description").
[331] Tr. 9/19/17, Morning Session, at 40.
[332] APP 1, Appx. 17, at 14712.
[333] *Id*. at 14713.
[334] Tr. 9/19/17, Morning Session, at 41 (Varney) (stating "[a]gain, I'm not the visual expert").
[335] APP 1, Appx. 17, at 14373.

> [T]here's extensive ATV use in these areas, along with snowmobile use.… I don't see any adverse effect on fishermen who are on these ponds that are stocked by Fish & Game, and in areas that have ATV trail use during one part of the season and snowmobile use in the other part of the season.[336]

Mr. Varney's explanation exposes two significant flaws in his reasoning. First, the unanalyzed presumption that the fact that Nathan Pond, or any other designated remote trout fishery, experiences ATV and snowmobile users diminishes the remoteness of, or view from, Nathan Pond. Many of the fishermen enjoying Nathan Pond probably arrive there by ATV or snowmobile; these user groups are not mutually exclusive.[337]

Second, Mr. Varney does not "see any adverse effect on fishermen who are in these ponds *that are stocked* by Fish & Game."[338] His answer presumes that Fish & Game would continue to stock Nathan Pond if the proposed project is constructed. However, per the preamble to its list of remote trout fisheries, the "Department manages selected waters to provide remote trout fishing experiences … in a wilderness setting.[339] If transmission lines are visible from Nathan Pond, there would no longer be a wilderness setting, which may result in Nathan Pond no longer being "selected waters" by Fish & Game, and, therefore, no longer stocked. Mr. Varney did not inquire of Fish & Game whether the proposed project might cause Nathan Pond or any other designated remote trout fishery to be de-listed or unstocked.[340]

Next, Millsfield has four ponds in proximity to the proposed new overhead right-of-way: Millsfield Pond, Bragg Pond, Long Pond, and Moose Pond.[341] Consistent with his inconsistent

[336] Tr. 9/26/17, Morning Session, at 73 (Varney).
[337] Tr. 10/20/17, Morning Session, at 118–19 (Ellis) (describing the various uses, including snowmobiling and ATV riding, the proposed project would affect).
[338] Tr. 9/26/17, Morning Session, at 73 (Varney) (emphasis added).
[339] SPNF 242, at 7344.
[340] Tr. 9/19/17, Morning Session, at 55; Tr. Day 40, Morning Session, at 75; CS 1, at Jon Petrofsky 3 (discussing the remoteness of Nathan Pond).
[341] SPNF 249 (map identifying each pond).

approach to identifying land use features in his report, Mr. Varney notes Bragg Pond but not the others.[342] Even with regard to Bragg Pond, he does not mention the use, only stating that "Brag [sic] Pond is approximately 1,760 feet west of the ROW."[343] Similarly unhelpful is Mr. Varney's map, which depicts the land use along most of the corridor in Millsfield being "Unknown, Vacant Land."

The users of all four of these ponds currently see no transmission lines.[344] If the proposed project is constructed, the following would happen: 1) the project would be visible from *all* of Millsfield Pond, with a majority of the Pond seeing 6-10 towers and a significant portion seeing 11-20 towers; 2) the project would be visible from *all* of Bragg Pond, with more than half the Pond seeing 11-20 towers and the remainder of the Pond seeing 6-10 towers; 3) the project would be visible from portions of Long Pond, with one section seeing 6-10 towers; and 4) the project would be visible from Moose Pond, with 1-5 towers visible from some portions of the Pond.[345]

This cluster of trout ponds is significant: 1) all four ponds are Fish & Game designated trout ponds;[346] 2) State Parks promotes Millsfield Pond, Moose Pond and Bragg Pond as fishing destinations in the Great North Woods; [347] and 3) Long Pond, Moose Pond and Bragg Pond are Fish & Game designated remote trout fisheries.[348] Trout anglers are a significant part of the tourist economy in the Great North Woods.

As discussed above, Mr. Varney did not inquire of Fish & Game whether views of transmission structures from these ponds resulting in the loss of a wilderness setting would cause

[342] Tr. 9/19/17, Morning Session, at 56; APP 1, Appx. 41, at 23459–60.
[343] APP 1, Appx. 41, at 23460.
[344] APP 1, Appx. 17, at 14715.
[345] *Id*. at 14716.
[346] SPNF 15.
[347] SPNF 16.
[348] SPNF 242.

Fish & Game to de-list the ponds from the remote trout fisheries list.[349] By definition, a wilderness setting would not transmission lines and towers. However, Mr. Varney refused to make such a basic acknowledgement, as shown in the following exchange:

> Q: If a pond did lose its remote trout fishery designation, would that be a change in use caused by the Northern Pass?
>
> A (Varney): It would still be a trout pond where people are able to enjoy fishing.
>
> Q: It would be a trout pond. But my question is: If it was de-listed from the remote trout pond list, would that be a change in use?
>
> A (Varney): It's a recreational use that currently exists. And people would be able to fish there and catch stocked trout before the Project occurs, and they would be able to fish there for stocked trout after the Project is constructed.[350]

Mr. Varney's response is a repeat of his guiding principle that an interference with land use must be a *physical* interference. As long as people are not physically prevented from fishing at Bragg Pond, for example, Bragg Pond would remain an unchanged part of the recreational land use category, in his opinion. If the pond were no longer stocked, trout anglers would likely stop coming. As such, the proposed project would have physically impeded the prevailing use of Nathan Pond.

Mr. Varney did not address in his report whether views of the proposed project "could diminish the recreational experience for users" of recreational lands in general.[351] On the stand, he acknowledged that a view of the proposed project would "probably not" enhance the experience of a hiker, fisherman, or boater.[352] However, he would not acknowledge that

[349] SPNF 242 (remote trout fisheries list); *see also* Tr. 09/19/17, Morning Session, at 57 ("I don't have an opinion on the designations. It was not part of my report to evaluate the designation") (Varney). Mr. DeWan also did not consider the remote trout fishery designation. APP 1, Appx. 17, at 14375.
[350] Tr. 9/19/17, Morning Session, at 55–56.
[351] Tr. 9/18/17, Afternoon Session, at 140–41.
[352] *Id.* at 142.

recreational land use would be affected by views of the proposed project, as shown in his response to Ms. Weathersby's hypothetical:

> Q: Let's just look at recreational use just for a second. People enjoy a hiking trail with beautiful views. The enjoyment of many hikers, once the Project is built, hypothetically has been diminished. Use goes down. Only half as many hikers now use that trail.…This is a hypothetical, of course. Is that land use then affected? They can still hike. . . . [I]n your analysis, is that land use affected by the Project?
>
> A (Varney): No. And I disagree with the hypothetical. My experience in looking at that is that, even after projects are constructed, that, as communities grow, there's an increase in use. And if you were to look, for example, at the Hydro-Quebec line in West Concord, there are trails in that area, including portions of the trail that are within the right-of-way that are advertised and promoted on the City's website[.][353]

First, Mr. Varney disagrees that the recreation land use would be affected or diminished. Second, his answer is his own talking point rather than a response to the hypothetical posed. Third, by equating the continued use of a trail in a growing city with the beautiful and pristine natural vistas seen from places like Little Diamond Pond and remote trout ponds, Mr. Varney ignores the reality of where these places are located. Concord residents would not expect an unspoiled setting for their everyday trails. However, a fisherman looking for a wilderness setting would not expect to see the proposed project while fishing. If the proposed project degrades the view from these beautiful places that are in more remote locations, visitors may travel elsewhere for the untouched experience they are looking for.

e. Dummer

The proposed project would enter Dummer as a new overhead line in a new right-of-way in the area of Big Dummer and Little Dummer Ponds. In his report, Mr. Varney notes that the Project "passes about 1,000 feet west of Dummer Pond" but neglects to mention which Dummer

[353] Tr. 9/26/17, Morning Session, at 130–31.

Pond to which he refers.[354] Mr. Varney does not discuss either pond in any additional detail, despite both being designated trout ponds and promoted by State Parks as fishing destinations in the Great North Woods.[355]

According to DeWan, neither Pond currently has a view of transmission structures[356] but if the proposed project were constructed, more than 20 towers would be visible from almost all of Big Dummer Pond.[357] DeWan's photosimulations show what a dramatic change Big Dummer Pond would experience.[358] A view of numerous lattice towers on a ridge overlooking the pond would certainly impact the Pond's current land use as a featured fishing destination in the Great North Woods.[359] Little Diamond Pond's fishing experience would be similarly degraded with 11-20 structures visible from most of the pond, and more than 20 towers visible from parts.[360]

In three consecutive towns—Dixville, Millsfield, and Dummer—the proposed project would have a devastating effect on fishing, which is a recreational land use. Dixville and Millsfield would no longer have ponds with "wilderness settings" that make those ponds eligible to be remote trout fisheries, and Big Dummer and Little Dummer would have full visibility of the proposed project. Tourists who fish these ponds may choose to go elsewhere, and local fishermen would have to travel to find the remote experience they currently enjoy, which may be part of the reason they live where they live.

f. Stark

In Stark, the proposed project and the rebuilt 345-kv lines would be parallel pair of towers above the tree canopy that would be a gateway under which all visitors to the Percy

[354] APP 1, Appx. 41, at 23463.
[355] SPNF 15; SPNF 16.
[356] APP 1, Appx. 17, at 14718.
[357] *Id*. at 14719.
[358] *Id*. at 14333.
[359] See Tr. 4/13/17, Morning Session, at 145 (describing a lattice tower as "kind of an erector set") (Quinlan).
[360] APP 1, Appx. 17, at 14719.

Summer Club and Christine Lake would pass, markedly different from the current experience of driving by substantially shorter wood poles.[361] It appears that the proposed project would be visible from Christine Lake, as DeWan noted that existing structures are visible in photographs taken from a portion of the lake.[362] If existing towers are visible from the lake, two sets of taller towers would certainly be visible. The proposed project from Victor Head, which is accessible by the public through the Percy Summer Club land, would draw the visitors' eyes as the transmission line would be in the middle of the sweeping view.[363]

The proposed project would change the essential character of the unique, historic summer community that has remained "virtually unchanged since the late 1800s and early 1900s."[364] Considerable State and private financial resources in protecting the Nash Stream State Forest and the Forest Society's Kauffman Forest reservation have further ensured that the greater area has also remained virtually unchanged, as the existing lines are below the tree canopy.[365] The 2,078 acre Kauffman Forest and the 315 acre Percy Summer Club properties generally are "working forests" with some designated natural areas.

The context of these properties within a larger natural landscape is summed up as follows:

> The natural attributes of this larger landscape in Stark are significant. The Upper Ammonoosuc River threads through the lower elevations of this landscape, fed by Phillips Brook (draining a 24,000-acre watershed) and Nash Stream (draining a 40,000-acre watershed) to the north. This landscape is also marked by large blocks of the White Mountain National Forest, owned and managed by the US Forest Service, and large blocks of state forest land, owned and managed by the New Hampshire Department

[361] APP 201, at 67840; APP 1, Appx. 17, at 14420 (photograph of existing towers at the Christine Lake Road crossing).
[362] Tr. 9/18/17, Morning Session, at 107-08; Tr. 12/11/17, Afternoon Session, at 71, 85 ("I've paddled on Christine Lake many times, and I can see the existing right-of-way.") (Abbott).
[363] APP 1, Appx. 17, at 14429.
[364] *Pre-filed Testimony of Susan E Percy*, DNA 59, at p. 2 (Percy's pre-filed testimony is listed as the second DNA 58 in the official exhibit list. There is no DNA 59 in that list, so we assume that this exhibit is DNA 59.)
[365] *Pre-Filed Testimony of Will Abbott*, SPNF 1, at 6, 8.

> of Resources and Economic Development's Division of Forests and Lands. The 40,000-acre Nash Stream State Forest, New Hampshire's largest state forest, abuts the Kauffmann Forest and the Percy Summer Club easement to the north. The Kauffmann Forest also abuts two other state forests—the Percy State Forest and the Devil's Slide State Forest, and is within the larger viewshed of the White Mountain National Forest to the south.[366]

This landscape is on view along the 10-mile stretch of Route 110 from Northumberland through Stark and into Dummer and Milan—which is part of the Woodland Heritage Trail Scenic Byway and "one of New Hampshire's most scenic drives."[367] The proposed project would be prominently visible from this beautiful drive.[368]

As the proposed project continues through Northumberland, Lancaster, Dalton, and Whitefield, it would continue to unduly interfere with the sparsely populated Great North Woods, including its continued interference with many additional State parks and State forests, as discussed in the next section. For the foregoing reasons, the proposed project would unduly interfere with the orderly development of the Great North Woods region.

4. The Proposed Project would Unduly Interfere with the Orderly Development of the Region with Regard to Conservation Lands

The proposed project would directly impact at least 28 conservation properties, 16 of which are protected by the Forest Society either by full ownership (in fee) or by conservation easements.[369] These are only the direct hits, so to speak, and do not include indirectly impacted conserved lands such as Weeks State Park, Coleman State Park, and the uncounted conservation-

[366] SPNF 1, at 24.
[367] *Pre-Filed Testimony of Carl Martland*, HIST 12 at Appx. A; SPNF 1, at 8.
[368] APP 1, Appx. 17, at 14722.
[369] SPNF 1, at 15, 40–41.

easement lands, town forests, and, possibly, the White Mountains, that would be indirectly affected by the proposed project.

Siting decisions have the potential to harm visual amenities of conservation land, the very same visual amenities public policy favors preservation of. Much of the land along the proposed route has been "put into conservation," either though ownership by a governmental or non-governmental conservation organization or through conservation easements. Here in New Hampshire, a purpose to be achieved by such conservation is the preservation, among other things, of scenic beauty and wildlife habitat. Such preservation is a public purpose at all levels of law from municipal, to state, to federal law. As a matter of public policy, lawmakers have put tax incentives and special legal protections in place to encourage private individuals and charitable organizations, such as the Forest Society, to enter into conservation arrangements.[370] Many such arrangements attract significant financial support from the governments, again all levels, both through direct participation and favorable tax treatment. Several of the department and agencies which are also members of the Subcommittee participate heavily in such programs. The arrangements are frequently deemed to be trusts affected with a public interest.

The "orderly development" of heavily conserved areas does not include projects which interfere with the scenic quality of the conserved lands the way that the proposed project would. When considering undue interference, the Subcommittee should consider the conservation status of lands nearby to where the proposed project would be located; it should be one of the many factors which determine the orderly development of the region. The proposed project would go through key conservation territory and that fact should be given substantial weight.

[370] See, e.g., RSA 79-A; I.R.C. § 170(h)(4)(A)(iii)(I) ("the preservation of open space (including farmland and forest land) where such preservation is … for the scenic enjoyment of the general public").

In Mr. Varney's report on land use, he includes a section on Conservation Lands, which he identifies as a prevailing land use along the proposed project.[371] While Mr. Varney mentions several conserved properties that would be near or within the proposed project's right-of-way, he does not provide any analysis whatsoever about the proposed project's compatibility or consistency with conservation lands or their expansion. Rather, Mr. Varney simply asserts, "[t]he Project will not interfere with or have an adverse impact on conservation lands and will not alter the on-going, long-term management, use or public access to these parcels."[372] A common goal of conservation lands is to expand them or link them together. Mr. Varney did not consider whether introducing new lines and towers would impede such connections.

Again, Mr. Varney looks for a physical interference that would prevent the conservation land from continuing to be conservation land, while turning a blind eye to the changes to land use caused by visual impacts and resource degradation and the prevention of future connections of conserved lands. Mr. Varney's superficial exercise of noting conservation lands and asserting that there would be no undue interference is not sufficient evidence to support a finding that the proposed project would not unduly interfere with the orderly development of the region with regard to conservation lands along the entirety of the proposed route.

Beginning in Clarksville, as noted, the proposed project would be buried beneath the Forest Society's Washburn Family Forest and then overhead in a new right-of-way immediately adjacent to the Forest for approximately 1.5 miles.[373] As discussed above, Mr. Varney did not discuss in his report the Forest, its uses, or analyze how those uses would be affected by the proposed project.[374] Mr. Varney also did not consider the uses of and effects on the USDA

[371] APP 1, Appx. 41, at 23425.
[372] *Id*.
[373] APP 201, at 67740–62; SPNF 1, at 15.
[374] Tr. 9/19/17, Morning Session, at 14–15.

Hodge Grasslands reserve Easement in Clarksville and Stewartstown, or on the conservation easements held by the Forest Society on the Green Acre Woodlands, McAllaster, Placey, or Thompson Trust properties in Stewartstown. Coleman State Park in Stewartstown would also be dramatically affected, as discussed above.

In Stark, the proposed project would be overhead through the Forest Society's Kauffmann Forest, the Nash Stream State Forest, the Percy State Forest, the Forest Society's conservation easement on the Percy Summer Club property, and the White Mountain National Forest.[375] Mr. Varney does not mention the uses of any of these properties in his report, much less analyze the proposed project's effect on them despite the myriad public uses of all of these properties, including the Percy Summer Club Land.[376] Further, Mr. Varney's map of Stark that purports to show prevailing uses does not show a single land use.[377]

Cape Horn State Forest is in Northumberland.[378] Two utility rights-of-way are located in Cape Horn State Forest, on either side of the prominent Cape Horn, though Mr. Varney did not analyze the cumulative effect of adding the proposed project and the rebuilt 345-kv line to one right-of-way and the existence of infrastructure in the other right-of-way.[379] Through the Cape Horn State Forest, the Northern Pass would be at heights of 70 to 95 feet and the rebuilt 345-kv line, which is now below tree canopy, would be 79 to 101.5 feet in height.[380] Essentially, two Northern Pass-height transmission lines would be in the right-of-way here and throughout the

[375] APP 201, at 67836–51.
[376] *See* APP 1, Appx. 41, at 23465-66; DNA 59, at 2.
[377] APP 1, Appx. 41, at 23467.
[378] The Applicant does not have a deeded easement, or any other rights, with respect to a parcel along the proposed route through Cape Horn State Forest. Tr. 5/2/17, Morning Session, at 113–14 (Johnson); *see also Cape Horn Map*, CFP 250, at 9453. Although the Applicant's witness noted his belief that the omission resulted from a scrivener's error, the Applicant has submitted no evidence to correct this lack of property rights. Tr. 5/2/17, Morning Session, at 114 (Johnson).
[379] Tr. 9/19/17, Morning Session, at 69.
[380] APP 201, at 67854–61.

existing right-of-way. Mr. Varney did not analyze this change in land use within the corridor and its effects on the State Forest land use.[381]

Mr. Varney's report does not include consideration of the uses of or effects on several conservation lands in Lancaster, including Weeks State Park, the Forest Society's conservation easements on the Barton/Baker/Baker and Campen properties, the Lancaster Town Forest, or the USDA Savage Grasslands Reserve Easement.[382] Mr. Varney's map does not show any of these properties—not even Weeks State Park.[383]

Although Mr. Varney discusses the management plan of the Silvio O. Conte National Fish and Wildlife Refuge in Whitefield, his report contains no analysis of why the proposed project would not unduly interfere with the land use of the Refuge.[384]

Forest Lake State Park is in Dalton, and Forest Lake is in Dalton and Whitefield.[385] Neither Forest Lake nor Forest Lake State Park are depicted on Mr. Varney's Dalton and Whitefield maps, and the text does not state the proximity of Forest Lake or Forest Lake State Park to the proposed project, much less analyze any potential effects of the proposed project.[386] This lack of analysis is significant because DeWan's maps show that the lake currently sees no transmission lines, but if the proposed project is constructed, 1-5 towers would be visible from almost all of the Lake, including the State Park frontage.[387] The proposed project would also be visible from the main road to Forest Lake State Park (Forest Lake Road).[388]

[381] APP 1, Appx. 41, at 23469–70; Tr. 9/19/17, Morning Session, at 67–69.
[382] APP 1, Appx. 41, at 23471–73.
[383] *Id*. at 23473; Tr. 9/19/17, Morning Session, at 70.
[384] APP 1, Appx. 41, at 18–19, 23474–77.
[385] APP1, Appx. 17, at 14502–05.
[386] APP 1, Appx. 41, at 23478–80.
[387] APP 1, Appx. 17, 14730–31.
[388] APP 201, at 67894–95.

In Bethlehem, the Forest Society holds conservation deed restrictions on the Manley property and owns The Rocks.[389] "The Rocks is a Forest Society reservation of 1,442 acres of land in Bethlehem" that the Forest Society operates for many uses, including as its "North Country Conservation and Education Center."[390] The Rocks hosts approximately 12,000 to 14,000 visitors a year, and the part of The Rocks where much of the visitor activity takes place has, according to Mr. Abbott, "one of the most spectacular views in New Hampshire of the Presidentials."[391] Mr. Varney's report does not include any analysis of the uses, including as a destination Christmas tree farm, and potential project impacts on The Rocks and its land uses.[392]

Mr. Varney does not mention or analyze the impacts to the Forest Society's conservation easements on the Hannah property or the Darvid property in Easton, or to the White Mountain National Forest in Easton and Woodstock.[393] It appears that Mr. Varney assumed, without providing analysis, the underground portion of the proposed project would not unduly interfere with the orderly development of the region. Not analyzing the effects of the underground section on prevailing land use is a gross defect in his analysis.

Mr. Varney did not analyze the proposed project's effects on the Livermore Falls State Forest in Campton; the Thomas State Forest in Hill; the Worthen Conservation Easement in Bristol; the U.S. Army Corps of Engineers' Franklin Falls Reservoir in New Hampton, Bristol, Hill, and Franklin; the Fish & Game's Webster Lake Wildlife Management Area in Franklin; the

[389] SPNF 1, at 15.
[390] SPNF 1, at 8, 29; *Pre-Filed Direct Testimony of Jane Difley*, SPNF 142, at 6131.
[391] Tr. 12/11/17, Afternoon Session, at 33–34.
[392] APP 1, Appx. 41, at 23482–83; Tr. 12/11/17, Afternoon Session, at 35–36 ("[W]e contribute to the North Country economy because there are bed & breakfasts and inns who promote packages where people stay at the inn and they come to the Rocks and get a Christmas tree, ride in a carriage that's pulled by horses, et cetera. And those inns and bed & breakfasts now have business between Thanksgiving and Christmas that they didn't formerly have.") (Difley).
[393] APP 1, Appx. 41, at 23484–85, 23490–91, 23493–94.

Great Gains Memorial Forest in Franklin; or the Cambridge Drive Open Space Easement in Canterbury.[394]

In New Hampton, the proposed overhead project would cross land owned by John and Nancy Conkling.[395] The Conklings acquired approximately 450 acres with a view looking toward Mount Cardigan, and two Conkling sons have also built houses on the property.[396] Mr. Conkling estimates that the existing towers in the right-of-way are about 40-feet tall, and if the proposed project is approved, he expects to see several towers ranging from 70-110 feet in height.[397] Many years ago, the Conklings placed a conservation easement on 90 acres of their land.[398] Mr. Varney did not analyze effects on the Conkling property or conservation easement, nor did he read any conservation easements related to properties that would be affected by the proposed project, despite purportedly analyzing the effects on conservation lands in his report.[399]

In Concord, the proposed project would directly impact five conservation areas, including the Spear property, on which the Forest Society holds a conservation easement.[400] The proposed project would also go through the maple sugaring property of Dean Wilber.[401] Some of the tallest towers along the entire proposed project would be in the vicinity of, and visible in, Bear Brook State Park in Allenstown.[402] Finally, the proposed project would directly impact two Forest Society easements in Deerfield as well as the Alvah Chase Town Forest and two additional

[394] *Id*. at 23499–500, 23512–14, 23516–17, 23520–21, 23529–31.
[395] APP 201, at 68021 (Conkling property labeled 6162).
[396] *Pre-Filed Direct Testimony of John Conkling*, SPNF 138, at 6088, 6090.
[397] Tr. 10/18/17, Afternoon Session, at 177–78 (Conkling).
[398] *November 29, 2007, Grant of Conservation Easement, John C. Conkling and Nancy W. Conkling to Society for the Protection of New Hampshire Forests*, SPNF 145, at 6150–70.
[399] Tr. 9/18/17, Afternoon Session, at 132–33; *see also* APP 1, Appx. 41, at 23425 (Report section on Conservation Lands).
[400] SPNF 1, at 15, 34.
[401] *See Pre-Filed Direct Testimony of Dean Wilber dated November 15, 2016*, SPNF 139, at 6092–93.
[402] APP 201, at 68097–99.

conserved parcels.[403] Mr. Varney did not analyze the effects of the proposed project on any of these conservation lands.

In sum, the proposed project would unduly interfere with the orderly development of the region with regard to conservation lands throughout the proposed project's 192 miles. The number of State parks and forests, federally-owned lands, town conservation lands, and other land conserved through conservation easements that would have undue interference with their conservation land use is unprecedented. Along with New Hampshire's State Parks, the Forest Society would be slated to take perhaps the biggest hit from the proposed project, with 16 Forest Society properties and conservation easements proposed to be directly affected.

B. Applicant has not met its Burden Regarding Orderly Development Because Critical Information Concerning Construction is Still Missing or Undefined

When, how, where, and for what duration construction would occur is of course one of the primary concerns of municipalities.[404] Pursuant to Site 301.15, in determining whether the proposed project would interfere with orderly development, the Subcommittee shall consider the extent to which the siting, construction, and operation of the proposed facility would affect land use, employment, and the economy of the region and the views of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility.[405]

[403] SPNF 1, at 4, 29–30.
[404] The magnitude of this issue has been clearly demonstrated throughout this case. *See, e.g.*, Tr. 5/3/17, Afternoon Session, at 41 (Bowes) (noting that 20 to 25 work locations would be ongoing at any one time). Not only lanes but entire roads would have to be closed. Tr. 5/3/17, Afternoon Session, at 50–51 (Bowes); 72 (Johnson). This proposed project would involve 19,653 trips of concrete and dump trucks for the open-trench construction portion of the proposed project. Tr. 10/23/17, Afternoon Session, at 145–46 (Taylor). This assumes a 4-feet deep trench, however, the Applicant's plans seem to be evolving to require trenches approximately 7 or more feet deep, in which case the 19,653 will only increase. *Id.* at 146 (Taylor). This figure does not count trips to remove ledge, mud extraction trucks, deliveries of water for drilling, logging trucks, chipper trucks, cranes, flatbeds carrying backhoes, drilling rigs, bobcats, generators, dumpsters, steel plate trucks, pipe trucks, splice vault trucks, cable reel trucks, paving trucks, paving equipment, or pickup trucks. Tr. 10/24/17, Morning Session, at 38–39 (Taylor).
[405] N.H. CODE ADMIN. RULES, 301.15.

While the Forest Society is confident the dozens of municipal intervenors and residents intervening in this Docket will address the views and consideration of the municipalities on the effects of the uncertain and pervasive construction impacts, the fact that these municipalities must confront such pervasive construction impacts on such inadequate information concerning construction within municipalities is a significant concern.

The construction impacts remain undefined because critical details concerning the precise route and construction plans remain absent. For example, if Applicant uses the micro tunneling approach in Franconia, Franconia would have lane closures for 14 to 20 weeks for the tunneling, plus another three to four weeks to bring the line across, which is essentially the entire tourism season.[406] If they use the horizontal directional drilling approach, Applicants has not provided any information about the extent of lane closures.

Also, Applicant has still not provided a traffic control plan, which would help the Subcommittee better assess the impact on orderly development because it would include information such as for any given location of construction, the duration of delays, the number of travelers subject to the delay, the frequency and activity of construction vehicles arriving and departing from the site, etc.[407]

And yet another example: witnesses for Counsel for the Public were not aware of any plans for mitigation of noise at any site proposed for horizontal directional drilling.[408] This

[406] Tr. 9/29/17, Morning Session, at 68, 76 (Johnson).
[407] Tr. 10/23/17, Afternoon Session, at 5–6 (Bascom).
[408] *Id*. at 28 (Zysk and Taylor).

means that the noise associated with the horizontal direction drilling would likely go unabated, exacerbating the construction impacts associated with the road and lane closures.[409]

This uncertainty is particularly troubling for local businesses. Applicant has consistently been dismissive of concerns of jobs lost if the proposed project is approved, including jobs lost due to construction impacts in the underground section—a concern Applicant trivialized as "speculation."[410] It is entirely possible that one, two, or more years of construction disruption could cause companies to go out of business.[411] Alex Ray, the owner of The Common Man restaurants and other businesses throughout New Hampshire and employer of 2,000 people, noted that New Hampshire's tourism success is most reliant on our "idyllic landscapes" and that "[t]here is no cost benefit analysis that supports" the proposed project.[412] Even if lost business income is paid through the applicant's claims process, the storefront may remain empty and there could be a lesser mix of businesses, in addition to the negative experience for the business owner, which would mark an undue interference with employment and the economy caused by the proposed project.

