



Department of Energy

Washington, DC 20585

December 7, 2012

The Honorable Jeanne Shaheen
520 Hart Senate Office Building
United States Senate
Washington, DC 20510

Dear Senator Shaheen:

Thank you for your letter of October 18, 2012, regarding the process by which the Department of Energy (the "Department") selected the SE Group; Ecology and Environment, Inc. ("E&E"); and Lucinda Low Swartz (collectively, the "SE Group team") to assist the Department in preparing an Environmental Impact Statement ("EIS") examining Northern Pass Transmission LLC's application for a Presidential Permit to construct and operate a transmission line across the United States-Canada border. I agree that a highly qualified EIS contractor, free of any conflict of interest, is critical to the Department's objective of establishing public trust in the Department's environmental review. I appreciate the chance to describe the process by which we selected the SE Group team.

The Department is confident that it followed all applicable legal and regulatory requirements in selecting the SE Group team. Ultimately, that selection was the Department's and the Department's alone. Moreover, while we are aware of inquiries regarding the Department's communication with Northern Pass during the selection process, such communication is both permitted by the regulations and consistent with well-recognized, standard procedures in such matters.

The Department has no reason to understand that any member of the SE Group team has a "financial or other interest in the outcome of the [proposed Northern Pass] project," as would be prohibited under 40 C.F.R. § 1506.5. To the contrary, the Department took care during its roughly five month-long selection process to ensure the absence of any such conflict of interest. The Department is committed to conducting a thorough, impartial, and transparent environmental review of the proposed Northern Pass transmission project and demands a multi-disciplinary scientific and objective work product from the SE Group team.

1. The Regulations Governing the EIS Contractor Selection Process

The EIS contractor selection process is governed by regulations promulgated by the Department and the government-wide Council on Environmental Quality ("CEQ"). The Department's Presidential Permit regulations provide that, "[i]f an EIS is determined to be necessary, the applicant shall enter into a contract with an independent third party, which may be . . . a qualified private entity selected by [the Department]." 10 C.F.R. § 205.328.¹ The corresponding CEQ regulation, 40 C.F.R. § 1506.5(c), provides that:

¹ The EIS contracting mechanism is generally referred to as third party contracting. Under a third party contracting arrangement, "[t]he [contractor] is responsible to [the agency] for preparing an EIS that meets the requirements of



- “[i]t is the intent of these regulations that the contractor be chosen solely by the lead agency, or by the lead agency in cooperation with cooperating agencies, or where appropriate by a cooperating agency to avoid any conflict of interest;”
- “[c]ontractors shall execute a disclosure statement prepared by the lead agency, or where appropriate by the cooperating agency, specifying that they have no financial or other interest in the outcome of the project;” and
- “[n]othing in this section is intended to prohibit any agency from requesting any person to submit information to it or to prohibit any person from submitting information to any agency.”

CEQ has promulgated guidance to assist agencies in interpreting these regulations. See “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” 46 Fed. Reg. 18,026 (March 23, 1981). Question 17 of that guidance interprets the meaning of the phrase “financial or other interest in the outcome of the project” broadly to cover “any known benefit other than general enhancement of professional reputation.” *Id.* A financial benefit such as “a promise of future construction or design work on the project” or “indirect benefits the consultant is aware of (e.g., if the project would aid proposals sponsored by the firm’s other clients),” should disqualify an entity from preparing a NEPA document. *Id.*

Additional CEQ guidance, however, makes clear that § 1506.5(c) does not require “multidisciplinary firms [to be] excluded from [EIS] preparation contracts because of links to a parent company which has design and/or construction capabilities.” “Guidance Regarding NEPA Regulations,” 48 Fed. Reg. 34,263 (July 28, 1983). Rather, the guidance states that § 1506.5(c) “prohibits a person or entity entering into a contract with a federal agency to prepare an EIS when that party has at that time and during the life of the contract pecuniary or other interests in the outcomes of the proposal.” *Id.* The guidance further provides that “if there are no such separate interests or arrangements, and if the contract for EIS preparation does not contain any incentive clauses or guarantees of any future work on the project, it is doubtful that an inherent conflict of interest will exist.” *Id.* Finally, the guidance expressly makes clear that “§ 1506.5(c) does not prevent an applicant from submitting information to an agency.” *Id.*

the NEPA regulations and [the agency’s] NEPA procedures. It is in the applicant’s interest that the EIS comply with the law so that [the agency] can take prompt action on the . . . permit application.” See “Forty Most Asked Questions Concerning CEQ’s National Environmental Policy Act Regulations,” 46 Fed. Reg. 18,026 (March 23, 1981). This arrangement ensures that the Department has control over data collection and analysis and is responsible for the quality of the EIS, but the applicant – not the American taxpayer – bears the cost of the review.

