

October 9, 2012

BY ELECTRONIC MAIL

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
Fourth Supplemental Scoping Submission
Objections to DOE Review and Request for Termination of NEPA Contractor Team**

Dear Mr. Mills:

Conservation Law Foundation (“CLF”) has repeatedly urged the U.S. Department of Energy (“DOE”) to conduct its review of the Presidential Permit application of Northern Pass Transmission LLC (“NPT”) for the proposed Northern Pass transmission project (“Northern Pass”) in a process that fully complies with the National Environmental Policy Act (“NEPA”) and its implementing regulations to ensure (i) fair and meaningful public involvement, (ii) consideration of an appropriately broad range of alternatives and all associated impacts, and (iii) unbiased and rigorous data collection, analysis, and review to enable DOE to make well-informed decisions under NEPA and the applicable Executive Orders.¹

In light of documents recently obtained by CLF pursuant to the Freedom of Information Act (“FOIA”), we have grave concerns with the fairness, integrity, and legality of DOE’s process to date. In a process where objectivity is essential, DOE is relinquishing key responsibilities to NPT, the applicant, in ways that violate NEPA’s procedural requirements, that greatly undermine the legitimacy and openness of DOE’s review, and that will diminish public confidence in DOE’s review process and decisions and, by extension, discourage meaningful public involvement.

As discussed below, the documents indicate that DOE has abdicated its fundamental obligations to control the process in numerous ways, including: (i) selection of the third-party NEPA contractor, (ii) establishing the arrangement for managing the preparation of the Environmental Impact

¹ This letter is intended to supplement, and hereby incorporates by reference, CLF’s prior submissions in the above-referenced docket, many of which expressed concerns about or requested changes in DOE’s review process.

Statement (“EIS”) and the associated procedures for incorporating the public’s input, and (iii) determining key foundations for DOE’s NEPA review, including the extent of the information that the applicant must provide in the permit application, the critically important “purpose and need” statement for the EIS, and whether or not to prepare a programmatic or comprehensive EIS.

DOE must take immediate action to establish a fair and unbiased process that conforms to the requirements of NEPA and promotes public confidence in its procedural integrity and DOE’s ultimate decisions on the application. The most important step that DOE must take is to terminate the current contractor team and replace it with a new contractor or DOE-based team that will be free of any conflict of interest and potential bias.

I. DOE’s Selection of the New Contractor Team Was Fatally Flawed

The documents obtained by CLF pursuant to its FOIA request show that DOE has failed – for the second time in this proceeding – to select a third-party NEPA contractor without a conflict of interest, violating the procedural requirements of NEPA and denying the public its right to a fair and unbiased review of the proposed Northern Pass project. The regulations promulgated by the Council on Environmental Quality (“CEQ”) require that all third-party NEPA contractors must be chosen (1) “*solely* by the lead agency,” here DOE, (2) “to avoid *any* conflict of interest.” 40 C.F.R. § 1506.5(c) (emphases added). As discussed below, DOE’s selection of the new contractor team failed both requirements.

As DOE is well aware, CLF, other interveners in this Presidential Permit proceeding, New Hampshire’s two United States Senators, and many members of the public questioned or objected to DOE’s original selection of Normandeau Associates (“Normandeau”) as its contractor to prepare the EIS for the proposed Northern Pass project. Under a Memorandum of Understanding (“MOU”) approved by DOE, Normandeau was serving both as DOE’s contractor for purposes of preparing an EIS, and as NPT’s consultant for purposes of obtaining state permits for the project. CLF and others identified this arrangement as presenting a clear conflict of interest in violation of 40 C.F.R. § 1506.5(c) because Normandeau had both professional obligations to assist NPT in obtaining necessary approval by the New Hampshire Site Evaluation Committee and pecuniary interests that would be furthered by approval of NPT’s Presidential Permit application. *See, e.g.*, Objection to Selection of EIS Contractor, dated February 9, 2011.

Incredibly, despite Normandeau’s clear conflict of interests, DOE never concluded that there was anything wrong with Normandeau continuing in the contractor role; rather, it was NPT that ultimately withdrew its support for the arrangement. In the letter announcing the decision, NPT’s counsel acknowledged that “the strong expressions of concern by certain members of the public about the arrangement lead us to believe that continuing with this arrangement may cause the public to lack confidence in the objectivity and rigor of the ultimate environmental analysis of the project,” an “outcome [that] obviously does not serve the interests of the project, any of the

permitting agencies or the public.” Letter from Attorney Sullivan to Anthony Como, dated March 7, 2011.