[409] *See infra* at Part IV.B.3.b. discussing impact to Forest Society properties from horizontal drilling; Noise is just one example of effects CFP's witnesses were not able to fully evaluate. Because the Applicant requested certain delegations, it omitted certain information from this proceeding, leaving CFP's witnesses unable to advise the SEC on potential impacts associated with traffic and additional laydown areas. Tr. 10/24/17, Afternoon Session, at 26–27 (Taylor).
[410] Tr. 9/26/17, Morning Session, at 93 (Varney).
[411] Tr. 9/26/17, Morning Session, at 89–99 (Way; Varney); *see also Public Comment of Alex Ray* at 1 (12/16/17) (owner of The Common Man and other businesses stating his expectation that construction disruptions will result in business closures).
[412] *Public Comment of Alex Ray* at 1 (12/16/17).

When Applicant addressed the concern of construction impacts to the economy and employment, such as to businesses, Applicant insisted these concerns can be addressed through a "claims process," but offer no explanation of what exactly that is or how it would work.[413] Applicant has also delayed outreach to impacted businesses, and the impacts to these businesses would of course reverberate through the local business community.[414] In local economies, many of the abutters' businesses are intertwined. To put a picture to words, it's not "just about buying the [Mr. McAllaster's] milk. There are customers that plan on the milk, and there's customers that may have a different price impact from buying their milk in some other place. Mr. Ahern, for example, comes to mind in terms of getting rid of his straw…"[415] This kind of interference is perhaps why Mr. McAllaster, at age 65, had not traveled south of Littleton for 50 years until he traveled to Concord to participate in the hearing on this matter.

The impact of the lacking construction information also would spread to bridges. The average life span of a bridge in New Hampshire is about 50 years.[416] There are 14 bridges in the proposed underground section that are 70 years old or older, as well as the Connecticut River bridge on Route 3, which was built in 1931.[417] The underground presence of the proposed project is likely to constrain construction decision-making in the future, whether it be types of bridge abutments that can co-exist with the underground project or adding a turning lane at the

[413] *See* Tr. 9/29/17, Afternoon Session, at 129–30 (Bowes) ("You are correct that there's going to be indirect impacts for traffic along this roadway. So, understanding what the business loss would be, whether it's direct, where we would have the business close, or whether it was indirect because of the season, that the business owner experienced a loss, this is exactly what our claims process is designed to address, is to make this customer whole for the lost opportunity, as well as the direct loss of business.").
[414] A certain segment of abutters is going to be impacted. Instead of reaching out to them sooner so they have plenty of time to plan for their customers, the Applicant is waiting until the plan is "as final as possible." 10/2/17, Afternoon Session, at 68–69 (Way; Bowes).
[415] Tr. 10/2/17, Afternoon Session, at 68–69 (Way; Bowes); *see also* Tr. 10/24/17, *Afternoon Session*, at 187 (admitting that the Traffic Management Plan, which Applicant is required to submit but has not yet submitted, would not address the proposed project's impact on businesses or tourism).
[416] Tr. 9/26/17, Morning Session, at 48 (Oldenburg).
[417] *Id.* at 47, 53.

Profile School in Franconia and other currently unforeseen improvements, which would result in additional costs for taxpayers if certain cost-effective designs would not be compatible with the proposed project.[418]

There is also great factual and legal uncertainty as to how the proposed project would impact local roads. The impacted municipalities have an interest in the management and regulation of activities along, across, and under, municipally maintained highways and right-of-way, and in seeing that municipal authority is recognized. Further, the Forest Society holds conservation easements on land abutting and under municipally maintained highways, and has an interest in assuring that existing encumbrances are managed lawfully and not exceeded.

Applicant is asking this Subcommittee to give it the authority to close local roads, including North Hill Road and then Old County Road, or to delegate that authority to DOT.[419] The Applicant cannot do the proposed project without closing these local roads.[420] Applicant proposes that the Subcommittee has authority to permit this portion of the installation and should do so by applying "the NHDOT Standard Specifications for Road and Bridge Construction and the provisions, instructions, and regulations set forth in the NHDOT's standard Excavation Permit."[421] Putting aside whether the options are legally permissible,[422] there are only a finite number of ways Applicant could get this approval,[423] including having the Subcommittee delegate such authority to the DOT; however, DOT has made clear its jurisdiction in this regard

[418] *See* Tr. 9/26/17, Morning Session, at 47–58 (Oldenburg).
[419] Tr. 10/2/17, Afternoon Session, at 108 (Johnson); *Northern Pass Transmission LLC Public Service of New Hampshire NH SEC Application for a Certificate of Site and Facility*, APP 1, at 104.
[420] Tr. 10/2/17, Afternoon Session, at 108 (Johnson).
[421] *Id.*
[422] While the Forest Society has previously weighed in on this issue, *see* SEC Docket No. 2016-03, *Petition for Declaratory Ruling*, (12/19/16), it does not comprehensively address this legal issue in this memorandum but supports the arguments raised by the intervening municipalities who joined in its Petition.
[423] Tr. 10/2/17, Afternoon Session, at 121–25 (Iacopino; Bowes).

is limited.[424] The Subcommittee does not itself possess the technical expertise or the staff to regulate this process effectively. This uncertainty prevents the Subcommittee from determining whether the proposed project interferes with orderly development.

Uncertainty continues concerning the colocation of the proposed project and the 24-inch Portland Natural Gas pipeline. Most significantly,[425] Applicant excluded the underground, 24-inch Portland Natural Gas pipeline from the plans submitted to the SEC.[426] Applicant claims it did this to avoid congesting the drawings.[427] The easement for the pipeline is 50-feet wide within the overall right-of-way.[428] At only 150-feet wide, the area of the right-of-way where the pipeline would be colocated is also one of the more narrow areas of the right-of-way.[429] Having a narrow right-of-way of 150 feet along with a colocated underground gas pipeline with a 50-foot easement within the right-of-way is not typical for the proposed project.[430]

Throughout the discussion of the pipeline and potential risks associated with colocation,[431] Applicant relied on the fact that an "interference" study was underway, which would provide more information about the risks, and which Applicant would share with owner of the gas pipeline.[432] The target date of the study had been May, but as of 5/31/17, Applicant said

---

[424] *DOT Response to Applicants' Request to Delegate Authority*, at 1-2 (12/22/17).
[425] As an example of other concerns associated with collation for which there is a continued lack of information or knowledge on the part of the Applicant, the Applicant acknowledges that cathodic protection on pipelines breaks down with time unless properly maintained and that it does not know the condition of the cathodic protection system of the gas pipeline. Tr. 5/31/17, Morning Session, at 32–33 (Bradstreet; Bowes).
[426] *Id.* at 6, 23 (Bradstreet).
[427] *Id.* at 7.
[428] *Id.* at 7.
[429] *Id.* at 7–8.
[430] *Id.* at 8.
[431] Generally speaking, natural-gas pipelines and electric transmission lines can have three types of electrical interference: capacitive coupling (a voltage could potentially be induced on a parallel pipeline) (a/k/a electrostatic coupling); lightning strike (potentially increasing the voltage of the soil, and putting a stress across the coating of the pipeline); and electromagnetic induction. *Id.* at 24–25 (Bradstreet; Bowes). These interferences primarily result in concerns regarding personal safety, including the potential for electrical shock, and corrosion of the pipeline. *Id.* at 26 (Bradstreet).
[432] *Id.* at 11, 14 (Bowes); 25, 27, 28 (Bradstreet).

it would be done within the next few weeks.[433] However, subsequent to that witness panel, the so-called "interference" study was submitted and it was nothing more than a preliminary analysis that essentially identified what actual studies needed to be undertaken to evaluate the specific risks and interferences that would likely be occasioned by the proposed project.[434] However, parties, including the Forest Society, were unable to further explore this issue on cross-examination.[435] At the close of evidence, Applicants have presented no expert testimony concerning the safety and feasibility of colocating the proposed project with the natural gas pipeline.[436]

One of the major gaps in information relating to the colocation is blasting.[437] Applicant acknowledged that blasting can generally damage underground gas pipelines.[438] However, in part because Applicant has not identified where blasting would be required, especially in connection to where the proposed line would be colocated with the underground natural gas pipeline, Applicant has provided no project-specific information about this risk.[439] Nor did Applicant intend to further study this risk.[440]

In short, given the extensive construction impacts communities would face if the proposed project were approved, the Subcommittee requires more information than Applicant has provided to determine whether the construction impacts would unduly interfere with the orderly development of the region.

---

[433] *Id.* at 38 (Bradstreet).
[434] *Northern Pass HVDC Project Letter Report Final*, APP 179, at 63351 ("The purpose of this initial assessment is to identify interference topics that may need further assessment.").
[435] Tr. 10/23/17, Afternoon Session, at 45–61 (Manzelli; Honigberg).
[436] Tr. 4/18/17, Morning Session, at 117–27 (Johnson).
[437] The lack of complete information concerning where and when blasting would take place also undermines the opinions of Applicant's aesthetic and historic witnesses. *See supra* Footnote 148 (for discussion of blasting effects not studied by Widell).
[438] Tr. 5/31/17, Morning Session, at 41–42 (Bowes).
[439] *Id.* at 42–43.
[440] *Id.* at 41 (Bradstreet).

C. The Proposed Project would Unduly Interfere with New Hampshire's Tourism

Applicant must establish that the proposed project would not unduly interference with New Hampshire's tourism. Applicant has not done that. And, the testimony from the Forest Society, Counsel for the Public, and other Intervenors demonstrates the proposed project would seriously setback New Hampshire's unique brand of outdoor-based, recreational tourism, the foundation of which is the Granite State's superior scenic beauty—a setback from which it may never fully recover.[441] That, perhaps, is why 86% percent of the public commenters opposed to the proposed project, are opposed, at least in part, because of undue interference with the economy.[442]

People, be they from away, seasonal residents, or the generations that have long called the Granite State home, come to New Hampshire, especially the Great North Woods, to experience the relatively untouched, vast expanses of forests and exist amongst the idyllic historic and cultural landscapes that have come to embody the image of New Hampshire. As noted in the discussion about land use, one of the greatest assets and hopes to New Hampshire towns is the continued success of the tourism industry that thrives because of the relatively unspoiled natural and historic landscape. In part, for these reasons, the Forest Society, on behalf of its members and in an effort "to continue to perpetuate the forests of New Hampshire by their wise use and their complete reservation in places of special scenic beauty," respectfully requests the Subcommittee conclude the proposed project would unduly interfere with New Hampshire's tourism and deny the application.

---

[441] *Thomas E. Kavet (Kavet, Rockler) Prefiled Testimony dated (12/30/16),* CFP 146, at 6191 (Table 24: showing lasting economic harm to tourism).

[442] Out of the 1,476 public comments read, 1,164 commenters oppose the proposed project, at least in part, because of the undue interference with the economy it would have. *See supra* Footnote 4.

1. Applicant Must Prove the Proposed Project would not Unduly Interfere with New Hampshire's Tourism

Applicant must prove that the proposed project "will not unduly interfere with the orderly development of the region…" and that it "will serve the public interest."[443] As part of those standards, the Subcommittee shall consider: the extent to which the proposed project would affect the economy and employment of the region: the welfare of the population; the overall economic growth of the state; the environment of the state; historic sites; and aesthetics.[444]

2. New Hampshire's Unique Tourism Appeal is Outdoor Recreation in Superior Scenic Beauty

The Granite State's superior scenic beauty draws tourists and seasonal residents to New Hampshire for outdoor recreation and the sense of being in a relatively undisturbed forested and historic landscape. In working for the State of New Hampshire in 2002 and 2003, Applicant's witness for tourism, Mr. Nichols, concluded that tourists coming to New Hampshire rank "scenery/natural beauty" as the destination feature of *greatest* importance.[445] Other high-ranking features include quaint towns or villages; lakes and rivers; parks and forests; historic sites; and access to mountains.[446] New Hampshire ranked *number one* amongst New England states for fall foliage; scenery; natural beauty; access to mountains; lakes and rivers; quaint towns and villages; parks and forests; and outdoor sports activities.[447] As of 2003, New Hampshire's tourism edge over competing states like Maine or Vermont was to position itself as "offering superior access to outstanding scenery in year-round outdoor activities and recreation."[448]

---

[443] RSA 162-H:16, IV(b); IV(e).
[444] N.H. CODE ADMIN. RULES, Site 301.15(a); Site 301.16(a), (d)–(g).
[445] Tr. 7/18/17, Morning Session, at 51–52 (Nichols) (emphasis added).
[446] *Id.*
[447] *Id.* at 53 (emphasis added).
[448] *Id.* at 53–54.

Up and down the State, the outstanding, scenic beauty of New Hampshire is a cornerstone of the tourism industry.[449] As noted in the prior land use section, the "undeveloped character" of the Great North Woods is part of what draws people there,[450] exemplified by places like Little Dummer Pond. The Forest Society's Rocks property in Bethlehem is a "major" outdoor tourism attraction.[451] The greater Lincoln and Woodstock areas are important tourism destinations in New Hampshire in and of themselves, and also serve as gateways for tourists to reach Loon Mountain, the Kancamagus Highway, the great White Mountains, as well as the Mt. Moosilauke and Appalachian Trail areas.[452] New Hampshire hosts the New Hampshire Marathon around Newfound Lake.[453] In keeping with New Hampshire's reputation for outstanding natural scenery, this marathon is not touted as the most challenging or most elite; rather, it is promoted as "The most beautiful marathon in New England."[454] Tourists come to hunt and use designated OHRV trails in Lost Nation, especially on scenic roads like Lost Nation Road and Page Hill Road.[455] Granite State tourism is centered on biking, hiking, leaf-peeping, skiing, snowboarding, camping, and so much more.[456] Quality scenery is an important prerequisite of these recreational experiences.[457]

Tourism is a very competitive business.[458] Tourists have a choice among competing destinations; they don't have to come to New Hampshire.[459] As Cassandra Laleme noted, "the biggest concern is the impact would be because [tourists] take an alternative route. Rather than

[449] Tr. 10/6/17, Afternoon Session, at 85 (Kavet).
[450] Tr. 7/19/17, Morning Session, at 59 (Nichols).
[451] *Id.* at 34.
[452] Tr. 7/18/17, Morning Session, at 15–16 (Nichols).
[453] *New Hampshire Marathon, Website Homepage*, JT MUNI 224.
[454] *Id.*
[455] Tr. 11/3/17, Morning Session, at 31(Mellett).
[456] Tr. 7/19/17, Afternoon Session, at 14–15 (Nichols); *see also* Tr. 12/11/17, Morning Session, at 94–96 (Collier) ("People who come north … are out enjoying the ambiance of our roads and towns.").
[457] Tr. 7/18/17, Morning Session, at 60 (Nichols).
[458] *Id.* at 51.
[459] *Id.*

coming to Bethlehem or coming 302, they could take 93 and go either to Vermont or go farther east and go to Conway or some other place. So I think people will, if they're aware of this delay, will reroute. That's exactly what I would do. And if they're just looking for the New England experience, they will find that in another town."[460]

Tourism involves much more than marketing.[461] Special places do not retain their appeal by accident.[462] It requires vision, management, and land-use control to protect and cultivate those unique attributes that make certain national and cultural landscapes special.[463] Having and maintaining natural beauty is "certainly a very important aspect."[464] A key factor to grow tourism at a particular destination is to build on that destitution's existing strengths,[465] which in the case of New Hampshire is superior access to outstanding natural splendor.

Countless residents, civic leaders, and small businesses across the state have done much work to make sure that New Hampshire's special tourism industry, outdoor recreation in superior scenic beauty, thrives. The general impression of the tourist is that New Hampshire is a beautiful state.[466] Scenery is certainly important to tourism in New Hampshire—a particular scenery.[467] Promotional materials from the State of New Hampshire, none of which show pictures of high voltage transmission lines, depict the splendor of the Granite State's superior scenic beauty.[468] Being able to deliver what is depicted in promotional materials is important.[469] It's bad for business when promotional materials and reality do not align.[470]

---

[460] Tr. 11/8/17, Morning Session, at 126 (Laleme).
[461] Tr. 7/18/17, Morning Session, at 54 (Nichols).
[462] *Id.*
[463] *Id.*
[464] *Id.* at 54–55.
[465] *Id.* at 55.
[466] Tr. 7/18/17, Morning Session, at 61 (Nichols).
[467] Tr. 7/18/17, Afternoon Session, at 103 (Nichols).
[468] Tr. 7/18/17, Morning Session, at 56 (Nichols).
[469] *Id.* at 57.
[470] *Id.*

3. Applicant has not Proven the Proposed Project would not Unduly Interfere with New Hampshire's Tourism

Overall, Applicant's only witness for tourism, Mr. Nichols, did not meet Applicant's burden. Mr. Nichols looked only at the state as a whole, and did not evaluate whether the proposed project would impact specific tourism attractions. As noted in the discussion about aesthetics and historic resources, there is no basis in law for such an approach.[471]

a. Mr. Nichols is not Qualified to Render his Opinion

Mr. Nichols is not qualified to render the opinions he has given in his testimony and on cross-examination. Mr. Nichols earns his living advising tourism destinations on how to maximize tourists at their destination, which include getting the ideal type of tourist to come, and getting the tourist to stay longer, spend more money, and come more frequently, which is exactly what he was doing for the State of New Hampshire in 2002 and 2003–but not in this case.[472] In fact, Mr. Nichols has never done the type of analysis he did for this case; every single one of his more than 250 prior projects has been to "address a similar overall goal to understand how a tourism destination can maximize its potential in the increasingly competitive tourism industry."[473] Of course, Applicant is not a tourism destination.[474] Mr. Nichols analysis in this case is the first out of more than 250 projects where he was in the position of justifying a utility development project.[475] Prior to this case, Mr. Nichols had never been tasked with assessing the impact to tourism of the siting of brand-new utility infrastructure.[476]

---

[471] *See supra* Part I.B.1.d.
[472] Tr. 7/18/17, Morning Session, at 23 (Nichols).
[473] *Id*. at 26.
[474] *Id*.
[475] *Id.* at 27.
[476] *Id.*

Not only has Mr. Nichols' method for economic analysis never been used by anyone to analyze a transmission line, Mr. Nichols had never even done so himself before inventing this method for this case.[477]

b. Mr. Nichols Did Not Analyze Impacts of Traffic Delays, Impacts of Adverse Effects to Aesthetic and Historic Resources, or Tourism Businesses

First, even though Mr. Nichols himself noted possible traffic delays as the "*number one*" critical or very important destination barrier with respect to tourism, and Mr. Nichols noted in a general sense that the proposed project would cause traffic delays, neither he nor any other of Applicant's witnesses specifically analyzed the impact of traffic potentially putting a downward pressure on tourism.[478] Developments commonly require preparation and submission of traffic studies that would typically evaluate current traffic conditions and then project what impact a particular development would have on things like wait times at traffic lights, stop signs, or other locations; safety considerations, such as visibility, volume and types of vehicles; and other considerations.[479] Applicant has prepared no such traffic study,[480] and Mr. Nichols testified that he was not qualified to prepare a traffic study.[481] Short of analyzing the impacts that construction might have upon tourism himself, Mr. Nichols could have done a literature search on this topic to discover what others had determined, but he did not do even that.[482] Instead, Mr. Nichols offered the following defense: "Today's visitor understands that traffic congestion, traffic delays can be part of a visitor experience, and I believe making the general conclusion that we have, I don't

[477] *Id.* at 149–50 (explaining he usually relies on economists to perform economic modeling, and then uses the outputs of such modeling).
[478] Tr. 7/18/17, Morning Session, at 14, 18–19 (Dandeneau) (emphasis added) (recalling Mr. Nichols' testimony).
[479] *Id.* at 8–9 (Nichols).
[480] *Id.* at 10.
[481] *Id.*
[482] Tr. 7/19/17, Afternoon Session, at 17 (Nichols).

need to know the exact duration. I understand how that weighs into a visitor's decision process."[483]

Therefore, Mr. Nichols could not and did not consider traffic when he formed his opinions about the potential impacts the proposed project would have on tourism. This is especially problematic because the construction season coincides with the tourism season.[484] As such, Applicant has put this Subcommittee in the position of having little to no information about what impacts disruption of the traffic caused by the project would have upon tourism.

Second, Mr. Nichols was not aware of the meanings of "scenic resource" or "historic site" according to SEC rules.[485] Nowhere in Mr. Nichols' materials did he address the legal standards with respect to aesthetics or historic sites, not even as they relate to potential impacts to tourism.[486] This is particularly egregious considering, as Mr. Nichols himself testified, the primary driver of tourism in this state is its natural, historic, and cultural aesthetics.[487]

Third, Mr. Nichols perplexingly omitted categories of businesses that are important to the New Hampshire economy and employment, including to tourism. Specifically, his analysis completely excluded the following types of businesses: travel agencies, fishing, hunting, and trapping, theater, racing, and amusement parks.[488] Mr. Nichols even excluded amusement parks despite the fact that a representative from Whale's Tale Water Park participated in one of the listening sessions.[489] According to a list of businesses Applicant supplied, in the underground

[483] Tr. 7/18/17, Morning Session, at 94–95 (Nichols).
[484] *Id.* at 17–18 (Nichols); *Public Comment of Katherine Aldrich Cote (owner of Polly's Pancake Parlor)* at 1– 2 (7/20/17) (describing Polly's "meticulous attendance records" supporting her statements that local and regional construction and other events "have negatively affected our business" and noting that of the 93,500 customers that Polly's served in 2016, 71,031 of those customers were served from April to October).
[485] Tr. 7/18/17, Morning Session, at 48–49 (Nichols).
[486] *Id.* at 49–51.
[487] *See supra* Part II.C.
[488] Tr. 7/18/17, Morning Session, at 154–56 (Nichols) (discussing category names from the SIC Division Structures).
[489] *Id.* at 155.

section of the route alone, there are about 25 inns, hotels, campgrounds, etc. and about 27 eating establishments.[490] Mr. Nichols ignored all of them. Applicant told Mr. Nichols to take a project-as-a-whole approach to his analysis, and as a result of those instructions, he "did not attempt to analyze impacts to any individual business or any individual geographic area."[491] Like Mr. Varney, Mr. Nichols also "did not specifically analyze the second home market."[492]

c. Mr. Nichols' Methodology was not Sound

i. Mr. Nichols' Methodology Severely Lacked Specificity

Perhaps the largest flaw in Mr. Nichols' methodology is its lack of specificity. Of note, lack of specificity was reportedly a problem with another of Mr. Nichols' former clients.[493] Mr. Nichols so lacked in specifics about New Hampshire that he did not even know where Hanover, Keene, Lebanon, Portsmouth, or Plymouth are located, or even whether any of them would be along the proposed route or not.[494] Mr. Nichols was not aware of designated bicycle routes anywhere in New Hampshire.[495] Mr. Nichols' analysis was so lacking that he completely omitted the Appalachian Mountain Club from his process and study and was mostly unaware of their profound role in New Hampshire tourism.[496]

Overall importance and markets for tourism vary amongst different regions of the State, which means tourism dollars can have disproportionate local economic impact, especially if an area of the State is more economically challenged.[497] Yet, he addressed specific regions in New

---

[490] *See List of Businesses Along Underground Route*, APP 164, at 63121–35.
[491] Tr. 7/19/17, Morning Session, at 32–33 (Nichols). As noted, the project-as-a-whole approach is not legally sustainable. *See supra* Part I.B.1.d.
[492] Tr. 7/19/17, Morning Session, at 136 (Nichols).
[493] 5/17/03, *Sarasota Herald Tribune "Officials criticize tourism review Sarasota County officials say a consulting firm's report lacks insight."*, SPNF 204 (commissioners described Mr. Nichols' work as lacking specifics and they reported being dissatisfied and even very troubled).
[494] Tr. 7/18/17, Morning Session, at 122; 156–57 (Nichols).
[495] Tr. 7/19/17, Afternoon Session, at 14 (Nichols).
[496] Tr. 7/18/17, Afternoon Session, at 93–103 (Nichols; Plouffe).
[497] Tr. 7/18/17, Morning Session, at 59–60.

Hampshire only in three instances: 1) a statement of the fact that the New Hampshire Division of Travel and Tourism breaks the state into seven regions; 2) a table reflecting the level of visitor spending in those regions; and 3) a statement about which region attracts the largest share and which attracts the smallest share of visitor spending.[498] Of note—Mr. Nichols did not look at a single specific tourism attraction in New Hampshire.[499] For example, the Forest Society's Lost River property is accessed by 60,000 visitors each year from a driveway off of Route 112 in North Woodstock, which would be directly disrupted by the proposed underground construction along Route 112.

Despite all of this, including his own earlier analysis and conclusions of New Hampshire's brand and its inextricable reliance on outdoor recreation in New Hampshire's superior scenic beauty, he in no way identified, quantified, discussed, characterized, or in any other way analyzed which tourists come for the aesthetic value of New Hampshire's landscape or how they might react to a transmission line through it.[500] Although Mr. Nichols acknowledged there are different types of tourists, for example tourists who come for the NASCAR races, or for the tax-free shopping, or for the great outdoors, he made no effort to account for these specific variations.[501]

ii. Mr. Nichols Misunderstood his Former Clients, Relied on Flawed Data, and Conflated New Siting with Existing Structures

In many other ways, Mr. Nichols' methodology was not sound. First, he relies in large part on his lack of recollection that in his "20 years of work on tourism planning that any concern was raised about the presence of transmission lines and their possible effect on visitor

[498] Tr. 7/19/17, *Morning Session*, at 8 (Nichols).
[499] *See, e.g.*, Tr. 7/19/17, Morning Session, at 41–42 (Nichols) (did not analyze the adverse impacts the proposed project would have on Percy Lodge and Campground).
[500] Tr. 7/18/17, Morning Session, at 58–59 (Nichols).
[501] *Id.* at 57–59.

demand."[502] Leaving aside the fact that it is not fair or reliable for a purported expert to rely upon lack of recollection in that way,[503] Mr. Nichols did not know that in fact his clients raised concerns about the presence of transmission lines and their possible adverse effect on visitor demand. Mr. Nichols admitted that just because the concern had never been raised to him it did not mean that his clients did not have such concerns; he simply was not aware of them because he never asked them.[504] Indeed, at least two of his former clients have stated specific concerns about utility lines.[505]

Second, Mr. Nichols also erred when he relied on data from Plymouth State University and on listening sessions he conducted, even though no respondent in this data expressed anything about high voltage transmission lines, in a way that Mr. Nichols credited.[506] Leaving aside obvious and serious problems with the survey and listening sessions, Mr. Nichols acknowledged that this information does not mean the respondents involved want the proposed

---

[502] *Pre-Filed Testimony of Mitch Nichols*, APP 31, at 662; APP 1, Appx. 45, at 23727.

[503] While, the SEC does not generally apply the New Hampshire Rules of Evidence to its proceedings, those rules and the law resulting from them provide useful instruction that an expert's opinion cannot be based on his or her recollection of their career alone, as such opinion does not meet the *Daubert* standard. *See* RSA 516:29-a (codification of the standard from *Daubert v. Merrell Dow Pharms.*, Inc., 509 U.S. 579 (1993). Pursuant to N.H. R. Ev. 702, an expert witnesses "qualified . . . by knowledge, skill, experience, training, or education, may testify . . ." only if four criteria are met. The expert witness's specialized knowledge must help the "trier of fact to understand the evidence or to determine a fact in issue." N.H. R. Ev. 702(a). The testimony must also be "based on sufficient facts or data," and "the product of reliable principles and methods." *Id.* at 702(b)–(c). Finally, the expert must have "reliably applied the principles and methods to the facts of the case." *Id.* at 702(d). While an expert can be qualified by extensive experience, *see Baker Valley Lumber v. Ingersoll-Rand Co.*, 148 N.H. 609, (2002), the expert testimony must still rise to a threshold level of reliability to be admissible, *Baxter v. Temple*, 157 N.H. 280, 284 (2008). Apart from not meeting the requirements of N.H. R. Ev. 702, an opinion based exclusively on a witnesses recollection of his career also is not based on methods that "(1) Have been or can be tested; (2) Have been subjected to peer review and publication; (3) Have a known or potential rate of error; and (4) Are generally accepted in the appropriate scientific literature." *See id.* Commentary on whether or not an expert has seen a particular concern in his career is not a reliable opinion gleaned from reliable principles and methods applied to sufficient facts of the case. As such, it cannot be the subject of expert testimony pursuant to the rules of evidence, and should not be accepted as such in this case. Such unreliability also raises constitutional concerns.

[504] Tr. 7/18/17, Morning Session, at 30–31; 72 (Nichols).

[505] *2014 Englewood Community Redevelopment Plan*, SPNF 206, at 88–89 ("utility lines also have a negative aesthetic impact on the street and limit the size and location of street trees. Many feel that decorative street trees look out of place next to the power lines"); *December 2, 2012, Direct Testimony of Richard Schreiber on Behalf of James City County, Virginia*, SPNF 205, at 6827– 29 (testifying against a proposal to site transmission lines aboveground across the James River and stating that the only effective mitigation would be complete burial).

