From:	Schlosser, Michael
To:	Trowbridge, Philip; Blecharczyk, Jeffrey
Subject:	RE: Complaint questions
Date:	Monday, July 8, 2024 11:46:10 AM
Attachments:	2021-10-12-ADMIN-REVIEW-CLOSE-2021210150.pdf Re Property Owner Response to NHDES Comments.msg ROW Property Rights RE NHDES Compliance.msg Appeal of Robert C. Michele &a., (Slip Opinion 2014-159, August 11, 2015).pdf

Phil,

I spoke with Jeff and Ridge about this and have attached pertinent prior communications. The response is short and is a modification of a response from the attached letter. There are instances in the application for issued AoT permits of the applicant signing as the applicant as well as the situation of the agent signing for the applicant and the applicant signing as the owner of the easement on the same application. I only looked at 4-5 applications to make this determination. I am not sure it is necessary to state that Eversource signed as either the applicant or owner in the response, but I did respond directly to the questions.

DES and the New Hampshire Attorney General have allowed Eversource to sign the AoT permits for its 70+ transmission line rebuilds as "owner" or agent of the land on which it has easements.
DES, the New Hampshire Attorney General and Eversource willfully excluded transmission easement-encumbered landowners from the AoT permitting process, in violation of DES's own rules.

NHDES has issued permits for AoT applications that are signed by Eversource as the applicant or owner. For the purposes of a permit to do work in a ROW, the easement owner holds record title to do any work they are authorized to do in the ROW by the easement. Therefore, the easement holder is legally the "owner" per Env-Wq 1502.45 and NHDES did not willfully exclude easement encumbered landowners. Please see the attached *Appeal of Robert C. Michele &a.*, (Slip Opinion 2014-159, August 11, 2015) for support of this interpretation.

Let me know if you would like me to add anything to the response.

Thanks,

Mike Schlosser, PE
Alteration of Terrain Bureau, Land Resources Management

Water Division, NH Department of Environmental Services
29 Hazen Drive, PO Box 95
Concord, NH 03302-0095
(603) 271-3568
Michael.J.Schlosser@des.nh.gov

From: Trowbridge, Philip <Philip.R.Trowbridge@des.nh.gov>
Sent: Friday, July 5, 2024 3:16 PM

To: Blecharczyk, Jeffrey <JEFFREY.D.BLECHARCZYK@des.nh.gov>; Schlosser, Michael <Michael.J.Schlosser@des.nh.gov>
Subject: FW: Complaint questions

Please prepare a response using language from the previous complaints regarding easement ownership.

Philip Trowbridge, P.E., Manager
Land Resources Management Program
Water Division, NH Department of Environmental Services
P.O. Box 95
Concord, NH 03302-0095
phone (603) 271-4898
email: Philip.R.Trowbridge@des.nh.gov

We greatly appreciate your feedback. Please take a moment to fill out our 3-minute NHDES-LRM customer satisfaction survey.

From: Scott, Robert <Robert.R.Scott@des.nh.gov>
Sent: Friday, July 5, 2024 2:59 PM
To: Trowbridge, Philip <Philip.R.Trowbridge@des.nh.gov>
Subject: Fwd: Complaint questions

Robert R Scott
Commissioner
New Hampshire Department of Environmental Services
29 Hazen Drive, PO Box 95
Concord, NH 03302-0095
W: 603.271.2958
C: 603.892.1706
robert.r.scott@des.nh.gov

From: Nancy West <nancywestnews@gmail.com>
Sent: Friday, July 5, 2024 2:34:47 PM
To: Scott, Robert <Robert.R.Scott@des.nh.gov>
Subject: Complaint questions

EXTERNAL: Do not open attachments or click on links unless you recognize and trust the sender.

Mr. Scott, I apologize for sending an incomplete email. I believe you were copied on the full complaint. Is it accurate:

DES and the New Hampshire Attorney General have allowed Eversource to sign the AoT permits for its 70+ transmission line rebuilds as "owner" or agent of the land on which it has easements.

DES, the New Hampshire Attorney General and Eversource willfully excluded transmission easement-encumbered landowners from the AoT permitting process, in violation of DES's own rules.

Nancy West
Publisher - InDepthNH.org
603.738.5635
nancywestnews@gmail.com

Sign up for our FREE newsletter or DONATE

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: http://www.courts.state.nh.us/supreme.

THE SUPREME COURT OF NEW HAMPSHIRE

Wetlands Council
No. 2014-509

APPEAL OF ROBERT C. MICHELE & a.
(New Hampshire Wetlands Council)

Argued: April 22, 2015
Opinion Issued: August 11, 2015

Cleveland, Waters and Bass, P.A., of Concord (David W. Rayment and Mark S. Derby on the brief, and Mr. Rayment orally), for the petitioners.

Johnson & Borenstein, LLC, of Andover, Massachusetts (Mark B. Johnson on the brief and orally), for the respondents.

LYNN, J. The petitioners, Robert C. and Katherine L. Michele, trustees of the Robert C. Michele Revocable Trust (Micheles), appeal a ruling of the Wetlands Council (Council) upholding a decision of the New Hampshire Department of Environmental Services (DES) to issue a permit allowing the respondents, Joseph and Linda Bremner (Bremners), to install a seasonal dock in water adjacent to the Micheles' pond-front property over which the Bremners have an easement. We affirm.

I

The following facts are derived from the record. The Micheles own property in Jaffrey with approximately 750 feet of shoreline on Gilmore Pond.

The Bremners own nearby property that does not directly adjoin the pond. At one time, the Bremners' and Micheles' properties were a single parcel, owned by George and Karen Rickley (Rickleys). When the Rickleys conveyed what is now the Bremners' property, they sought approval to subdivide a section of their 750 feet of shoreline to accompany the plot. The town planning board denied the request, and the Rickleys instead conveyed the plot with an easement over a 118-foot segment of their shoreline.[1] The relevant language of the deed states that the owner of the partitioned lot (now the Bremners) "shall have the right under this easement to the exclusive use of said parcel of shore frontage for whatever purposes they may desire." The Micheles bought their property with full knowledge of the easement.

In 2007, the Bremners applied to DES for a permit to install a seasonal dock in the pond, adjacent to their easement. See RSA 482-A:3 (Supp. 2007) (subsequently amended). The Micheles objected to the application, arguing that the Bremners had no legal right to apply for a dock permit on the Micheles' land without their consent. In 2009, DES granted the permit, and the Bremners installed a dock. The Micheles promptly filed both a motion for reconsideration and an action in superior court seeking to invalidate the easement. DES took no further action pending the outcome of the lawsuit. The superior court determined that the easement was valid, and in a 2011 unpublished order, we affirmed the court's ruling. See Michele v. Bremner, No. 2010-0844 (N.H. Aug. 24, 2011). Thereafter, DES affirmed its grant of the permit. It found that the Bremners' dock qualified as a minimal impact project, see N.H. Admin. Rules, Env-Wt 303.04(a), and concluded that, because under its regulations only major shoreline structures require that the fee owner be the applicant, see id. 402.18(a), the Bremners could apply for a dock permit. DES also found that the Micheles failed to demonstrate that the seasonal dock unreasonably affected the value or their use and enjoyment of their property. The Micheles appealed to the Council, which affirmed the DES decision. This appeal followed.