Despite the lesson of DOE’s unsuccessful experience with choosing a consultant with clear conflicting interests, documents recently obtained by CLF pursuant to its October 17, 2011 FOIA request reveal that DOE is, for the second time, proceeding with a conflicted EIS contractor – in this case a contractor team comprised of SE Group, Ecology & Environment (“E&E”), and Lucinda Low Swartz – the improper selection of which was advocated and choreographed by NPT.

A. DOE Improperly Abdicated Its Responsibility to Select the Contractor

The requirement that NEPA contractors “be chosen *solely* by the lead agency,” 40 C.F.R. § 1506.5(c), obligate DOE, at a minimum, to control the contractor search, to communicate directly and independently with prospective contractors, to administer the review of candidates for conflicts of interest, and to conduct the selection process free of significant influence from the applicant. Indeed, while CEQ guidance does condone a limited, ministerial role for the applicant in the process – namely, undertaking “the necessary paperwork for the solicitation of a field of candidates under the agency’s direction,” even this limited role is permissible only “so long as the agency complies with Section 1506.5(c).” 46 Fed. Reg. 18,026, 18,031 (Mar. 23, 1981) (Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations) (Answer 16). As discussed below, documents obtained by CLF pursuant to its FOIA request demonstrate that NPT took on a much broader role in the selection of the current EIS contractor team in violation of CEQ regulations and guidance. Indeed, with the selection of a contractor team identified and personally assembled by NPT’s counsel, Attorney Mary Anne Sullivan, it does not appear that DOE undertook a meaningful independent search of its own and instead requested that NPT conduct a search on DOE’s behalf.

Documents obtained by CLF reveal that NPT’s counsel, Attorney Sullivan, advocated and acted as an agent for the prospective contractor team, serving as the intermediary between DOE and the team members. In an email dated May 12, 2011, Attorney Sullivan conveyed NPT’s recommendation that SE Group be selected as DOE’s contractor, following NPT’s “difficult” effort, which had previously been a subject of discussion between NPT and DOE, to identify a qualified consultant. **Exhibit (“Ex.”) 1.** Attorney Sullivan subsequently recruited Ms. Swartz to join the team. *See* **Ex. 2** (emails from Ms. Swartz to DOE dated June 23 and 28, 2011, referencing discussions with Attorney Sullivan). Thereafter, SE Group, Ms. Swartz, E&E, and Attorney Sullivan met and collaborated, independently of DOE, to develop written materials, including statements of qualifications and a “strategic work plan,” to facilitate DOE’s selection of the full team.² **Ex. 3** (email stating

² The strategic work plan was presented to DOE in an email from Attorney Sullivan and discussed in a meeting among DOE, the prospective contractor team, NPT, and Attorney Sullivan on July 14, 2011.

recommendation and attaching strategic work plan); **Exs. 6 and 7** (emails providing additional information regarding SE Group); **Ex. 2** (including June 23, 2011, email to DOE from Ms. Swartz noting that contractor team was “preparing a work plan for [Attorney] Mary Anne [Sullivan] that I understand will be forwarded to DOE for consideration”). Attorney Sullivan also documented NPT’s assurance that the contractor team had no disqualifying conflicts of interest in a letter to DOE dated August 4, 2011. **Ex. 8.**³ On August 12, 2011, DOE announced the selection of the NPT-recommended contractor team and released a new MOU among NPT, the contractor team, and DOE regarding preparation of the EIS.⁴

Ex. 3 (July 13, 2011 email referencing meeting). According to an email from DOE to Attorney Sullivan following the meeting, DOE declined to post this lengthy, critical document – setting forth the contractor team’s proposed approach to management of the NEPA process – to the Northern Pass EIS website. **Ex. 4** (July 19, 2011 email). Rather, DOE requested that Attorney Sullivan prepare a one-page statement of the contractor team’s qualifications for public release, *see id.*, which Attorney Sullivan provided in a subsequent email. **Ex. 5** (July 22, 2011 email).