2. The Department's Selection Process

As you are aware, in March 2011 the Department terminated its relationship with its original EIS contractor, Normandeau Associates. Accordingly, the Department began working to select a new EIS contractor and instructed Northern Pass to assist it in doing so. I understand that Northern Pass reviewed the Department's list of seven NEPA contractors pre-approved by the Department and recommended two of those contractors for the Department's consideration. The Department then identified one of the two for further Departmental review and consideration.

Over the succeeding several weeks, the Department conducted due diligence to ensure that this contractor did not have a prohibited conflict of interest. In addition, the Department took the extra step of ensuring that the contractor did not have any current contracts of any sort with Northern Pass or its parent companies. In mid-April, the contractor informed the Department that one of its component businesses had submitted a proposal to serve as contractor on a different matter for one of Northern Pass's parent companies. Out of an abundance of caution, the Department decided not to select that contractor and, instead, continued its contractor search process.

From approximately mid-April to mid-May 2011, the Department consulted a number of contractors who had expressed interest in serving as its EIS contractor. During the same time period, I understand that the Department, the United States Forest Service of the Department of Agriculture (a cooperating agency in the Department's review of the Northern Pass application), and Northern Pass, discussed the possibility of the SE Group serving as the Department's EIS contractor. The Forest Service had previous positive experience working with the SE Group on an unrelated NEPA review. Over the ensuing weeks, the Department had further discussions with the Forest Service regarding that experience. It is my understanding that Northern Pass did as well, and, in mid-May 2011, Northern Pass recommended the SE Group as a potential EIS contractor. As described above, this was the third contractor it had recommended.

The Department assessed the SE Group's technical qualifications and experience by, among other things, reviewing a list of representative EISs the SE Group had prepared as well as a narrative description of its NEPA contracting qualifications. Based on that assessment, the Department concluded that the SE Group did not have sufficient experience with linear projects, such as transmission lines, to serve as its EIS contractor on the Northern Pass application. However, the Department determined that it would be appropriate to consider a team of contractors that included both the SE Group and other contractors possessing such experience. The Department had previously worked with E&E and Ms. Swartz, and suggested that Northern Pass inquire whether those entities were in a position to participate as part of a NEPA contractor team and whether they had any conflict of interest. In July 2011, Northern Pass sent an email recommending the SE Group team – comprising the SE Group, E&E, and Ms. Swartz – to the Department. As described above, this was its fourth contractor recommendation during the course of the search process.

The Department reviewed the proposed SE Group team's qualifications and determined that the team possessed the necessary technical expertise and experience. Before finalizing its selection,

however, the Department asked Northern Pass to provide written assurance describing its own conflicts review process. On August 4, 2011, Northern Pass's counsel provided the Department with a letter stating that its parent companies had conducted a search "to identify any open, pending, or closed purchase orders" between either of themselves and any member of the SE Group team and determined that there were no such purchase orders.² Letter from Mary Anne Sullivan to Brian Mills (August 4, 2011). Available at http://www.northernpasseis.us/media/documents/2011-08-04_northern_pass_letter_re_conflicts_review_process.pdf.

On August 5, 2011, all members of the SE Group team signed the disclosure statements provided for by the CEQ regulations, declaring that they "ha[ve] no financial or other interest in the outcome of the project." NEPA Disclosure Statements for Preparation of the Northern Pass Transmission Line Environmental Impact Statement (August 5, 2011). Available at http://www.northernpasseis.us/media/documents/Financial_Disclosure_Statements_SE_Group_Contractor_Team.pdf. The same day, Northern Pass and the SE Group team members signed a Memorandum of Understanding ("MOU") setting forth the respective roles and responsibilities of the Department, the SE Group team, and Northern Pass, and providing, *inter alia*, that "[i]n preparing the EIS, the activities of, and work performed by, [the] SE Group [team] will be directed solely by DOE staff." Memorandum of Understanding Among the United States Department of Energy and Northern Pass Transmission, LLC and SE Group (August 12, 2011), at 4. Available at http://www.northernpasseis.us/media/documents/DOE_NP_SE_MOU_8_12_2011.pdf.³

On August 12, 2011, the Department signed the MOU and announced its selection of the SE Group team as the Department's new third party EIS contractor.