[506] APP 1, Appx. 45, at 23743.

project or that the respondents involved are perfectly representative of everyone in the municipalities along the proposed route.[507]

Further, it is not accurate to conclude that all unexpressed things are unimportant. For example, Mr. Nichols acknowledged that "clean air certainly would be a desirable element" for "the vast majority of visitors."[508] By Mr. Nichols' own measurements, the top-rated activities in New Hampshire are scenic drives; visit a National Forest or State Park; visit a beach/ waterfront area; tour by automobile, bus, etc.; participate in outdoor activities; visit a historic site; and attend/visit a cultural site/event.[509] Yet, despite the obvious import of clean air to these activities, no respondents attributed any importance about clean air.[510] Of course, air quality can and does impact choices some people make when they travel.

In the same way, it was a mistake for Mr. Nichols to conclude that the absence of expressed concern about high voltage transmission lines means the proposed project would not unduly interfere with tourism.

[507] Tr. 7/18/17, Morning Session, at 34 (Nichols).
[508] *Id.* at 36.
[509] *December 2002 Report, Nichols Gilstrap: New Hampshire's Image as a Travel Destination*, SPNF 202, at 58569.
[510] Tr. 7/18/17, Morning Session, at 35–37.

Third, Mr. Nichols apparently lacked information about actual data of original siting of other projects. Mr. Nichols unpersuasively pointed to his work with the City of Estes Park in Colorado and the North Cascades Scenic Byway in Washington to support his opinion that transmission lines do not unduly interfere with tourism destinations.[511] First of all, transmission lines near the City's visitor center at the edge of the City are not visible in Rocky Mountain National Park, which is the Park to which Estes Park serves at the major gateway.[512]

Additionally, in both cases, Mr. Nichols' work had nothing to do with the original siting of the lines, and therefore, he was unaware of any of the many important considerations such as the details of the decision-making process regarding the original siting and installation; topographical or elevation-based constraints, such as deep slopes; environmental assessment to identify and then to maximize avoiding and minimizing adverse impacts to water, to soil, to air, to wildlife, to plants; financial considerations of the chosen route versus alternatives; or whether either line was installed for reliability needs.[513]

Moreover, Mr. Nichols provided no study of the tourism impacts of introducing either one of these lines when they were first installed, nor any other data about the impact of these lines to tourism, aside from his general statements that these areas are very popular.[514] Indeed, Mr. Nichols admitted that he cannot say whether, because of the original installation of these power lines, these areas are more popular, less popular, or have maintained the same level of

[511] *Supplemental Pre-Filed Testimony of Mitch Nichols*, APP 105, at 54292; *see also* Tr. 7/18/17, Morning Session, at 32 (Nichols).
[512] Tr. 7/19/17, Afternoon Session, at 39 (Nichols).
[513] Tr. 7/18/17, Morning Session, at 43–44 (Nichols).
[514] *Id.* at 45–47 (Nichols).

popularity.[515] Mr. Nichols' approach ignored these important temporal distinctions, distinctions which undermine his opinion on this point.[516]

Further, not all share his opinion about Estes Park. At least one tourist reviewed it as a "beautiful view, marred by power lines" and that the infrastructure "ruined" the otherwise "untouched beauty of the region."[517] This ruining of otherwise untouched beauty is exactly what RSA 162-H is designed to enable New Hampshire, through this Subcommittee, to guard against. Here, that means denying the application.

d. The Proposed Project Would have a Measurably Undue Interference with New Hampshire Tourism

The record established that the proposed project would have a measurable undue interference with tourism, the lifeblood of so many of the affected communities. In particular, the Counsel for the Public's witnesses, Thomas E. Kavet and Dr. Nicolas O. Rockler[518] offer some clear and persuasive analysis on tourism impacts. Kavet comprehensively questioned Applicant's finding of no tourism impact.[519] Kavet concluded that there could be a measurably negative impact on New Hampshire tourism.[520] People come to New Hampshire to participate in many outdoor activities and enjoy our scenic resources, including "attracting motorized tourism,

---

[515] *Id.* at 47.
[516] This applies also to Mr. Nichols' reference to the Maine Reliability Program, which had not yet been completed when at the time Mr. Nichols considered it. Tr. 7/18/17, Morning Session, at 145 (Nichols).
[517] Tr. 7/19/17, Afternoon Session, at 100–01 (Weathersby) (referencing and introducing Trip Advisor Review from Ann F from Sioux Falls, South Dakota who visited on 11/9/13) (which was intended to be entered as an exhibit but may not have been).
[518] Unless noted otherwise, "Kavet" and/or "Kavet's analysis" shall refer to the work of the collective Kavet Rockler, including the contributions of Thomas E. Kavet and Dr. Nicolas O. Rockler.
[519] Tr. 10/6/17, Afternoon Session, at 94. ("We don't believe that 'no tourism impact' is credible. And even a very small impact can be quite consequential. That's essentially what the data showed."); *see also* Tr. 10/11/17, Afternoon Session, at 44 ("Well, it's inconceivable to me that the impact will be zero, and that's what the Applicant is saying.").
[520] CFP 148, at 6303 (Kavet and Rockler's supplemental report: "Based on conversations with New Hampshire tourism experts, the presence of the proposed Project could have measurable negative tourism impacts in New Hampshire, especially in the Great North Woods region.).

motorsport tourism, as well as hikers and canoers and fishing …."[521] The proposed addition of "a highly visible industrial structure in areas whose primary tourism appeal is exactly the opposite: pristine natural beauty, unspoiled wilderness, and unparalleled scenic vistas from the tallest mountains in the Northeast."[522] Kavet noted that "there is ample evidence that scenic beauty and a pristine wilderness experience is a primary destination attribute affecting tourist visitation to New Hampshire."[523]

Kavet explained that any "incremental degradation of the scenic landscape," while perhaps affecting only a small number of tourists, adds up to a real impact over the scale of a large industry like tourism,[524] especially in these days of nearly real time reporting on ubiquitous social media platforms such as Trip Advisor. Degradation of the landscape cannot help the tourism industry in New Hampshire[525] so while the exact magnitude of the impact cannot be predicted,[526] "nobody would seek to put this in a scenic environment and say oh, things are better with this there."[527] He also spoke to the magnitude of the undue interference, noting that "224 scenic byways, 183 designated rivers, 1,338 conservation/public lands, 218 great ponds, 1,311 public rivers, 12,313 scenic drives/public roads, 1,158 recreational trails, 83 access sites to public waters, 242 other recreational sites, 85 listed historic resource locations, 1,290 potential historic resources and 488 other community resources … will have visibility of the proposed

[521] Tr. 10/11/17, Morning Session, at 143–44.
[522] CFP 146, at 6118.
[523] *Id.* at 6301 (noting that scenic beauty repeatedly arises as a critical visitation draw in surveys, and the New Hampshire Division of Travel and Tourism and private businesses have spent tens of millions of dollars promoting and maintaining this brand).
[524] Tr. 10/11/17, Afternoon Session, at 13–14 (Kavet) ("[E]ven a fairly small effect can be fairly significant, especially when you don't have a lot of longer term benefits that are accruing from this. A lot of the benefits are nearer term. Big construction project, some electricity price benefits are likely, and then you're running a risk of some degradation of the scenic landscape that could affect a really important segment of the economy.").
[525] *Id.*
[526] CFP 146, at 6190 ("While there may be uncertainty with respect to the exact magnitude of negative tourism impacts from the Project's aesthetic impacts, it is unlikely, as the Applicants now contend, that there will be none.").
[527] Tr. 10/11/17, Afternoon Session, at 13–14 (Kavet) ("And, you know, the incremental effect of one, we know it's not a positive.").

transmission line."[528] Surveys conducted by Applicant did not get at transmission lines like what is proposed.[529]

Over time, the impact would increase, as it affects return visits and is reported in visitor recommendations.[530] "[I]f you do something that changes the tourism appeal in an area, even if it's very small, in an industry that's growing, and the impact doesn't disappear, then you will have that effect persisting."[531] Such losses would continue "as long as the transmission line is visible, and grow slightly, with the expected expansion of the tourism sector as a share of the New Hampshire economy."[532] Even though there may be some shift within New Hampshire from the visibility corridor to other areas, overall, there would be a loss of tourism dollars statewide.[533] Kavet also explained that New Hampshire's attractiveness to tourists has to be considered relative to nearby states.[534] Any impact could cause New Hampshire to lose its advantage over those states for tourism dollars, further eroding the tourism market (assuming other states do not also degrade their scenic landscapes).[535] Further, loss of tourism prevents New Hampshire from capitalizing on New England's changing demographics: any undue

[528] CFP 146, at 6190.
[529] Tr. 10/11/17, Morning Session, at 95 (Kavet) ("They didn't ask about high voltage transmission lines, which seemed like a really obvious thing to ask about, if that's what you were trying to find out about. So, it says 'power lines', which could refer to any telephone pole with a power line on it. And, even then, there were a fairly high percentage of respondents who said it would be a critical determinant in whether they would visit a state or not.").
[530] CFP 146, at 6107 ("The impacts would be lower in earlier years, but would increase over time as return visits and visitor recommendations, which are routinely reported in social media, are affected by actual experience.").
[531] Tr. 10/11/17, Afternoon Session, at 15–16 (Kavet).
[532] CFP 146, at 6191.
[533] Tr. 10/11/17, Morning Session, at 141–42 (Kavet) ("There will also be some that have shorter visits or spend less or don't come at all to the state as a whole. . . . there are much more concentrated impacts. So, Plymouth, for example, may have much higher impacts than the state as a whole. . . . Could be very small, but we did estimate an impact that was statewide.").
[534] CFP 146, at 6189 ("Tourism officials have stressed that the competition for tourism dollars is stiff. Changes that damage New Hampshire's image could readily divert business in this market segment towards neighboring competitors.").
[535] Tr. 10/11/17, Afternoon Session, at 20 (Kavet) ("As to whether that really gets mitigated way out into the future will probably depend on the relative attractiveness. So if every other state has a lot more development that's around, there's no place else to go that will be the best you can do.").

interference on tourism affects an industry that capitalizes on the aging population of the region.[536]

Kavet opined that over 11 years between 2020 and 2031, New Hampshire would lose 190 jobs and lose direct tourist spending of approximately $10 million *per year* (in current dollars).[537] Mr. Nichols was wrong to exclude restaurants from his analysis. Kavet noted that New Hampshire has a high percentage of tourist-related restaurant revenue (56% of total restaurant revenues) compared to the national average.[538] Some parts of the state have even higher percentages, like Carroll County at 78%.[539] This leaves New Hampshire vulnerable because impacts on tourism would cause significant financial losses on to the state's restaurant businesses.

In addition to direct impact, impact caused by construction blocking roads could compound the impact on the tourism economy and employment of specific localities like Plymouth where "[t]he possible closure of some downtown businesses could tarnish what is now a thriving downtown tourist destination, and adversely affect future tourism visitation."[540]

Thus, the proposed project would unduly interfere with tourism—an essential component of New Hampshire's economy and employment. At a minimum, Mr. Nichols' report and testimony is far too non-specific and lacking rigorous scientific or economic analysis to meet Applicant's burden to show that the proposed project would not unduly interfere with orderly

[536] *Id.* at 15–16 ("Unlike some industries, tourism is really benefiting from an aging population. So the demographic issues that weigh negatively on employment and some things like that are benefiting this industry because it is something that older people disproportionately spend on. So it's an area of growth.").
[537] CFP 146, at 6107–08 ("Using a midpoint between 3% and 15%, and a phased-in direct tourism spending reduction over time of 9% scaled to assess the tourism dollars in the area within the Project viewshed, we projected direct spending losses of approximately $10 million per year (in current dollars) and total economic impacts, including secondary effects, of average annual losses of more than $13 million in Gross State Product and the loss of nearly 190 jobs over the 11 year period from 2020 to 2030.").
[538] Tr. 10/11/17, Morning Session, at 167 (Kavet).
[539] *Id.*
[540] CFP 148, at 6210.

development of the region, especially with respect to the critical, and somewhat fragile, New Hampshire tourism economy.

D. The Proposed Project would Unduly Interfere with Real Estate Values

Pursuant to Site 301.09(b), the application must contain and the Subcommittee shall consider the potential effect of the proposed project on state tax revenues and the tax revenues of the host and regional communities, and on real estate values in the affected communities.[541] Further, in consideration of whether the proposed project is in the public interest (discussed at length subsequently) the Subcommittee shall consider, in pertinent part, the extent to which the proposed project would affect the economy of the region, welfare of the population, and private property.[542] It is this context that Applicant bears the burden of proving the proposed project would not unduly interfere with real estate values.

The sole witness for Applicant on real estate values is James Chalmers, Ph.D. Dr. Chalmers' work in this case consisted of four aspects, none of which were specific to the proposed project:[543] 1) literature review; 2) New Hampshire case studies; 3) New Hampshire subdivision study; and 4) New Hampshire market activity analysis.[544] Dr. Chalmers did not rely on the literature review; it merely "informed" his opinion.[545] He relied on the latter three categories, and of those three, he found the case studies to be his "dominant consideration" because they "carry the most information" and are the "most informative."[546] Dr. Chalmers did

[541] *See also* N.H. CODE ADMIN. RULES, Site 301.15(a).
[542] *Id.* at Site 301.15(a); Site 301.16(a)–(g).
[543] *See infra* Part II.D.1.
[544] Tr. 7/31/17, Morning Session, at 22–23 (Chalmers).
[545] *Id.* at 34–35.
[546] *Id.*

no appraisals for his work in this case.[547] Instead, he relied on inferences from appraisals done by others, including Brian Underwood and Mark Correnti.[548]

After making only one visit to New Hampshire and completing his report in June of 2015, Dr. Chalmers rendered his ultimate opinion in this case that there is no evidence of consistent measurable effects of high voltage transmission lines on the market value of residential real estate.[549]

Overall, Dr. Chalmers' opinion does not satisfy Applicant's burden.[550]

1. Dr. Chalmers Did Not Specifically Analyze this Proposed Project

Dr. Chalmers' work in no way considered the particular attributes of the proposed project.[551] According to Dr. Chalmers, his entire report "wasn't Northern Pass specific."[552] "It didn't address the issue of the impact of the Project on local and regional real estate markets."[553] Instead, his report addressed the "effect of high voltage transmission lines on residential, primarily on residential real estate values as a general issue of research."[554]

Dr. Chalmers' report was a generic multi-purpose tool for use across all of the projects for which he has been retained, including Seacoast Reliability and Merrimack Valley

[547] *Id.* at 21.
[548] *Id.* at 69.
[549] *Id.* at 16.
[550] The Forest Society does not address all of the numerous defects associated with Dr. Chalmers' testimony and report. *See, e.g.*, Tr. 8/1/17, Afternoon Session, at 75 (Chalmers; Pacik) (testifying that a case study was in error when it described a house as one story, when the picture clearly shows a two-story house); Tr. 7/31/17, Afternoon Session, at 114–15 (Chalmers) (testifying that it was an error to ignore a certain transaction); 7/31/17, Morning Session, at 24 (Chalmers) (admitting that because New Hampshire's housing stock is so heterogeneous, the large-scale statistical analyses contained in most of the 11 studies Dr. Chalmers relied upon do not apply directly in New Hampshire); *id.* at 25–31 (on two previous occasions, Dr. Chalmers opined that when adverse impacts to property values are found because of high voltage transmission lines, the adverse impact was as high as 10% and usually in the range of 3% to 6%, whereas in this case he opined that it was 1% to 6%).
[551] Tr. 7/31/17, Morning Session, at 14 (Chalmers); Tr. 8/1/17, Afternoon Session, at 48 (Chalmers); Tr. 8/2/17, Morning Session, at 29 (Chalmers); APP 1, Appx. 46, at 23745–25513.
[552] Tr. 7/31/17, Morning Session, at 14 (Chalmers).
[553] *Id.*
[554] *Id.*

Reliability.[555] Dr. Chalmers' ultimate opinion in this case is identical to that in those two other cases.[556] This, despite "big differences"[557] between this proposed project and Merrimack and Seacoast—the proposed project would be 8 to 15 times longer; not be a reliability project; tower heights would be up to 3 times taller; 32 miles of it would be in a new right-of-way; and would involve an undefined buried portion.[558]

2. Dr. Chalmers is Not Expert in the New Hampshire Real Estate Market

Even putting aside the lapse in his New Hampshire licensure,[559] Dr. Chalmers's report and testimony lack credibility because he is not an expert in the New Hampshire real estate market.[560] He is not a real estate broker; he has never sold homes.[561] He did not study any

---

[555] *Id.* at 14–15.
[556] Tr. 8/2/17, Morning Session, at 25 (Chalmers); *see also April 12, 2016, Pre-Filed Testimony of James Chalmers - Seacoast Reliability Project*, SPNF 210; *Pre-Filed Testimony of James Chalmers - Merrimack Valley Reliability Project*, SPNF 211.
[557] Tr. 8/2/17, Morning Session, at 12, 13, 15 (Chalmers).
[558] *See id.* at 4–7 (acknowledging the Merrimack Valley Reliability Project is a 24.4 mile reliability project for a new 345 kV transmission line from Tewksbury, MA to Scobie Pond Substation in Londonderry with tower heights of 75 to 90 feet and no new right-of-way; *id.* at 7-9 (acknowledging the Seacoast Reliability Project is a 12.9 mile reliability project for a new 115 kV transmission line from Madbury Substation to Portsmouth Substation, with tower heights ranging from 55 to 105 feet and the most common height of 84 feet).
[559] When Dr. Chalmers' New Hampshire license as an appraiser lapsed, he did not correct the record. Dr. Chalmers first became a licensed appraiser in Arizona because he was beginning to serve as an expert witness and realized that courts expected him to be licensed. Tr. 7/31/17, Morning Session, at 9 (Chalmers). Through a reciprocity agreement between the States of Arizona and New Hampshire, Dr. Chalmers obtained a New Hampshire license as an appraiser in 2015 for his work in this case. *Id.* at 9–10. Dr. Chalmers pre-filed testimony represents that he is a New Hampshire-licensed appraiser. *Pre-Filed Testimony of Dr. James Chalmers*, APP 30, at 654. At the conclusion of the year, while continuing to work on this case, Dr. Chalmers let the license expire because he would have had to come to New Hampshire "and sit in a classroom for a week and get 20 hours of or 28 hours of appraisal credit" for continuing education and that did not appear to him to be necessary. Tr. 7/31/17, Morning Session, at 10 (Chalmers). When Dr. Chalmers submitted his supplemental pre-filed testimony dated 4/17/17, he reaffirmed his original pre-filed testimony (with exceptions that do not apply to this issue) without correcting the record that he was no longer licensed in New Hampshire. Tr. 8/2/17, Morning Session, at 34 (Chalmers). In reality, at the time he filed his supplemental testimony, his New Hampshire license had been expired for well over a year. Since the time Dr. Chalmers' New Hampshire appraiser licensure expired on 1/1/16, he took no overt steps to notify anyone involved in this case, including the Subcommittee, that he was no longer a licensed appraiser, except perhaps mentioning it in passing to Marvin Bellis or Dana Bisbee. *Id.* at 29–30. Indeed, Dr. Chalmers specifically declined to make any changes to his pre-filed testimony and then swore to and affirmed his pre-filed testimony at the outset of his appearance at the adjudicative hearing. Tr. 7/31/17, Morning Session, at 6 (Chalmers). It was only through examination at the adjudicative hearing on 8/1/17, that he testified about the lapse of his licensure.
[560] Tr. 7/31/17, Morning Session, at 12 (Chalmers).
[561] *Id.* at 8.

individual real estate markets in New Hampshire, including the real estate markets in any of the 31 communities that would host the proposed project, even though he says "appraisal and real estate is always local."[562] It makes sense, then, that Dr. Chalmers could not comment on whether the real estate market in Stewartstown was any different than that of Plymouth, or whether that of Plymouth was any different than that of Concord or Deerfield.[563] What does not make sense is Dr. Chalmers' opinion that *no* individual real estate markets in New Hampshire were "germane" to his analysis in this case.[564]

3. Dr. Chalmers' Overall Methodology was Too Constricted

Like others of Applicant's witnesses, Dr. Chalmers' approach suffered from being inappropriately constricted. At nearly every stage of his work, he excluded, reduced, and narrowed the field of consideration, limiting the public's and the Subcommittee's understanding of potential interference the proposed project would have, if approved, on real estate values.

a. Dr. Chalmers was Far Too Restrictive in the Type of Properties he Included in his Study

Dr. Chalmers' 58 case studies involved only single-family detached residences, and within those, he did not distinguish between primary residences versus second or vacation homes.[565] And within those, he did not consider any part of the property aside from the primary residence, and he did not consider what the view might be from second or higher stories.[566] Dr. Chalmers left out: hotels, motels, campgrounds, Appalachian Mountain Club ("AMC") cabins

[562] *Id.* at 11–12.
[563] *Id.* at 12.
[564] *Id.*
[565] Tr. 7/31/17, Afternoon Session, at 35–37, 96–97 (Chalmers). Here again, Applicant omits the second-home/tourism aspect of the economy.
[566] Tr. 8/2/17, Afternoon Session, at 27–28, 38–39 (Chalmers).

and huts, and all commercial and tourism property, even though many such properties would have a view of the proposed project.[567]

Dr. Chalmers looked at only one residential condominium community, McKenna's Purchase,[568] and that was only because the manager of McKenna's Purchase raised concerns about the fact that Dr. Chalmers did not look at residential condominiums or any other multifamily residences.[569]

Dr. Chalmers also ignored whether any development plans had been foregone as a result of the project being proposed.[570] Dr. Chalmers' relied on his literature review—which was unrelated to the proposed project or New Hampshire—to conclude that the proposed project would have no measurable impact on the value of commercial property in New Hampshire and, therefore, he gave such properties no consideration whatsoever.[571] Dr. Chalmers, therefore, had no basis to opine on whether the proposed project would adversely impact any individual tourist destination.[572]

b. Dr. Chalmers' Measure of Changed Views Was Deeply Flawed

In New Hampshire, scenic views are an important component of how residents and visitors value and appreciate New Hampshire—views from a house, from a resort, from a road, from a park, and more.[573] For all homes, including second homes, scenic views always have

[567] Tr. 7/31/17, Morning Session, at 35–37 (Chalmers).
[568] Tr. 7/31/17, Afternoon Session, at 85 (Chalmers).
[569] Tr. 8/1/17, Morning Session, at 94–95 (Chalmers).
[570] Tr. 8/2/17, Morning Session, at 55–56 (Chalmers)
[571] Tr. 7/31/17, Morning Session, at 34–35, 37 (Chalmers).
[572] *Id.* at 41. Of note, Dr. Chalmers did not overlook all of these aspects of real estate values because they are impossible to analyze. For example, when probed about some of New Hampshire's tourism real estate, such as campgrounds, Dr. Chalmers was quite able to describe the basics of what would need to be done to study the real estate value impact to them: "it's a very specialized little market segment. That has its own supply-and-demand relationships, and you'd have to understand those. And then you'd have to understand whether some change in the external environment would impact that." Tr. 8/2/17, Morning Session, at 148–49 (Chalmers).
[573] Tr. 7/31/17, Afternoon Session, at 86–87 (Chalmers).

some level of importance.[574] In New Hampshire, many second homes are vacation homes, which tend to be located in scenic areas with scenic views.[575] Many such vacation and second homes are located within the 31 municipalities through which the proposed project would pass.[576] Dr. Chalmers' approach to assessing the effect of view upon real estate values involved far too much speculation and ignored his own recognition about the importance of scenic views. As Mr. Van Houten noted with respect to the importance of scenic views to his home, "Bethlehem is located in the White Mountains. This is a unique part of the world, cherished by many for its scenic attributes and low-key pace of life."[577] He continued, "[b]ecause of this, any development that would degrade the bucolic aspects of a property would render it less attractive to potential buyers. In my case, the view from the house may be affected, and the vista from the corridor would change dramatically. The existing poles are lower than the trees; those proposed would be higher."[578]

In August of 2015, Dr. Chalmers visited approximately 89 properties over two and a half days, spending 15 minutes or less at each.[579] Dr. Chalmers had with him only Applicant's project map, the preliminary design, and his list of properties.[580] He had no instruments, no photosimulations, no viewshed maps, and he did not interview anyone.[581] Dr. Chalmers did not actually go onto any of the properties he was studying; he stayed only on the public way of the

[574] *Id.* at 87.
[575] *Id.* at 92.
[576] *Id.* at 92.
[577] *Van Houten Pre-Trial Testimony*, DWBA 8, at 2.
[578] *Id.*
[579] Tr. 7/31/17, *Afternoon Session*, at 56 (Chalmers).
[580] *Id.* at 57.
[581] Tr. 7/31/17, Morning Session, at 13 (Chalmers); Tr. 7/31/17, *Afternoon Session*, at 57–58 (Chalmers); *see also NPT Project Maps Preliminary Design October 2015*, APP 1, Appx 1, at 1015–1379.

road.[582] He drove along only the areas of the portions of the proposed project that were accessible by the road.[583]

For each of property Dr. Chalmers visited, he implemented a technique he invented for this case.[584] He categorized the properties as "Before Clearing Visibility," "After Clearing Visibility," and "Change."[585] For the first category, from the road Dr. Chalmers determined if the property had a view of any of the existing utility structures, and if so whether the view was clear or partial. For the second category, Dr. Chalmers estimated what the visibility of the proposed project would be by referencing the project maps and looking towards the right-of-way from the road to conceptualize the following in his mind:

1. where the most visible structure from the proposed project would be;
2. what vegetation would be cleared because of the proposed project; and
3. given any cleared vegetation, imagined what structure would be the most visible, and what would it look like; and
4. whether that visibility would be partial or clear.[586]

With respect to visibility, Dr. Chalmers claims that the only properties that might have a market value effect are those that had no view of existing structures in the right-of-way and because of the proposed project would have either a partial or clear view of the new structures in the right-of-way.[587] Dr. Chalmers undertook this evaluation of "changed" view without any consultation with Applicant's aesthetic witnesses, who, even though Dr. Chalmers was unaware of this, also conducted analysis to determine where the views would change as a result of the proposed project.[588] According to Dr. Chalmers' arbitrary evaluation of "change," within 100

[582] Tr. 7/31/17, Afternoon Session, at 58–59 (Chalmers).
[583] Tr. 7/31/17, Morning Session, at 13 (Chalmers).
[584] Tr. 8/2/17, Afternoon Session, at 10 (Chalmers).
[585] Tr. 7/31/17, Afternoon Session, at 63 (Chalmers).
[586] *Id.* at 59–63, 65–66; Tr. 8/2/17, *Morning Session*, at 59 (Chalmers).
[587] Tr. 7/31/17, Afternoon Session, at 59–63, 66–67.
[588] Tr. 8/2/17, Morning Session, at 63–64 (Chalmers).

feet of either edge of the right-of-way where the line is proposed to be constructed, out of the 89 properties that he looked at, only 11 of them would have a "change."[589]

Dr. Chalmers' defined a "clear" view as an unobstructed, above-the-tree-line view of all portions of the structure to which conductors are attached.[590] In the same breath, Dr. Chalmers acknowledged that he is not a visual expert, but explained that he defined "clear" the way he did because in his experience people react most to having a view of where the conductors attach to the pole, as opposed to other unobstructed views.[591] This definition underscores how Dr. Chalmers undervalued visibility because the definition excluded so much: unobstructed views of lower portions of poles; unobstructed views of conductors at any other location aside from where they attach to poles; unobstructed views of any utility structure if the view occurred only in winter; and more. While at least one property excluded by Dr. Chalmers' limiting definition has been identified, it is unknown in this docket how many others there might be.[592]

Dr. Chalmers also completely ignored height. It made no difference to him whether the new structure would be 70 feet tall or 120 feet tall.[593] This analysis is deeply flawed because, similar to Mr. Varney's approach, it leads to the conclusion that no matter the additional height of new or replaced structures; or the additional number of lines; or the change in type of structure from monopole to lattice, real estate values would not be impacted, a result which Dr. Chalmers himself admitted was "surprising."[594]

It exceeds credulity to imagine that the real estate value of a home that currently has a partial view through the tips of winter trees of only a couple of inches of a monopole would not

[589] *Id.* at 66.
[590] Tr. 8/1/17, Morning Session, at 5–6, 8 (Chalmers).
[591] *Id.* at 7.
[592] *See*, *e.g.*, *id.*at 9–11 (discussing 419 Raccoon Hill Road in Salisbury).
[593] Tr. 7/31/17, Afternoon Session, at 65 (Chalmers).
[594] *Id.* at 59–63, 67–70 (Chalmers).

be effected by the replacement of that pole with two new poles and a clear view of 20 to 70 feet of pole, and lines, above even the summer tree canopy. Much more credible is Dr. Chalmers' statement to a reporter that "[i]f it is basically a view lot and your view is down the valley and you string transmission lines across that valley right in the middle of the viewshed and that becomes kind of the dominant feature of the view, I can easily imagine your $200,000 second home might only be a $75,000 second home or a $100,000 second home, something like that."[595]

This also accords with the decision of the New Hampshire Board of Tax and Land Appeals to grant a 50% abatement, from $133,800 to $66,900, in the case of a Wentworth home near the Hydro-Quebec Phase II line.[596] For this reason, Applicant's so-called guarantee program—which would assist a maximum of 11 properties[597]—is woefully inadequate.

c. Dr. Chalmers Ignored Personal Loss

With respect to the private property prong of the public interest standard, the Subcommittee should note the personal loss that would be occasioned as a result of the proposed project. Outside of market economics, even Dr. Chalmers acknowledged concepts such as a multi-generational homestead, "essentially a family heirloom," with which any interference would be "a very serious issue."[598] Many intervenors have explained this well.[599] Speaking to the

[595] *Id.*at 90–91 (Pappas) (quoting *Jensen, Chris. Appraisal Triggers Latest Dispute Over Northern Pass. New Hampshire Public Radio Nov. 2012*, CFP 385).
[596] *See Robert E. and Barbara A. Smith v. Town of Wentworth*, BTLA Docket Nos. 6291-89 and 9269-90, at 1–2 (4/21/92) (holding, based on the evidence, the correct total assessment should be $66,900 ordered because (1) the fact that through ignorance of the Hydro-Quebec expansion the Taxpayers paid too much for the property should not go unadjusted; (2)the knowledge of the impending construction of the Hydro-Quebec line would have a significant chilling effect on the value dwelling (and in general the property) in such close proximity due to both its visual effect and the uncertainty of the health concerns raised by electromagnetic radiation; (3)owing to the close proximity (within 50 ft. according to the Taxpayers) of the house to the edge of the right-of-way...in the very shadow of the tower, the Board applies a 50% reduction to the total value and leaves the allocation of value between land and building to the Town); *see also 81 Saunders Hill Road, Wentworth, NH: Deed, Tax Map and Satellite Imagery of Property*, JT MUNI 258.
[597] Tr. 8/2/17, Afternoon Session, at 58 (Chalmers).
[598] Tr. 7/31/17, Afternoon Session, at 105–06 (Chalmers).

value of his back acreage, Mr. Van Houten testified, "[w]ell, it does have tremendous value to me, because I do spend an awful lot of time outdoors on that land. I enjoy looking at and learning about wildlife, and sharing what I've learned with my friends and their kids. And, so, we're out there a fair amount. So, that is a value."[600] Dr. Chalmers' method does not account for the fact that many homeowners would experience this personal loss for many years before then realizing an economic loss of a sale.