³ It is clear from NPT’s original recommendation of SE Group, dated May 12, 2011, that DOE gave NPT not only the task of locating qualified contractors, but also the responsibility for avoiding a conflict of interest. **Ex. 1** (“As you know, we have had difficulty identifying firms that have the requisite experience and have no prior business relationships with any of these entities.”). At DOE’s request, NPT memorialized its conflicts process in the above-mentioned letter to DOE dated August 4, 2011. **Ex. 8.** In an internal email, a DOE legal advisor confirmed DOE’s apparent view that it was sufficient for DOE to rely on NPT’s conflicts search, NPT’s assurances regarding the comprehensiveness of that search, and the financial disclosure statements from the contractors. **Ex. 9.**

⁴ DOE’s only public statement pertinent to this selection process was provided in its “Frequently Asked Questions” on the Northern Pass permitting process, released in June 2011, which included the following discussion:

DOE is ultimately responsible for selecting the third-party contractor that helps DOE prepare the EIS. DOE selects a contractor after reviewing the candidate’s record and ascertaining the absence of any conflicts of interest Normandeau is no longer DOE’s third-party EIS contractor helping DOE prepare the Northern Pass EIS. DOE is working to identify a new contractor to help DOE prepare the Northern Pass EIS.

Frequently Asked Questions, dated June 2, 2011, at 8-9. Notably absent from the discussion is any mention of NPT’s role in the selection process. Relatedly, CLF was disturbed to learn from recently-obtained FOIA documents that more than a month after Normandeau was withdrawn as the EIS contractor, the firm continued to perform substantive work as DOE’s consultant, including, at a minimum, the important tasks of characterizing and categorizing scoping comments from the public.

NPT's thorough control over the contractor search, assembly of the contractor team, presentation of the contractor team to DOE, and the conflicts review process are wholly inconsistent with the requirement that the contractor "be chosen *solely*" by DOE. Likewise, it is impossible to characterize NPT's comprehensive influence over DOE's contractor selection process as the type of "paperwork" associated with "solicitation of a field of candidates" under the agency's direction that CEQ's NEPA guidance permits. Given the available evidence, it does not appear that DOE made any meaningful "choice" or that it was doing anything other than following the lead of the permit applicant, NPT. Certainly, the documents obtained by CLF disclose no meaningful, independent work by DOE to identify and assess the qualifications of any contractors or to consider any candidate other than the team recommended by NPT.⁵ Rather, the documents show that DOE delegated its contractor selection process to NPT in violation of 40 C.F.R. § 1506.5(c).

B. The Contractor Team Has A Clear Conflict of Interest Due to NPT's Role in Its Selection

To reiterate, a contractor hired to prepare an EIS must be chosen "to avoid *any* conflict of interest." 40 C.F.R. § 1506.5(c) (emphasis added). *See also Sierra Club v. Marsh*, 714 F. Supp. 539, 552 (D. Me. 1989) ("Any [EIS] prepared pursuant to . . . NEPA shall be prepared . . . by a contractor . . . chosen . . . to avoid any conflict of interest.") (quoting 40 C.F.R. § 1506.5(c)) (ellipses in original). Although the contractor team may lack the same type of conflicting interests that Normandeau Associates had, the contractor team nonetheless has a prohibited conflict of interest in violation of 40 C.F.R. § 1506.5(c).⁶ Courts examining this issue have focused on the potential conflict's impact on the "objectivity and integrity of the NEPA process," especially where the agency is disengaged. *See, e.g., Ass'ns Working for Aurora's Residential Env't v. Colo. Dep't of Trans.*, 153 F.3d 1122, 1128 (10th Cir. 1998).

Ex. 10 (April 8, 2011 email from Normandeau documenting "binning" of scoping comments). In light of Normandeau's real and perceived conflict of interest, its continued involvement in this capacity was inappropriate. Given its importance to the fairness of DOE's review and the merits of DOE's decisions on the scope of the EIS, this work must be redone.

⁵ A partial email to DOE from SAIC, a prospective NEPA contractor, indicates that DOE failed to provide a prompt response to SAIC's information package. *See Ex. 7* (date unknown).

⁶ For purposes of determining whether a firm has any "financial interest or other interest in the outcome of the project" which would cause a conflict of interest, CEQ has broadly interpreted the term "financial interest or other interest in the outcome of the project" to encompass "*any known benefits* other than general enhancement of professional reputation." 46 Fed. Reg. at 18,031 (Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations) (Answer 17a) (emphasis added).