II

The Micheles first argue that DES erred in granting the Bremners, as mere easement holders, a permit to install a seasonal dock over the fee owners' objection. Rather than argue that the Bremners lack a sufficient property interest to install a dock in the water adjacent to the easement, they contend that, under the relevant statutes, DES lacks the authority to issue dock permits to easement holders. In support of this argument, the Micheles advance several theories: (1) the plain meaning of the terms "ownership" and "landowner-applicant" as used in the statutory scheme compel the conclusion

[1] There is some discrepancy as to how much of the shoreline is encompassed in the easement. The exact size is immaterial to the current appeal, and we adopt the 118-foot figure used by DES and the Council.

that only fee owners can apply for a dock permit, see RSA 482-A:11, II (2013); (2) DES, in interpreting the statute, impermissibly went beyond its plain meaning by examining DES regulations; and (3) the instructions and forms that DES uses to administer the statute demonstrate that only fee owners can apply for permits. Alternatively, the Micheles argue that even if the Bremners could apply for a permit under the statute, DES erred in granting a permit because it adversely affected the value and enjoyment of their land.

The Bremners counter that a plain reading of the statute shows that it does not prohibit easement holders from applying for dock permits. They also maintain that this reading is consistent with the statute's purpose, DES's regulations, and DES's forms and procedures. Additionally, the Bremners contend that the issuance of the permit in this case was reasonable, and that many of the Micheles' arguments are based upon unpreserved or irrelevant considerations.

To resolve these issues, we must engage in statutory and regulatory interpretation. Although we give some deference to an agency's interpretation of its own regulations or of a statute it administers, "our deference is not total." Appeal of Old Dutch Mustard Co., 166 N.H. 501, 506 (2014) (quotation omitted). Concerning statutes, "[w]e are still the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole." Appeal of Town of Seabrook, 163 N.H. 635, 644 (2012). As to regulations, "[w]e examine the agency's interpretation to determine if it is consistent with the language of the regulation and with the purpose which the regulation is intended to serve." Old Dutch Mustard, 166 N.H. at 506 (quotation omitted). "We use the same principles of construction when interpreting both statutes and regulations." Id.

"We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." Appeal of Local Gov't Ctr., 165 N.H. 790, 804 (2014). "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. "We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." Id. "Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole." Id. "This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." Id. Additionally, "[w]hen the language of a statute is plain and unambiguous, we need not look beyond the statute itself for further indications of legislative intent." Petition of Malisos, 166 N.H. 726, 729 (2014).

RSA 482-A:3, I, requires that "any person" who wishes to construct a dock must apply to DES for a permit, unless an exemption applies.[2] The statute further specifies other requirements that an "applicant" must fulfill. See RSA 482-A:3, I(d)(1) (notifying abutters). RSA 482-A:11, II then provides, in relevant part, that "[b]efore granting a permit under this chapter, the department may require reasonable proof of ownership by a private landowner-applicant." (Emphasis added.) The Micheles rely primarily upon the legislature's use of the terms "ownership" and "landowner-applicant" in RSA 482-A:11, II to support their position that only fee owners can apply for dock permits. The legislature did not define the terms "owner," "ownership," "landowner," "landowner-applicant" or "applicant." See RSA 482-A:2 (Supp. 2011) (amended 2012).

"When a term is not defined in the statute, we look to its common usage, using the dictionary for guidance." K.L.N. Construction Co. v. Town of Pelham, 167 N.H. 180, 185 (2014). Webster's Third New International Dictionary defines "ownership" as "the state, relation, or fact of being an owner: lawful claim or title"; and "owner" as "one that has the legal or rightful title whether the possessor or not." Webster's Third New International Dictionary 1612 (unabridged ed. 2002) (emphasis added). We acknowledge that these are broad definitions. We see no reason, however, to limit the meaning of the terms when the legislature did not see fit to do so. Based upon the common meaning of the term, we conclude that "ownership," as used in the statute, neither is limited to fee ownership nor requires possession. We further conclude that parties who hold title to a shoreline easement, such as the Bremners, are "owners" under the statute. Because the term "owner" encompasses property interests other than fee ownership, the Micheles' citation to the repeated use of the terms "owner," "property owner," and "landowner" throughout the statutory scheme does not advance their argument.

Contrary to the Micheles' argument that the legislature could not have intended easement holders to be able to apply for a permit under the statute, we see no evidence that the purpose of the statute was to change the balance of property rights between fee owners and easement holders from what it was under the common law. As the Micheles point out, we have previously noted that an "easement is a nonpossessory right to the use of another's land." Arcidi v. Town of Rye, 150 N.H. 694, 698 (2004). As explained above, however, possession is not a requirement of an "ownership" interest in land. Further, in Arcidi, we said that when there is an express grant of an easement, "a grantee takes by implication whatever rights are reasonably necessary to enable it to enjoy the easement beneficially. This includes the right to make improvements

[2] We observe that, although RSA 482-A:3, IV-a would normally exempt a low impact seasonal dock, such as the one at issue, from the permit requirements, the proposed dock must be the only dock on the frontage to qualify for the exemption. The Bremners' dock does not qualify for such an exemption because the Micheles already have a dock on the frontage.

that are reasonably necessary to enjoy the easement." Id. at 701 (citation omitted). Arcidi concerned an easement over the plaintiff's land for "ingress and egress by motor vehicle." Id. at 697 (quotation omitted). We held that it was reasonable for the easement holder to cut down trees, fill in wetlands and build a gravel road across the easement. Id. at 697, 702. We conclude that, under the common law, installing a dock — arguably a less impactful project — can be a reasonable use of an easement in at least some circumstances.[3]

Instead of altering the state of property rights under the common law, the purpose of the statute is "to protect and preserve [the state's] submerged lands under tidal and fresh waters and its wetlands . . . from despoliation and unregulated alteration." RSA 482-A:1 (2013). It follows, therefore, that anyone who could build a dock under the common law can apply for a dock permit under RSA chapter 482-A. Given the broad grant of the Bremners' easement, they have a sufficient ownership interest to obtain a dock permit under RSA chapter 482-A.

The Micheles contend that this interpretation of the statute will impermissibly force DES to decide the relative property rights of parties with competing interests. We have previously stated that DES's authority to regulate docks "does not include the power to determine the relative rights of property owners." Gray v. Seidel, 143 N.H. 327, 330 (1999). Gray, however, involved an appeal of a superior court order which determined that, because DES and other local authorities regulate docks, the court lacked jurisdiction to decide whether building a dock was a reasonable use of the plaintiffs' easement. Id. at 329-30. We reversed, holding that the court did have jurisdiction to rule on the question of whether the plaintiffs' proposed dock constituted a reasonable use of the easement. Id. at 330. Gray stands merely for the proposition that DES's authority to regulate docks does not divest the courts of jurisdiction to decide underlying property rights. Nothing in that case alters the fact that, in issuing any dock permit, DES must necessarily decide whether the applicant has met the statutory and regulatory criteria. Thus, DES retains the authority to determine whether an applicant has a sufficient property interest to apply for a dock permit.

