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BY EMAIL AND FEDERAL EXPRESS

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**Re: Northern Pass Transmission LLC, Presidential Permit Application**
**OE Docket No. PP-371**
**Response to Motion to Stay Proceedings and for Preparation of Comprehensive Assessment of Need for Imports of Canadian Energy into Northeastern United States**

Dear Messrs. Como and Mills:

On behalf of Northern Pass Transmission, LLC ("Northern Pass"), this letter responds to the Motion to Stay Proceedings and for Preparation of Comprehensive Assessment of Need for Imports of Canadian Energy into Northeastern United States filed on April 28, 2011, by the Conservation Law Foundation, Inc., the Ammonoosuc Conservation Trust, the Appalachian Mountain Club, the Appalachian Trail Conservancy, the Coos Community Benefits Alliance, the North Country Council, Owl's Nest Resort & Golf Club, the Society for the Protection of New Hampshire Forests, and various individuals (collectively "CLF"). Specifically, CLF has requested that the U.S. Department of Energy ("DOE") prepare a comprehensive Environmental Impact Statement ("EIS") that examines the need for imports of Canadian energy into the northeastern United States, and that DOE stay all proceedings related to DOE's environmental review under the National Environmental Policy Act ("NEPA") of Northern Pass' application for

a Presidential Permit to construct, operate, maintain, and connect a high voltage direct current transmission line with a 1,200 MW capacity (the "Project") at the border between the United States and Canada.[1]

As discussed below, the CLF Motion is without legal support. It appears instead to be nothing more than an attempt to delay consideration of the Northern Pass application for a Presidential Permit, a permit that would enable the delivery of clean, low carbon power to New Hampshire and to New England as a whole and that would likely hasten the shutdown of aging, more expensive sources of fossil-fuel generated power. The Motion also seems designed to postpone the day when this job-creating, economic development-enhancing project can begin delivering on the promise it represents for New Hampshire. Specifically, CLF's argument that DOE must analyze the Project "both on its own, and in combination with other projects involving importation of electricity generated in Canada" in a single comprehensive EIS, finds no support in the relevant statute, regulations or case law. Indeed, similar claims asserted in similar circumstances have been repeatedly and decisively rejected by the courts. Accordingly, Northern Pass requests that DOE deny the relief requested in CLF's motion.

## I. The Standard for Requiring a Regional EIS Is Not Met Here.

NEPA requires federal agencies to prepare an EIS for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). The Supreme Court has been clear that where, as here, the issue is whether a region-wide EIS is required, there must be "a report or recommendation on a proposal for a major federal action with respect to the . . . region." Kleppe v. Sierra Club, 427 U.S. 390, 399 (1976). Multiple individual projects proposed by private industry do not create such a proposed federal action or plan. Id. at 401. As the Court explained, "Where no [region-wide federal] plan exists, any attempt to produce an impact statement would be little more than a study . . . containing estimates of potential development and attendant environmental consequences. There would be no factual predicate for the production of an environmental impact statement of the type of envisioned by NEPA." Id. at 402.

Here, neither DOE nor any other federal agency has a plan or proposal to promote power imports from Canada into the Northeast, and thus Kleppe indicates that no EIS incorporating a regional analysis is required. To the extent the Canadian government, the province of Quebec or Hydro Quebec has such a regional strategy, it is beyond the reach of NEPA. Environmental Defense Fund v. Massey, 986 F.2d 528, 533 (D.C. Cir. 1993) ("NEPA is designed to regulate conduct within the territory of the United States, and imposes no substantive requirements which could be interpreted to govern conduct abroad"), Sierra Club v. Clinton, 746 F. Supp. 2d 1025, 1045-46 (D. Minn. 2010) (activities in Canada are "beyond the review of NEPA").

[1] In filing its Motion, CLF relied on Rule 212 of the Federal Energy Regulatory Commission, a rule that appears to have no applicability to this proceeding. While DOE has adopted FERC Rules 211and 214 governing interventions and protests, it has not adopted the FERC procedural rules as a whole. 75 Fed. Reg. 69990 (2010)

## II. There Are No "Connected," "Cumulative" or "Similar" Actions Here that Require Consideration in a Single EIS.

### A. Standards for Determining the Scope of an EIS

Multiple federal actions can require evaluation in a single EIS, but only if they meet certain standards that are not satisfied here. In determining whether multiple actions should be considered in a single EIS, CEQ's NEPA regulations direct federal agencies to consider whether proposed actions are "[c]onnected actions, which means that they are closely related and therefore should be discussed in the same impact statement." 40 C.F.R. §1508.25(a)(1). Actions are connected and should be discussed in the same EIS if they:

> (i) Automatically trigger other actions which may require environmental impact statements.
> (ii) Cannot or will not proceed unless other actions are taken previously or simultaneously.
> (iii) Are interdependent parts of a larger action and depend on the larger action for their justification.