Because NPT and its attorney were responsible in a direct and personal way for the team's selection and the substantial fee revenue that is and will be associated with the work, there is a strong risk that the contractor team will be susceptible to pressure – express or implied – to treat NPT favorably or to reach conclusions favorable to NPT. This prospective risk of bias poses a potential conflict of interest that DOE must avoid because it directly threatens the impartiality of the NEPA process that the prohibition on conflicts is intended to safeguard. The risk also results in the perception of bias that undermines public confidence in DOE's process.

It appears that bias is already a reality. According to the documents obtained by CLF, one member of the contractor team – Ms. Swartz, who has a senior oversight role on the team⁷ – has demonstrated a predisposition to side with NPT on important issues at the heart of DOE's NEPA reviews. In an email from Ms. Swartz to DOE dated June 23, 2011, Ms. Swartz explained that she is working as a contractor in connection with the DOE's NEPA review of the Champlain Hudson Power Express ("CHPE"), a proposed underground high-voltage transmission project that would connect Canada and the New York City area. As set forth in CLF's previous scoping comments and those of many others, CHPE or some modified version of CHPE is a potentially reasonable and practical alternative worthy of full evaluation in the NEPA process for the Northern Pass project – a point with which NPT has essentially disagreed. *See, e.g.*, CLF Scoping Comments, dated April 12, 2011, at 2, 4, 10; CLF Second Supplemental Scoping Submission, dated October 14, 2011, at 4-5; NPT Response to Motion for Comprehensive EIS, dated May 5, 2011, at 5-6. In Ms. Swartz's email, she asserted that neither she nor Attorney Sullivan perceived a conflict with her participation as a NEPA contractor in both proceedings, stating:

I don't believe that my participation in the Champlain Hudson Express EIS and the Northern Pass EIS would pose any actual or perceived conflict interest. The Champlain Hudson Power Express project is not in competition with the Northern Pass project since they would use entirely different rights-of-way in different states and provide power to different markets. ***Each project will be considered on its own merits and not as alternatives to each other.*** Further, the project proponents are different entities.

⁷ Ms. Swartz is charged with providing "NEPA compliance oversight and strategic DOE-specific NEPA compliance guidance" to the other contractors and to DOE, as well as providing "quality assurance reviews of all documents prior to the submission of deliverable work products to the DOE." *See* SE Group Contractor Team Description, at <http://www.northernpasseis.us/media/documents/Integrated Project Team.pdf>.

Ex. 2 (emphasis added). In a letter predating this email, NPT, for its part, explained its position on the relevance of CHPE to the Northern Pass EIS with virtually identical language: “plainly DOE is under no obligation here to analyze in the same EIS the Northern Pass Project and the CHPE project, which are two entirely separate and distinct transmission projects that will be owned and operated by separate companies, serve different electricity markets, and are proposed to be constructed in different corridors, through different States.” NPT Response to Motion to Stay Proceedings, dated May 5, 2011, at 6.

According to this evidence, Ms. Swartz already has expressly prejudged – before weighing any of the facts or the thousands of public comments filed with DOE on the scope of the Northern Pass EIS, including CLF’s – whether a key alternative proposal should be considered and evaluated in the Northern Pass EIS. Ironically, Ms. Swartz’s opinion was provided in order to establish that she had no conflict of interest in participating in the NEPA process. In these circumstances, it is highly questionable that Ms. Swartz can or will carry out her duties in the NEPA process with an open mind, especially as to critically important issues such as the identification of reasonable alternatives for detailed study in the EIS.⁸

II. DOE Unfairly Allowed NPT to Structure DOE’s Arrangement with the Contractor Team

DOE’s missteps in the selection of the EIS contractor team have been further compounded by DOE’s willingness to allow NPT to exert extraordinary influence over the arrangements governing the conduct of the NEPA process. The documents obtained by CLF reveal that in an email dated Monday, July 18, 2011, two business days following DOE’s formal meeting with NPT and the prospective contractor team, DOE tasked Attorney Sullivan with preparing a draft MOU. **Ex. 4.** Attorney Sullivan submitted a draft MOU to DOE the following day. **Ex. 11.** A DOE attorney proposed certain minor changes to the MOU by email dated August 4, 2011, indicating that the only remaining step was for the contractor team to sign financial disclosure statements and for NPT and the contractor team to execute the MOU. **Ex. 12.** Members of the contractor team were not included in this correspondence. Attorney Sullivan collected signatures from NPT and the contractor team and submitted the final executed version of the MOU to DOE for its signature by an email dated August 8, 2011. **Ex. 13.** DOE’s minimal participation further demonstrates that DOE fundamentally