4. Dr. Chalmers' Data Shows Adverse Effect on Real Estate Values

Leaving aside the various flaws associated with Dr. Chalmers' work in this case, and assuming for the sake of argument that his conclusions could be accepted, his own analysis provides reason enough to deny the proposed project because it would unduly interfere with real estate values.

First, he actually found that high voltage transmission lines did have an adverse sale price effect on 10 of the 58 homes he included in his case study. [601] Plus, the data for another 11 homes showed "possible" adverse sale price effect.[602] The range of impact to the 10 homes was as high as a 17.9% decrease to a low of 1.6% decrease. [603] Even assuming the entire undue interference with real estate values would be limited to only those 10 homes, that extent of undue interference is enough to merit denial of the proposed project. As noted, reviewing a project

---

[599] *See, e.g.*, DWBA 8, at 2 ("There is nothing here restricting the committee's assessment to monetary value. Most of us are motivated by a concern for the quality of life at our homes. Some impacts of this proposal would be immediate, such as noise heard from the yard or towers looming over homes. Other impacts are broader in scope, and affect the lives of all residents and visitors, such as tall towers encroaching upon views from homesteads, byways, rivers, lakes, hiking trails, etc. The landscape is an important attribute to most of us who live in the North Country, and a project which proposes to change it from a rural to an industrial landscape on the scale of Northern Pass is at odds with the people who own and live on this land.").
[600] Tr. 11/9/17, Morning Session, at 125 (Van Houten).
[601] APP 1, Appx. 46, at 23778 (High Voltage Transmission Lines and Real Estate Markets in New Hampshire: A Research Report, by Chalmers & Associates, LLC, 6/30/15).
[602] *Id.*
[603] *Id.* at 23772, 23775.

requires "minute analysis of the site-specific impacts."[604] Denial is not appropriate only if a project would unduly interfere with the values of *all* properties, or would completely eliminate *all* value of some properties.[605] Consistent with the balancing the Subcommittee must perform,[606] the scant benefits that may be associated with the proposed project do not justify forcing a single family—never mind 10 families—[607] to bear decreases to the value of their homes ranging from 17.9% to 1.6%.

Applicant proposed a plan to evaluate claims from a few of these families.[608] But, such taking of real estate value from families comes too close to the power of eminent domain which the legislature made unavailable to Applicant.[609]

As a result of the flaws of Dr. Chalmers analysis discussed here and for reasons briefed by others, the impact to real estate values would actually be far more extensive. Chalmers himself concluded from his case studies: 57% of properties that had "very close proximity" and a "clear" view had an adverse sale price effect.[610] However, Dr. Chalmers made no effort to quantify the value that the proposed project would take from families based on his results. He did not identify all of the properties along the proposed route that would be in very close proximity with a clear view or apply his results to that presumably large population.

Again, the Forest Society does not concede to Dr. Chalmers numbers, but if Applicant is going to rely on them Dr. Chalmers should have at least completed the case study analysis by applying its results to this proposed project. This would have predicted the value that would have

---

[604] *See supra* Footnote 122.
[605] *Id.* (discussing that a single flaw can render a project not approvable).
[606] RSA 162-H:1.
[607] It is accurate to speak to these homeowners as families because Dr. Chalmers' analysis was limited to single-family detached dwellings, which are occupied predominately by families.
[608] *Supplemental Pre-Filed Testimony William Quinlan*, APP 6, at 44961 (describing the NPT Guarantee Program Overview).
[609] RSA 371:1; *see also* House Bill 648 (2012).
[610] APP 1, Appx. 46, at 23778 ("Of those properties that combined very close proximity and clear visibility, eight of the 14 had a sale price effect (57%) and six did not (43%).").

been taken only from single-family detached homes because Dr. Chalmers did not analyze other property types (aside from the belated look at McKenna's Purchase).

E. The Subcommittee Should Give Little Weight to Applicant's Municipal Outreach Efforts

When considering the "view of municipal and regional planning commissions and municipal governing bodies regarding the proposed facility."[611] Applicants outreach to host and affected communities was insufficient. Applicant's attorneys have questioned numerous municipal witnesses about outreach summaries that Applicant created. But these outreach attempts have largely been a unilateral conveying of information rather than collaborative efforts. For example, one "outreach" item regarding Clarksville was "Project representative dropped off Wetlands Permit."[612] The Applicant even includes in the outreach summary "SEC Site Tour."[613]

A comparison of Applicant's outreach attempts in this Docket to the TDI Clean Power Link, a project of similar size and purpose,[614] reveals just how lacking Applicant's efforts have been. Kavet noted that the developers of the two projects have "approached this issue in very different ways."[615] For example, in the case of TDI Clean Power Link, where Kavet represented the developer, "when [the developer] ran into a municipality where there's a problem and they couldn't -- businesses were saying this is really going to be problematic for us, [the developer] changed the route."[616] Kavet drew further distinctions between TDI Clean Power Link and this application, noting that TDI Clean Power Link "would work with each town to develop alternative routes, methods, approaches to minimizing impacts, such that local businesses and the

[611] N.H. CODE ADMIN. RULES, Site 301.15(c).
[612] *Summary Outreach Efforts with Clarksville*, APP 355, at 84386.
[613] *Id.* at 84384.
[614] Tr. 10/11/17, Morning Session, at 19–20; 114–15 (Kavet).
[615] *Id.* at 115.
[616] *Id.* at 115–16.

towns were all comfortable with that along the route" and stating "[t]hat's not what [he has] experienced with this particular project."[617]

III. The Proposed Project would have Unreasonable Adverse Effects on Water Quality and the Natural Environment

Applicant's burden is to show "the site and facility will not have an unreasonable effect on air and water quality, [and] the natural environment."[618] Applicant has not met this burden.[619] Approving this project would risk irrevocably and pervasively altering New Hampshire's natural environment for the worse. Globally rare natural communities may blink out forever, and the lush, verdant, and relatively untouched landscape of northern New Hampshire may be spoiled for generations, all of which would unduly interfere with businesses integral to New Hampshire's long-standing and growing outdoors-based tourism and recreation.

Two preliminary points apply to both the analysis of effects on water quality and on natural environment.

First, the Presidential Permit having been issued has no bearing on whether the project would have unreasonable adverse effect to water quality or the natural environment. First, as discussed previously, the standards are different and only the SEC considers the standards in RSA 162-H. Second, if there was any doubt about that, the USDOE that up in the Final Environmental Impact Statement when it wrote:

> DOE's responsibilities under the Presidential permit regulations (10 CFR Sections 250.320-205.329) are limited to responding to an application for an international border crossing for a transmission project. The scope of DOE's decision is whether or not to grant the requested Presidential permit for the Project at the international border crossing proposed in the

[617] *Id.* at 116.
[618] RSA 162-H:16, IV(c).
[619] The Forest Society relies on other parties to discuss important considerations with respect to water quality which we have not addressed here for efficiency, including risks associated with fluidized thermal backfill, fracturing, and more, as well as Applicant's over-reliance on DES, Fish & Game, NHB, and other governmental agencies.

> amended Presidential permit application (August 2015). *The New Hampshire Site Evaluation Committee has siting authority for the Project in the state of New Hampshire*. Additionally, the USFS has siting authority for portions of the Project located in the WMNF. Therefore, the selection of a particular alternative alignment within the state of New Hampshire is beyond the scope of DOE's decision.[620]

Second, little weight should be given Applicant's arguments attempting to discredit witnesses, such as Raymond Lobdell, the Forest Society's environmental witness, because they did limited or no fieldwork. The burden is on Applicant not the other parties. It more than suffices for witnesses to rely on the application and other information to evaluate whether Applicant satisfied the criteria. For example, Mr. Lobdell relied on information provided in the application, in particular the data associated with the underground portion, along with information from the TDI Clean Power Link Project in Vermont, and the Environmental Impact Statement, all of which show that burial results in significantly less wetland impacts.[621]

A. The Proposed Project Would Have Unreasonable Adverse Effect on Wetlands

Applicant admits the proposed project would adversely affect wetlands[622] along the proposed route.[623] The record shows those adverse effect would be unreasonable. Applicant has not shown that the proposed project would not have unreasonably adverse effects on wetlands

---

[620] *Final EIS, August 2017*, APP 205, at 71643 (emphasis added).
[621] Tr. 12/21/17, Morning Session, at 130 (Lobdell).
[622] "There was a time in our history when wetlands were considered wasteland, but that time has passed. It has long been established that wetlands are one of our most important and productive ecosystem components. For that reason, wetlands were one of the first natural resources offered regulatory protection in New Hampshire nearly 50 years ago. Why? Well, besides containing, acre for acre, a disproportionally higher number of plant and animal species compared to uplands, wetlands serve a variety of ecological functions including improving and maintaining water quality by trapping sediment, filtering out pollutants, and removing excess nutrients. They can reduce downstream flooding, recharge ground and surface waters, provide wildlife and aquatic habitat, and stabilize shorelines. Wetlands provide scenic vistas, hiking, canoeing, hunting, fishing, and educational values. For all of these reasons, wetlands should be protected and impacts to them avoided or minimized, which is what the law requires." *Supplemental Pre-Filed Direct Testimony of Raymond Lobdell dated April 17, 2017, and the following attachment:- USACE Highway Methodology, Appendix A; Sample Wetland evaluation supporting documentation; pages 20-21*, SPNF 67, at 4233.
[623] Tr. 6/15/17, Afternoon Session, at 6-7 (Carbonneau) ("Yes, the Project has some impacts to wetlands, and I would consider them to be adverse.").

and their related functions and values along nearly the entire length of New Hampshire. To the contrary, the evidence submitted demonstrates the wetlands and their related functions and values along the entire route would likely suffer unreasonable temporary and permanent adverse effects.

1. Applicant has not Provided Subcommittee Full and Complete Disclosure of Impacts to Wetlands

Applicant has not provided Subcommittee "full and complete disclosure" of the plans as required by RSA 162-H:1 to evaluate the effects of the proposed project on air and water quality and the natural environment.[624]

Specifically, Applicant anticipates needing numerous and extensive additional storage sites, laydown areas, staging areas, ORARs[625], but has not identified how many, at what locations, or what sizes.[626] Applicant also still lacks a construction schedule, preventing it from being able to answer "accurately" whether certain wetlands would be temporarily impacted for as long as three years or more.[627] Applicant also collected bathymetric[628] data only for one ponded wetland, not all ponded wetlands proposed to be impacted.[629] Applicant has provided no pre-blasting survey or blasting plan; no identification of where blasting would occur; and has not, therefore, provided an opinion from its environmental witnesses about the impact of blasting

[624] *See also* CFP 129, at 2803–08 (noting many instances where a full assessment of impact could not be conducted because of "insufficient information").
[625] Off Right-of-Way Access Roads.
[626] Tr. 6/16/17, Morning Session, at 50–51 (Carbonneau); Tr. 6/16/17, *Afternoon Session*, at 23–26 (Carbonneau). Any additional impacts identified by the Applicant and permitted only through DES if the SEC were to issue a certificate that included the scope of delegation the Applicant seeks would be without any review of this Subcommittee or the SEC, would be without any public hearing, and no information about these additional wetland impacts would be provided to the parties in this case. *Id.*, at 92-93 (Lew-Smith). Moreover, such a delegation would be unlawful. *See infra* Part V.A.
[627] *See* Tr. 6/16/17, Afternoon Session, at 78–82 (Carbonneau).
[628] Measurement of water depth at various places in a body of water.
[629] Tr. 6/16/17, Afternoon Session, at 98 (Carbonneau). Ms. Carbonneau says the reason Normandeau did not collect bathymetric data on any other ponded wetland is because "most of the areas with ponded water have vegetation growing out of them so we know for a fact that they're fairly shallow." *Id.* at 99. However, "fairly shallow" would not be good enough to be able to restore these wetlands to what they were prior to adverse impact.

on the natural environment, air quality, or water quality.[630] During the Forest Society's only chance to cross-examine the environmental panel, the geotechnical work had been completed.[631] The design for the trenchless installations remains unsettled; they may decide in the field to trench "through a stream during (sic) frozen part of the year …"[632] Because the access roads "have not been designed per se" and because the roads may require various cuts and fills, their full impacts are not known.[633] Applicant did not put forward any evidence specifically on the impact that noise arising out of the construction and operation of the proposed project would have on wildlife.[634] Applicant provided neither site-specific restoration plans nor detailed existing topographic, soil, and hydrologic information for each restoration site.[635] This is important if the wetlands are to be restored to their pre-construction condition.

Finally, Counsel for the Public's witnesses also wanted further information. With respect to the Karner Blue, Mr. Amaral would have wanted Applicant to have specified: how the right-of-way would be maintained after construction, and details on time and funding for the

[630] Tr. 6/20/17, Afternoon Session, at 105–06 (Carbonneau); Tr. 6/23/17, *Morning Session*, at 38-39 (Carbonneau).
[631] Tr. 6/20/17, Afternoon Session, at 62 (Carbonneau). This is just one example of Applicant's failure to timely submit the necessary information prior to the cross-examination of the environmental panel. The Forest Society's due process was infringed as a result. Another example of this due process concern as it relates to this panel, which was noted on the record by Attorney Pappas for CFP, occurred when Applicant uploaded to ShareFile, the evening before the environmental panel, amendments to the Applicant's 8/17 Avoidance and Minimization Measures. Tr. 11/6/17, Afternoon Session, at 4, 13 (Pappas; Lew-Smith). The next hearing day (11/6/17), the parties had a discussion on the record the result of which was that if any party believed the Applicant's environmental panel needed to be recalled, that party could file as motion requesting that. *Id.* The Chair instructed the parties that as "quickly as you can get your arms around what it is you're looking at, it makes sense to act, I mean, even if it is to say this is so overwhelming, it's going to take us months, which I'm sure Mr. Bisbee will have a response to. But as quickly as you can get your arms around what it is you're looking at and say what you need to say." *Id.* at 9 (Honigberg). It appears that no party ever did follow up to request that the Applicant's environmental panel be recalled, or to request any other relief related to the arguably late-filed information. At least on the part of the Forest Society, this absence of follow up resulted not from lack of intent but from complete inability to do so given the other requirements of this case triggered by the way the matter has been managed.
[632] Tr. 5/3/17, Afternoon Session, at 31–32 (Scott).
[633] Tr. 5/31/17, Afternoon Session, at 99-100 (Oldenburg and Bradstreet).
[634] Tr. 6/20/17, Morning Session, at 56 (Barnum); Dr. Barnum did testify about one indirect noise effect, the effect upon deer and moose from noise of snowmobiles. Tr. 6/14/17, *Afternoon Session*, at 63–64 (Barnum).
[635] SPNF 67, at 42335.

restoration that would be required for the mitigation parcel to become suitable.[636] With respect to bats, Mr. Reynolds would have wanted less "vague" information, including at least that Applicant make some effort to look at the small-footed bat and where small-footed bats are along the proposed project.[637] Michael Lew-Smith, Counsel for the Public's witness for the environmental panel, would have wanted Applicant to use a methodology that sufficiently detected all populations of the whorled pogonia.[638]

Further, no weight should be given to Applicant's promises of finding further reductions in wetland or natural resources impacts if the proposed project moves forward. The Subcommittee needs to measure wetland impacts as part of its deliberations. Moreover, Applicant admits any further significant reductions are not likely.[639] Because Applicant has not identified the potential area of additional wetland impacts, Applicant has not presented the Subcommittee prerequisite information to give full and timely consideration to the environmental consequences.[640] The decision as to whether the Subcommittee should issue a certificate is not an iterative process.

Finally, Applicant's statement that they have overestimated wetland impacts to give flexibility in the field and avoid having to go back to DES for every change raises concerns. Due to the overestimation, the exact location of Applicant's work is unknown and could also mean that approval would lawfully permit Applicant to in fact impact all of the wetlands they

[636] Tr. 11/7/17, Morning Session, at 103–04 (Amaral).
[637] *Id.* at 104 (Reynolds).
[638] *Id.* at 105 (Lew-Smith).
[639] Tr. 6/16/17, Afternoon Session, at 17-18 (Carbonneau).
[640] RSA 162-H:1.

estimated.[641] This also means there are miles of the route for which we do not know the impacts to vernal pools.[642]

The purposes written into law in RSA 162-H:1 cannot be satisfied critical information about the impacts to the natural environment is not provided. "In order to properly assess overall wetland impacts of this project, all the impacts should be identified and both the extent of impact and the impact to functions and values quantified during the permitting process not after the permits are issued."[643] Changes to the proposed project appear to still be underway, and these changes could impact wetlands but evade review by the SEC.[644]

2. It Would be Insufficient to Rely Only on DES Recommendations for Approval

As a matter of law, the Subcommittee cannot conclude the proposed project has no unreasonable adverse effect on wetlands solely because DES recommended approval.

The Subcommittee must consider all relevant evidence to determine if the proposed project would have an unreasonable adverse impact. The Subcommittee has the legal authority and obligation to consider the standards in RSA 162-H:16. And those standards with respect to air and water quality and the natural environment are significantly broader than the scope of review of DES, NHB, or Fish & Game. RSA 162-H does not charge the SEC with simply confirming that various other state agencies recommend approval. Had that been the minimal type of regulatory authority lawmakers sought to confer on the SEC they could have written RSA 162-H to require only that determination, but they did not.

---

[641] Tr. 11/7/17, Morning Session, at 91-93 (Oldenburg; Lew-Smith).
[642] *Id.* at 100.
[643] *Pre-Filed Direct Testimony of Raymond Lobdell dated December 30, 2016, and the following attachment: Experience and Resume of Raymond Lobdell*, SPNF 63, at 7527.
[644] *See, e.g.*, Tr. 11/6/17, Afternoon Session, at 110 (Lew-Smith) (noting that if the proposed route changes, for example from the left side of a road to the right side, can change the impacts to wetlands).

While the Subcommittee must consider DES' recommendation in determining whether a proposed energy facility would have an unreasonable adverse effect on water quality, it must also consider "other relevant evidence submitted pursuant to Site 202.24."[645] To conclude there would be no unreasonable adverse effect on wetlands because DES has recommended approval would contravene the intent of the law because of the following statutory instruction: the Subcommittee "shall consider the determinations of [the relevant agencies]" and "other relevant evidence."[646]

The standards the law assigns to the SEC to adjudicate as part of its determination of whether to issue a certificate are broader than the standards applied by any other agency, especially other New Hampshire agencies.[647] For DES to consider whether to recommend approval of a wetlands permit, it has to determine if a proposed project has adequately avoided, minimized, and mitigated wetland impacts (including determining whether the proposal is the least impacting).[648] "The words unreasonable adverse effect or reasonable adverse effect appear nowhere in the DES decision. The SEC's mandate is broader than the DES's, and it is the SEC's job to consider the reasonableness of these impacts. DES has a defined and more limited jurisdiction."[649]

As noted elsewhere, the Forest Society believes that DES erred when it rendered its recommendation. However, even assuming for the sake of argument that DES got it right, that in

---

[645] N.H. CODE ADMIN. RULES, Site 301.14.

[646] *Winnacunnet Coop. Sch. Dist. v. Town of Seabrook*, 148 N.H. 519, 525-26 (2002) ("When construing a statute, we must give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words.").

[647] Similarly, the federal Department of Energy and U.S. Forest Service did not consider the Subcommittee's RSA 162-H standard when they issued the Presidential Permit and the Record of Decision, respectively. Federal review of the proposed project is conducted on different legal standards than those applied by the Subcommittee. Importantly, U.S. Forest Service made a decision based only on the portion of the proposed line that crosses National Forest Service lands and did not consider the rest of the project. *See* U.S. Forest Service Final Record of Decision, at 1 (1/5/18).

[648] RSA 482-A; N.H. CODE ADMIN. RULES, Env-Wt 100 *et seq.*

[649] Tr. 11/7/17, Afternoon Session, at 85 (Publicover).

no way means that the project has satisfied the legal requirements applicable in this context: no unreasonable adverse effect to water quality for the natural environment. In other words, proving that a project sufficiently avoids, minimizes, and mitigates wetland impacts is not the same as proving that a project has no unreasonable adverse effect on water quality of the natural environment.

The same is true for other agencies. New Hampshire National Heritage Bureau (NHB) and Fish & Game have only the authority to recommend how impacts may be mitigated, they do not have permitting authority.[650] Regardless of whether Applicant has in fact worked with NHB to develop avoidance and mitigation measures, the "question of whether those impacts constitute an unreasonable adverse effect is a decision for the SEC to make."[651] A "bad route in which the impacts have been minimized is still a bad route, and that is the decision for the SEC to make."[652]

Applicant emphasizes "[t]hese applications [for the relevant permits] satisfy the stringent requirements of those permitting programs to avoid, minimize and mitigate wetland impacts"[653] to imply therefore the Subcommittee need look no further. Applicant has consistently sought to portray any argument that the proposed project would result in an unreasonable adverse effect as an argument that DES (or another agency) erred. On 11/7/17, Applicant's counsel asked Counsel for the Public's Environmental Panel whether they were saying that the recommendations to permit the project issued by state agencies were "so defective, that even with the Applicants' compliance with all these permit conditions, it still will result in an unreasonable adverse effect

[650] RSA 217-A (National Heritage Bureau enabling statute); RSA 206:1 (Fish and Game Department established); *see also* Tr. 11/7/17, Afternoon Session, at 85 (Publicover).
[651] *Id.*
[652] *Id.* at 85–86.
[653] APP 1, at 91.

to different species?"[654] The witness responded that he's "not saying that they're 'defective' in any way."[655] He continued, observing the state agencies "have their regulatory framework that they issue permits for, and the SEC has its own regulatory framework that it issues permits and conditions for. And the language is different and the process is different."[656] Therefore, he concluded even if the conditions of state agencies were followed, "the Project will still have an unreasonable adverse effect on certain species."[657] Responding to questions from Subcommittee Member William Oldenburg, the witness put a fine point on it, stating that "if they were exactly the same, then you wouldn't have any need to put any conditions on any permits at all. I mean, why are they even here?"[658]

Simply because Applicant may follow the conditions in the DES recommendation to engage in ongoing coordination with Fish & Game and NHB with regard to avoidance and minimization measures does not mean that such engagement would result in avoiding unreasonable adverse effects to the natural resource in question.[659] Permitted adverse impacts can still be unreasonable and not serve the public interest.

State agency input is but one of many factors this Subcommittee should consider. As Mr. Lew-Smith aptly noted in response to question from Applicant's counsel about whether the witness was suggesting agency recommendations be disregarded, he responded that he was not and "[e]ven if I suggested that, I think they wouldn't listen to me. I'm suggesting that they take in all the information that they have. And that our professional opinion is another piece of that

[654] Tr. 11/7/17, Morning Session, at 23–24 (Walker; Lew-Smith).
[655] *Id.* at 24 (Lew-Smith).
[656] *Id.*
[657] *Id.*
[658] *Id.* at 100-01 (Lew-Smith) (concluding that the SEC would "consider a much broader issue").
[659] Tr. 11/6/17, Afternoon Session, at 166-67 (Lew-Smith).

information."[660] Other factors include the input of federal agencies[661] and other parties to this matter and their witnesses. As noted here and below, many of them are of the opinion that the proposed project should not have been recommended to receive a wetlands permit because it is not the least impacting route, and/or that the proposed project would result in unreasonable adverse effect to the natural environment and water quality.

The Forest Society believes DES erred in recommending approval, including that it did not require Applicant to: 1) submit essential information; 2) correct its wetlands assessment; and 3) use the least-impacting alternative, or prove why the least-impacting alternative was not practicable. In addition to the arguments made below in subsections 3 through 8, DES' decision is flawed in many respects and the Subcommittee should account for this in its analysis of effects. For example, after DES' determination, Applicant decided to move structures to decrease impacts to wild lupine.[662] "So, clearly that wasn't the least environmental impact."[663] As such, DES was wrong to determine that the project as proposed would be the least-impacting alternative.[664] DES also failed to consider municipal wetland buffers.[665]

With the deep understanding that can come only after having done hundreds of wetland applications with DES, Mr. Lobdell disagrees with DES' conclusion that the proposed project is the least impacting alternative and he has some serious concerns about DES' ability to monitor construction and restoration. He is not alone; Mr. Lew-Smith and Rick Van de Poll, City of Concord's wetlands witness, both expressed similar concerns.[666] In sum, *all three* of the

[660] Tr. 11/7/17, Morning Session, at 22–23 (Walker; Lew-Smith).
[661] *See*, *e.g*, N.H. CODE ADMIN. RULES, Site, 301.14(d).
[662] Tr. 11/6/17, Afternoon Session, at 168 (Lew-Smith).
[663] *Id.*; Tr. 11/7/17, Morning Session, at 28–29 (Lew-Smith).
[664] Tr. 11/6/17, Afternoon Session, at 168 (Lew-Smith).
[665] Tr. 11/16/17, Afternoon Session, at 154–55 (Tardiff).
[666] Tr. 11/6/17, Afternoon Session, at 166, 167–68 (Lew-Smith); Tr. 12/21/17, *Morning Session*, at 32–35 (Van de Poll).

witnesses hired by others to evaluate the proposed project are concerned about DES' recommendation to approve the wetlands permit, including the restoration that it would require. Mr. Lobdell believes no condition of approval would make the wetland application approvable.[667]

3. Proposed Project is not the Least-Impacting Alternative and Applicant has not Proven the Least-Impacting Alternative is Not Practicable

Applicant has not sufficiently explained why the least-impacting alternative route is impracticable, too costly, or otherwise prohibitive.[668] The least-impacting alternative route--Alternative 4a from the Northern Pass Transmission Line Project Environmental Impact Statement Supplement ("Supplement")—would bury the proposed project along existing highway right-of-ways. This alternative would have significantly less permanent and temporary impacts to wetlands than the proposed project.

The route proposed by Applicant is not the one with the least impact to wetlands or surface waters.[669] It is undisputed that the proposed project's wetland impacts would be reduced if Applicant modified the proposed project to include full burial of the transmission lines along

[667] Tr. 12/21/17, Morning Session, at 126 (Lobdell).

[668] Another piece of evidence against the Applicant's claim that anything but the proposed project is practicable is the DOE's conclusions with respect to cost. DOE concluded that the "hybrid" project, on that would have the new right-of-way located underground along transportation corridors instead of overhead through the forest, would cost $1.5 billion. Keep in mind that DOE also said that the proposed route would cost $1.37 billion whereas Applicant says it would cost $1.6 billion. So, DOE's $1.5 billion figure may not be an apples-to-apples comparison with Applicant's $1.6 billion figure. Even assuming that DOE underestimated, it seems that an apples-to-apples comparison would put the cost of the hybrid at about $1.75 billion. An increase of $150 million does not make a project impracticable.