40 C.F.R. §1508.25(a)(1).

Courts have applied an "independent utility" test to determine whether proposed actions are connected and must be analyzed in a single EIS. See, e.g., Great Basin Mine Watch v. Hankins, 456 F.3d 955, 969 (9th Cir. 2006) (explaining that "[t]he crux of the test is whether each of two projects would have taken place with or without the other and thus had independent utility") (internal quotations omitted); Utahns for Better Transp. v. U.S. Dep't of Transp., 305 F.3d 1152, 1183 (10th Cir. 2002); Conservation Law Foundation v. Federal Highway Admin., 24 F.3d 1465, 1472 (1st Cir. 1994) (an EIS considering a highway construction project is of proper geographic scope if the project it analyzes has "independent utility"). Courts have generally found that proposed actions are not connected for purposes of NEPA, and therefore need not be analyzed in a single EIS, where the facts demonstrate that the actions at issue are not dependent on other actions and would proceed regardless of the occurrence or non-occurrence of other, purportedly connected actions.[2]

[2] See, e.g., Coalition on West Valley Nuclear Wastes v. Chu, 592 F.3d 306, 310-312 (2d Cir. 2009) (finding that DOE's consideration of waste management activities at a former commercial nuclear fuel processing plant site and long-term closure issues were not connected actions warranting consideration in a single EIS); Wilderness Workshop v. BLM, 531 F.3d 1220, 1228-1231 (10th Cir. 2008) (finding that authorization of a natural gas pipeline through national forest land and future natural gas development were not connected actions because the development of additional natural gas wells was "entirely speculative" and enough wells already existed to give the pipeline independent utility); Earth Island Institute v. U.S. Forest Service, 351 F.3d 1291, 1305 (9th Cir. 2003) (finding that Forest Service timber sale and restoration projects were not connected actions because "the two restoration projects in this case have independent utility in that they each generate revenue and implement distinct forest conservation measures, and each plan would go forward without the other"); Great Basin, 456 F.3d at 969 (finding that BLM's approval of two separate gold mining permits were not connected actions because the projects "seem to have very little connectedness" and there was no indication that ore from one of the mining projects would

In addition to determining whether actions are "connected," federal agencies must also consider whether proposed actions are "cumulative actions" or "similar actions." See 40 C.F.R. §1508.25(a)(2) & (3). "Cumulative actions" are those actions "which when viewed with other proposed actions have cumulative significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. §1508.25(a)(2). The CEQ regulations define "cumulative impact" as "the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions." 40 C.F.R. §1508.7. The CEQ Handbook at vii (1997) elaborates that a cumulative impacts analysis should focus on "truly meaningful effects" on particular affected resources, ecosystems and human communities that are "additive, countervailing or synergistic," using natural boundaries to define the scope of the affected environment.

"Similar actions" are those actions "which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography." 40 C.F.R. §1508.25(a)(3). For actions that are deemed to be "similar," "[a]n agency *may* wish to analyze these actions in the same impact statement." 40 C.F.R. §1508.25(a)(3) (emphasis added).

### B. DOE's Consideration of Northern Pass' Application for a Presidential Permit Does Not Require a "Comprehensive EIS" Analyzing Other Non-Connected or Speculative Cross-Border Transmission Projects

CLF's argument seems to be that, because DOE is currently considering Presidential Permit applications for both Northern Pass and the Champlain Hudson Power Express ("CHPE"), which proposes to import 1,000 MW of electricity into New York from Canada, DOE must analyze the environmental impacts of the CHPE project and any other "similar projects," in a single EIS with the Northern Pass Project. Motion at 3, 9. However, CLF has failed to demonstrate that the CHPE project or any other future speculative projects are "connected," 'cumulative," or "similar" actions that might require a single EIS.[3]

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be processed at the other project); Utahns for Better Transp., 305 F.3d at 1184 (finding that construction of a new four-lane parkway and restoration and expansion of an existing highway were not connected actions because the parkway construction "does not 'automatically trigger' the reconstruction of [the existing highway]" and the parkway construction may proceed without the highway reconstruction); Citizens' Committee to Save Our Canyons v. U.S. Forest Service, 297 F.3d 1012, 1028-1029 (10th Cir. 2002) (finding that a Master Development Plan for a ski resort and a land interchange were not connected actions, as the ski resort would have developed regardless of whether the interchange occurred); Sylvester v. U.S. Army Corps of Eng'rs, 884 F.2d 394, 400 (9th Cir. 1989) (finding that development of a golf course and related resort were not connected actions for purposes of NEPA because "each could exist without the other, although each would benefit from the other's presence").