⁸ CLF also has substantial concerns with the apparent opinions of DOE’s in-house counsel on this issue. Addressing Ms. Swartz’s potential conflict, an internal email by a DOE attorney affirmed that “[a]s long as she doesn’t have a financial interest in NP, she’s ok under the regs.” **Ex. 2.** As discussed above, the applicable definition of conflicts of interest is plainly much broader than financial interests alone.

failed to understand its obligation to avoid the reality or perception that DOE's review of the Northern Pass project was structured according to NPT's preferences from the beginning.⁹

Indeed, the MOU's origins exacerbate and reinforce CLF's specific concerns, discussed in previous comments submitted to DOE after the MOU was made public, that the terms of the MOU provide NPT with undue influence over the NEPA process. In our prior submission, CLF cited DOE's failure to disclose the so-called Consulting Services Agreement, a separate and legally binding contract between NPT and the contractor team that was referenced in the MOU but to which DOE is not a party. CLF Second Supplemental Scoping Submission, dated October 14, 2011, at 1-2. Given DOE's negative response to CLF's FOIA request specifically asking for a copy of the CSA, it appears that DOE itself *has no copy* of this key document, which apparently sets the schedule and budget for preparation of the EIS. If this is true, it is even more likely that DOE lacks effective control over the contractor team, notwithstanding any precatory statements to the contrary in the MOU.

III. DOE's Mishandling of Contractor Issues Undermines Public Confidence in the Permitting Process

With the above revelations about DOE's illegal and inappropriate abdication of its responsibilities to select the EIS contractor team and to properly manage that team, the perceived legitimacy of DOE's review of Northern Pass is now at grave risk.

The public may have a reasonable and justifiable fear that NPT has effectively biased the permitting process by identifying and recommending a contractor team predisposed to reach favorable conclusions on the scope of the EIS and by crafting the terms of the MOU to magnify its influence over the NEPA process. Conversely, DOE's near-complete reliance on NPT to shape and conduct the contractor selection process – once again – may reinforce the public's perception that DOE's entire review of Northern Pass is fundamentally unfair and biased in NPT's favor, based on a heightened perception that DOE itself lacks the independence and determination to carry out a rigorous, impartial review of NPT's application that could result in an unfavorable outcome for the applicant. These risks were what motivated NPT to terminate the Normandeau arrangement in March 2011, and they are as dangerous to the legitimacy of the permitting process now as they were then.

⁹ That perception would have been heightened if the public knew at the time about the full extent of NPT's involvement in structuring DOE's arrangement with Normandeau. According to documents obtained by CLF, NPT both spearheaded the original process leading to the selection of Normandeau Associates as DOE's NEPA contractor and drafted the MOU governing the management of the NEPA process. **Exs. 14 and 15.** Like the MOU with the new contractor team, DOE attorneys provided mostly minor changes to NPT's original draft. *See, e.g., Exs. 16 and 17.*

Taken together, the defects in the selection and management of the current contractor team and the associated risks to the legitimacy of DOE's review are too significant for the team to continue to assist DOE with preparation of the EIS. As a result, the termination of the contractor team is the only appropriate remedy for the defects in DOE's selection process. CLF requests that DOE immediately take that step.

IV. DOE Has Improperly and Unfairly Allowed NPT to Shape Key Substantive and Procedural Decisions Affecting DOE's NEPA Review

Beyond its mishandling of the selection and management of the third-party NEPA contractors, DOE also has relinquished to NPT substantial responsibility for critically important decisions regarding the direction of the NEPA review. For example:

- **DOE passively allowed NPT to limit the information provided in its Presidential Permit application, deeply undermining the public's ability to understand and comment on the project during the scoping process.** Based on documents obtained by CLF, it appears that DOE effectively signed off on the form and content of a draft Presidential Permit application provided by NPT to DOE in July 2010. *See, e.g., Ex. 18* (email from NPT's counsel dated July 12, 2010 providing draft in anticipation of in-person meeting with DOE). Although pre-application discussions are not *per se* inappropriate, NPT's opportunity to obtain DOE's agreement with the form and content of the application outside the public eye has, in this case, greatly diminished the quality and extent of information available to stakeholders about the project and only adds to the appearance that NPT has been unfairly empowered to structure and direct what is supposed to be an impartial and rigorous agency review of its proposal. For the reasons detailed by CLF and others, NPT's final application, filed with DOE in October 2010, was unacceptably incomplete and inconsistent with the requirements of DOE's own NEPA regulations. *See, e.g., CLF Protest, Comments, and Motion to Intervene*, dated December 16, 2010, at 2-8.¹⁰ Nevertheless, DOE improperly affirmed the form and content of NPT's permit application before it even submitted a final application.