3. The Department's Selection Process Complied With Applicable Law

The Department is confident that the process described above was consistent with its own and CEQ's regulations. The Department selected the SE Group team only after a conflict of interest

² More specifically, Northern Pass's letter stated that (1) "Northeast Utilities . . . asked its Purchasing Department to conduct a search to identify any open, pending or closed purchase orders between any Northeast Utilities company and any of the three entities;" (2) "[t]hat search disclosed no open, pending or closed purchase orders with any of the three entities;" (3) "Northeast Utilities also asked NSTAR Transmission Ventures . . . to have the NSTAR Contracts Department undertake a like search;" (4) "NSTAR advised Northeast Utilities that it had no open, pending or closed purchase orders with any of the three entities;" (5) "[t]o confirm the results of these inquires, Northern Pass asked SE Group, Ecology & Environment, Inc., and Lucinda Low Swartz to conduct a search for any work they might be doing or have done in the past for any Northeast Utilities or NSTAR affiliate;" (6) "[a]fter a search, the three entities advised Northern Pass that there was no such work;" (7) Northern Pass also asked the three entities to advise if they were doing any work for any Hydro Quebec affiliate;" and (8) "Northern Pass received a negative response to that inquiry as well." Letter from Mary Anne Sullivan to Brian Mills (August 4, 2011). Available at http://www.northernpasseis.us/media/documents/2011-08-04_northern_pass_letter_re_conflicts_review_process.pdf.

³ The MOU further provides that "DOE will be viewed as the client, and [the] SE Group [team] will comport itself as an independent third party under the supervision of DOE." MOU at 4. Finally, it makes clear that "DOE has the authority and reserves the right to unilaterally approve and/or modify any statement, data, analysis, and conclusion contained in the EIS." *Id.*

analysis and only after an assessment of the team's qualifications and the Department's determination that, working together, its members possessed the requisite technical expertise and experience with detailed environmental reviews of large-scale linear transmission projects. As noted above, the selection was made only after the Department examined and rejected three different contractors referred to it by Northern Pass. The Department considered a number of contractors not recommended to it by Northern Pass. In short – and as envisioned by 40 C.F.R. § 1506.5(c) and the CEQ guidance thereunder – the ultimate decision to select the SE Group team was the Department's and the Department's alone.

The CEQ regulations and applicable guidance expressly contemplate “an[] agency requesting any person to submit information.” 40 C.F.R. § 1506.5(c); see also “Guidance Regarding NEPA Regulations,” 48 Fed. Reg. 34,263 (July 28, 1983). It is common for agencies engaged in environmental reviews to raise issues, request information, and otherwise communicate, as needed, with applicants seeking licenses, permits, or other authorizations. To the extent that the selection of the SE Group team differed from the selection of other NEPA contractors under similar circumstances, those differences reside in the additional scrutiny and the resulting extra assurance that no member of the team had a colorable conflict of interest. In light of the additional scrutiny and requested assurances, it is difficult to see how the Department could have conducted as comprehensive a diligence process without communicating with Northern Pass.

The Department respects the concerns that some stakeholders have expressed regarding the proposed Northern Pass project. We are committed to conducting a rigorous and impartial environmental review precisely to ensure that those concerns, and all other potential environmental impacts of the proposed project, are fully considered. Although our environmental review is still in its early stages, we likewise recognize the importance of conducting that review in a transparent manner. To that end, we appreciate the chance to set forth the steps we took in retaining the SE Group team.

If you have any questions, please do not hesitate to call me or Mr. Brad Crowell, Principal Deputy Assistant Secretary for Congressional and Intergovernmental Affairs, at (202) 586-5450.

Sincerely,



Patricia Hoffman
Assistant Secretary
Office of Electricity Delivery and Energy Reliability