

Appalachian Mountain Club • Conservation Law Foundation • Coos Community Benefits Alliance

February 9, 2011

Mr. Anthony J. Como
Director, Permitting and Siting
Office of Electricity Delivery and Energy Reliability
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Mr. Brian Mills
Office of Electricity Delivery and Energy Reliability (OE-20)
U.S. Department of Energy
1000 Independence Avenue, S.W.
Washington, D.C. 20585

**Re: Northern Pass Transmission LLC, Presidential Permit Application, OE Docket No. PP-371
Objection to Selection of EIS Contractor**

Dear Messrs. Como and Mills,

By this letter, the undersigned interveners in the above-referenced docket hereby object to the U.S. Department of Energy's (DOE) selection of Normandeau Associates, Inc. (Normandeau) as its contractor for preparing the Environmental Impact Statement (EIS) mandated by the National Environmental Policy Act (NEPA). Each of our organizations, and our many members, have significant concerns with the so-called Northern Pass project (the project) – a project which, as currently proposed, consists of 180 miles of high-voltage transmission infrastructure to deliver 1200 megawatts of HydroQuebec-generated electricity into New England. We intend to actively engage in this proceeding, including the NEPA process. While we are not, by this objection, taking a position on the merits of the project, we view the proper preparation of the EIS to be essential to the legitimacy of the NEPA process, including meaningful involvement by the public and fully-informed decision-making by DOE. As set forth below, Normandeau has a clear and expressed conflict of interest in this proceeding which precludes DOE from hiring it as a contractor to prepare the EIS.

The Council on Environmental Quality's NEPA regulations unequivocally require that in contracting for the preparation of an EIS, the lead federal agency (in this case DOE) must avoid any conflict of interest, in selecting a contractor. See 40 C.F.R. § 1506.5(c) ("It is the intent of these regulations that the contractor be chosen solely by the lead agency, . . . to avoid any conflict of interest."). If a prospective consulting firm has a conflict of interest, "it should be disqualified from preparing the EIS, to preserve the objectivity and integrity of the NEPA process." 46 Fed. Reg. 18026 (1981) (FORTY MOST ASKED QUESTIONS CONCERN CEQ'S NATIONAL ENVIRONMENTAL POLICY ACT REGULATIONS, Council on Env't'l Quality (Answer 17.a)).

Normandeau's interests in this matter are conflicted because it has been hired by, and is working on behalf of, the project applicant, Northern Pass Transmission, LLC, to secure regulatory approvals for the project including, without limitation, state law-required environmental approval by the New Hampshire Energy Facilities Site Evaluation Committee (SEC). Accordingly, Normandeau's work relating to the

Project is imbued with a pecuniary interest and a contractual duty owed to Northern Pass Transmission, LLC, the project developer.

The October 2010 Memorandum of Understanding among DOE, Northern Pass Transmission, LLC, and Normandeau regarding “Independent Third Party Preparation of a NEPA Compliance Document” (Memorandum of Understanding) does not, and as a matter of law cannot, nullify or otherwise diminish Normandeau’s inherent conflict of interest. To the contrary, the Memorandum of Understanding amounts to an acknowledgement of the conflict and the extent to which Normandeau owes obligations and duties to provide meaningful and substantial benefit to Northern Pass Transmission, LLC in the project’s environmental regulatory review. As set forth in the Memorandum of Understanding, Normandeau will, “under the direction and control of Northern Pass, with data developed by [Normandeau’s] Resource Evaluation Team”:

Provide expert assistance in preparing permit applications needed for the approval and construction of the Project, in preparing for, and participating in, hearings and other meetings regarding the Project, and in responding to data requests. Such categories of permits and permit activities included, but are not limited to:

1. 401 Water Quality Certificate/construction related surface water quality
2. Dredge and fill wetlands permit
3. Site specific alteration of terrain permit
4. Comprehensive Shoreland Protection Act permit for construction activity in protected shorelands
5. NPDES storm water discharge permit
6. Fish and wildlife protection
7. State historical and archaeological resources protection
8. State public highway crossing licenses
9. State public lands and public water body crossing licenses
10. Analysis of potential mitigation options and measures