¹⁰ In lieu of requiring NPT to refile a more complete application, DOE responded to CLF's and other objections with post-facto "interpretative guidance" that DOE would process applications lacking "certain information described in § 205.322 [that] may not be available to the applicant at the time an application is submitted to DOE." *See Interpretive Guidance on the Requirements of 10 C.F.R. § 205.322 at 2, at http://www.northernpasseis.us/media/documents/interpretive_guidance_final.pdf*. CLF disagrees with this approach and reserves the right to raise the legal inadequacy of NPT's application in the future.

- **DOE abdicated to NPT the critically important task of defining, in the first instance, the “purpose and need” for agency action.** Specifically, NPT’s counsel originally drafted *at DOE’s request* much of DOE’s notice of intent to prepare an EIS, including the “agency purpose and need” statement set forth in that notice.¹¹ **Ex. 19** (email from NPT’s counsel to DOE dated December 8, 2010). The key sentence in the notice – pertaining to purpose and need – reflects virtually no change from the language prepared by NPT.¹² As discussed in CLF’s scoping comments, this statement was impermissibly narrow and would improperly restrict the entire NEPA analysis, in violation of NEPA’s requirements and DOE’s own NEPA guidance. *See, e.g.*, CLF Scoping Comments, dated April 12, 2011, at 5-7. It is unacceptable that NPT was given the opportunity to draft the notice and to define the purpose and need for agency action, a decision which could play a significant role in limiting the parameters for the range of reasonable alternatives to be studied in the EIS, in a way that could bias the entire NEPA analysis to favor NPT’s proposal.
- **DOE unfairly entertained informal, *ex parte* communications with NPT regarding the direction of DOE’s NEPA review and pending intervenor proposals to improve the process, such as preparation of a comprehensive EIS.** Specifically, documents obtained by CLF show that NPT’s counsel, Attorney Sullivan, essentially advised DOE on the appropriateness of pursuing a programmatic EIS in connection with the proposed Northern Pass project. In April 2011, CLF and others filed a motion, which NPT opposed and to which DOE still has not formally responded, that DOE pursue a comprehensive or programmatic EIS to address current and future proposals for electricity imports from Canada to the northeastern United States. It appears that DOE was considering this approach following the July 11, 2011 announcement of the Northeast Energy Link transmission project, a potential competitor to NPT. Northeast Energy Link was clearly a topic of conversation at NPT’s and its recommended contractor team’s July 14, 2011 meeting with DOE, discussed above. After that meeting, Attorney Sullivan

¹¹ *See* Notice of Intent to Prepare an Environmental Impact Statement and Conduct Public Scoping Meetings, and Notice of Floodplains and Wetlands Involvement; Northern Pass Transmission, LLC, 76 Fed. Reg. 7,828 (Feb. 11, 2011).

¹² *Compare* 76 Fed. Reg. at 7,830 (“The purpose and need for DOE’s action is to decide whether to grant Northern Pass the subject Presidential permit.”) *with* **Ex. 19** (NPT draft) (“The purpose and need for DOE’s action is to decide whether to grant Northern Pass said Presidential permit.”).

provided DOE with a copy of Northeast Energy Link's regulatory filing describing the project and other materials regarding energy market coordination between the United States and Canada. **Ex. 20** (July 14, 2011 email from Attorney Sullivan providing filing); **Ex. 21** (July 15, 2011 email providing report regarding United States-Canada Clean Energy Dialogue). Then, in an email dated July 25, 2011, transmitted in connection with some unspecified discussion between Attorney Sullivan and a DOE attorney, Attorney Sullivan provided a document to that attorney containing bullet points that describe authorities regarding the use of programmatic EISs. **Ex. 22**. This document was then forwarded to other DOE attorneys and staff under the subject line "programmatic EIS?" *Id.*¹³ It appears from the documents, therefore, that Attorney Sullivan was advising DOE, on an *ex parte* basis, regarding the legal authorities that should inform DOE's decision-making on the direction of the NEPA process. Notably, DOE continues to pursue its review of NPT's application on a project-specific basis, consistent with NPT's preferred, advocated approach. Given the context, the communications between NPT and DOE on this issue were grossly unfair and inappropriate and reflect, yet again, NPT's extraordinary access and influence.