[669] SPNF 63, at 7516-17. Of note, DES' initial finding was that the proposed project did not satisfy the legal requirement set forth in RSA 482-A and Env-Wt 302.03 and Env-Wt 302.04 to use the least-impacting alternative because of the new 32-mile right-of-way. Tr. 6/16/17, Afternoon Session, at 36-37 (Carbonneau); *id.* at 41–43; *see NH DES Progress Report 5/20/16,* request no. 1, p. 2.

state highway right-of-ways.[670] The record demonstrates in many ways what a dramatic reduction in wetland impacts could be had by virtue of complete burial.

First, the USDOE concluded that a full burial route would have only 6.5 acres of wetland impacts, compared to its conclusion that the proposed route would have 208 acres of wetland impacts. [671] By these numbers, the buried route would have 97% less wetland impacts than the proposed route.[672]

Second, the TDI Clean Power Link project, with its route length of 154 miles being relatively comparable to the proposed project, would have only 2.2 acres of (temporary)[673] wetlands impacts as a result of it being a completely buried project.[674] Applying these numbers to the proposed project, on a per mile basis this would equate to 2.7 acres of wetland impacts, which would be 98% less wetland impacts than the proposed route.[675]

Lastly, according to Applicant, the wetland impacts in the portion of the project proposed to be buried from Bethlehem to Bridgewater would be only 71 square feet per mile, whereas wetland impacts would be 90,828 per mile in the 30-mile N2 section just to the north.[676] These numbers, again, show a substantial difference, in this case a 99% reduction in wetland impacts as a result of burial.[677] Applicant recognized this substantial reduction when describing the burial from Bethlehem to Bridgewater "substantially reduced impacts on sensitive plant communities,

---

[670] Tr. 6/16/17, Morning Session, at 49–60 (Carbonneau) (admitting alternative routes that bury the line would, potentially, have less impact than he route as proposed); SPNF 63, at 7516–17 (opining that the Wetlands Application does not even directly address whether the proposed route is the least impacting alternative).
[671] SPNF 63, at 7517 (citing APP 205).
[672] 6.5 is 3.125% of 208. 100% take away 3.12% equals 96.875%, and then round up to 97%; *see also* SPNF 63, at 7521.
[673] TDI Clean Power Link will have no permanent wetland impacts. *Id.* at 7517.
[674] *Id.*
[675] *Id.* at 7518–19 (2.2 acres per 154 miles equals 2.74 acres per 192 miles. 2.74 acres is 1.95% of 140 acres. 100% take away 1.95% equals 98.05% and then round down to 98%).
[676] *Id.* at 7518, 7520 (also, burial of the entire line, assuming similar overall impacts on a per-mile basis for the Section UG-Central, could reduce the disturbance of 1,011 acres of land and impacts to over 141 acres of wetlands and stream to 300 acres and 10 acres or less respectively—a more than 90% reduction in total wetland impacts).
[677] Square feet per mile is .078% of 90,828 square feet per mile. 100% take away .078% equals 99.92% then round down to 99%, APP 1, Appx. 31, at 21079-305. 71; *see also* SPNF 63, at 7518.

wildlife habitat, wetlands, and streams along that entire stretch of the route" and "… reduced direct, permanent wetland impacts by approximately 0.6 acres, reduced temporary impacts by over 30 acres, and reduced secondary impact to wetlands, stream and vernal pools by over 70 acres."

Neither the wetlands application nor DES' recommendation included consideration of this potential reduction in wetland impacts.[678]

The proposed project is also not the least-impacting alternative for the majority of the 13 wetland functions and values considered. In Section N2, 12 out of the 13 wetland values assessed would be impacted, including 12 functions and values[679] which, in Mr. Lobdell's professional opinion, are "critical to wetland ecosystem functioning."[680] Nevertheless, Applicant concludes that no principal wetland functions and values would be permanently impacted in the buried Section UG Central.[681]

It is also difficult for the Subcommittee to determine if this is the least-impacting alternative because Applicant would not provide any alternative layouts.[682]

Therefore, full burial along right-of-way not only decreases the number and spatial extent of wetland impact sites, it also significantly decreases impacts to wetland functions and

[678] SPNF 63, at 7517.
[679] *Wetlands, Rivers, Streams, and Vernal Pools Resource Report and Impact Analysis*, APP 1, Appx. 31, at 21160. (Groundwater recharge; floodflow; fish and shellfish habitat; sediment/toxicant retention; nutrient removal; production export; sediment/shoreline stabilization; wildlife habitat; recreation; uniqueness/heritage; visual quality aesthetics; and endangered-species habitat).
[680] SPNF 63, at 7519.
[681] APP 1, Appx. 31, at 21169.
[682] SPNF 63, at 7528.

values.[683] "The only way to significantly reduce the 140 acres of wetland impacts is to bury the line along highway right-of-ways."[684]

Federal agencies' findings support this conclusion. The DOE similarly found the Alternatives 4a, 4b, and 4c (underground in roadway corridors) would decrease the wetland impacts thirty-two-fold as compared to the proposed project and also significantly reduce impacts to critical wetland values and functions.[685] Applicant acknowledged the DOE analysis shows the proposed route would not be the least impacting alternative, and the least impacting alternative would be a route that is entirely buried.[686]

Applicant has not articulated an argument for why any of the routes identified by the DOE and EPA as having less adverse wetland effects would be too costly, only that Applicant would not desire to build it at those prices.[687] However, an applicant's unwillingness to pay should not be the sole determinant of what is practicable. Applicant's witness, Normandeau Associates, Inc., was informed by Applicant that burial was not practicable based on logistics and cost.[688] As noted by Applicant's witness, practicable in this context means "available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."[689]

---

[683] *Id.* at 7520 (noting that while burial comes with certain concerns and "must be done with care," "[n]evertheless, whether directional drilling, trenching, and even if blasting is needed, burial along existing transportation corridors would have less wetlands and environmental impacts than would the placement of the transmission line on towers above ground within existing and new utility rights-of-way").
[684] *Id.* at 7521–22.
[685] *See Draft Environmental Impact Statement issued by USDOE*, APP 106, at 45229–33.
[686] Tr. 6/16/17, Afternoon Session, at 47 (Carbonneau).
[687] *Id. at* 8 (Carbonneau) (admitting Applicant did no wetland assessment or wetland delineation for any alternatives that would have completely buried the entire line).
[688] *Id.*, at 51–52.
[689] 40 C.F.R. § 230.3(q); N.H. CODE ADMIN. RULES, Env-Wt 101.74 ("'Practicable' means available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes."); Tr. 6/16/17, Morning Session, at 36 (Carbonneau).

Applicant's apparent position is that as the proponent for the proposed project it is entitled to decide what is or is not practicable because it knows what is cost prohibitive and/or otherwise infeasible.[690] That is not right. While it is Applicant that is in the best position to have information and in-depth understanding about its cost and feasibility limitations, it is the regulators that ultimately must decide, based on the information Applicant has provided, whether any particular route or option is practicable or not. The standard is not based solely on project's perception of affordability.

EPA did not conclude the alternatives were impracticable. EPA concluded that "[a]ll of the alternatives in the DEIS appear to be practicable."[691] EPA stated that putting the line underground next to existing highways would cause less damage to wetlands and upland habitat and Alternative 7 (the proposed alternative) cannot pass the least-impacting alternatives test required for a federal permit.[692] Applicant responded to this letter by saying, in essence, burial was too slow, too expensive, and not logistical.[693] However, Applicant's response letter also admits more burial may be technically feasible.[694] Further, after this response and after the Final Environmental Impact Statement was published, EPA again issued a letter opining that the proposed project would not be permittable.[695] The law requires the Subcommittee to consider the Army Corps statements, and those of other state or federal agencies having permitting or other regulatory authority, such as the EPA.[696]

[690] Tr. 6/16/17, Afternoon Session, at 63–65 (Carbonneau).
[691] *Id.* at 62; *Letter, June 14, 2016, EPA regarding proposed project to U.S. Army Corp of Engineers*, SPNF 43, at 3977.
[692] SPNF 63, at 7577.
[693] Tr. 6/16/17, Afternoon Session, at 66–67 (Carbonneau).
[694] *Id.*, at 67 (Carbonneau).
[695] *Letter, September 26, 2017, EPA to U.S. Army Corps of Engineers*, SPNF 268, at 7509–11.
[696] N.H. CODE ADMIN. RULES, Site 301.14(d); Tr. 6/16/17, Afternoon Session, at 68 (Carbonneau).

4. Applicant's Assessment of Wetlands Effects for Full Burial is Insufficient

Applicant admits that "if the line is buried in existing roadways it would greatly reduce impacts to wetlands and natural resources …."[697] The Application even states that burying the line through the WMNF "substantially reduces impact on sensitive plant communities, wildlife habitat, wetlands, and streams along the entire stretch of the route."[698] This would include avoiding impacts to sensitive ponded and deep soil organic wetlands.[699] Nonetheless, without sufficient basis to do so, Applicant argues that burial alternatives would result in extensive wetland impacts outside line of burial.[700]

The only apparent analysis of I-93 as an option as it relates to wetlands consisted of a limited desktop review "some years ago" led by Lee Carbonneau of the Applicant's environmental panel.[701] The review looked only at available GIS and aerial photos, and only for two areas (Canterbury and further north).[702] Ms. Carbonneau and others at Normandeau performed this limited review to "try to map in a very general approximate sort of way wetland and water resources within the right-of-way in those limited locations."[703] Ms. Carbonneau did not know of anyone outside of Normandeau who would have analyzed wetland impacts related to the I-93 option.[704] So, although she had never reviewed the document and was not aware of it as of the hearing, she assumes that her limited work was the sole basis for Applicant's statement

[697] *Id.* at 72 (Carbonneau) (admitting that the Applicant had not evaluated any burial alternative); *see also* Tr. 6/15/17, Morning Session, at 50 (Carbonneau); Tr. 6/16/17, Afternoon Session, at 51, 61 (Carbonneau).
[698] *Application for State of New Hampshire Department of Environmental Services Wetland Permit for Major Dredge and Fill Project for the Northern Pass Transmission Project New Hampshire*, APP 1, Appx. 2, at 1997.
[699] Tr. 6/16/17, Afternoon Session, at 113 (Carbonneau).
[700] *Burns & McDonnell Underground White Paper CONFIDENTIAL*, APP 80, at44537 ("[E]xtensive wetland areas are located along the outer edge of the limited access ROW and would be significantly impacted as well.") (quoted and discussed excerpts are not from the portions of APP 80 which Applicant claims should be treated confidentially).
[701] Tr. 6/16/17, Afternoon Session, at 9–11 (Carbonneau).
[702] *Id.*; Tr. 6/23/17, Morning Session, at 47–48 (Carbonneau).
[703] Tr. 6/16/17, Afternoon Session, at 10 (Carbonneau).
[704] *Id.* at 11.

(in its Exhibit APP 80) that "[e]xtensive wetland areas are located along the outer edge of the limited access right-of-way and would be significantly impacted as well."[705]

In sum, Applicant relies on APP 80 and the alleged "extensive wetlands" and "significant[] impact[s]" in part to prove that the I-93 option was not available; yet it appears, based on Ms. Carbonneau's testimony, no one associated with Applicant did any field-based wetlands assessment or delineation to support these determinations and that no one did anything to determine water resources in anything more than a very general approximate way, or at any location beyond the two.

Rather than asking their wetlands witnesses to choose a route from point "a" to point "b" so as to minimize wetland impacts, Applicant first chose the route and only after that tasked Normandeau to begin its wetlands assessment.[706] Applicant gave Normandeau the route and tasked them to: assess the wetland impacts; consider avoidance, minimization, and mitigation; do the field work that was required; and put together the permit applications. It was the project team—not Normandeau—that decided to bury in the White Mountains National Forest.[707]

Applicant also has made numerous attempts to downplay the admitted environmental benefits of the burial alternatives—these attempts are unpersuasive. For example, Applicant says that the majority of wetland impacts associated with the new right-of-way are for the transition stations, which the proposed project would still need even if completely buried, implying that

[705] APP 80 at 44537; Tr. 6/16/17, Afternoon Session, at 10–11.
[706] Tr. 6/16/17, Afternoon Session, at 11–12 (admitting this to be a fair description: "And in terms of big picture, what your role was on this Project, do I understand correctly from what we discussed at Technical Sessions that more or less you were given a route and your role was to assess the wetland impacts, you know, go over the avoidance minimization mitigation, put the packages today, do the Permit Application, do the field work that was required, et cetera?" "One exception is that for the new 32-mile right-of-way, Normandeau provided some information at a higher level for the selection of the overhead route. However, for that new right-of-way section, Normandeau did not have the option of proposing a full burial.).
[707] *Id*. at 53.

even 100% burial may not be that much less impactful.[708] However, this statement lacks credibility because it appears Applicant has not made the basic determination of the number of transition stations a completely buried project would require.[709] Further, Applicant has resisted providing analysis of burial along Route 3, arguing DES lacked the authority to require this of Applicant.[710]

Applicant claims that the I-93 option is not a good idea because, based on the Department of Transportation *Utility Accommodation Manual* ("UAM") requirements, it would be required to put the line far from the travelled way, so far away, that it would create all too many wetland impacts, more than the proposed route.[711] However, the UAM also requires that the line be buried not under the pavement, but Applicant has chosen not to abide by that requirement, and instead through hundreds of exceptions seeks permission to site most of the buried portion of the current proposal under the pavement. Applicant has offered no explanation for why it could not seek the same exceptions with respect to an I-93 route.[712]

For these reasons, Applicant's purported analysis of "all" underground routes does not suffice to justify the extent of wetland effects that the proposed project would cause.

---

[708] *Id.* at 58–59.
[709] *See id.* at 59.
[710] *Applicant's Response to DES Request for Wetlands Information 7/12/16*, APP 62, at 35043–44;Tr. 6/16/17, Afternoon Session, at 45 (Carbonneau); *see also id.* at 44 (admitting no one in state government told Ms. Carbonneau that Routes 3 or 93 were not available for the project).
[711] APP 80, at 44535–37.
[712] S*ee Devine & Millimet letter continued - complete burial, impacts, greater than overhead*, APOBP 49; *see also Devine & Millimet Letter from D. Bisbee to Craig Rennie - Department of environmental services, cover letter 4-27-2016*, APOBP 48; Tr. 6/20/17, *Afternoon Session*, at 78–79 (Lakes; Carbonneau).

5. Applicant has Inadequately Assessed Wetland Functions and Values

Applicant has not adequately assessed wetland functions and values.[713] For the following four reasons, Applicant erred critically in its assessment of wetlands impacts for each of the over 1800 separate wetland impacts the proposed project would cause.[714]

First, Applicant's finding that only 2% of the wetlands were rated as "high quality"[715] is questionable. Applicant's ranking system inappropriately devalued wetlands.[716]

Following Applicant's ranking, any wetland that performs a small number of functions and values at a very high level would never be deemed a high quality wetland.[717] For example, a wetland that had as a function and value habitat to an endangered species, but did not have many other functions and values, would never be a high quality wetland.[718] Normandeau developed the ranking system specifically for this project to determine, according to them, what constituted a high quality wetland.[719] They assigned one point for each function, two points for principal functions, and then added together all of the functions and values.[720] If the resulting number exceeded 14, they then deemed it a high quality wetland.[721]

This is a misapplication of the methodology.[722] The Manual states clearly that principle functions and values should be evaluated individually and that numerical methods should not be

[713] SPNF 63, at 7527.
[714] *Id.*
[715] Notably, wetlands can be high quality even if only one function is present, such as the presence of an endangered species. SPNF 67, at 4238.
[716] Tr. 12/21/17, Morning Session, at 89–90 (Lobdell).
[717] *Id.* at 90 (Lobdell) ("[A] wetland can have just one function that's very important and it has high function in that value or in that function. And so the wetland can be very valuable, but it wouldn't show up under this system as in their list of high quality wetlands.").
[718] Tr. 6/20/17, Morning Session, at 43–45 (Carbonneau).
[719] *Id.* at 43.
[720] *Id.* at 42.
[721] *Id.*
[722] SPNF 63, at 7527.

used and "[i]n no case, however, should arbitrary weighting be applied to wetland functions, or should dissimilar functions be ranked."[723]

Of the 1,972 wetlands assessed, Normandeau deemed only 46 of them as high quality, which is about only two percent.[724] Ms. Carbonneau's opinion that only 2% of wetlands are high value was "very, very low" based on Mr. Lobdell's experience in the field doing a number of town-wide wetland assessments, and looking at Fish & Game's Wildlife Action Plan[725] which shows about 50% of wetlands are high quality.[726] The number of high quality wetlands potentially affected by the proposed project in this extensive cross section of the length of the state is certainly significantly higher than 2%.[727]

Second, Applicant assessed only parts of wetlands located in the right-of-way, not the entire wetland complex, although many of the rationales listed in the Manual require looking at not just part of the wetland but the entire watershed in which the wetland exists.[728] Ultimately, DES did not require Applicant to assess wetlands outside of either the existing right-of-way or the proposed new right-of-way, despite DES' initial concern about Applicant not having done so.[729] Applicant's witnesses admit they did not assess every impacted wetland as a whole even though assessing only a portion of wetland complex might not represent the complete set of wetland functions and values for that whole wetland system.[730]

---

[723] SPNF 63, at 7527 (quoting and citing US Army Corps of Engineers New England District, The Highway Methodology Workbook Supplement, September, 1999, at 8).
[724] Tr. 6/20/17, Morning Session, at 43 (Carbonneau).
[725] *Wildlife Habitat by Ecological Condition*, DFLD ABTR 172.
[726] Tr. 12/21/17, Morning Session, at 91 (Lobdell).
[727] *Id.*
[728] SPNF 63, at 7528; *see Supplemental Prefiled Testimony of Raymond Lobdell*, at 4239 (USACE Highway Manual).
[729] Tr. 6/16/17, Afternoon Session, at 41–43; *see also* 5/16/16, *New Hampshire DES Progress Report*, SPNF 48, at 3991 ("It is not clear how the proposed 32 mile new ROW in Coos County avoids surrounding wetlands on a landscape scale when the wetland impact plans only represent wetlands located within the ROW.").
[730] Tr. 6/16/17, Afternoon Session, at 114–15 (Carbonneau).

The decision to not assess the wetlands as a whole complex is a significant flaw in Applicant's and DES' analysis. Wetlands can be a unified system.[731] Therefore, entire wetland systems should be evaluated for impacts, both inside and outside of the right-of-way.[732] Assessing only portions of wetland systems may show wetlands to have less value than if the entire wetland system were evaluated. [733] Thus, Applicant's wetland assessment should have included the entire wetland complex, not just a small portion of the wetland.[734]

For example, a wetland in Lancaster near the Northumberland town line (Wetlands #LC57) is shown to be only 0.3 acres in size and not a high value wetland in Appendix B.[735] However, looking at the revised wetland delineation on the new Project Maps, Wetland #LC57 is in fact part of a several hundred acre wetland complex with high functional values.[736] Beyond knowing that wetlands would be impacted beyond the right-of-way, Applicant has not provided essential information for reviewers to quantify the impact fairly.[737]

Multiple residents with properties that include wetlands that the proposed project would impact testified consistently with the wetland scientists that viewing only the wetlands impacted within the right-of-way did not make sense because they viewed their whole wetlands as part of an integrated system.[738]

Applicant's assessment of wetland values and functions violates the intent of Site 301.03(c)(4), enacted after submission of the application, which requires "identification of wetlands and surface waters of the state within the site, on abutting property with respect to the

[731] Tr. 12/21/17, Morning Session, at 78 (Lobdell).
[732] *Id.* (looking at parcels 9710 and 9709 on APP 201, at 68115 and parcels 21033 and 21041 on APP 200, at 67707).
[733] SPNF 63, at 7528.
[734] *Id.*
[735] *Id.*
[736] *Id.*
[737] Tr. 12/21/17, Morning Session, at 84, 124–25 (Lobdell).
[738] *See* Tr. 12/12/17, Afternoon Session, at 187–89 (Hartnett); *id.* at 51–52 (Berglund).

site, and within 100 feet of the site if such distance extends beyond the boundary of any abutting property, except if and to the extent such identification is not possible due to lack of access to the relevant property and lack of other sources of the information to be identified."

In response to this new requirement, Applicant simply did a desktop review to identify wetland boundaries beyond the right-of-way.[739] Despite some sites being accessible, Applicant did not make additional physical inspections.[740] This was the extent of Applicant's compliance with the new rule. It did not update the wetlands functions and values assessment after supplementing the wetland boundaries per the new rules.[741] Moreover, Applicant did not include any wetland impacts outside of the right-of-way because Applicant simply assumed there would not be any.[742] Applicant also violated the intent of the rules by evaluating wetland functions and values for purposes of mitigation only, and not avoidance and minimization, which Applicant admits is required.[743]

Third, in several locations, Applicant's narrow scope of wetlands evaluation led it to entirely miss certain wetlands.[744] Spot-checking only in Concord, Mr. Van De Poll identified 65,947 square feet of temporary impacts and 760 square feet of permanent impacts that Normandeau missed. The Subcommittee must consider the possibility Applicant made similar errors throughout the entire route.

Fourth, and finally, Applicant created its own form for wetland assessment,[745] which alone is an unremarkable fact; certified wetland scientists commonly do this. What is remarkable

---

[739] Tr. 6/16/17, Afternoon Session, at 115–16 (Carbonneau).
[740] *Id.*
[741] *Id.* at 117 (Carbonneau).
[742] Tr. 6/20/17, Morning Session, at 33 (Carbonneau); Tr. 6/23/17, *Morning Session*, at 95–97 (Carbonneau).
[743] Tr. 6/16/17, Afternoon Session, at 121 (Carbonneau).
[744] Tr. 11/16/17, Afternoon Session, at 50-51 (Van de Poll) ("[O]n the very small sample set that I used in the City of Concord, there were some considerable errors that should give pause to the SEC."); *Pre-Filed Testimony of Rick Van De Poll on Behalf of the City of Concord dated April 17*, 2017, JT MUNI 142, at 6327–28.
[745] Tr. 6/16/17, Afternoon Session, at 123–24 (Carbonneau).

is the form did not collect or document a single rationale, an uncommon omission not supported by the Manual.[746] It is important to always use the rationales the Manual prescribes because "the reason for doing the entire assessment is to determine the functions and values of the wetland you're assessing. And without knowing what those rationales are for determining whether that function or value exists, it's difficult to understand the true value."[747] The standard of practice is to "always" include a place for rationales and to document them.[748]

By not following the standard practice to always include rationales, no one has any information about why it is that the people collecting data determined that any given wetland was suitable for any given function and value because the underlying rationales were not documented.[749] Applicant's witness assumes "it would have included some of those, at least some of those rationales that are in the methodology."[750] No certified wetland scientist could reproduce Normandeau's wetland assessment—[751]reproducibility being a cornerstone of scientific technique.

6. Many of the Temporary and Secondary Wetland Impacts Would Actually Be Permanent Impacts

The proposed project would result in an unreasonable adverse effect to water quality because much of the wetland impacts characterized by Applicant as temporary or secondary would be permanent impacts, for the following five reasons. The result is that Applicant has understated the amount of permanent impacts the proposed project would cause.

---

[746] *Id.*
[747] Tr. 12/21/17, Morning Session, at 89 (Lobdell).
[748] *Id.*, at 129–30; s*ee also* Tr. 11/6/17, Afternoon Session, at 98 (Lew-Smith) (noting that the only circumstances under which he would not always document rationales was on smaller projects and he added that this is not a smaller project).
[749] Tr. 6/16/17, Afternoon Session, at 126 (Carbonneau).
[750] *Id.*
[751] Tr. 6/20/17, Morning Session, at 38–41 (Carbonneau).

First, Applicant has not provided sufficient information to determine whether wetland impacts as a result of road access and staging areas would be permanent. And in the opinion of Mr. Lew-Smith, many of the temporary impacts caused by road crossings and mats would be permanent.[752]

According to Applicant, temporary impacts consist primarily of two ramifications from timber mats: placement of the mats themselves and use of the mats.[753] Although the severity of impact depends on the weight of equipment, frequency of use, type of soil, etc., during cross-examination, Ms. Carbonneau had no information about the weight of equipment,[754] how long the temporary impacts would be in place, or the duration of impact.[755] Applicant could have done much more to specifically identify specific wetland impacts so that these wetland impacts could be reviewed and considered as part of this SEC process.[756]

Second, impacts that Applicant categorizes as temporary could result in conversion of wetland to upland, which is a permanent, direct wetland impact. The EPA stated as much when it wrote:

> While the temporary impacts are not permanent, impacts can be substantial in size and remain long after the fill is removed. The Application states that some of the staging, storage and laydown areas could be as large as 50 acres. For example, soil compaction can greatly alter the movement of surface and groundwater in and near the site of the temporary road or work area. This can result in a change of the wetland type and soil temperature, and in some cases result in a conversion to upland.[757]

[752] Tr. 11/6/17, Afternoon Session, at 93–94 (Lew-Smith).
[753] Tr. 6/16/17, Afternoon Session, at 77 (Carbonneau).
[754] *Id.* at 77–88.
[755] *Id*. at 78–82.
[756] Tr. 11/6/17, Afternoon Session, at 92–93 (Lew-Smith).
[757] SPNF 43, at 3978.

Applicant acknowledged that the federal government assumes some temporary wetland impacts would become permanent.[758]

Further, Applicant's response that if a temporary impact became a permanent impact then DES could simply require further mitigation is untenable because such after-the-fact permitting deprives the SEC of its mandatory statutory duty to determine—prior to approving a proposed project—whether an applicant has met its burden to prove a project would not have unreasonable adverse effects to water quality.[759]

Third, because Applicant has not sufficiently analyzed the impact to wetlands with deep, organic soils, Applicant has not provided enough information to determine whether impacts to these areas would be permanent. The proposed project would impact more than 42 acres of wetland with deep, organic soils.[760] "A deep organic soil wetland implies that there is a substantial amount of organic material that has the possibility of becoming compressed."[761] It is more difficult for these deeply mucky or peaty soils to support heavy loads.[762] Rutting is more likely to occur in a deep organic soil than a solid mineral soil.[763] Dr. Van de Poll testified about instances where he had personally observed permanent wetland impacts resulting from soil compaction.[764] The proposed project's crossing of deep organic soils could crush and destroy

[758] Tr. 6/20/17, Morning Session, at 13–14 (Carbonneau).
[759] *Id.* at 14–15.
[760] Tr. 6/16/17, Afternoon Session, at 90–91 (referencing Table 3, the ARM Fund Calculation Results for the Northern Pass Project by town and Final Compensatory Wetland Mitigation Plan).
[761] Tr. 6/16/17, Afternoon Session, at 85 (Carbonneau).
[762] *Id.* at 86–88; SPNF 63, at 7522 ("Part of what makes deep, organic soils so sensitive is that their peaty, mucky soil can actually be upwards of 20-feet deep."); *id.* ("Also, the longer the mats are in place and the more heavy equipment crosses them, the more wetland impact can occur.").
[763] *Id.* at 89; SPNF 63, at 7522 ("Impacts to these soils can include compaction and rutting which can lead to hydrologic discontinuity within the wetland, changes in water chemistry, and alterations to plant and animal habitat.").
[764] Tr. 12/21/17, Morning Session, at 53–55 (Van de Poll) (for example, despite a mat being placed to install a new utility poll, the wetland soils became rutted, and now those ruts channel water on about a two- or three-percent slope in a fashion that is very different than the scrub-shrub swamp that was there previously); *id.* (also noting that such ruts attract wood frogs to lay eggs in them, but then ruts overheat, dry out and kill the natal population of that individual).

wetland plants; decrease water infiltration; change the wetland flow pattern; and change the grade of a wetland, therefore changing the vegetation that can grow there in the future.[765]

The Applicants also indicate they plan to cross wetlands on frozen ground "as much as possible."[766] If heavy equipment is used on unfrozen sections or during mud season there could be significant, permanent compaction of the organic soils and permanent damage to wetland morphology and functions and values.[767] If this were to occur, these impacts would not temporary, they would be permanent.[768]

Despite acknowledging the heightened risk to wetlands with deep organic soils, Applicant provided nothing more specific than the mere notation of the number of acres of impacts to deep organic soils per municipality.[769] Applicant performed no field-mapping of deep organic soils.[770] Instead, Normandeau used field observations to help identify them.[771] But, these field observations were done as part of delineating the edge of the wetland, and did not include the information used to identify deep organic soils as opposed to other wetland soils.[772]

In addition to field observation, Applicant primarily used a nationwide database of soil data gathered by federal employees or contractors, called the Soil Conservation Service or the US Department of Agriculture Natural Resources Conservation Service Web Soil Survey.[773] Ms. Carbonneau never participated in Web Soil Survey mapping and, therefore, has no personal

---

[765] Tr. 6/16/17, Afternoon Session, at 88–89 (Carbonneau); SPNF 63, at 7522 ("Disturbed wetlands with organic soil are not easily restored and severe soil disturbance may permanently alter wetland hydrology."). These risks may be even greater because little is known of the depth or type of organic matter, depth or type of existing root mat, soil compatibility, underlying mineral soils, or hydrology. *Id.* at 7522–23.
[766] SPNF 63, at 7523.
[767] *Id.*
[768] *Id.* at 11-12.
[769] Tr. 6/16/17, Afternoon Session, at 93–94 (Carbonneau); App Ex 1, at Appx. 31, at 21162 (third column is the temporary impacts to deep organic soils per particular segment of the line).
[770] Tr. 6/16/17, Afternoon Session, at 91 (Carbonneau).
[771] *Id.*
[772] *Id.*, at 95–96.
[773] *Id.* at 91–92; *see, e.g.*, *USDA-NRCS Coos County Soil Survey*, SPNF 197.

knowledge as it relates to the proposed project about whether all organic soils are identified in it.[774] As such, Ms. Carbonneau admits that the Web Soil Survey, and by extension to Applicant, could have missed deep organic soils.[775] Ms. Carbonneau did not provide enough information by relying upon county soil surveys because their scale (1 inch equals 2,000-foot) is too large to show small wetlands or small hydric soil mapping units.[776] For example, different types of wetland or other soils could be grouped together in a way that did not indicate that wetland soils were present.[777]

Moreover, Applicant deliberately chose not to do site-specific field work to identify deep organic soils[778] despite the fact that Alteration of Terrain permitting requires exactly that.[779] Applicant sought and received from DES a waiver from this requirement within the overhead right-of-way[780] and only did field work to identify deep organic soils where it deemed a "considerable amount of actual construction activity would take place"[781] which appears to be only at the Deerfield substation.[782] The DES waiver leaves unknown a degree of impact that must count against Applicant's burden.