Although we need not look beyond the plain and unambiguous terms of the statute to ascertain the legislative intent in this case, see Petition of Malisos, 166 N.H. at 729, we note that DES's regulations are consistent with our ruling. The commissioner of DES is empowered to adopt regulations to implement RSA chapter 482-A. RSA 482-A:11, I (2013). DES regulations

---

[3] Indeed, the issue of whether the Bremners' dock is an unreasonable use of the easement under the common law has already been litigated. In 2014, a superior court found that the Bremners' dock was a reasonable use of the easement but ordered the Bremners to remove their personal property from the easement. The Micheles have not appealed this ruling. The Bremners appealed the decision to the extent that it bars them from leaving certain personal property on the easement, but that issue is not before us today.

define "applicant" as someone "who has applied for a permit" and has "an interest in the land on which a project is to be located that is sufficient for the person to legally proceed with the project." N.H. Admin. Rules, Env-Wt 101.06. The regulations also state that "[a]n applicant for a shoreline structure defined as major shall be the owner in fee." Id. at 402.18. DES read these regulations to mean that only applicants for major projects need be the fee owner; applicants for minor projects, like the Bremners' dock,[4] may have a lesser ownership interest. We agree with DES's interpretation of these regulations.

The Micheles also assert that because the DES application forms and instructions ask for the "owner's" information and because the forms have no place on them to identify the applicant as an easement holder, it must follow that only fee owners can apply for a permit. This argument is based upon the same misunderstanding of the meaning of the term "owner" as was discussed above. Because a person who holds an easement interest in property is an "owner" thereof, the absence of additional language in the forms and instructions specifically referencing easement holders provides no support for the Micheles' position.

III

Alternatively, the Micheles argue that even if an easement holder can apply for a permit under the statute, DES and the Council erred in upholding the permit in this case because the Bremners' dock adversely affects the value and enjoyment of the Micheles' property. DES cannot grant a dock permit if doing so will "infringe on the property rights or unreasonably affect the value or enjoyment of property of abutting owners." RSA 482-A:11, II. Whether a permit infringes upon property rights or unreasonably affects the value or enjoyment of another's land is a determination of fact. Cf. Webb v. Rye, 108 N.H. 147, 150 (1967) (stating that whether, under the circumstances, a land use was unreasonable and constituted a nuisance is a question of fact). RSA chapter 541 governs our review of Council decisions. See Appeal of Dean Foods, 158 N.H. 467, 471 (2009). Under RSA 541:13 (2007), we will not set aside the Council's order except for errors of law, unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable. The Council's findings of fact are presumed prima facie lawful and reasonable. RSA 541:13. In reviewing the Council's findings, our task is not to determine whether we would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record. See Dean Foods, 158 N.H. at 474. We review the Council's rulings on issues of law de novo. Appeal of Portsmouth Regional Hosp., 148 N.H. 55, 57 (2002).

---

[4] The Micheles do not contend that the Bremners' dock constitutes a major shoreline structure.

The Micheles advance several reasons why, in their view, the issuance of the dock permit was unreasonable. They first argue that they are entitled to greater protection than that which RSA 482-A:11, II generally provides because, as fee owners, they have a greater interest than abutting property owners. The statute, however, provides no extra protection for fee owners whose properties are encumbered by water access easements, and we will not add language to the statute that the legislature did not see fit to include. Local Gov't Ctr., 165 N.H. at 804. In any event, a property owner who has granted an easement to a third party logically has a lessened — not a heightened — expectation of unencumbered use and enjoyment of his property as compared to a property owner who has not surrendered any interest in his property and is instead seeking protection against interference from an abutter. Consequently, even if we were to assume that DES or the Council erred by treating the Micheles as "abutting owners" under RSA 482-A:11, II, any such error was not prejudicial because it afforded the Micheles more protection than that to which they were entitled under the statute.

The Micheles next contend that the installation of the dock reduces their privacy and seclusion.[5] After a hearing, at which Mrs. Michele was the sole witness for the petitioners, the Council determined that the Micheles failed to show that the permit unreasonably infringed upon their property rights. It also found that the Micheles were aware of the easement when they purchased their property and that a single witness's subjective testimony failed to show that a small, seasonal dock unreasonably affected the use and enjoyment of the Micheles' land. We cannot say that these findings lack evidentiary support in the record or are unjust or unreasonable.[6]

The Micheles next assert that installation of the dock increased their shorefront liability while eliminating any control they have over the easement area. Their risk is compounded, they argue, by increased incidences of vandalism and trespassing on the easement. Mrs. Michele testified that, as a result of the Bremners' dock, the Micheles' insurance agent advised them to increase their liability coverage. Although agreeing that the dock will likely subject the Micheles to suit if an injury occurs on or around the easement area, the Council found this was inadequate to make installation of the dock

---

[5] The Micheles point to testimony that the Bremners cut down trees from the easement area. This, according to the Micheles, removed a natural screen and caused a community uproar for which the Micheles were blamed. The dock permit, however, did not allow the Bremners to cut down trees. In fact, the Bremners removed the trees before applying for the dock permit. Thus, the tree removal is irrelevant to the issue of whether the permit affected the Micheles' use and enjoyment of their land.

[6] The Micheles also argue that the installation of the dock represented a departure from the intensity of use of the easement established by the Bremners' predecessors in title. That argument concerns the parties' relative property rights and not whether the permit violates RSA 482-A:11, II. Therefore, it is outside the scope of the Council's decision, see Gray, 143 N.H. at 330, and we need not address it.

unreasonable. The Micheles, when they bought the property, knew that they were responsible for insuring the easement area. Further, the Micheles are incorrect in claiming that they have lost all control of the easement area. The Bremners enjoy only the right to make reasonable use of their easement, which includes using it to access the pond and their dock; the Micheles retain the right to seek relief in court should the Bremners make unreasonable use of the easement.

Finally, the Micheles maintain that the placement of the dock thirteen feet from the easement boundary was unreasonable. RSA 482-A:3, XIII(a) states that "[a]ll boat docking facilities shall be at least 20 feet from an abutting property line in non-tidal waters . . . ." (Emphasis added.) We understand their argument to be that, because DES treated them as abutting owners under RSA 482-A:11, II, it also should have treated them as abutting owners under RSA 482-A:3, XIII(a). We disagree. As noted above, to the extent DES may have treated the Micheles as abutting property owners for purposes of RSA 482-A:11, II, it afforded them more protection than that to which they were entitled. We are aware of no legal principle that would require DES to compound any such error by treating the Micheles as abutting property owners under RSA 482-A:3, XIII(a) as well. On the contrary, DES and the Council correctly determined that the 20-foot setback requirement did not apply in the easement context because the owners of the dominant and servient estates hold overlapping rather than abutting property interests. Therefore, RSA 482-A:3 XIII(a) is not applicable.[7] The record reflects that the Bremners chose the location of the dock so as to create the least impact to the shoreline. We hold that the Council did not err in upholding DES's approval of the location of the dock.

IV

For the foregoing reasons, we conclude that the Council did not err in upholding DES's decision to grant a dock permit to the Bremners.