Provide expert testimony in support of the SEC process or other permitting proceedings excluding any NEPA related hearings;

Using information provided through the Resource Evaluation Team data collection efforts, respond to data requests in the SEC or other permitting proceedings; and

Participate in meetings, including public outreach meetings in support of the SEC process, as requested by Northern Pass, to explain data collection results and any potential impacts of the proposed Project route and alternative routes.

Memorandum of Understanding, Exhibit A at pp. 3-4.¹ The foregoing contractual obligations of Normandeau, which include testifying in regulatory proceedings as a witness for Northern Pass

¹ In *Sierra Club v. Marsh*, 714 F.Supp. 539 (D. ME. 1989), plaintiff Sierra Club challenged the validity of the NEPA process for the development of a cargo facility on Sears Island, Maine, in part based on the theory that Normandeau Associates, as EIS preparer, had a conflict of interest as a result of its simultaneous assistance to the Maine Department of Transportation in preparing an Army Corps of Engineers permit application. There, the court rejected this conflict-of-interest claim based on a determination that Normandeau’s assistance in the Corps

Transmission, LLC, amount to an agency / principal relationship by which Normandeau owes legally cognizable duties to Northern Pass Transmission, LLC. In this regard, it is noteworthy that Normandeau's work on behalf of Northern Pass Transmission, LLC pre-dates the Memorandum of Understanding, as it has engaged in activities for the purpose of building support for the project at least as early as June 29, 2010 when it appeared for and advocated for the project as a representative of Northern Pass Transmission, LLC.

As the foregoing facts demonstrate, Normandeau has a conflict of interest that renders it unsuitable for purposes of acting in the employ of DOE in regulatory proceedings on the Presidential Permit application. At precisely the same time it is charged with providing an objective analysis of project-related impacts and alternatives for purposes of assisting DOE in the NEPA process, it will be acting with the objective and contractual duty to assist Northern Pass Transmission, LLC in obtaining environmental regulatory approvals, including from the SEC on behalf of, and at the direction of, Northern Pass Transmission, LLC. As set forth above, the SEC review entails many of the same environmental considerations that are elements of or considerations within the DOE's regulatory review. In light of its contractual relationship with and obligations to Northern Pass Transmission, LLC, Normandeau has professional and pecuniary interests in achieving results in the NEPA and SEC processes that are favorable to Northern Pass Transmission, LLC (its paying client) which render it unsuitable for work in support of the DOE's public interest and Presidential Permit application review.²

The Memorandum of Understanding does not, and as a matter of law cannot, eliminate Normandeau's conflict of interest; nor does it somehow sanitize Normandeau's role and ability to serve two different clients with distinct and conflicting interests *in the same matter*. The provisions of the Memorandum of Understanding attempt to structure the various roles and responsibilities of Normandeau to purportedly separate its role as *EIS preparer accountable to DOE* from its role as *permitting consultant hired by Northern Pass Transmission, LLC*. The resulting complicated and contrived arrangement confirms the basic, inescapable fact that Normandeau has a conflict of interest. The acknowledgement and existence of this conflict, pursuant to the above-cited CEQ regulations, is both the beginning and the end of the analysis: in light of DOE's affirmative obligation to select a contractor to avoid any conflicts of interest, it is inappropriate and a violation of the letter and spirit of NEPA to attempt to work around this conflict as DOE, Northern Pass Transmission, LLC and Normandeau have attempted to do through their Memorandum of Understanding.³

permitting matter was a mere "ministerial task," involving the completion of "a two-page form which requires the applicant to identify itself, give the location of the proposed project, give a brief summary of its purpose, identify the status of other permits needed for construction, and describe the work for which a Corps permit is required." *Sierra Club*, 714 F.Supp. at 555, n. 18. In proceedings on the instant project, the tasks to be provided by Normandeau on behalf of the project applicant, Northern Pass Transmission, LLC, cannot reasonably be characterized as "ministerial."