[3] Other than the CHPE project, CLF does not identify any other specific or reasonably foreseeable future transmission projects warranting consideration in a "comprehensive" EIS. The Vermont power purchase agreement ("PPA") the Motion references at 6 simply replaces a long-standing PPA, albeit at a lower level of power imports. http://energizevermont.org/2011/04/burlington-free-press-psb-approves-power-deal-with-hydro-quebec/. It does not

The central flaw in the CLF argument is that it has failed to show "connected" actions. There is simply no indication that the Northern Pass Project, or the CHPE project, "automatically trigger" other actions requiring an EIS. 40 C.F.R. §1508.25(a)(1)(i). Second, CLF has not demonstrated – nor could it – that the Project, the CHPE project, or any of the other purely speculative projects that CLF has suggested may occur "[c]annot or will not proceed unless other actions are taken previously or simultaneously." 40 C.F.R. §1508.25(a)(1)(ii). Third, CLF has not demonstrated – nor could it – that the Project, the CHPE project, and other not yet proposed transmission projects in the Northeast are "interdependent parts of a larger action and depend on the larger action for their justification." 40 C.F.R. §1508.25(a)(1)(iii). To the contrary, it is quite clear that the Northern Pass Project, as proposed, will have "independent utility" as an electric transmission project that is expected to deliver 1,200 MW of energy into the New England from Canada regardless of the construction and operation of any other electric transmission lines extending from Canada into the United States. Therefore, DOE need not analyze the Project, the CHPE project and other hypothetical projects in a single EIS.

In addition to not being "connected" actions, Northern Pass and the CHPE project are not "cumulative" actions requiring a single EIS, as they are entirely separate projects in entirely different communities in non-adjacent States serving different power markets and affecting different resources and different ecosystems. Any impacts of these two projects on their respective communities and natural environments are not "additive, countervailing or synergistic." Moreover, although the Project and the CHPE project may be "similar" in the broadest sense of the term, as they are both transmission projects in the Northeast proposing to import power from Canada, the CEQ regulations do not require both to be analyzed in a single EIS. See 40 C.F.R. §1508.25(a)(3) ("An agency *may* wish to analyze these actions in the same impact statement.") (emphasis added).

Indeed, in a very recent case involving claims by a number of environmental groups that various federal agencies violated NEPA for failing to analyze in a single EIS the environmental impacts of two cross-border pipeline projects that were being constructed and would be operated by a single company, the U.S. District Court for the District of Minnesota held that the two pipeline projects—one constructed to transport heavy crude oil from Canada to the U.S., and the other constructed to transport a petroleum-based dilutant from the U.S. to Canada to facilitate the flow of the heavy crude—had "independent utility and are not reliant upon each other for their operation." Sierra Club v. Clinton, 746 F. Supp. 2d at 1042. The Sierra Club Court concluded that the State Department, which had prepared an EIS related to the issuance of a Presidential Permit for the construction of the heavy crude pipeline, was not required to include the separate dilutant pipeline in the scope of its NEPA analysis. Id. Moreover, despite the plaintiffs' assertions that the pipelines were "being constructed side by side in the same right of way at

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involve new transmission. The other possible imports CLF identifies are not attached to projects or proposals. They might more accurately be said to represent the "mere contemplation" of action, which does not trigger NEPA. Kleppe v. Sierra Club, 427 U.S. at 405-407. Significantly, even as to CHPE, where there is a live proposal, CLF has made no similar request for a stay in the CHPE proceeding to allow preparation of a comprehensive EIS that would also consider the Northern Pass Project.

roughly the same time," the Court found that, although the pipelines were "similar in certain respects," the CEQ regulations did not require an analysis of the projects in a single EIS. Id. (emphasizing that under 40 C.F.R. §1508.25(a)(3) "[a]n agency *may* wish to analyze these actions in the same impact statement").

If the Court in Sierra Club found that two cross-border pipelines, owned and operated by the *same company*, and being constructed side by side in the *same right of way* at roughly the *same time*, were not required to be analyzed in the same EIS, then 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. Moreover, there is no basis for concluding that construction of the Northern Pass Project would not proceed but for the CHPE project or other unnamed and unplanned transmission projects in the Northeast, and vice versa.

CLF's reliance on the Supreme Court's opinion in Kleppe to support a contrary conclusion is misplaced. The Supreme Court in Kleppe held that multiple proposed coal-related projects in the Northern Great Plains region did not require the federal government to prepare one comprehensive EIS covering all projects before proceeding to approve specific pending applications. Id., 427 U.S. at 414. Moreover, the Supreme Court cautioned that "[e]ven if environmental interrelationships could be shown conclusively to extend across basins and drainage areas, practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements." Id. The Court also emphasized that those feasibility considerations are for the federal agency with the relevant expertise to make. Id. at 412. The feasibility considerations the Court identified in Kleppe included basin boundaries, drainage areas, administrative boundaries and areas of economic interdependence. Here, the only other live project CLF has identified is located two states away from the Northern Pass Project and is designed to deliver power within NYISO, a distinct electric power market. DOE, as the responsible federal agency with the relevant expertise for making such judgments, should find that there is simply not sufficient interrelationship between the only two proposed projects to warrant their consideration in a single comprehensive EIS.

## V. Conclusion

In sum, for all of the reasons discussed above, CLF's assertion that DOE must analyze the Project in a single EIS with the CHPE project and other purely speculative projects involving importation of electricity generated in Canada is not supported by the relevant CEQ or DOE

NEPA regulations or by applicable case law. Accordingly, there is no need for DOE to stay the current NEPA proceedings related to Northern Pass' application for a Presidential Permit, and DOE should not grant the relief requested in CLF's motion.

Respectfully submitted,

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cc: Service List (by electronic mail)