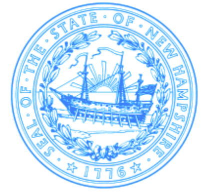
Affirmed.

DALIANIS, C.J., and HICKS, CONBOY, and BASSETT, JJ., concurred.

[7] For the same reason, we also reject the Micheles' argument that DES's inconsistent treatment of them under the statutory scheme is indicative of a legislative intent that only fee owners can apply for permits.

The State of New Hampshire
Department of Environmental Services

Robert R. Scott, Commissioner



October 13, 2021

MARGUERITE FRANCIS
INV OF PRIVACY
ELKINS NH 03233

Re: Land Resources Management File Number: 2021-02744
Subject Property: Eversource Transmission Line M127

Dear Ms. Francis:

Thank you for contacting the New Hampshire Department of Environmental Services (NHDES) regarding the subject complaint. We apologize for the delay in responding, which was due to staff vacations and the need to thoroughly research answers to your questions.

We have reviewed all of the correspondence on this issue and compiled the key questions. Our responses to these questions are listed below.

Was Eversource forthright on their permit application submissions?

> We interpret this question to have two components: (1) Whether Eversource misrepresented whether it has the legal right to undertake the project on the property, and (2) Whether Eversource exceeded the work authorized under the permit.
>
> For the first component, NHDES' authority regarding property rights is limited to determining whether an applicant has sufficient ownership interest to proceed and whether it has met the applicable statutory and regulatory criteria. If Eversource exceeded its rights under the existing easement, then any dispute should be resolved by the parties to the easement. Therefore, if you believe that Eversource took actions in the Right-of-Way (ROW) that were not allowed under the easement agreement, you should take this issue up with Eversource.
>
> For the second component, if an applicant violates the conditions of their permit, NHDES has the authority to bring the applicant into compliance. On July 23/2021, NHDES staff conducted a site inspection of the ROW. No violations of permit conditions were observed.

Was the correct Wetland permitting processes (SPN vs Standard Wetland) utilized?

We have reviewed the Wetlands permit application requirements for Statutory Permit by Notification (SPN) and Standard Dredge and Fill permits and find that the SPN was, in fact, the correct type of Wetlands permit for this work.

> The use of the SPN was applicable for the work proposed and conducted along Transmission Line M127 in accordance with RSA 482-A:3, XV and Administrative Rule Env-Wt 521. Env-Wt 521.06(a)(2) outlines the relevant requirements for utility projects to be considered minimum impact and, therefore, eligible for the SPN:
>
> > *521.06(a)(2): The project does not include establishing new access roads, installing permanent stream or wetland crossings, constructing new utility corridors or rights-of-way, or establishing new utility assets within existing corridors or rights-of-way;*
>
> Transmission Line M127 is an existing utility ROW, for which the applicant requested temporary access across wetlands to conduct maintenance in the utility ROW. The project was not for the construction of a new transmission corridor; it was for maintenance of an existing utility corridor. The wetland impacts were temporary to conduct upgrades to access travel ways in uplands, pole replacement and maintenance of vegetation in the ROW. No new access roads, utility assets, or permanent stream or wetland crossings were established for the project. Therefore, the project met the criteria for minimum impact from Env-Wt 521.06(a)(2).
>
> If the applicant had proposed construction of a substation, parking lot, storage facility, or other utility assets in the ROW then a standard wetlands application would have been required in accordance with Env-Wt 521.01 (b).

Was the Alteration of Terrain (AoT) application complete?

> We have no information to indicate the AoT application was incomplete.

Was the AOT amendment waiver approved by DES communicated to municipalities?

> Waiver decisions for AoT applications are included in the permit, which was provided to the municipalities.

Why were Property Owner signatures absent from the approved permit application?

> For the purposes of a permit to do work in a ROW, the easement owner holds record title to do any work they are authorized to do in the ROW by the easement. Therefore, the easement holder is legally the "owner" per Env-Wq 1502.45. Please see the attached *Appeal of Robert C. Michele &a.*, (Slip Opinion 2014-159, August 11, 2015) for support of this interpretation.

Were proper permitting procedures followed regarding abutter notifications?

> NHDES has followed all requirements in the statutes and rules for notifications for these permits. Neither the Wetlands SPN nor the AoT application require abutter notification. Waiver decisions for the AoT permit were included in the permit, which was provided to the municipalities. We certainly understand your frustration at not being notified of the work by Eversource. However, proper permitting procedures were followed by NHDES in this case.

We have endeavored to answer all of your questions in this letter. If you have any other questions, please contact me at (603)271-4898 or Philip.R.Trowbridge@des.nh.gov and I will direct them to the appropriate staff.

Sincerely,

Philip Trowbridge, P.E., Manager
Land Resources Management Program
Water Division, NH Department of Environmental Services

From:	Marguerite
To:	Trowbridge, Philip
Cc:	Anne Norris; Michael McDonald; Blecharczyk, Jeffrey; Mauck, Ridgely; Pelletier, Rene; Scott, Robert; Karen Ebel; Daniela Allee; Sarah McCann
Subject:	Re: Property Owner Response to NHDES Comments
Date:	Tuesday, November 2, 2021 5:58:45 PM
Attachments:	2021-10-12-ADMIN-REVIEW-CLOSE-2021210150.pdf

EXTERNAL: Do not open attachments or click on links unless you recognize and trust the sender.

Re-sending this revised version for those who may not have received it last week. Phillip Trowbridge has provided some proposed meeting dates and we certainly appreciate his responsiveness. I will reach out to the appropriate non-DES individuals to find the best time slot.

Marguerite Francis
INV OF PRIVACY

> I appreciate your prompt response to my email. At this point a face to face meeting is clearly required given that we do not have agreement on a common set of facts regarding the M-127 project. Additionally, permit irregularities that I had originally assumed were errors on Everource's part now appear to be DES-sanctioned modifications to Administrative Codes outside of the legislative approval process. While it may not be possible to reach any consensus on the issues, it seems prudent that we try before I pursue an escalation strategy.
>
> 1). Your letter dated 10/13/2020 confirms our understanding of the requirements for projects allowable under the SPN rules—projects requiring new access roads are ineligible for SPN permitting. You went on to explicitly state that no new access roads were established for the M-127 project. That is an incorrect statement and likely a key root cause explaining the communication difficulties that have frustrated both DES and various New London stakeholders.
>
> Prior to our meeting, your team may want to assemble any documents that inform their conclusion that the access roads in New London pre-existed. To my knowledge, the Eversource project support individuals who worked with us last year never denied that new roads were constructed—it was obvious to property owners, town administrative staff, the Eversource construction team, etc. The Utility had a legal right to upgrade the power line, and given the new pole/fiber technologies being installed, new roads were required. We were focused on the lack of notification to property owners regarding the construction, and how the new scars on our hillsides were going to be fixed.
>
> When I asked Eversource in early July, 2020 who permitted the new road construction, they answered DES and provided me with the SPN. When I asked the Town of New London who permitted the new roads, they said DES and referred me to the SPN. I later found out that the AOT package was also central to untangling the new road conundrum, and that documentation talks about new road development in New London and was approved by DES. This is a long way of saying no one at the time disputed the obvious—new super highways were being built across New London, and the only entity that approved any part of that construction was DES. As we all know now, the project was never fully permitted.
>
> Did Eversource advise the Wetlands team that they were building new access roads? And if they did, how did the Wetlands team reconcile the SPN definition of minimal impact projects with the reality that new access roads were always part of the plan?
>
> I am certain that Eversource did not discuss the new access roads/construction pads with the town. They delivered an SPN to the town that stated no new roads were being built, and included maps that depicted “access” without clarifying what that legend meant. While an AOT was subsequently received by the town, it is unclear who reviewed that document. If I and other New London property owners had viewed the maps in the early Spring when all of the key stakeholders had them, it would have been obvious that the access roads were new construction. Obvious because some of the impacted property is part of our town walking trail system that is utilized every day.