Fourth, Applicant has wrongfully and inappropriately limited what it determines to be permanent impacts to those instances where the wetland would cease to exist as a wetland. Applicant claims that even a "permanent change" is not a permanent impact if a wetland is converted to a different type of wetland and is never going to revert to its original condition.[783]

---

[774] Tr. 6/16/17, Afternoon Session, at 92 (Carbonneau).
[775] *Id.* at 92–93.
[776] Tr. 12/21/17, Morning Session, at 92–93 (Lobdell).
[777] *Id.* at 93.
[778] Tr. 6/16/17, Afternoon Session, at 94–95 (Carbonneau).
[779] *Id.*
[780] Tr. 12/21/17, Morning Session, at 93–94, 125 (Lobdell).
[781] *Id.*
[782] Tr. 6/16/17, Afternoon Session, at 98.
[783] *Id.* at 104–05.

Contrary to Applicant's position, multiple witnesses testified that permanent changes to a wetland's functions and values are a permanent impact to wetlands.[784] The following colloquy illustrates Applicant's extremely narrow interpretation of permanency, resulting from counting far fewer permanent impacts than would actually result from the proposed project:

> Q: … On Day 16, in the Morning Session, 24 Page 92, Mr. Magee testified that even if the project impacted a hundred percent of the wild lupine, it would not be unreasonable because the impact is temporary. Can one of you address Mr. Magee's characterization of the impact to the wild lupine would be entirely "temporary"?
>
> A (Lew-Smith): Yeah, it's been a little confusing, I think, with the temporary versus permanent impacts. And from what I gathered, what they're talking about is actual -- the permanent impact is something where you're taking away habitat, all right. You put a pole there, and where the pole is there's no more habitat. And a temporary impact is, you know, a work area. So those permanent and temporary impacts are really a description of the construction activity; it's not a description of the impact on the resource. And I feel like, by design or not, the Applicant has used those interchangeably, okay: If I run a bulldozer over a patch of lupine plants and it churns them all up and kills them, I'm calling that temporary impact, right, because I'm not paving it, I'm not putting a pole there.
>
> They're calling it a temporary impact because they're saying, well, it will grow back probably, right. To me, that's not an accurate description of the actual impact we're talking about, okay. If you have -- if you run bulldozer over lupine plants and it kills those plants, that's a permanent impact on those plants. Now, it's true that they may grow back, okay, from their underground roots. But there hasn't been any studies on that. They haven't supported that with any detailed plans. *So, really, those are permanent impacts.*[785]

[784] Tr. 12/21/17, Morning Session, at 126 (Lobdell); *see also* Tr. 11/16/17, *Afternoon Session*, at 39–40 (Van de Poll); *Pre-Filed Testimony of Rick Van de Poll on Behalf of the City of Concord dated December 30, 2016*, JTMUNI 141, at 6320–21. These permanent changes Applicant categorizes as temporary are not mere possibilities but are likely to occur with the type of work proposed. For example, at Turtle Pond in Concord, in connection with replacement of a utility pole, the witness observed subsequent loss of soil integrity, including deep grooves and changes which would alter the hydrology such that a state watch species, *carex haydenii (*Hayden's sedge), would not return. Tr. 11/16/17, Afternoon Session, at 41–42 (Van de Poll); JTMUNI 141, at 6318–21 (discussing concerns associated with and examples of permanent changes resulting from impacts Applicant deems temporary).

[785] Tr. 11/6/17, Afternoon Session, at 74–76 (Lew-Smith) (emphasis added).

Applicant similarly misidentified what would actually be permanent impacts as secondary. The proposed project would have 180 acres of secondary impacts.[786] Applicant characterizes the following as secondary impacts: 1) deep organic soil that may not rebound fully from the placement of a timber mat and construction vehicles in the event that that happened during a time when the ground was not frozen; 2) removal of tree canopy from forested wetland which converts the wetland from a forested wetland to either a shrub wetland or an emergent wetland that is not a loss of wetland area, but it is a change in the type of wetland it is, and, therefore, a change in the way the wetland functions; and 3) cutting of tree canopy within buffer zones of streams and vernal pools.[787] The vast majority of secondary impacts would be located in the proposed new right-of-way because that is where most of tree clearing would occur.

Applicant would address secondary impacts by a combination of restoration and compensatory mitigation. For restoration, Applicant would replant along streams where trees were removed, but would replant only low woody vegetation, not trees, because it would be a right-of-way.[788] Here again, because the secondary impacts would result in permanent changes to wetland functions and values, they would be permanent wetland impacts.

It is a gross omission for Applicant not to have counted as permanent impacts changes to wetland functions and values.

Fifth, and finally, Applicant categorized an impact as temporary without taking into consideration the fact that Applicant may need to impact the wetland again for maintenance, line or structure repair, or decommissioning in the future.[789]

---

[786] Tr. 6/16/17, Morning Session, at 48 (Carbonneau).
[787] Tr. 6/16/17, Afternoon Session, at 104 (Carbonneau); *see also* Tr. 6/16/17, *Morning Session*, at 48–49. The federal government—not DES—regulates secondary impacts. *Id.* at 48; *see also* Tr. 6/16/17, *Afternoon Session*, at 106.
[788] Tr. 6/16/17, Morning Session, at 49.
[789] Tr. 6/20/17, Morning Session, at 7–8.

7. The Proposed Project Would Have Unreasonable Adverse Impact to Vernal Pools

The proposed project would have an unreasonable adverse effect on vernal pools, in the opinions of both Mr. Lobdell and Mr. Lew-Smith. In the opinion of Mr. Lew-Smith, the proposed project would have an unreasonable adverse effect on vernal pools because not all measures were taken to avoid and minimize impacts to that resource.[790] "The data collection methodology used for vernal pools appears to be sufficient in terms of type of data collected, amount of data and time of year. However, the ranking protocol for determining quality of the pools was an inappropriate methodology and was inconsistently applied. This has resulted in a lack of reliable data."[791] For similar reasons, Mr. Lobdell opined that "[t]he project as proposed would have unreasonably adverse impacts to wetlands,"[792] which include vernal pools.[793]

8. Applicant's Proposed Restoration Plan for Impacted Wetlands is Inadequate

In short, Applicant's restoration plan is woefully inadequate; DES erred in recommending approval of permits based on Applicant's restoration plan.[794] The written plan is a four-page set of notes that are general in nature and meant to apply to all 800 restoration

[790] Tr. 11/6/17, Afternoon Session, at 86 (Lew-Smith).
[791] *Id.* (quoting CFP 136, at 3535); *see also supra* Part III.A.5 (for discussion of wetlands, generally).
[792] SPNF 63, at 7516–17.
[793] Mr. Lobdell uses "wetlands" as an umbrella term that includes vernal pools. *See* SPNF 63, at 7579 ("The proposed project would fill 2.53 acres of wetlands, including 4 vernal pools...").
[794] Applicant represented the restoration plan in wildly inconsistent ways. On the one hand, Applicant admits its restoration would merely set the stage for wetland functions to come back, which means stabilizing disturbed soils, regrading, and putting in seed mixes that are native but not designed in any way to match the vegetation at any specific wetland. On the other hand, Applicant claims that it would restore the wetlands, to the extent possible, so that the existing functions and values would remain, and would use a developed mitigation plan for any residual long-term permanent impacts. Applicant's evidence makes clear the restoration plan is limited to the former—merely setting the stage in hopes that all wetland functions and values will return. Tr. 6/16/17, Morning Session, at 46–48 (Carbonneau); Tr. 6/20/17, Morning Session, at 6–7 (Carbonneau). Applicant also admits the planting of native seeds would occur only "if revegetation is not going to happen clearly immediately based on just removal of a timber mat, for example." *Id.* at 7.

sites.[795] Applicant admits that this is the primary document specifying what Applicant would do on the restoration sites, yet it details no plans specific to any given site.[796]

First, Applicant has not provided the information necessary to actually restore wetlands to what they would have been prior to impact. Applicant has provided no site specific restoration plans, existing conditions plans, existing elevations, no existing soils, no existing hydrology,[797] no photos of existing conditions, no identification of existing vegetation,[798] no site-specific recommendations for seed mixing[799] no site-specific information about which deep, organic soils would rebound,[800] no site-specific information on the seasonality or the duration of the impact,[801] and no site-specific restoration plan sheet for each of the 800 restoration sites.[802] In the face of these omissions, Applicant claims the proposed project contractors would be well-enough equipped to perform restoration because, along with the four-page set of generic restoration notes and the proposed project's overall plan set, contractors would also have an unidentified "very large set of notes."[803]

Not providing existing conditions of a wetland to have a baseline for restoration and mitigation is not customary or typical in the field of wetland science.[804] Without these existing

[795] *See* APP 62, at 35059–61; SPNF 63, at 7525 (Applicant has not provided detailed information on the over 800 wetland restoration sites).
[796] Tr. 6/20/17, Morning Session, at 25 (Carbonneau); SPNF 63, at ("The restoration plan submitted provides no site by site existing conditions information that would be important for not only restoration, but also to minimize impacts during layout and construction.").
[797] Tr. 12/21/17, Morning Session, at 94 (Lobdell).
[798] Tr. 6/20/17, Morning Session, at 20–22 (Carbonneau). Note also that Attorney Walker chided Dr. Van de Poll for not submitting photos to the Subcommittee. Tr. 12/21/17, Morning Session, at 16 (Walker).
[799] Tr. 6/20/17, Morning Session, at 13 (Carbonneau).
[800] *Id.* at 11–12.
[801] *Id.* at 12–13.
[802] *Id.* at 11–13, 15–16, 19–20 (plan sheets). Despite a request from DES for detailed restoration planting plans for temporary wetland stream and vernal pool impact areas, Applicant did not even prepare one single plan sheet for restoration. Tr. 6/20/17, Morning Session, at 19-20.
[803] *Id.* at 24–25 (Carbonneau).
[804] Tr. 11/16/17, Afternoon Session, at 211–12 (Van de Poll).

features, restoration cannot possibly restore the conditions to what they were originally; it needs to be known what the conditions looked like before.[805]

Second, many of Applicant's wetlands maps lack best management practices, preventing Intervenors from evaluating whether they would be adequate.[806] Applicant's apparent position is the Subcommittee would be able to evaluate the sufficiency of restoration plans for each impacted wetland because the proposed project's overall plans merely note the location of wetlands that would be impacted.[807]

Third, the proposed restoration plan has numerous other flaws. For example, the restoration plan calls for planting stakes[808] at either a 100-per-acre or 500-per-acre frequency depending on the type of soil, even though the USDA NRCS Engineering Field Handbook recommends an approximate frequency of 4,800 stakes per acre (2 to 3 foot spacing).[809] Another example is that if after removing mats or gravel/fabric wetland crossings do not rebound and depressions remain, Applicant states that "[i]n the event that additional soil is needed to meet grades (in restored wetlands) commercially acquired topsoil or salvaged wetland topsoil will be evaluated for project use."[810] This would be a "fill" and would amount to a permanent wetland impact, completely counterproductive to restoration objectives.[811]

[805] Tr. 12/21/17, Morning Session, at 95 (Lobdell) ("Well, I'm not sure how you can tell a site has been restored to the pre-existing conditions if you don't know what the conditions are before you start."); SPNF 63, at 7525.
[806] *See, e.g.*, Tr. 10/23/17, Morning Session, at 123–26 (Zysk).
[807] Tr. 6/20/17, Morning Session, at 20 (Carbonneau).
[808] Dormant woody cutting of live vegetative material typically used in wetland restoration.
[809] Tr. 6/20/17, Morning Session, at 27–31 (Carbonneau); *Applicant's Response to DES Request for Wetlands and Shoreland Information 1/25/17*, APP 74, at 44409 (reference to 100-per-acre frequency); APP 62, at 35059 (reference to 500-per-acre frequency).
[810] SPNF 63, at 7524–25.
[811] *Id.* at 7525.

Fourth, even if the restoration proceeds as Applicant claims, the wetlands laws DES would be enforcing allow up to 25% of an area that had wetland vegetation before being impacted to go without being successfully restored.[812]

Fifth, and finally, it is not enough to simply condition approval upon Applicant submitting site-specific restoration plans.[813] Providing all of the omitted information "should have been done by now in order to assess, *to truly assess* the impacts."[814] It is very difficult to restore the 42 acres that Ms. Carbonneau described as very poorly drained, organic soils, which can compress very easily and are very sensitive and can be impacted, and that "has a great deal to do with whether the Project is approvable with the existing route."[815]

In sum, the proposed project would have an unreasonable adverse effect on water quality, including on wetlands, including vernal pools.

B. The Proposed Project Would Have Unreasonable Adverse Effects to the Natural Environment

Applicant not satisfied its evidentiary burden of proof, here again, putting the Subcommittee in a position where it lacks the full and complete disclosure necessary to fairly and adequately evaluate the proposed project.[816]

---

[812] Tr. 6/20/17, Morning Session, at 35–37 (Applicant admits that even though there will be occasional monitoring by maintenance crew after the three-year time period for monitoring rehabilitation, there will not be site-specific monitoring for the purpose of determining if vegetation cover has remained at 75 percent).
[813] Tr. 12/21/17, Morning Session, at 120 (Lobdell).
[814] *Id.* (emphasis added).
[815] *Id.* Also note that the actual extent of impact is not known since the 42 acres is the Applicant's estimate and not based on actual delineation of organic or very poorly drained soils in the field, but on information from the county soil surveys which are only general in nature. SPNF 63, at 7522–23.
[816] For the most part, the Forest Society relies on others to discuss the technical details of flora and fauna, and the natural environment. Here, we simply identify the application's voids and discuss forest fragmentation.

1. Applicant Provided Inadequate Information on Flora and Fauna Throughout Entire Impacted Area

Applicant has not provided sufficient information concerning impacts to flora and fauna throughout the impacted areas. Aside from the Karner Blue Butterfly, Applicant did not provide individual counts or specific restoration plans for rare plant and insect species.[817] Applicant also did not provide numerous other types of information, including: 1) an inventory or best management practice or avoidance practices for multiple species of impacted bats, including the northern long-eared bat and the small-footed bat,[818] 2) details of the required predetermined buffer area to protect common nighthawks,[819] 3) details of the survey that would be conducted to identify suitable denning habitat to protect the Canadian lynx,[820] 4) avoidance and minimization measures for the American marten,[821] 5) modeling for the right-of-way within the entire range of the whorled pogonia,[822] 6) assessment of the impact to avian species that use water (water fowl, loons, herons) in locations of the proposed project that would cross rivers or other water bodies and/or would be located in river valleys,[823] 7) an agreement with a Pembroke landowner to shift the construction access route across the right-of-way to protect the licorice goldenrod

[817] *See* Tr. 6/14/17, Morning Session, at 151–54 (Carbonneau; Magee) (admitting Applicant did not conduct a study determine the exact decrease in the populations of rare insects and plants within the right-of-way, aside from Karner Blue and Lupine).
[818] Tr. 6/14/17, Afternoon Session, at 20, 25, 43–44 (Barnum); Tr. 6/26/17, Morning Session, at 35–37.
[819] 11/6/17, Afternoon Session, at 69–70 (Parsons). Applicant's witnesses suggest Normandeau and New Hampshire Fish & Game would determine it at a later date, which makes it "really hard" for the Subcommittee and others, to determine that the protection for the common nighthawk is sufficient. *Id.* at 70. Also of note, Dr. Barnum agreed that "the Best Management Practice is going to be to wait until we have a lot of dead birds." *Id.* at 150; *see also id.* at 109.
[820] *Id.* at 70–71(because of the lack of detail it is possible that the survey itself could "cause disruption in the breeding and denning of the lynx itself").
[821] *Id.* at 72.
[822] *Id.* at 81(Lew-Smith).
[823] *Id.* at 149–50 (Parsons). Of note, Mr. Parsons testified that the Applicant's approach to avoidance of avian collisions "didn't pass the smell test to us." *Id.* at 151 (Parsons).

population,[824] or 8) sufficient information about the frosted elfin butterfly[825] or other butterflies.[826]

The purposes of RSA 162-H:1 cannot be achieved if the Subcommittee lacks this much critical information about the impacts to the natural environment.

2. The Proposed Project would Result in Unreasonable Adverse Effects on the Natural Environment

The proposed project would result in an unreasonable adverse effect on the natural environment in several ways, including with respect to fragmentation and other piecemeal impacts.

Due to the proposed project's immense scale and scope, it would result in exactly the type of fragmented development Applicant's own witnesses acknowledge is the biggest threat to New Hampshire's natural environment. The proposed project proposes to permanently cut in two the biggest remaining block of relatively intact forest landscape in all of New Hampshire,[827] clearing a 120-feet wide swath along 32 miles of proposed new right-of-way.[828]

When asked to consider the greatest threats to the environment and the species of New Hampshire, three of Applicant's witnesses said piecemeal impacts from development.[829] Later in the hearing, Applicant's witness described the project's impacts in a way that makes clear the

[824] Tr. 11/7/17, Morning Session, at 67 (Parsons); *see also id.* at 30 (Lew-Smith).
[825] Tr. 11/16/17, Afternoon Session, at 38 (Van de Poll) (citing JTMUNI 142). "We just don't know. And we don't know how it differs from the Karner Blue in terms of choosing which subpopulation of wild lupine to lay its eggs on. So, we're really kind of in the dark with this species." *Id.*
[826] *Id.*
[827] Tr. 11/7/17, Afternoon Session, at 56 (Publicover) ("This will be the largest permanent fragmenting feature within the largest relatively unfragmented block of forest in the State of New Hampshire.").
[828] Tr. 5/3/17, Afternoon Session, at 140 (Bradstreet); Tr. 11/7/17, Afternoon Session, at 56 (Publicover).
[829] Tr. 6/20/17, Afternoon Session, at 121–22 (Magee) ("I guess from the standpoint of plant species, it's probably, I've got to think, about development overall and loss of habitat piecemeal here and there and everywhere and because of everything, yeah."); *id.* (Carbonneau) ("I think I would agree that development often results in loss of habitat."); *id*. (Barnum) ("I agree with Lee and Dennis. The development and just general, bit by bit by bit loss of habitat is probably the greatest threat.").

impacts would amount to exactly the piecemeal impacts that so threaten New Hampshire.[830] Aside from transition Stations 1 and 5, "[a]ll of the rest of the permanent impacts are scattered in very small increments along the entire right-of-way."[831] "For temporary impacts, there are very small chunks here and there, and then there are a few very large wetlands that we just can't find a way to get around."[832]

The piecemeal adverse effects that the proposed project would have in the natural environment, including the forest fragmentation effects, would be unreasonable.

IV. Issuance of a Certificate Would Not Serve the Public Interest

Balancing the unreasonable adverse effects and undue interference the proposed project would cause against the purported benefits demonstrates the proposed project would not serve the public interest.

A. The Subcommittee Should Balance Potential Impacts and Potential Benefits of the Proposed Project with the Purposes and Objectives of RSA 162-H:1 to Ensure that "Issuance of a Certificate will Serve the Public Interest."

More so than prior cases, this cases raises the question of what type of analysis RSA 162-H:16, IV(e) requires. The public interest standard of RSA 162-H:16, IV(e) requires the Subcommittee to determine if issuance of the certificate would serve the public interest by

[830] Tr. 6/20/17, Afternoon Session, at 125–26 (Carbonneau).
[831] *Id.* at 125.
[832] *Id.* at 127.

balancing the adverse impacts and benefits the proposed project would have with the purposes and objectives of RSA 162-H:1.[833]

Rather than a balancing test, Applicant asserts that so long as it has met its burden of proof for all the other standards in RSA 162-H: 16, IV(a) through (c), the Subcommittee shall find the proposed project would serve the public interest if it would provide benefits. In Applicant's interpretation, however, the benefits, would not be balanced against impacts.[834] Applicant's interpretation amounts to nothing more than box-checking exercise. Such interpretation is inconsistent with the plain language of the statute and requires a selective reading of the legislative history, case law, and past SEC decisions.

1. Plain language of RSA 162-H Requires a Balance of Benefits and Impacts

RSA 162-H requires the Subcommittee to balance impacts and benefits the proposed project would have. Statutes must be interpreted "not in isolation, but in the context of the overall statutory scheme [and the] analysis must start with consideration of the plain meaning of the relevant statutes, construing them, where reasonably possible, to effectuate their underlying policies."[835] RSA 162-H:16, IV (e) provided in pertinent part:

> [a]fter due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits, the site evaluation committee shall determine if issuance of a certificate will serve the objectives of this

[833]In addition to the arguments made in this section, the Forest Society respectfully suggests the Subcommittee consider again the arguments in the following motions and/or objections concerning the scope of the public interest standard, which arguments are hereby incorporated by reference and are only summarized in this memorandum: *Joint Pre-Hearing Motion of the Society for the Protection of New Hampshire Forests and the Grafton County Commissioners to Clarify that all Tracks Include Evidence Relevant to "Public Interest"* (4/24/17); *Counsel for the Public's Objection to Applicants' Motion for Clarification and/or Rehearing Order on Motion to Strike Forward NH Plan* (7/6/17); *Objection of the Society for the Protection of New Hampshire Forests to the Applicants' Motion for Clarification and/or Rehearing of Order on Motion to Strike Forward NH Plan* (7/6/17).
[834] *Motion for Clarification and/or Rehearing Order on Motion to Strike Forward NH Plan*, ¶ 34 (6/26/17).
[835] *Appeal of N.H. Right to Life*, 166 N.H. 208, 211 (2014) (quotation omitted).

> chapter. In order to issue a certificate, the committee shall find that . . . [i]ssuance of a certificate will serve the public interest.

RSA 162-H:16, IV, specifically links the four factors of section IV with the objectives of the chapter, which are found in RSA 162-H:1. In pertinent part, RSA 162-H:1 states, "[a]ccordingly, the legislature finds that it is in the *public interest* to maintain a *balance* among those potential significant impacts and benefits in decisions about the siting, construction, and operation of energy facilities in New Hampshire." Reading this language together, RSA 162-H plainly requires the Subcommittee to consider both impacts and benefits, in connection with its determinations pursuant to RSA 162-H:16, IV.

The rule interpreting this directive, Site 301.16, "Criteria Relative to Finding a Public Interest," recognizes the link between RSA 162-H:1 and RSA 162-H16, IV. That rule includes criteria that mirror considerations present in the subsections of (a), (b), and (c) and the objectives of RSA 162:H-1, stating: "[i]n determining whether a proposed energy facility will serve the public interest, the committee shall consider: (a) the welfare of the population; (b) private property; (c) the location and growth of industry; (d) the overall economic growth of the state; (e) the environment of the state; (f) historic sites; (g) aesthetics; (h) air and water quality; (i) the use of natural resources; and (j) public health and safety."[836]

The plain language of both the enabling statue and implementing regulation require the Subcommittee to do much more than simply assume that any project which can satisfy the criteria in RSA 162-H:16, IV(a)-(c) would serve the public interest.[837] The Subcommittee must look for something akin to the greater good and consistency with the purposes of this chapter.[838]

---

[836] N.H. CODE ADMIN. RULES, Site 301.16.
[837] The legislature surely knew how to create a rebuttable presumption of public interest if it wanted to. *See e.g.* RSA 38:3. It did not do so here.
[838] *See also Browning-Ferris Indus. v. PUC*, 116 N.H. 261, 262 (1976) (giving "public interest" a broad interpretation).

2. Legislative History Demonstrates that the Legislature Intended the Public Interest Finding Entail Consideration and Balance of Impacts and Benefits of a Proposed Project

Assuming for the sake of argument the plain language is not unambiguous, and therefore there is need to turn to legislative history[839] that too demonstrates that lawmakers intended the public interest findings to entail a comprehensive consideration and balance impacts and benefits of a proposed project. Counsel for the Public's redlined excerpts of the 2014 amendments to RSA 162-H:1 and RSA 162-H:16, IV included in its above-footnoted Objection[840] reveal an intended coupling of RSA 162-H:1 and RSA 162-H:16, IV and a balancing of impacts and benefits to ensure that the issuance of a certificate would serve the public interest.

That same Objection also included an exhaustive account of the evolution of legislative amendments to RSA 162-H:1 and RSA 162-H:16, IV. Most notably, the Objection includes the following excerpt of the only "official" statement on the public interest issue by the chief sponsor of the amendments, Sen. Forrester:

> [t]he "amended bill mandates that the SEC make a finding that a proposed project serves the public interest, **after considering all environmental, social, and economic impacts and benefits**. Senator Forrester explained that "***[t]his is a workable, common-sense requirement that recognizes that,*** even in a restructured energy market, ***all major energy projects should provide a strong package of public benefits*** — whether for our natural resources, for ratepayers and businesses, for public health, or for the state's economy, or for all of the above — ***and that these benefits must be weighed against the projects' potential adverse impacts***. Other states, including Maine and Vermont, have such a requirement, ***ensuring that the greater good of the state and its communities is weighed as part of every siting decision***.[841]

[839] *See State Employees' Ass'n of NH, Inc. v. State*, 127 N.H. 565, 568 (1986).
[840] *Counsel for the Public's Objection to Applicants' Motion for Clarification and/or Rehearing Order on Motion to Strike Forward NH Plan* (7/6/17).
[841] *Counsel for the Public's Objection to Applicants' Motion for Clarification and/or Rehearing Order on Motion to Strike Forward NH Plan*, at 15–16 (7/6/17) (emphasis in original) (exhibit references omitted).

The Forest Society's above-footnoted[842] Objection includes a summary of the legislative history for the administrative rulemaking process. This history also supports the interpretation of the public interest standard as a requirement to balance the impacts and benefits. In a letter from Senator Forrester, dated 11/16/16, to the SEC Chair, Senator Forrester explained that it would be a misreading of the full legislative history to read the amendment of subsection (e) to its current trim form to be a rejection of a "net benefit" determination.

In short, the Subcommittee cannot, as Applicant has urged throughout this proceeding, satisfy RSA 162-H:16, IV(e) by finding that Applicant has satisfied RSA 162-H:16, IV(a) through (c) and then simply checking to make sure Applicant has offered some benefit along with its proposal. It must, as guided by Site 301.16 and RSA 162-H:16, IV, balance the potential impacts and benefits to ensure the needs of the public at large are being met.[843]

B. The Proposed Project Would Not Serve the Public Interest

As noted, this standard requires the Subcommittee to balance the abundant adverse effects and risks discussed in the preceding sections of this memorandum (and others briefed by other parties) with the purported benefits of the proposed project.[844] Here, Applicant offers only limited benefits, most of which are uncertain and short-term in duration, in exchange for a permanent and pervasive scar across the northern two-thirds of the state, a scar with wide-reaching adverse effects. While the rules do indeed envision a factor-by-factor balancing test, the Subcommittee should note, as the legislative history shows, the point of this test is to give the Subcommittee a chance to step back and simply ask if granting the application would really

[842] *See id.*
[843] *Browning-Ferris Indus.*, 116 N.H. at 262.
[844] In the event the Subcommittee accepts Applicant's erroneous interpretation of the public interest standard, the Forest Society respectfully requests the Subcommittee consider the arguments made in this subsection as part of its analysis of all criteria, including the public interest standard.

serve the purposes found in RSA 162-H:1 and meet the needs of the public, as well as those of Applicant. For the six reasons discussed in the subsequent questions, the answer is no—the proposed project would not serve the public interest.