CLF is deeply concerned that DOE's actions in this proceeding to date, including the decisions identified in this letter, as well as its other decisions to reject opportunities and stakeholder requests to strengthen the integrity and comprehensiveness of the NEPA review, constitute an approach that is inconsistent with the mandatory intent and safeguards of NEPA to ensure an objective, thorough environmental review with meaningful public involvement. In this regard, certain documents obtained by CLF show a disturbing disregard for the integrity of DOE's decision-making and the value of public participation in its review of the proposed Northern Pass project. In one such comment, a DOE attorney explained that its problem with the Normandeau arrangement "all along has been a) public characterization/ perception and b) *setting the precedent of backing down under the weight of public criticism.*" See **Ex. 2** (emphasis added). If DOE's priority is in fact to avoid any precedent that it corrected errors or changed course in response to valid public concerns, it would be fair for the public to conclude that DOE is not interested in meaningful public involvement and is incapable of reaching a legitimate final decision on the permitting applications that the President and Congress have entrusted it with faithfully reviewing on the nation's behalf.

¹³ CLF later argued that the Northeast Energy Link project provided an important additional reason to pursue a programmatic-like EIS before conducting a NEPA review on NPT's specific application. See, e.g., CLF Second Supplemental Scoping Submission, dated October 14, 2011.

V. CLF's Requests for Immediate Termination of Contractor Team and Other Procedural Changes

In light of the legal and procedural concerns identified in this letter, CLF requests that DOE:

1. Terminate the current NEPA contractor team,
2. Select a new consultant or internal team in a transparent process that is administered and directed solely by DOE, and to avoid any conflicts of interest, without NPT input or involvement, and
3. Adopt additional procedures for public notice and participation to assure an open, fair, impartial, and rigorous evaluation of NPT's application, including but not limited to:
 - a) Making available for public review and comment a post-scoping, pre-draft-EIS report, as described by CLF and others in our letter dated March 30, 2011;¹⁴
 - b) Issuing specific written decisions on all significant pending protests, objections, motions, and comments filed by interveners, including the motion for a comprehensive EIS filed by CLF and others on April 28, 2011;
 - c) Revising and broadening the purpose and need statement set forth in the Federal Register notice announcing the preparation of the EIS, as requested in CLF's April 12, 2011 scoping comments;
 - d) Providing at least three additional scoping hearings throughout New Hampshire and an additional 90-day written comment period to accept

¹⁴ In the event that CLF's request for termination of the contractor team is denied, it is now clear that much of information sought by the referenced letter could be readily disclosed. To the extent that an updated strategic work plan similar to the one provided to DOE in July 2011, the even more detailed technical work plan that the strategic plan describes, or some other written scope of work are to be utilized by the contractor team in the NEPA process, they should be publicly disclosed as soon as possible. Just as importantly, the public should be provided an opportunity to provide public comment on the decisions reflected in these documents, which include the definition of the purpose and need for agency action, the types of technical studies that will be undertaken to characterize the project's impacts, and the selection of reasonable alternatives for detailed analysis in the EIS.

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further public input on the scope of the EIS, following NPT's release of additional routing information;

- e) Utilizing collaborative innovations employed in other federal NEPA reviews to enhance public involvement in and oversight of DOE's NEPA process, such as stakeholder meetings, workshops, open conference calls, and online databases of information and studies supporting the EIS made available to the public for feedback as they are completed and not solely upon publication of the draft and final EISs.

* * *

CLF respectfully seeks an immediate response to the instant objections and expedited action on CLF's requests. NPT is expected to provide updated routing information that would restart the NEPA process by the end of 2012. To avoid a fatally tainted NEPA process, CLF's concerns therefore must be addressed urgently, before the contractor team begins to prepare the draft EIS.

We appreciate DOE's consideration of this submission, which we provide without prejudice to any and all legal rights CLF may have, each of which is hereby expressly reserved.

Respectfully submitted,

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