Obvious because some of the impacted property is clearly visible from busy town roads. Obvious because some of the impacted property is in our side yards. For an “outside” entity relying on maps, nothing is obvious.
>
> 2). I was surprised at the the DES response to my concerns that the maps provided with the SPN did not reflect what was actually built. It appears that the documentation requirements specified in the SPN regulations are more “form” rather than “substance”. I did not see anything in the SPN rules that indicated that the required maps and documentation could be “drafts” of plans. Nor was I able to find language that allowed Eversource to change their mind after a Wetlands permit had been approved without communicating those changes to the DES or to municipalities. Of course the changes that were made were to the routing of the new access roads and it is unclear if Eversource initially disclosed to the Wetlands team that new roads were being built.
>
> For the record, the submitted SPN maps were inaccurate for multiple properties in New London, not just 605 Wilmot Center Road. The maps changed significantly. I suspect DES knows this at this point.
>
> You categorized the access roads that were built as “temporary” access. That contradicts Eversource’s assertion that they were intended to be permanent. I am going to share with the utility the DES position that these roads were supposed to be temporary. We want the road on our property removed, and you appear to agree that the SPN permit did not authorize permanent roads/assets. Can you verify this before we reach out to Eversource quoting DES and demanding that the road be fully removed?
>
> 3). Your answer to the AOT question is concerning. Rather than enforce the codified rules that every other entity must follow, you have implied that Eversource does not need to comply with the “larger plan of development” and “ total project” AOT compliance requirements.
>
> Early on in this process, I reached out to the PUC asking the direct question—are there any rules in place that would allow Eversource to be exempt from statutes/regulations/ordinances either at the state or municipal level? Their answer was unambiguous—Eversource is required to follow all codes applicable to any other business entity/individual.
>
> I am troubled that your AOT team adjusted the standard rules to accommodate Eversource. I am copying Karen Ebel, our State Legislature Representative, on this email so that she is aware of my continuing frustration that Eversource seems to operate under protocols that are unspecified in statutory codes, are unique to Eversource, and more importantly, are sometimes detrimental to property owner rights.
>
> For some New London property owners, not all of the new road/construction pad development on their property was included in the AOT. A property owner reviewing that package would have no knowledge that what was depicted was a partial representation of what was going to occur in their back yards. Additionally, how could any municipal Planning Board adequately review a submitted AOT and understand the full scope/impacts of a project within their borders if the DES allows the developer to break the project into pieces and only include a subset of those pieces for municipal AOT review? Who is informing individual property owners and town planning boards that some of the puzzle pieces are missing. I now fully understand why the total project rule is in place. None of this works unless all of the puzzle pieces are in the box.

For the record, when I asked our Town Planner to provide me with the Municipal permitting and approval documentation associated with the terrain alteration/steep slope/excavation work done on our property, he referred me to the DES AOT as the permitting authorization for that work. He was unaware and surprised that the AOT omitted several puzzle pieces, including our property. Eversource never applied for a municipal permit to close the holes that appeared when the DES approved a partial M-127 plan. We and other property owners impacted by the missing permitting would appreciate understanding who dropped the ball. I had originally assumed it was Eversource. Today it is clear those process deficiencies intersect Eversource, DES, and the Town of New London. Had Eversource/DES adhered to the “total project” statutory rule, the permitting gaps would still exist (our municipal ordinance is stricter relative to bringing in fill to alter land terrain), but there would be partial permitting.
>
> If DES believes that Eversource should be exempt from adhering to existing regulations, you have the ability to propose an administrative rule change, conduct public meetings, and ask the state legislature, if required, to approve proposed amendments. If you want to introduce “linear utility project” as a new or distinct concept in the regulations with new or distinct administrative codes, you can certainly do so. Public scrutiny would surface any

unintended consequences associated with proposed rule changes. Until then, Eversource is required to follow the existing rules sanctioned by the Legislature.
>
> I have suspected for many months, that the root cause of the mess that happened with the partial re-build of the M-127 power line is that both the DES and the Town of New London treated this project differently because it was an Eversource project, and because Eversource intentionally communicated this project as routine pole replacement rather than a rebuilding of a a large part of the power corridor. Eversource completed the construction in New London without permits and without Planning Board approval. Our town administrative team assumed that because it was Eversource and because the DES had approved permits that they did not need to scrutinize the work. For over a year, our town struggled with the notion that Eversource needed to follow all of the same ordinances and approval procedures as anyone else who wanted to embark on a major excavation/construction project. The town's outside counsel stepped in and advised our administrative staff that Eversource had no exemption from local permitting requirements/exceptions, and that property owner signatures would have been required had the utility correctly applied for all mandated permits. Eversource is not the property owner and cannot assume that role if not statutorily prescribed.
>
> I believe that the DES is in a similar, precarious position. You have not provided any codified premise allowing for Eversource to opt out of rules that apply to other developers/entities. What I hear you saying is "We've always done it this way." That does not mean that your department's decision to treat Eversource differently—"linear utility project" vs "commercial development project"— and ignore the total project rule is legally correct. I have not found any reference to linear utility project in any administrative rule. Doing the wrong thing consistently does not make it right. And as we know from this project, an AOT that includes only a subset of the proposed work makes it impossible for municipalities and property owners to get a complete understanding of total project impacts, determine required municipal permitting, obtain required Planning Board exceptions, etc.
>
> 4). I will follow up directly with the NH DOJ on your assertion that the appeals case you cited is applicable to the permitting done for the M-127 project. As you can suspect, I strongly disagree and believe that the lawyers needed a solution to an uncomfortable problem. But my intuition could be wrong on this. In order to avoid wasting DOJ time, can you provide me with the contact information for the person who rendered that legal opinion?
>
> 5). I appreciate your agreeing to re-look at the previous DES response to this question. Our town administrative team does not appear to have that documentation in their files. More importantly, incomplete files (and inaccurate file documentation) can become bigger problems down the road. While I understand that the Eversource construction was essentially completed before they advised the DES that they were amending their approved AOT permit, it does seem rather odd that the GZA permitting team submitted detailed site plans for DES approval prior to the construction sub-contractor determining where they wanted to build the new roads. The changes depicted in the Amendment were significant, and provide additional proof that new roads were built. It is another example of getting permits approved before completing the planning and decision making—form over substance.
>
> I had requested a meeting to address property owner concerns that have been festering for a long time. I have publicly stated to the PUC, SEC, Town of New London, and DES that our objectives are to 1). Get New London properties returned to their original state, if desired by impacted property owners and 2). Prevent future NH residents from experiencing the trauma associated with strangers arriving at their homes, unannounced, and building super highways through their back yards without any plans being shared. An additional and more recent goal is to get all levels of NH "government" to stop treating Eversource differently than the rest of us. As a member of our Board of Selectman recently said—"Eversource may be the only game in town but that doesn't mean they should be allowed to do what they want without following the rules and without oversight."
>
> Things went wrong within Eversource, within the Town of New London, and in my opinion, within the DES. Eversource has accepted some but not all of their process improvement opportunities. The Town of New London, after involving outside counsel, has accepted its process failures and has committed to improvements. Hopefully, the DES will objectively look at their end-to-end process and address any deficiencies.
>
> I look forward to our meeting, if for no other reason than ensuring accurate communication is occurring. I do not expect that we will reach consensus on all of our concerns. After working on similar issues with the Town of New London for over a year, I have become more cognizant of the difficulty of solving complex and sensitive problems easily or quickly, and the need at times for an objective third party to sit at the table as critical thinking/analysis