1. Adverse Effects Noted Above (Reasonable or Not) Should be Considered

As noted, several of the criteria in Site 301.16 share similarities with the standards set forth in RSA 162-H:16, IV(a) through (c). But, the standards of Site 301.16 are not as limited as the standards they mirror but, instead, reflect the broad purpose of RSA 162-H:1. Therefore, the Subcommittee should consider each of the ten criteria free from the silos of the other standards. With such an approach, it is near impossible to ignore the enormous, pervasive, and permanent adverse effects, risks, and undue interference the proposed project would have, as discussed in the preceding sections of this memorandum. When considering those adverse effects and undue interference in connection with the welfare of the population, private property, location and growth of industry, overall economic growth of the state, environment of the state; historic sites, aesthetics, air and water quality, use of natural resources, and public health and safety, and then balancing that against the meager purported benefits, the scale is weighed heavily on the side of finding the proposed project would not serve the public interest.

2. Applicant's "Establishment" of "Prescriptive Rights" Would Not Serve the Public Interest

In connection with its required consideration of property rights, the Subcommittee should conclude Applicant's self-made plan for purported prescriptive rights would not serve the public interest.

Applicant has experienced difficulty establishing the boundary of DOT's right-of-way. Applicant first went "back and re-looked at the archives and historical things to make sure we've

got all of the appropriate documentation. We have worked with the DOT to get the commissioner's return of layouts which prescribe, you know, metes and bounds of a lot of the roads that we're on."[845] If a location did not have enough information "either by the commissioner's return or historic layouts," Applicant stated that it would "have to establish the right-of-way through prescriptive rights."[846]

To "establish" the so-called "prescriptive rights," Applicant would have its representatives use their "survey expertise to identify the areas of use and occupancy," which would typically be the lanes of the road itself, shoulders, drainage ditches, or any kind of physical evidence that would describe the use and occupancy of the road.[847] Having identified what they perceive to be the area of "use and occupancy," Applicant would "set that as our boundary."[848] At no point did Applicant suggest that it plans to ask DOT to make any particular approval of where Applicant has set the boundary of so-called "prescriptive rights."[849] Rather, Applicant would note such boundaries on the survey yet to completed, and DOT's overall review and consideration of the entire survey would presumably include consideration of the so-called "prescriptive rights."[850]

The DOT, like the SEC, does not have jurisdiction to adjudicate property rights. "[A]s a general rule, since actions involving a claim to an easement by prescription require a determination of ownership and possessory rights to realty, the state court with jurisdiction to

[845] Tr. 9/29/17, Morning Session, at 10 (Johnson).
[846] *Id.*
[847] *Id.* at 112–13.
[848] *Id.* at 113.
[849] *Id.*
[850] Tr. 9/29/17, Morning Session, at 115-16 (Johnson).

determine title to the property where the claimed easement is located will be the appropriate forum."[851] In New Hampshire, that is the superior courts.[852]

As such, DOT does not have subject matter jurisdiction to determine property rights in the absence of any other provision for granting such jurisdiction.[853] Applicant has provided no support for the proposition that DOT would have such jurisdiction.

Nowhere in DOT's statutory authorizations does the legislature transfer any jurisdiction over property rights determinations from the superior courts to the DOT. And nothing authorizes this Subcommittee to delegate to the DOT the authority to determine property rights.[854]

Additionally, it would DOT itself that would have standing to bring such a claim—not Applicant. Neither DOT nor Applicant could meet the elements of a prescriptive easement through the proposed procedure. "To establish a prescriptive easement, the claimant must prove by a balance of probabilities twenty years' adverse, continuous, uninterrupted use of the land claimed in such a manner as to give notice to the record owner that an adverse claim was being made to it."[855] Even one of Counsel for the Public's witnesses, Mr. Taylor, acknowledged that an essential element to prescriptive rights is use and occupancy for a certain amount of time.[856] Existence of road features today does not automatically mean right-of-way rights; those features

[851] *Gordon v. Town of Rye*, 162 N.H. 144, 152 (2011) (citing Larsson, Causes of Action to Establish Private Easement by Prescription, 42 COA2d 111, 217 (2009)).
[852] See *Radkay v. Confalone*, 133 N.H. 294, 297 (1990) ("[t]he legislature has specifically provided that declaratory judgment actions can be brought in superior court by parties faced with adverse claims to an interest in real property"); *see also* RSA 491:22, I (2010) ("any person claiming a present legal or equitable right or title may maintain a petition [in the superior court] against any person claiming adversely to such right or title to determine the question as between the parties").
[853] *Gordon*, 162 N.H. at 152; *cf. Gray v. Seidel*, 143 N.H. 327, 330 (1990) (court declined jurisdiction when it found the legislature had empowered the State Wetlands Board and city councils to regulate private property rights related to docks.).
[854] *Campaign for Ratepayers' Rights*, 162 N.H. 245, 255 (2011).
[855] *Jesurum v. WBTSCC Ltd. P'ship*, 169 N.H. 469, 476 (2016).
[856] Tr. 10/23/17, Afternoon Session, at 69 (Taylor) (stating "if an area of land has been used for a certain time period").

must have been an "adverse, continuous, [and] uninterrupted use" over the twenty-year period.[857] Road features that exist today may not have been in place for the requisite 20 years, and Applicant simply observing the current presence of road features does nothing to determine the duration or nature of their existence.

DOT would have the burden to produce in superior court on a parcel by parcel basis "evidence of acts of such a character that they create an inference of non-permissive use"[858] and "[t]he burden of persuasion remains at all times on the [claimant]."[859] Without evidence that each specific road feature in an undocumented section of possible right-of-way has existed in its current location for twenty or more years, and in a sufficiently adverse, continuous, uninterrupted way, DOT could not establish a prescriptive property right of any kind.

Moreover, if DOT were to determine that portions of the right-of-way were obtained by prescriptive rights, such determination would come too close to an exercise of eminent domain, which, as noted, lawmakers specifically deprived Applicant of with the amendment to RSA 371:1.[860]

Applicant's only avenue to determine unascertainable portions of the right-of-way boundary is through superior court actions against potentially scores of individual property owners. Because of this, Applicant's proposal to use so-called "prescriptive rights" to simply self-declare the boundary based on what can be seen today cannot support a finding that the proposed project would serve the public interest, in particular with respect to private property rights.

---

[857] *See Jesurum*, 169 N.H. at476.
[858] *Bonardi v. Kazmirchuk*, 146 N.H. 640, 643 (2001).
[859] *Id.*
[860] RSA 371:1 ("No public utility may petition for permission to take private land or property rights for the construction or operation of an electric generating plant or an electric transmission project not eligible for regional cost allocation, for either local or regional transmission tariffs, by ISO – New England or its successor regional system operator.").

3. The Proposed Project Would Adversely Impact Forest Society's Private Property, Much of Which is Publically Accessible Conservation Land

a. Kauffman Forest

In the portion of the right-of-way that runs through Kauffmann Forest, owned by the Forest Society, currently the existing 115 kV line is located such that in extreme weather events, trees in the Kauffmann Forest falling into the right-of way would not likely reach the line, and vice versa, towers falling would likely land only in the right-of-way.[861] This section of the right-of-way is only 150-feet wide and in addition to the 115 kV line, also has an underground natural gas pipeline colocated in the right-of-way.[862] If the proposed project were built extreme weather events "would cause extensive tree damage in this area as well."[863] The "most likely scenario would be trees falling onto the right-of-way, taking the conductors down and then pulling structures in the same direction as the conductors."[864] There "would be probably widespread damage to the Kauffmann Forest …"[865]

In addition to considering this issue in connection to private property, the Forest Society notes its relevance to the public safety standard, both that set forth in RSA 162-H:16, IV(c) and in Site 301.16(j).[866] At the same time, Applicant has submitted no competent evidence on the colocation risks and dangers.

[861] Tr. 5/4/17, Morning Session, at 48–50 (Bradstreet).
[862] *Id.* at 47 (Johnson) (150'); *id.* at 53 (Bradstreet) (colocated gas pipeline).
[863] *Id.* at 51 (Bowes).
[864] *Id.*
[865] *Id.*
[866] *See also* N.H. CODE ADMIN. RULES, Site 301.08(b) (the implementing regulation for public safety portion of RSA 162-H:16, IV(c)).

b. Construction Impacts to Forest Society's Properties

The Forest Society owns land, as part of the Washburn Family Forest, on either side of Route 3 in Clarksville and Pittsburg.[867] Applicant's Project Maps depict the parking lot in this vicinity that the Forest Society maintains for fishing access to the Connecticut River.[868] This area would be subject to lane closures on two-lane Route 3, immediately south of the parking lot, for 4 to 6 weeks[869] or longer. Access to the Forest Society parking lot on Route 3 would be shut down for a period of weeks or months. The Applicants made (but temporarily withdrew) an exception request for the Towns of Pittsburg and Clarksville to install beneath the pavement of Route 3 entry and exit pits for horizontal directional drilling and to install transmission line via horizontal direction drilling under the pavement of Route 3.[870]

The work zone for the entry pits for the horizontal direction drilling at the Connecticut River along Route 3 would be 27 feet wide by 400 feet in length.[871] The work zone for the exit pits for the horizontal direction drilling at the Connecticut River along Route 3 would be 27 feet wide by over 1000 feet in length, on the opposite of the road.[872] A splice vault would also be

[867] SPNF 1, at 6–7; *see also* APP 201, at 67741.
[868] *Id.*
[869] Tr. 10/23/17, Afternoon Session, at 59–60 (Taylor); *see also Group 11 Exception Request 178a*, CFP 548; Tr. 10/23/17, Morning Session, at 11, 14 (Taylor).
[870] CFP 548; *see also* Tr. 10/23/17, Morning Session, at 10–11 (Taylor). Generally speaking, each horizontal direction drilling has the following attributes and requirements:

- two separate bores which require two separate entry pits and two separate exit pits;
- Each of the exit and entry pits is approximately four feet by four feet;
- each of the entry pits must be approximately ten feet apart from each other;
- each of the entry pits requires approximately 30 feet of level clear space for width of the work area;
- each of the exit pits requires approximately 25 feet of level clear space for width of the work area;
- the length of entry pit work areas is generally about 300 feet; and
- the length of the exit pit areas varies, depending how long the drill is, between 300 to 1700 feet.

Tr. 10/23/17, Morning Session, at 11–13 (Taylor).
[871] CFP 548, at 13972; *see also* Tr. 10/23/17, Morning Session, at 14 (Taylor).
[872] CFP 548, at 13973 (Exception Request 178A); *see also* Tr. 10/23/17, Morning Session, at 15 (Taylor).

installed in this area, likely subsequent to the horizontal directional drilling, and would require an additional four to six weeks of lane closure.[873]

Given the public use of the Forest, including its access to fishing on the Connecticut River, the interference with the public use of this private property that the construction of the proposed project would cause would not serve the public interest. This is also another example of undue interference.

4. The Proposed Project's Purported Benefits are Uncertain, Minimal, or no Longer Exist

The Forest Society mostly relies on other parties to set forward the evidence and analysis showing Applicant has not met its burden with respect to the energy market, including the uncertainty associated with the Massachusetts Request for Proposals and for Forward Capacity Market. However, out of that entire, voluminous body of evidence, the Forest Society emphasizes that the credible evidence shows the projected savings of an average customer would be only, in the best case scenario, $3.14 per month.[874] And in the worst case scenario, the savings would actually be zero.[875] In either scenario, the value of what New Hampshire would lose if this proposed project were constructed is priceless.

In an apparent attempt to bolster the benefits the proposed project might bring to New Hampshire,[876] Eversource sought approval of a 20-year power purchase agreement ("PPA") through which Eversource would buy approximately 100 megawatts of energy transmitted to

[873] *Id.* at 16.
[874] *Comparison of Monthly Bill Savings - 621 kWh*, CFP 286; *see also Average Monthly Residential Bill 2015*, CFP 285.
[875] CFP 286; *see also* CFP 285.
[876] *Supplemental Pre-Filed Testimony of William J. Quinlan*, APP 6, at 44908 ("Finally, PSNH has entered into a power purchase agreement ("PPA") with Hydro-Quebec to ensure that PSNH customers will receive their fair share of low cost, clean hydroelectric power"); Tr. 4/13/17, Morning Session, at 151–52 (Quinlan) (testifying that the PPA would save PSNH customers approximately $100 million in savings).

Eversource's Deerfield Substation over the proposed project.[877] The New Hampshire Public Utilities Commission denied the proposal because it was inconsistent with New Hampshire law, specifically the Electric Utility Restructuring Statute, RSA 374-F.[878] The PPA was the only thing Applicant relied upon to bring to New Hampshire ratepayers whatever benefit it would provide.[879] With it being denied, Applicant can no longer claim that as one of the purported benefits of the proposed project.

5. In Weighing Adverse Effects Compared to the Purported Benefits, Subcommittee Should Consider the Alternatives

As discussed throughout this memo, the proposed project would cause unreasonable adverse effects and undue interference in and of its own right. Beyond that, viewing the adverse impacts the proposed project would cause in the light of other options to bring Canadian hydropower into the New England grid also shows the impacts would be unreasonable and undue.

First, other projects would have less impact. ISO-New England shows 10 projects that would bring Canadian hydropower into the ISO-New England grid, aside from the proposed project. On top of those, Granite State Power Link released its plan in 2017 to locate a new transmission line in existing rights-of-way for 108 out of 110 miles in Vermont and New

[877] *NPT Petition to PUC For Approval of PPA*, CFP 29 (PUC Docket No. DE 16-693, Public Service Company of New Hampshire d/b/a Eversource Energy, Petition for Approval of a Power Purchase Agreement with Hydro Renewable Energy Inc. (6/28/16)); *see also PUC Order No 26000 on PPA dated 03-27-17*, CFP 30 (PUC Docket No. DE 16-693, Public Service Company of New Hampshire d/b/a Eversource Energy, Petition for Approval of a Power Purchase Agreement with Hydro Renewable Energy Inc., *Order Dismissing Petition*, Order No. 26,000 (3/27/17).

[878] CFP 30, at 860 ("The proposal before us would have Eversource purchase electrical energy for a 20-year term over a new transmission line, resell that electricity into the wholesale market, and include the net costs or benefits of its purchases and sales in its electric distribution rates, through the mechanism of the [stranded cost recovery charge]. That proposal, however, goes against the overriding principle of restructuring, which is to harness the power of competitive markets to reduce costs to consumers by separating the functions of generation, transmission, and distribution. Allowing Eversource to use the SCRC mechanism as a ratepayer financed "backstop" for its proposed 20-year PPA would serve as an impermissible intermingling of a generation activity with distribution rates.").

[879] Tr. 4/13/17, Morning Session, at 137 (Quinlan).

Hampshire.[880] Another project is on the verge of bringing Canadian hydropower into the New England grid; the TDI Clean Link Project in Vermont is a $1.2 billion underground transmission line to bring in 1,000 megawatts using a line that runs, in part, under Lake Champlain.[881] Generally, these projects would seem to generate fewer adverse impacts than the proposed project. This is especially true for the TDI Clean Link Project, which, for example and as noted, would have only 2.2 acres of temporary wetland impacts and zero permanent wetland impacts.[882] The proposed project appears from the record to be the most expensive and most impacting of the other projects also designed to bring similar amounts of Canadian hydropower to the New England grid.

Second, Applicant did not adequately consider alternative routes. Although Applicant purported to have evaluated "all" underground alternatives, in fact Applicant looked only at three.[883] This so-called "evaluation" is typical of other evidence from Applicant: narrow in its horizon; minimal in its content; and inaccurate.

For example, and as noted earlier, Applicant relies upon alleged "extensive wetlands" and "significant[] impact[s]" in part to substantiate its claim that the I-93 option was not available. Yet, Applicant did no field-based wetlands assessment or delineation to support these determinations. Nor did it prepare any water resources analysis in anything more than a "very general approximate" way, and only at two sample locations.[884] Applicant did not provide any specific costs associated with any burial alternative. Instead, Applicant interpolated cost information they have generated for the portion of the proposed project that would be buried in

---

[880] *Brooks-Concord Monitor-National Grid Proposes A Northern Pass-Like Power Line*, CFP 13, at 317–19.
[881] Tr. 4/17/17, Morning Session, at 136 (Bowes); Tr. 6/8/17, Morning Session, at 54 (Frayer); CFP 13, at 317–19.
[882] *See supra* at Footnote 673.
[883] APP 80, at 44514–25.
[884] *See supra* Part III.A.4.

the White Mountain National Forest and assumed—without stating any basis for doing so—that cost information would be the same in any burial scenario.

The document describes environmental impacts as "unanalyzed" but "are in fact highly likely to substantially increase environmental impacts."[885] It is difficult to understand how Applicant can make credible factual assertions regarding impacts which are "unanalyzed."

The document misrepresents the Settlement Agreement between the State, the Forest Society, and others with respect to Franconia Notch.[886] The document claims the Settlement Agreement "plainly states that 'there will be no additional lanes or major construction within the Park,'" leading the reader to believe that the Settlement Agreement prohibits all construction when it actually prohibits only construction of additional highway.[887] The document essentially determines that the parties to the Settlement Agreement would never allow the proposed project to be sited through Franconia Notch, a determination that is both wrong and unfounded. Applicant never even asked the Forest Society or the Appalachian Mountain Club if they would consider such a siting for a buried transmission line.

Applicant has also been wrong about House Bill 626, signed into law in June of 2016.[888] The document claims that "Franconia Notch and the Franconia Notch Parkway are specifically and consistently excluded from any such consideration" as part of the energy corridor legislation.[889] In fact, the legislation excludes a 1.7 mile stretch of I-93 *north* of Franconia Notch because it is owned by the White Mountain National Forest; the only part of the entire I-93 corridor in New Hampshire not owned in fee by the state, which is why it is specifically

[885] APP 80, at 44533.
[886] *See December 14, 1979 Stipulated Order of Dismissal and Agreement by Appalachian Mountain Club, Forest Society, and Secretary of Transportation,* SPNF 267.
[887] APP 80, at 44538– 39.
[888] *House Bill 626-FN-A,* APP 85; *see also* Tr. 4/17/17, Morning Session, at 133–34 (Bowes) (testifying that he did not know whether Franconia Notch or Franconia Notch Parkway were excepted from the final version of HB 626).
[889] APP 80, at 44540.

excluded by the statute.[890] It is hard to understand how Applicant could confuse such unambiguous statutory language.

The project as proposed would not serve the public interest, in part, because other alternatives exist that can bring down Canadian hydropower with far fewer adverse impacts.

6. The Public Overwhelmingly Says the Proposed Project Would not Serve the Public Interest

Thousands of written and oral public comments have been made in this proceeding. Of those members of the public who have commented and oppose the proposed project, 96% of them oppose the project, at least in part, because it would not serve the public interest[891] Of the 92% of public commenters opposed to the project, 88% of them oppose the proposed project, at least in part, because it would not serve the public interest. Similar to orderly development, as a matter of law, this overwhelming amount of public opposition, along with the tremendous public opposition within the proceeding, requires a finding that the proposed project would not serve the public interest.

V. Applicant's Proposed Delegations and Conditions Would Unlawfully Delegate SEC's Statutory Functions and Role

A. Applicant's Proposed Delegations Would Be Unlawful

The Subcommittee's legal authority to delegate is limited; it "may not delegate its authority or duties, except as provided" in RSA 162-H.[892] The statute provides the Subcommittee only three delegation authorities.

---

[890] The exclusion of the 1.7 miles does not mean that a project could not be buried in that section. The State simply does not have jurisdiction to require burial without the input of the landowner, the U.S. Forest Service.
[891] Out of the 1,476 public comments read, 1,297 commenters oppose the proposed project, at least in part, because it would not serve the public interest. *See supra* Footnote 4.
[892] RSA 162-H:4, III-b.

First, the Subcommittee "may delegate the authority to monitor the construction or operation of any energy facility granted a certificate under this chapter to the administrator or such state agency or official as it deems appropriate."[893] If doing so, the Subcommittee must still "ensure that the terms and conditions of the certificate are met."[894]

Second, the Subcommittee "may delegate to the administrator or such state agency or official as it deems appropriate the authority to specify the use of any technique, methodology, practice, or procedure approved by the committee within a certificate issued under this chapter."[895]

Third and lastly, the Subcommittee "may delegate to the administrator or such state agency or official as it deems appropriate" "the authority to specify minor changes in the route alignment to the extent that such changes are authorized by the certificate."[896] However, this delegation is authorized only with respect to minor changes in route alignment "for those portions of a proposed" line "for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate."[897]

1. Applicant Made Two Different Delegation Requests

In Applicant's 10/19/15 application, Applicant identified only three delegation requests:

---

[893] *RSA 162-H:4, III*; *see also* N.H. CODE ADMIN. RULES Site 103.04(b) (setting forth the duty of the Administrator to monitor construction or operation "if and to the extent" so delegated); N.H. CODE ADMIN. RULES Site 301.17(d) (requiring the Subcommittee to consider whether to include a condition delegating the monitoring of the construction or operation).
[894] RSA 162-H:4, III.
[895] RSA 162-H:4, III-a; *see also* N.H. CODE ADMIN. RULES, Site 103.04(c) (setting forth the duty of the Administrator to specify the use of any technique, methodology, practice, or procedure "if and to the extent" so delegated); *Id.* at Site 301.17(e) (requiring the Subcommittee to consider whether to include a condition delegating the specification of the use of any technique, methodology, practice, or procedure "and with respect to any permit, license, or approval issued by a state agency having permitting or other regulatory authority").
[896] RSA 162-H:4, III-a; *see also* N.H. CODE ADMIN. RULES, Site 103.04(d) (setting forth the duty of the Administrator to specify minor changes in route alignment "if and to the extent" so delegated); N.H. CODE ADMIN. RULES, Site 301.17(f) (requiring the Subcommittee to consider whether to include a condition delegating the authority to specify minor changes in route alignment).
[897] RSA 162-H:4, III-a.

> Additional laydown areas may be identified, as necessary, during the course of construction. As part of this Application, and to the extent any other environmental approvals are necessary in connection with the identification of additional laydown areas, the Applicants request that the SEC delegate authority to NHDES to issue such approvals.[898]
>
> The wire-stringing operation requires a work pad approximately 100 feet by 200 feet, which is used for staging material and the puller and tensioner equipment, at each end of the section that is being strung. These pulling sites will be set up at various intervals along the ROW and are placed just before the stringing activity takes place. The Applicants request that the SEC delegate authority to NHDES to review and approve, as necessary, the location of wire pulling sites.[899]
>
> Given the iterative nature of the review of historic sites and the extended timeframe for such review to occur, the SEC has adopted the standard practice of conditioning approval on required further consultation with NHDHR, completion of any incomplete analysis and reports, and immediate reporting of new findings. See Groton Wind at 56-7 (citing the SEC's ability to delegate to an SEC member agency the authority to specify methods, etc. RSA 162-H:4, III-a.).[900]

Applicant's delegation requests appear to be unprecedented in their breadth and have been the subject of questions and confusion. Of note, these requests trigger the thorny issue of to what extent the SEC process preempts municipal regulation, an issue that would be completely avoided if the proposed project were denied.

By letter dated 12/12/17,[901] Applicant belatedly responded to requests made by counsel for the Subcommittee on 6/2/17 for a list of all construction-related delegations[902] and on 6/26/17 for a list of all delegations Applicant is requesting the Subcommittee make to state agencies.[903] The only response Applicant made to these requests was the list enclosed with the 12/12/2017 letter, which list the Applicant specified was only "preliminary" and that Applicant would "more

[898] APP 1, at 47.
[899] *Id.* at 49.
[900] *Id.* at 83–84.
[901] Letter from Thomas Getz to Administrator Monroe, Re: Preliminary List of Proposed Delegations, at 1 (12/12/17).
[902] Tr. 6/2/17, Afternoon Session, at 77–79 (Iacopino; Bowes).
[903] Tr. 6/26/17, Afternoon Session, at 121 (Iacopino; Needleman).

fully develop the list, as well as the component descriptions, and propose related and additional conditions as part of their brief in this proceeding."[904] Applicant's 12/12/17 delegation requests are discussed in the subsequent section, but suffice to say they are materially different and even broader than what was contained in the 10/19/15 application.[905]

2. Most of Applicant's Delegation Request Would be Unlawful

The vast majority of Applicant's delegation requests would be unlawful because they would exceed the limits of the three types of lawful delegation. Further, they do not appear to be supported by any precedent. The critical distinction between these requests and those of other projects is that here Applicant has purposefully not provided information about potential adverse impacts, and instead of simply asking for the Administrator or a state agency to monitor a well-defined project, Applicant seeks to sidestep the SEC process by unlawfully delegating to the Administrator or state agencies the authority to evaluate and approve adverse effects and undue

[904] *See supra* Footnote 901 (12/12/17 Letter: Proposed Delegations).

[905] The Forest Society respectfully refutes the Applicant's assertion in the 12/12/17 letter that the enclosed list of delegations "be treated as timely inasmuch as no party has been prejudiced by the timing of the filing." *Id.* When the request was made on 6/2/17, Applicant responded that they could provide the construction-related list by the end of June and that they would prepare the list of all delegations "expeditiously." Tr. 6/2/17, Afternoon Session, at 79 (Bowes); Tr. 6/26/17, Afternoon Session, at 122–23 (Needleman). Until 12/12/17, the Forest Society had no reason to know the breadth of delegation Applicant would be seeking. The Forest Society has been prejudiced by the delay because it was prevented from examining witnesses, not only the Applicant's, but also CFP's and intervenors', about the requested delegations, or otherwise challenging and exploring the requested delegations before the close of the record. The Forest Society notes Applicant claims the delay was inadvertent, but that does not change the fact that the delay did prejudice the Forest Society and Applicant has provided no good cause for the approximately 6-month delay. *See supra* Footnote 901 (12/12/17 Letter: Proposed Delegations).

interference the proposed project may cause.[906] The delegation requests can be categorized into a few different types, each of which is analyzed in turn.

First, with respect to the two requests to delegate to the Administrator "enforcement" or "compliance" authority,[907] those would be unlawful because they would exceed the scope of RSA 162-H:4, III-a which authorizes delegation only to "monitor" and specifically states that even when such monitoring is delegated, the Subcommittee must still "ensure that the terms and conditions of the certificate are met."[908]

One of the Subcommittee's mandatory duties is that is "shall" "[m]onitor the construction and operation of any energy facility granted a certificate under this chapter *to ensure compliance with such certificate*."[909] The law authorizes the Subcommittee to delegate to the Administrator only the first part of this mandatory duty—"monitor the construction or operation of any energy facility granted a certificate under this chapter." Lawmakers might have also written the second part of the Subcommittee's mandatory duty—"to ensure compliance with such certificate"—into the section of the law authorizing delegation to the Administrator, but they did not. When

---

[906] *See, e.g.,* SEC Docket No. 2010-01, *Final Decision and Order on Outstanding Issues,* at 27 (9/21/15) (with respect to an applicant having had DES, but not the SEC, approve relocating portions of a facility after the SEC had granted a certificate of site and facility: "The Committee notes that the original arguments made by the parties on the issues outlined in the Motion to Amend focused on the authority of the DES. The parties argued about whether there was an appropriate delegation of authority and subsequently whether any delegation of authority was appropriately handled by the DES. The Committee finds, however, that it has no authority to determine whether another stat e agency acted appropriately. The focus of inquiry should be on whether the Applicant should have sought the Committee's approval. It is undisputed that the Applicant was required to bring the revised construction plans to DES because they implicated the Wetlands Permit and the Alteration of Terrain Permit. However, going to DES while necessary was not sufficient. This Committee should have been notified of these types of changes because they affect more than just the permits issued by DES. The Committee finds that the Applicant should have filed a Motion to Amend Certificate with the Committee prior to making changes."). *See Also Appeal of the Londonderry Neighborhood Coalition (Energy Facility Site Evaluation Committee),* 145 N.H. 201, 205 (2000) (affirming committee's decision to impose "additional terms and conditions when State agency recommendations were not comprehensive").

[907] *See supra* Footnote 901 (12/12/17Letter: Proposed Delegations).

[908] RSA 162-H:4, III.

[909] RSA 162-H:4, I(c) (emphasis added); *see also* N.H. CODE ADMIN. RULES Site 103.01(c)(4) ("The committee shall be responsible for … Monitoring of the construction and operation of any energy facility issued a certificate under RSA 162-H and these rules to ensure compliance with such certificate.").

interpreting a law, an entity cannot "consider what the legislature might have said or add language that the legislature did not see fit to include."[910] The absence of this language in the law must be given meaning. Decision-makers are not free to ignore or add words into the law.[911] The Subcommittee is solely responsible for enforcement.[912] Because the Subcommittee "may not delegate its authority or duties, except as provided under this chapter," RSA 162-H, and nothing in RSA 162-H provides that the Administrator may ensure compliance or enforce, the Subcommittee may not so delegate to the Administrator.