²Normandeau's certified statement that it has "no financial or other interest in the outcome of the project" improperly obscures its contractual obligations to Northern Pass Transmission, LLC. Accordingly, Normandeau's certification is not credible, at a minimum, if not materially inaccurate. Memorandum of Understanding, Exhibit D.

³Even if, assuming for the sake of argument, it were lawful and appropriate at this stage in the process to structure a contractor's roles and responsibilities in a manner designed to minimize a known conflict of interest, the structure outlined in the Memorandum of Understanding fails to minimize the conflict. For example, Normandeau's "Resource Evaluation Team" is tasked with the role of working with *both* the "EIS Team" and the "SEC Team," with responsibilities that include "provid[ing] analysis in support of all Federal and state environmental review and permitting processes," and "support[ing] the development by the EIS Team or the SEC

The DOE acknowledges that the Northern Pass proposal is generating substantial public concern. According to Mr. Como's January 27, 2011 to interveners, this Presidential Permit proceeding "has generated a great deal of local interest resulting in *several hundred interested persons who have requested party status.*" (Emphasis added). Moreover, it is apparent that many more affected members of the public have not intervened but are nonetheless concerned and closely observing proceedings on the project. DOE's selection of a contractor with conflicting interests and duties – a contractor who will be subject to Northern Pass Transmission, LLC's development and negotiation of the scope of work for the EIS preparation, and who will play an influential role in shaping the EIS⁴ – will greatly undermine confidence in the legitimacy of the DOE's NEPA process among a large and growing interested public.

For the foregoing reasons, and to maintain the integrity of the NEPA process, we object to DOE's hiring of Normandeau and respectfully request that DOE select a different contractor to prepare the EIS, and that it do so after requesting and reviewing proposals from other qualified consultants. Our objection and request are provided without prejudice to any and all legal rights of the signatories to this letter, each of which is hereby expressly reserved. We further request that you treat this objection as a formal submission in the above-referenced docket and that you issue a formal decision in response thereto. We hereby certify that a copy of this submission has this day been sent via electronic mail, and by U.S. Mail, to Anne Bartosewicz (bartoab@nu.com), Northeast Utilities, 107 Selden Street, Berlin, CT 06037 and Mary Anne Sullivan, Esq. (maryanne.sullivan@hoganlovells.com), Hogan Lovells, LLP, 555 13th Street, NW, Washington, D.C. 20004

Respectfully submitted,

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Team, whichever requests it, of options for mitigating any potential environmental impacts." Memorandum of Understanding, Exhibit A, p.1. These dual roles are untenable. For example, the Resource Evaluation Team cannot reasonably be tasked with assessing for DOE whether a specific element of the project adequately mitigates the potential for adverse environmental impacts in the EIS process, while at the same time being tasked by Northern Pass Transmission, LLC with affirmatively testifying and / or seeking to demonstrate that such element is sufficiently protective of the environment for purposes of obtaining environmental approvals.

⁴For example, Normandeau's "EIS Team" will "propose to DOE a reasonable range of alternatives, impacts and issues to be considered in the EIS and determine the type and scope of studies needed to support the EIS preparation." Memorandum of Understanding, Exhibit A, p. 2. While we understand that such work will be performed under the sole discretion and control of DOE, the fact remains that a contractor serving the role of EIS preparer has unparalleled access and ability to influence the EIS – a fact that, no doubt, is the basis of CEQ's requirement that "[a]ny [EIS] prepared pursuant to . . . NEPA shall be prepared . . . by a contractor . . . chosen . . . to avoid any conflict of interest." *Sierra Club*, 714 F.Supp. at 552 (quoting 40 C.F.R. § 1506.5(c) (ellipses in original)).

/s/ Susan Arnold

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