occurs. Please trust us when we say we are not interested in participating in any shame/blame exercise. We are only interested in getting problems fixed.
>
> Hopefully DES staff will have access to the relevant Administrative Rules as well as all of the permitting/compliance documentation at our meeting. I have that information in my files.
>
> Please provide a couple of proposed meeting dates to me and I will work with the non-DES folks to choose the best time slot for participating New London stakeholders.
>
> Thank you for agreeing to a formal meeting to address our concerns. It is necessary and a critical next step.
>
> Marguerite Francis
> INV OF PRIVACY
> New London, NH. 03257
> INV OF PRIVACY
>
> Sent from my iPad
>
>> On Oct 26, 2021, at 3:39 PM, Trowbridge, Philip <Philip.R.Trowbridge@des.nh.gov> wrote:
>> Dear Ms. Francis,
>> Thank you for your email on October 18, 2021 regarding the subject topic. Below are responses to the questions you posed.
>> 1). Why was the SPN used when new roads/permanent assets were constructed?
>> We feel that we have answered this question clearly. Please see our response in the letter issued by the department October 13, 2021. The response was reviewed by the NHDES legal unit and the NHDOJ. It was determined that the project met the requirements for a Statutory Permit by Notification (SPN).
>> 2). Why does what was depicted in the SPN documentation differ from what was actually constructed? Your DES compliance photos show this discrepancy.
>> In response to your original complaint, NHDES conducted a field investigation to determine if the work was done in compliance with Wetlands SPN permits #2020-00242 and #2020-03207. To be in compliance with the SPN the work needed to follow the Best Management Practices Manual for Utility Maintenance. Our conclusion was that it was.
>> The discrepancy you mention seems to be that some temporary access ways are in different locations from where they were before or where they were shown on the SPN application. We are going to focus this answer on the section of the ROW off Wilmot Center Road. Work in this area was done under the Wetlands SPN alone. The AoT permit did not apply to this area. The Best Management Practices Manual encourages the use of established access ways to cross wetlands as much as possible, and most of the project appears to have done this. None of the wetland crossings observed by NHDES were in different locations. However, the access way in the upland area leading to Pole #176 took a different path than was shown on the plan in the application. There are situations where moving an access way is appropriate, such as to avoid steep slopes. We do not know why this section of the access way was relocated. However, since this part of the access way was in uplands, it is out of the jurisdiction of the Wetlands SPN. The location of an access way in upland areas is outside the scope of the Wetlands SPN approval.
>> 3). Why does the AOT omit some properties included in this project?
>> For linear projects, AoT has not required that permit coverage be obtained for areas of disturbances of less than 100,000 sq. feet, where such areas are discontinuous with other project disturbances. Therefore, the issued AoT permit may not have included all of the areas of disturbance associated with the overall scope of work performed by Eversource for this project. One such area is the ROW off Wilmot Center Road. NHDES considers the concept of a larger plan of development, defined in Env-Wq 1502.39, to be applicable to land development of commercial or residential projects, not linear utility projects such as the Eversource project.
>> 4). Why were property owner signatures excluded given the specificity of definitions included in the AOT regulations?
>> We feel that this question was addressed clearly in the October 13, 2021 response from NHDES. Our response on this matter was reviewed by the NHDES legal unit and the NHDOJ.
>> 5). Why were municipalities left out of the loop when Eversource notified DES of AOT changes, specifically the re-routing of the new roads they were building?
>> We have reviewed our October 13, 2021 response to the question "Was the AoT amendment waiver approved by DES communicated to municipalities?" It is apparent that our response was incomplete. A waiver decision was

included in the original permit for this project (AoT-1769), issued March 20, 2020, and was provided to the municipalities. Later, Eversource's agent, GZA GeoEnvironmental, Inc. (GZA), submitted a permit amendment and waiver request by email dated August 11, 2020. The request sought a NHDES waiver of Env-Wq1503.21(d)(4) and (6).] The email was not seen by AoT staff until it was discovered during a project file review in June 2021. NHDES followed up with GZA regarding the August 11, 2020 request and was informed that the scope of work for the project was already complete. NHDES is currently investigating whether Eversource provided notification to the appropriate municipalities, and whether any further compliance efforts are warranted. We will keep you informed on this matter as we learn more.

>> In response to your complaint, the Department has reviewed both the Wetlands and AoT files, performed a field inspection, and provided answers to your questions several times. With the exception of #5 above, which we are working on, we feel that we have thoroughly addressed your questions. It is a complicated situation so I would be happy to have a phone call or meeting with you if you would like to go over these responses.

>> ______________________________

>> Philip Trowbridge, P.E., Manager

>> Land Resources Management Program

>> Water Division, NH Department of Environmental Services

>> P.O. Box 95

>> Concord, NH 03302-0095

>> phone (603) 271-4898

>> email: Philip.R.Trowbridge@des.nh.gov

>> -----Original Message-----

>> From: Marguerite INV OF PRIVACY

>> Sent: Monday, October 18, 2021 2:17 PM

>> To: Trowbridge, Philip <philip.r.trowbridge@des.nh.gov>

>> Cc: Anne Norris INV OF PRIVACY ; Michael McDonald INV OF PRIVACY>; Blecharczyk, Jeffrey <JEFFREY.D.BLECHARCZYK@des.nh.gov>

>> Subject: NHDES Response to M-127 Compliance Review

>> EXTERNAL: Do not open attachments or click on links unless you recognize and trust the sender.

>> __________________________________

>>

>> Thank you for your response to our request for a full Wetlands/AOT file review of the Eversource rebuild of the M-127 power line in New London. Unfortunately, your answers do not fully align with the construction that occurred on our properties. We have the following questions/concerns that require additional discussion. We had suggested an in-person meeting on this to avoid the inevitable back and forth that occurs when only relying on written statements.

>> We will re-ask our questions using your letter as our outline.