Second, with respect to any delegation of "minor project modifications,"[913] "additional project modifications,"[914] and anything that could generate additional adverse effects or undue interference[915] these would also be unlawful because they would exceed the narrow scope of RSA 162-H:4, III-a. If the delegation authorized in that section said only "minor changes," it could possibly be so broad as to encompass some of Applicant's requests. But, the delegation authorized in this section is limited in following two important ways.

The "minor changes" relate only to the "route alignment."[916] That would mean that any change to the proposed project that would change anything other than the route alignment is not a change that the Subcommittee is authorized to delegate. For examples, the following would not be changes to route alignment: changes in structure height or type, time of construction, capacity of the line, etc.

---

[910] *K.L.N. Constr. Co. v. Town of Pelham*, 167 N.H. 180, 183–84 (2014) (citing *Eaton v. Eaton*, 165 N.H. 742, 745, 82 A.3d 1284 (2013) (quotation omitted)).
[911] *See id.*; *see also Hodges v. Johnson*, 2017 N.H. LEXIS 232, *25 (N.H. 2017) (When interpreting a statute, "we must give effect to all words in [the] statute and presume that the legislature did not enact superfluous or redundant words.").
[912] N.H. CODE ADMIN. RULES Site 103.01(c)(5) ("The committee shall be responsible for … Enforcement of the terms and conditions of any certificate issued under RSA 162-H and these rules.").
[913] *See supra* Footnote 901, at 2 (12/12/17 Letter: Proposed Delegations).
[914] *Id.* (Section I(C)).
[915] *Id.* (Sections II(B) and portions of (C)); *id.* at 3 (Sections III(B) through (E); IV(A); V(A) and (B); VI(A); and VII(A)).
[916] RSA 162-H:4, III-a.

Beyond that, this delegation authority is also limited by the last phrases of the statute—"for those portions of a proposed" line "for which information was unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate."[917] This limitation obviously recognizes in the context of constructing energy facilities, that it is reasonable to contemplate that unforeseeable things happen, and further, that in the face of an unforeseeable occurrence, an applicant need not always return to the SEC for more adjudicative process. In that situation, where unforeseeable circumstances would create the need for a minor change in the route alignment, the SEC may delegate that to be handled by the Administrator or the applicable state agency.

That is not the situation with Applicant's requests. Rather, Applicant has chosen not to generate information that it could have generated. The circumstances Applicant's delegation requests are designed to cover are in no way for information "unavailable due to conditions which could not have been reasonably anticipated prior to the issuance of the certificate." The information is unavailable only because Applicant affirmatively decided not to generate it.

The need for laydown areas is a good example of the many "conditions" that are known to Applicant, but Applicant has chosen not to generate information associated with potential adverse effects and undue interference. [918] Applicant has long known that it would need about 20 more laydown areas (in addition to the three that Applicant did identify), each as big as 50

[917] *Id*.
[918] Applicants still have not identified all laydown areas, which remains a concern to CFP's witness. Tr. 10/23/17, Morning Session, at 115–16 (Zysk).

acres.[919] The condition of needing more laydown areas is not reasonably unanticipated.[920] Quite the opposite, Applicant specifically anticipates it.[921]

The law is not prohibitively narrow. Applicant should have identified all the laydown areas needed as part of this adjudicative process. Then, if a certificate were granted, and if anything unforeseeable arose in the field that resulted in the need for a minor change to the route alignment, the Subcommittee could lawfully have delegated that to be handled by the Administrator or the applicable state agency.

Granting these delegation requests would result in the Subcommittee unlawfully abdicating its mandatory duty to make determinations about the impacts that would result from the proposed project, and instead allow the Administrator or a state agency to make those determinations. Not only would this end-run be unlawful in the ways discussed previously, but also, if the delegation were to be made to a state agency, that agency would be limited to its jurisdictional areas, which would never include the considerations required by RSA 162-H.[922] Excessive delegation would also present constitutional problems because it would usurp legislative power to the executive branch.

---

[919] Tr. 5/1/17, Morning Session, at 116–19 (Kayser).
[920] *See* RSA 162-H:4, III-a ("conditions which could not have been reasonably anticipated").
[921] This problematic deficiency of information also relates to the Applicant's decisions and management of the application process that has resulted in the following not yet being identified in full: marshalling yards; storage areas; wire pulling areas; crane pads; access roads; areas of increased stream temperature; installation of underground cable at water crossings; water withdrawals; the location of the underground route as it relates to exception requests; location of detours; traffic management plan; curb cuts; driveways; other access requirements; pipeline interference study; and more. *See generally supra* Footnote 901 (12/12/17 Letter: Proposed Delegations); SPNF 63, at 14–15 (noting that proposed locations for alternative accesses to structure sites should be part of the application).
[922] The Subcommittee did have available to it a process for handing over some or all of the required scope of its review. *See* RSA 162-H:4, IV. In sum, this process requires the Subcommittee to hold public hearings in the counties where the proposed project would be located, and to make certain findings to support a determination that "other existing statutes provide adequate protection of the objectives of RSA 162-H:1" and therefore the Subcommittee would exempt Applicant from the SEC process with respect to those other existing statutes. *Id*. However, the Subcommittee may exercise this authority only at two times: within 60 days of acceptance of the application, which time has long since expired; or within 60 days of the filing of a request for exemption, but no such request has been filed. *Id*.

Third, with respect to delegations requested to be given to state agencies,[923] at least one aspect of those would be unlawful. Despite the one-stop-shopping concept embodied in RSA 162-H, state agencies still retain enforcement of their permitting and regulatory authorities.[924] However, as discussed in section IV, state agency jurisdiction is generally narrower than the Subcommittee's. For example, while DES review wetland permits for avoidance, minimization, and mitigation of water resources, the Subcommittee reviews projects for unreasonable adverse impacts to the natural environment and water quality. So, to the extent delegation requests seek to delegate to state agencies the full and broad expanse of considerations contained in RSA 162-H:16, such delegation would be unlawful because that scope would far exceed the jurisdictional authority of any state agency outside of the SEC.

Fourth, and lastly, Applicant requests the Subcommittee delegate to DOT the following five responsibilities:

- Monitoring and compliance authority with respect to the use of locally and state maintained roads during construction and operation of the proposed project;
- Approval of exception requests submitted to DOT pursuant to the Utility Accommodation Manual;
- Approval of detours on locally maintained roads and I-93;
- Approval of the traffic management plan and traffic controls prior to construction; and
- Approval of curb cut permits, driveway permits, and other specific access permits to the right-of-way for construction.[925]

The Subcommittee should deny all five of these delegation requests for two reasons.

[923] *See supra* Footnote 901 (12/12/17 Letter: Proposed Delegations); *Id.* at 3 (Sections III(A); IV(A); VI(A); and VII(A)).
[924] *See* RSA 162-H:12, IV ("Notwithstanding any other provision of this chapter, each of the other state agencies having permitting or other regulatory authority shall retain all of its powers and duties of enforcement.").
[925] *See supra* Footnote 901 (12/12/17 Letter: Proposed Delegations).

As acknowledged in the 12/22/17 letter from DOT,[926] DOT lacks authority with respect to locally maintained roads, and, therefore, the Subcommittee should not grant any requested delegation request to DOT with respect to local roads.[927]

Also, Applicant represents that these requested delegations are the same as those requested and granted in the Merrimack Valley Reliability Project, another Eversource/PSNH project, that the SEC approved in 2016. In Kenneth J. Bowes' testimony, he stated:

> So we would plan to follow the same process if the SEC delegates to the New Hampshire DOT that responsibility, and that's what we've asked for on pages 82 and 83 of this Application. It was also recently granted for the MVRP Project for Docket number 2015-05. So we're asking basically for the same delegation for use of local roads as we did in that past Project.[928]

This is not accurate for several reasons.

One reason is that the requested delegations are legally different here than in Merrimack Valley. Requesting the DOT be given "monitoring *and compliance* authority," as noted, exceeds what the SEC can legally delegate to an agency.[929] The SEC may delegate only monitoring authority to an appropriate agency, but it cannot delegate its responsibility to "ensure that the terms and conditions of the certificate are met."[930] The next issue is that DOT cannot be granted authority over locally-maintained roads. DOT has plainly expressed significant concerns and refusal to "usurp local authority" over management of local roads.[931] DOT does not have the resources to monitor local roads and monitor compliance with "local ordinances and municipal

---

[926] *DOT Response to Applicants' Request to Delegate Authority* (12/22/17).
[927] *See supra* Footnote 901, at 2 (Section III(A) through (E)) (12/12/17 Letter: Proposed Delegations).
[928] Tr. 10/2/17, Morning Session, at 29 (Bowes).
[929] RSA 162-H:4, III ("The committee may delegate the authority to monitor the construction or operation of any energy facility granted a certificate under this chapter to the administrator or such state agency or official as it deems appropriate, but shall ensure that the terms and conditions of the certificate are met."); *see also* RSA 162-H:4, III-b ("The committee may not delegate its authority or duties, except as provided under this chapter.").
[930] *Id*. at III ("The committee may delegate the authority to monitor the construction or operation of any energy facility granted a certificate under this chapter to the administrator or such state agency or official as it deems appropriate, but shall ensure that the terms and conditions of the certificate are met.").
[931] *DOT Response to Applicants' Request to Delegate Authority*, at 1–2 (12/22/17).

operations."[932] It also has no authority over long-term maintenance of local roads or the authority to organize detours on local roads.[933]

Further, the major difference in nature and scale of the two projects make the requested delegations for Northern Pass materially different from Merrimack Valley in its potential impacts on local roads. Overall, Merrimack Valley was a much smaller project. As described previously with respect to Mr. Chalmers testimony, Merrimack Valley was is a 24.4 mile reliability project for a new 345 kV transmission line from Tewksbury, MA to Scobie Pond Substation in Londonderry with tower heights of 75 to 90 feet, no new right-of-way, and no burial in public roads. The proposed Merrimack Valley transmission line crossed roads only 37 times (1 over I-93, 7 over State-maintained roads, and 29 over locally-maintained roads).[934] The applicant requested state-level permits from DOT.[935] Counsel for the Public agreed that the impact on local roads would be minimal and temporary.[936] Counsel for the Public also acknowledged that applicant committed that installation of transmission lines "will not interfere with the safe, free, and convenient use for public travel on locally-maintained highways."[937] As such, in Merrimack Valley the applicant did not request and the subcommittee did not grant to DOT extensive authority over the management of local road blockages and detours or "compliance authority."

---

[932] *Id*. at 1.
[933] *Id*. at 1–2 ("The Department has a policy of not using local roadways for project traffic control unless approved by the local community. The Department would not look favorably on using non state roads for detours and traffic control on this utility project unless this was a request and/or approved by the local community that is responsible for roadway operations and maintenance.").
[934] SEC Docket No. 2015-05, *Decision and Order Granting Application for Certificate of Site and Facility*, at 85 (10/6/16) (citing SEC Docket No. 2015-05, Applicant Exhibit 1, at 93).
[935] *Id*. at 33–34. The applicant requested the following permits: Aerial Utility Permit required for Route 111, in the Town of Windham; Aerial Utility Permit required for I-93, in the Town of Londonderry; Aerial Utility Permit required for the Londonderry Rail-Trial; Temporary Driveway Permit on Route 28, in the Town of Londonderry; Driveway Permit in the Town of Londonderry. The Applicant also filed a Railroad Crossing and Temporary Use Agreement for the Londonderry Rail-Trail.
[936] *Id*. at 19–20 (citing SEC Docket No. 2015-05, Applicant Exhibit 23, at ¶ 36).
[937] *Id*.

Here, Applicant requests materially broader delegation to DOT for a significantly larger proposed project. The DOT has noted that the proposed project would require 109 aerial crossings, of which only 29 are over State-maintained roads and 80 are over locally-maintained roads.[938] In addition, while Merrimack Valley was a completely overhead transmission line, the transmission line here would also run under roadways and along roadsides for significant distances, which would have more extensive and completely different impacts on local traffic and road management. While Applicant did request the approval of a "traffic management plan" in Merrimack Valley as in this application, the scale of such plan is, as noted, completely different. Applicant is requesting DOT to approve "detours on locally maintained roads," approve the "traffic management plan and traffic controls prior to construction" and to take responsibility for "monitoring and compliance authority with respect to the use of local and state maintained roads."[939] These requests are wholly different from the requests in Merrimack Valley, where impacts on local roads were agreed to be minimal and full detours were apparently not required, and did not involve compliance.

Overall, most of the delegations Applicant requests would be unlawful, not supported by the law or by precedent.

B. The Subcommittee May Not Issue a Condition of Approval Changing the Project

The Subcommittee cannot cure the many shortcomings of the proposed project by conditioning approval in such a way as to change the project. The most obvious example of this limit would be that while full burial is the least-impacting alternative, and Applicant has not proven it is not practicable, the Subcommittee may not condition approval on full burial.

---

[938] *DOT Response to Applicants' Request to Delegate Authority*, at 2 (12/22/17).
[939] *See supra* Footnote 901 (12/12/17 Letter: Proposed Delegations).

The statute and rules give the SEC limited authority for approving a proposed project subject to conditions.[940] The statute includes examples of the types of conditions the SEC may issue; they generally concern scenarios like bonding and monitoring requirements.[941] Site 301.17 similarly lists eight specific and narrow conclusions the SEC must consider, if it decides to approve an application.[942] These conditions must be reasonable,[943] and must serve the objective of RSA 162-H:1. The Subcommittee's ability to condition an approval cannot be limitless. As such, the SEC cannot issue a condition that effectively requires compliance with the statutory and regulatory criteria for granting a certificate of site and facility; rather, the conditions must support the findings already made on the evidence in the record.

While not binding authority, the SEC's decision in the first Antrim Wind, LLC decision illustrates the concept.[944] In that case, the SEC denied an application for 10 wind turbines on top of Tuttle Ridge and Willard Mountain in Antrim, instead of approving it with the condition that two of the turbines with unreasonable adverse impacts be reduced in size.[945] Members of that SEC correctly recognized the limits of the SEC's authority to issue conditions, noting that they could not issue such a condition because it "would likely change other dynamics of the Project to

[940] RSA 162-H:4, I(b); RSA 162-H:4, I(d).
[941] *See* RSA 162-H:16, VI.
[942] N.H. CODE ADMIN. RULES Site 301.17. Note, the catch-all subsections is necessarily limited by the scope of examples that precede it and is not, therefore, a general invitation to attach any condition imaginable. *Dolbeare v. City of Laconia,* 168 N.H. 52,55 (2015) ("The principle of *eiusdem generis* provides that when specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words.").
[943] RSA 162-H:16, VI ("A certificate of site and facility may contain such reasonable terms and conditions, including but not limited to the authority to require bonding, as the committee deems necessary and may provide for such reasonable monitoring procedures as may be necessary.").
[944] SEC Docket No. 2012-01, *Decision and Order Denying Application for Certificate of Site and Facility*, (4/25/13), *as clarified by*, SEC Docket No. 2012-01, *Order Correcting Date of Decision Denying Application for Certificate of Site and Facility*, (5/7/13) (correcting the date of decision from 4/15/13 to 5/2/13).
[945] *Id.* at 52–54 ("In discussing alternatives to the proposed Site, the Subcommittee also considered a proposal suggested by Jean Vissering, a witness for Counsel for the Public, and echoed by several intervenors that would have eliminated turbines 9 and 10 due to their proximity to Willard Pond and to employ the use of smaller turbines throughout the remainder of the Facility.").

such a degree that the Subcommittee would be unable to confidently assess the consequences of issuing a Certificate" and the applicant never proposed such an alternative in its application.[946]

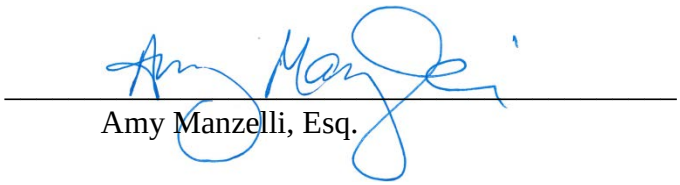
Here, there is not set of conditions that could possibly address all of the unreasonable adverse effects and undue interference identified above without materially changing the project to something different than what Applicant proposed, or without impermissibly deflecting the Subcommittee's responsibility to measure adverse effects and undue interference based on the record at the close of the hearing. While it is possible to envision an entirely underground proposal satisfying the required criteria and avoiding nearly all of the adverse effects and undue interference this proposed project would cause, it is clear that alternative is not part of the application and the SEC could not, on the evidence Applicant has presented, confidently assess the consequences of such a full burial.

Denial is the only way to avoid pervasively scarring New Hampshire forever with a proposed project that would bring little benefit in return for its enormous cost to current and future generations of Granite Staters.

[946] *Id.* ("A majority of the Subcommittee is reluctant to impose the mitigation measures suggested by Ms. Vissering on the Applicant. As noted above, Ms. Vissering suggested the elimination of two turbines and a reduction in size of the balance of the Facility among other measures as mitigation. However, we note that the Applicant did not propose a smaller project as an alternative despite the fact that, at one point, this Facility was proposed to consist of smaller turbines. The reduction in scale suggested by Ms. Vissering may substantially mitigate the unreasonable adverse effect on aesthetics but would likely change other dynamics of the Project to such a degree that the Subcommittee would be unable to confidently assess the consequences of issuing a Certificate.").

CERTIFICATE OF SERVICE

I hereby certify that on this day, January 12, 2018, a copy of the foregoing Post-Hearing Memorandum was sent by electronic mail to persons named on the Service List of this Docket.



Amy Manzelli, Esq.

APPENDIX A: LEGAL STANDARDS

The SEC is a one-stop procedure and venue for the "review, approval, monitoring, and enforcement of compliance in the planning, siting, construction, and operation of energy facilities."[947] As stated in the purposes section of the enabling statute, the SEC shall balance the significant adverse impacts of energy facilities to their benefits with respect to the following: the welfare of the population, private property, the location and growth of industry, the overall economic growth of the state, the environment of the state, historic sites, aesthetics, air and water quality, the use of natural resources, and public health and safety.[948] Administrative Rules Site 100 *et seq.*, which carry the force of law,[949] describe the requirements and procedure of the SEC in reviewing and acting up application,[950] and apply to Applicant and all parties.[951] While the Subcommittee may look to past SEC decisions to guide its decision-making, neither the written decision nor the records of deliberations are binding precedent.[952] This holds especially true as

[947] RSA 162-H:1.
[948] *Id.*
[949] It is well-settled in New Hampshire law that administrative rules have the force and effect of law. *See e.g. Portsmouth Country Club v. Town of Greenland*, 152 N.H. 617, 621 (2005) ("We agree that rules adopted by State boards and agencies may not add to, detract from, or in any way modify statutory law. Administrative agencies may, however, properly be delegated the authority to fill in details to effectuate the purpose of the statute. Rules and regulations promulgated by administrative agencies pursuant to a valid delegation of authority have the force and effect of laws.") (quoting and citing *Opinion of the Justices*, 121 N.H. 552, 557 (1981)).
[950] N.H. CODE ADMIN. RULES, Site 101.01.
[951] *Id.* at Site 101.02.
[952] *See, e.g., Interstate Tel. Coop. v. Pub. Utils. Comm'n*, 518 N.W.2d 749, 756 (S.D. 1994) ("State courts holding that administrative agencies are not bound by stare decisis have emphasized that an agency may not change its position on an issue arbitrarily or capriciously."); *Texas v. United States*, 866 F.2d 1546, 1556 (5th Cir. 1989); ("An agency … is not bound by the shackles of stare decisis to follow blindly the interpretations that it, or the courts of appeals, have adopted in the past."); *see generally* Charles H. Koch, Jr., *Article: Policymaking by the Administrative Judiciary*, 25 J. NAALJ 40, at 64-65 (2005) (Discussing the binding effect of past agency decisions on that agency based on survey of national law, summarizing its analysis as follows: "Thus, in application, administrative precedent has effect, but the effect is not binding, or stare decisis.").

applied to the SEC's interpretation of its rules, which shall be governed by general principles of statutory interpretation.[953]

Applicant bears the burden of proving facts sufficient for the Subcommittee to make the findings required under RSA 162-H:16 by a preponderance of the evidence.[954] The party asserting a proposition shall bear the burden of proving the proposition by a preponderance of the evidence.[955]

Pursuant to RSA 162-H:16, IV, "[a]fter due consideration of all relevant information regarding the potential siting or routes of a proposed energy facility, including potential significant impacts and benefits," the Subcommittee shall issue a certificate if it determines it the proposed project would serve the objective of RSA 162-H:1. In order to issue a certificate, the Subcommittee shall find that:[956]

> (a) The applicant has adequate financial, technical, and managerial capability to assure construction and operation of the facility in continuing compliance with the terms and conditions of the certificate.
>
> (b) The site and facility will not unduly interfere with the orderly development of the region with due consideration having been given to the views of municipal and regional planning commissions and municipal governing bodies.
>
> (c) The site and facility will not have an unreasonable adverse effect on aesthetics, historic sites, air and water quality, the natural environment, and public health and safety.
>
> (e) Issuance of a certificate will serve the public interest.

[953] *See supra* Footnote 84 (discussing the principles of statutory interpretation as applied to this administrative setting).
[954] *See* N.H. CODE ADMIN. RULES Site 202.19 (a) and (b).
[955] *Id.* at Site 202.19(b).
[956] RSA 162-H:16, IV.

APPENDIX B: PROCEDURAL HISTORY & PRESERVATION OF ISSUES

On 10/19/15, the Northern Pass Transmission, LLC and Public Service Company of New Hampshire (collectively, the "Applicant") submitted an application to the SEC for a Certificate of Site and Facility to construct a 192-mile transmission line. On 11/2/15, pursuant to RSA 162-H:4-a, the Chairman of the SEC appointed the Subcommittee in this docket. On 12/9/15, over multiple objections, as memorialized in an order dated 12/8/15, the Subcommittee accepted the application as complete. The Forest Society was granted full-party intervention status in this proceeding. After dozens of technical sessions and 70 hearing days, the record closed on 12/22/17. Pursuant to its 9/18/17 order[957], the Subcommittee is expected to issue an oral decision by 2/28/18 and a written decision by 3/10/18.

Throughout this matter, the Subcommittee and/or the Presiding Officer have made decisions that violated the Forest Society's procedural due process and other rights, including accepting the application although it was incomplete,[958] lack of formal record of technical sessions and denial of depositions,[959] proceeding at various junctures despite lack of information from Applicant and/or scheduling problems and not ruling until the eve of or after a relevant

[957] *Order Suspending Statutory Timeframe*, at 3 (9/18/17).
[958] *Contested Motion of the Society for the Protection of New Hampshire Forests to Determine Incomplete the Application* (11/9/15).
[959] *Applicant's Partially Assented to Motion to have Technical Sessions Transcribed*, at #8 (8/10/16); *Motion for Rehearing and Clarification Regarding Transcription* (9/16/16); *Municipal Intervenor Groups 1 South, 2, 3 South, 3 North, and the Society for the Protection of New Hampshire Forests Motion to Compel Deposition of James A. Muntz* (11/29/16); *Joint Motion for Rehearing by Municipal Groups 1 South, 2, 3 South, 3 North and The Society for the Protection of New Hampshire Forests of the October 24, 2016 Order on Motion to Compel Deposition of James A. Muntz* (11/23/16); *Motion of the Society for the Protection of New Hampshire Forests for Depositions of James A. Chalmers and Mitch Nichols* 11/18/16).

event had occurred,[960] not clarifying legal issues,[961] not compelling certain production,[962] not striking certain information,[963] and undue limiting of the examination of witnesses.[964] Also, the PUC was erroneously excluded from the SEC process.[965]

[960] *Motion of the Society for the Protection of New Hampshire Forests to Postpone Technical Session* (8/25/16); *Motion to Stay Technical Sessions and Request for Expedited Ruling* (9/7/16); *Motion of the Society for the Protection of New Hampshire Forests to Reschedule Technical Session* (9/14/16); *Counsel for the Public's Motion to Amend the Procedural Schedule* (10/4/16); *Joinder of the Society for the Protection of New Hampshire Forests in Motion to Amend Procedural Order of Counsel for the Public* (10/7/16); *Reply of the Society for the Protection of New Hampshire Forests to Applicant's Objection to Motion to Amend and Postpone* (9/16/16), *Municipal Groups' Motion to Extend Deadlines and Counsel for the Public's Response to Said Motions Regarding Scheduling* (2/16/17); *Joinder of Society for the Protection of New Hampshire Forests to Motion to Suspend* (4/3/17); *Joint Motion for Rehearing of Order on Motion to Temporarily Suspend Deliberations* (5/25/17); *Joinder of the Society for the Protection of New Hampshire Forests to Grafton County Commissioner's Motion for New Public Hearings and Motion to Require a New Application* (11/7/17).

[961] *Motion of the Society for the Protection of New Hampshire Forests to Clarify DES Decision* (3/ 31/17); *Motion for Rehearing on Motion to Clarify re DES Decision* (8/22/17).

[962] *Society for the Protection of New Hampshire Forests Joinder of Counsel for the Public's Motion to Compel Production of London Economics International, LLC* (3/17/17); *Pre-Hearing Motion of the Society for the Protection of New Hampshire Forests to Exclude Statements from Technical Sessions* (3/29/17); *Pre-Hearing Motion of the Society for the Protection of New Hampshire Forests to Strike Portions of the Applicant's Forward NH Plan* (3/29/17); *Joinder of the Society for the Protection of New Hampshire Forests to Counsel for the Public's Motion In Limine to Exclude Testimony and Report of Mitch Nichols and Nichols Tourism Group* (4/25/17); *Joinder of the Society for the Protection of New Hampshire Forests to NEPGA's Motion to Strike* (4/28/17); *Motion for Rehearing on Pre-Hearing Motion of the Society for the Protection of New Hampshire Forests to Strike Portions of the Applicant's Forward NH Plan* (6/23/17*); Joinder of the Society for the Protection of New Hampshire Forests to the NGO Intervenors Motion to Strike* (8/8/17).

[963] *Motion to Compel Documents Withheld* (9/9/16); *Motion to Compel* (9/28/16); *Motion of The Society for the Protection of New Hampshire Forests to Compel Documents Produced Informally to Counsel for the Public* (10/6/16); *Motion for Rehearing on the Order on Motion to Compel Documents Produced Informally to Counsel for the Public* (11/28/16); *Motion of the Society for the Protection of New Hampshire Forests to Compel* (1/6/17); *Joint Motion for Protective Order and Confidential Treatment* (1/30/17); *Motion of the Society for the Protection of New Hampshire Forests to Compel* (2/14/17); *SPNHF Motion for Rehearing on Order on Motion to Compel Production of LEI Model, or Motion to Strike Testimony* (5/12/17); *Expedited Motion to Compel of the Society for the Protection of New Hampshire Forests* (6/14/17); *Joint Motion of the Society for the Protection of New Hampshire Forests and NGO Intervenors to Compel Applicant's Unredacted Bid into the Massachusetts Request for Proposals* (8/28/17).

[964] *Society for Protection of New Hampshire Forests Motion for Rehearing of September 12, 2017 Procedural Order* (10/ 2/17); *Motion of the Society for the Protection of New Hampshire Forests for Rehearing of the October 6, 2017 and Subsequent Rulings from the Bench Limiting Intervenors' Cross-Examination* (11/6/17).

[965] The SEC process is well known as one-stop-shopping. RSA 162-H:7, VII ("Notwithstanding any other provision of law, the application shall be in lieu of separate applications that may be required by any other state agencies."). It relieves an applicant from having to go through several different state permitting processes which can be duplicative and disjointed, and instead streamlines everything with the SEC acting as the central hub. All state agencies with permitting or other regulatory authority are required to go through the SEC process. RSA 162-H:7, IV ("Each application shall contain sufficient information to satisfy the application requirements of each state agency having jurisdiction, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility"); *see also* RSA 162-H:7, VI-b and c (setting forth deadlines by which "All state agencies having permitting or other regulatory authority shall" "report progress" and "submit to the committee a final decision"). The Public Utilities Commission is included in this because it is a "state agency having jurisdiction, under state or federal law, to regulate any aspect of the construction or operation of the proposed facility." While RSA 162-H:7-a sets forward optional methods that state agencies may participate in committee proceedings, nothing there, or anywhere else in RSA 162-H, excepts a state agency from the mandatory one-stop-shopping accomplished by having everything flow through the SEC. Accordingly, it was an error for the Subcommittee to let this proceeding unfold without bringing in the Public Utilities Commission, and now that this docket lacks that requisite piece of the process, the Subcommittee should deny the application.