>> 1). You stated that the SPN permit was applicable because this project did not include construction of new access roads or new permanent assets. New roads were built throughout New London. In fact, the DES field site photos/commentary depicts "old road" and "new road". Additionally, Eversource left behind huge, new construction pads throughout our town. Those pads are permanent assets.

>> In terms of additional "proof" that new roads were built, I would refer you to the documentation Eversource provided to the DES. The SPN maps showing "access" do not match with the roads that were built for this project. One example would be my property—605 Wilmot Center Road. If you compare the SPN to the photographs that the compliance officer took, you will notice that what Eversource depicted on the SPN maps and what was actually constructed are different.

>> If you review the August AOT amendment and waiver request you will notice that Eversource notified the DES that their initial access road plans needed to change—road construction plans moved from one side of the Easement to the other. Roads that already exist cannot magically move 125 feet.

>> Please advise us as to how the SPN can be utilized when new roads/assets were obviously built.

>> 2). The properties included in the AOT does not include all of the properties included on the SPN. The SPN reflects the full Eversource project while the AOT includes only some of the properties where poles/associated equipment were replaced. Eversource invoked the 100,000 sq.ft. of contiguous land disturbance rule, ignoring the additional criteria—part of a larger plan of development. Our reading of the administrative code suggests that all properties part of the total project should be represented. To be specific, if the DES compares the SPN maps with the AOT maps, it will be clear that there are discrepancies in terms of missing properties. Given that this work was part of one large project, we believe that our properties should have been fully represented in the AOT.

>> 3). The AOT amendment waiver that the DES approved happened in August, months after the original permit

was transmitted to municipalities. So…it would not have been possible for the amendment waiver to have been included in the initial permit application.
>> Again, our question is basic. In August, when Eversource advised the DES that it was re-routing the new access roads that needed to be constructed, and requested a waiver from filing a formal amendment, did the DES ask Eversource for proof that it had notified municipalities of these changes?
>> 4). The DES "interpretation" of "owner" and the appeals case that is cited is flawed in a very specific manner. In the Robert C. Michele case, it was determined that a specific statutory definition of "owner" was missing, therefore allowing for an interpretation that an Easement holder could be construed as the owner. In the case of the AOT rules, these terms are defined.
>> The Administrative Rule definition does say that Eversource is the "Applicant". It also states that contact information and signature from the owner, if different than the applicant, is required on the application (ENV-Wq 1503.07).
>> "(C). The name and mailing address's of each property owner of the property on which the project will occur, if other than the applicant, and if the property owner does not have an agent, the following:
>> 1). For a property owner who is an individual, not an entity, the property owner's daytime telephone number and e-mail address"
>> Additionally, Env.-Wq 1502.45 states:
>> " "Owner" means the person who holds record title to the property on which the work for which RSA 485-A:17 requires a permit has occurred or is proposed to occur."
>> The AOT permit requires signature from the "Applicant" which is Eversource, the Applicant's "Agent" if applicable which is GZA, the "Owner" which are the McDonalds and myself, and the Owner's "Agent" if applicable which in this case it is not.
>> Eversource is not the record title holder, which I suspect you already understand.
>> ———
>> Given the number of months that this compliance review has been underway, I am disappointed in the completeness of your response. Our questions remain the same:
>> 1). Why was the SPN used when new roads/permanent assets were constructed?
>> 2). Why does what was depicted in the SPN documentation differ from what was actually constructed? Your DES compliance photos shoe this discrepancy.
>> 3). Why does the AOT omit some properties included in this project?
>> 4). Why were property owner signatures excluded given the specificity of definitions included in the AOT regulations?
>> 5). Why were municipalities left out of the loop when Eversource notified DES of AOT changes, specifically the re-routing of the new roads they were building?
>> It has been a very long and arduous journey trying to get to the bottom of what happened with the M-127 partial rebuild project. Our goals from the beginning were to ensure that 1) our properties were fully restored and 2) this would never happen again to other NewHampshire property owners. We have yet to achieve either of those goals.
>> We look forward to more specific responses to our concerns. If you are unable to decipher our questions, please give me a call. If I do not hear from you in 30 days, I will file a formal complaint with the NH DOJ. In my opinion, given that this mess has been repeated with the A-111, D-142, etc. rebuilds, time is of the essence.
>> Marguerite Francis
>> INV OF PRIVACY
>> New London, NH. 03257
>> INV OF PRIVACY
>> Sent from my iPad

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

From: Anne Norris INV OF PRIVACY
Sent: Monday, July 26, 2021 12:18 AM
To: Bishop, Robert <ROBERT.B.BISHOP@des.nh.gov>; Blecharczyk, Jeffrey <JEFFREY.D.BLECHARCZYK@des.nh.gov>
Cc: macofisle <INV OF PRIVACY
Subject: NHDES Compliance

EXTERNAL: Do not open attachments or click on links unless you recognize and trust the sender.

Good morning. We, Anne Norris and Michael McDonald, INV OF PRIVACY New London are one of many property owners in New London that were impacted by the partial re-build of the M127 power corridor last year. I am aware that the NHDES is conducting a Compliance review of this work—both the SPN (File # 2022-00242) and the associated Alteration of Terrain permitting (AOT-1769). A DES truck was at the Whitney Brook power line intersection and I am assuming that means that the compliance review is well underway. I have two specific questions relating to my property that I would appreciate receiving answers to as part of your review.

1). The Alteration of Terrain statute and associated permitting applications requires that property owners or their agents sign the application. The statute defines owner as:

Env-Wq 1502.45 "Owner" means the person who holds record title to the property on which the work for which RSA 485-A:17 requires a permit has occurred or is proposed to occur.

Neither Michael McDonald nor myself signed that permit application. Can you refer us to the

statute or administrative rule that allows this statutory requirement to be waived? If we had been included as part of the AOT submission we would not have been surprised when the bulldozers and dump trucks of gravel rolled into our property, and we would have had the opportunity to specify to Eversource property restoration expectations up front as opposed to dealing with this mess on the back end.

2). The original map submissions were subsequently changed to reflect new paths for the access roads that needed to be built to accommodate the power corridor rebuild. The roads on our property moved significantly—from one side of the easement to the other. This change was clearly greater than what would be allowed under the rules requiring either a formal amendment to the AOT or the submission of a new permit. We are aware that the DES waived both of these requirements. Was the Town of New London and/or property owners notified of this waiver and provided with the new maps? If not, why not?

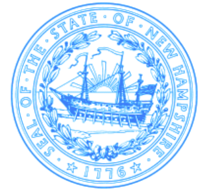
As a side note, not all of the work on our property was included in the AOT. While we know that the statute stipulates 100,000 square feet of “contiguous” land disturbance as the trigger for permitting, the SPN dealt with the M127 rebuild as a project, and having the AOT leave out portions of this work just creates confusion.

If you are not the correct person to address my property-specific questions as part of your Compliance review, I would appreciate your forwarding this email to the correct individual.

Thank you,
Anne Norris
Michael McDonald

The State of New Hampshire
Department of Environmental Services

Robert R. Scott, Commissioner



October 13, 2021

MARGUERITE FRANCIS
INV OF PRIVACY
ELKINS NH 03233

Re: Land Resources Management File Number: 2021-02744
Subject Property: Eversource Transmission Line M127

Dear Ms. Francis:

Thank you for contacting the New Hampshire Department of Environmental Services (NHDES) regarding the subject complaint. We apologize for the delay in responding, which was due to staff vacations and the need to thoroughly research answers to your questions.

We have reviewed all of the correspondence on this issue and compiled the key questions. Our responses to these questions are listed below.

Was Eversource forthright on their permit application submissions?

> We interpret this question to have two components: (1) Whether Eversource misrepresented whether it has the legal right to undertake the project on the property, and (2) Whether Eversource exceeded the work authorized under the permit.
>
> For the first component, NHDES' authority regarding property rights is limited to determining whether an applicant has sufficient ownership interest to proceed and whether it has met the applicable statutory and regulatory criteria. If Eversource exceeded its rights under the existing easement, then any dispute should be resolved by the parties to the easement. Therefore, if you believe that Eversource took actions in the Right-of-Way (ROW) that were not allowed under the easement agreement, you should take this issue up with Eversource.
>
> For the second component, if an applicant violates the conditions of their permit, NHDES has the authority to bring the applicant into compliance. On July 23/2021, NHDES staff conducted a site inspection of the ROW. No violations of permit conditions were observed.

Was the correct Wetland permitting processes (SPN vs Standard Wetland) utilized?

We have reviewed the Wetlands permit application requirements for Statutory Permit by Notification (SPN) and Standard Dredge and Fill permits and find that the SPN was, in fact, the correct type of Wetlands permit for this work.

> The use of the SPN was applicable for the work proposed and conducted along Transmission Line M127 in accordance with RSA 482-A:3, XV and Administrative Rule Env-Wt 521. Env-Wt 521.06(a)(2) outlines the relevant requirements for utility projects to be considered minimum impact and, therefore, eligible for the SPN:
>
> > *521.06(a)(2): The project does not include establishing new access roads, installing permanent stream or wetland crossings, constructing new utility corridors or rights-of-way, or establishing new utility assets within existing corridors or rights-of-way;*
>
> Transmission Line M127 is an existing utility ROW, for which the applicant requested temporary access across wetlands to conduct maintenance in the utility ROW. The project was not for the construction of a new transmission corridor; it was for maintenance of an existing utility corridor. The wetland impacts were temporary to conduct upgrades to access travel ways in uplands, pole replacement and maintenance of vegetation in the ROW. No new access roads, utility assets, or permanent stream or wetland crossings were established for the project. Therefore, the project met the criteria for minimum impact from Env-Wt 521.06(a)(2).
>
> If the applicant had proposed construction of a substation, parking lot, storage facility, or other utility assets in the ROW then a standard wetlands application would have been required in accordance with Env-Wt 521.01 (b).

Was the Alteration of Terrain (AoT) application complete?

> We have no information to indicate the AoT application was incomplete.

Was the AOT amendment waiver approved by DES communicated to municipalities?

> Waiver decisions for AoT applications are included in the permit, which was provided to the municipalities.

Why were Property Owner signatures absent from the approved permit application?

> For the purposes of a permit to do work in a ROW, the easement owner holds record title to do any work they are authorized to do in the ROW by the easement. Therefore, the easement holder is legally the "owner" per Env-Wq 1502.45. Please see the attached *Appeal of Robert C. Michele &a.*, (Slip Opinion 2014-159, August 11, 2015) for support of this interpretation.

Were proper permitting procedures followed regarding abutter notifications?

> NHDES has followed all requirements in the statutes and rules for notifications for these permits. Neither the Wetlands SPN nor the AoT application require abutter notification. Waiver decisions for the AoT permit were included in the permit, which was provided to the municipalities. We certainly understand your frustration at not being notified of the work by Eversource. However, proper permitting procedures were followed by NHDES in this case.

We have endeavored to answer all of your questions in this letter. If you have any other questions, please contact me at (603)271-4898 or Philip.R.Trowbridge@des.nh.gov and I will direct them to the appropriate staff.

Sincerely,

Philip Trowbridge, P.E., Manager
Land Resources Management Program
Water Division, NH Department of Environmental Services

From: Marguerite
Sent: Tue, 2 Nov 2021 17:56:49 -0400
To: Trowbridge, Philip
Cc: Anne Norris; Michael McDonald; Blecharczyk, Jeffrey; Mauck, Ridgely; Pelletier, Rene; Scott, Robert; Karen Ebel; Daniela Allee; Sarah McCann
Subject: Re: Property Owner Response to NHDES Comments
Attachments: 2021-10-12-ADMIN-REVIEW-CLOSE-2021210150.pdf

EXTERNAL: Do not open attachments or click on links unless you recognize and trust the sender.

Re-sending this revised version for those who may not have received it last week. Phillip Trowbridge has provided some proposed meeting dates and we certainly appreciate his responsiveness. I will reach out to the appropriate non-DES individuals to find the best time slot.

Marguerite Francis
INV OF PRIVACY

> I appreciate your prompt response to my email. At this point a face to face meeting is clearly required given that we do not have agreement on a common set of facts regarding the M-127 project. Additionally, permit irregularities that I had originally assumed were errors on Everource's part now appear to be DES-sanctioned modifications to Administrative Codes outside of the legislative approval process. While it may not be possible to reach any consensus on the issues, it seems prudent that we try before I pursue an escalation strategy.
>
> 1). Your letter dated 10/13/2020 confirms our understanding of the requirements for projects allowable under the SPN rules—projects requiring new access roads are ineligible for SPN permitting. You went on to explicitly state that no new access roads were established for the M-127 project. That is an incorrect statement and likely a key root cause explaining the communication difficulties that have frustrated both DES and various New London stakeholders.
>
> Prior to our meeting, your team may want to assemble any documents that inform their conclusion that the access roads in New London pre-existed. To my knowledge, the Eversource project support individuals who worked with us last year never denied that new roads were constructed—it was obvious to property owners, town administrative staff, the Eversource construction team, etc. The Utility had a legal right to upgrade the power line, and given the new pole/fiber technologies being installed, new roads were required. We were focused on the lack of notification to property owners regarding the construction, and how the new scars on our hillsides were going to be fixed.
>
> When I asked Eversource in early July, 2020 who permitted the new road construction, they answered DES and provided me with the SPN. When I asked the Town of New London who permitted the new roads, they said DES and referred me to the SPN. I later found out that the AOT package was also central to untangling the new road conundrum, and that documentation talks about new road development in New London and was approved by DES. This is a long way of saying no one at the time disputed the obvious—new super highways were being built across New London, and the only entity that approved any part of that construction was DES. As we all know now, the project was never fully permitted.
>
> Did Eversource advise the Wetlands team that they were building new access roads? And if they did, how did the Wetlands team reconcile the SPN definition of minimal impact projects with the reality that new access roads were always part of the plan?
>
> I am certain that Eversource did not discuss the new access roads/construction pads with the town. They delivered an SPN to the town that stated no new roads were being built, and included maps that depicted "access" without clarifying what that legend meant. While an AOT was subsequently received by the town, it is unclear who

reviewed that document. If I and other New London property owners had viewed the maps in the early Spring when all of the key stakeholders had them, it would have been obvious that the access roads were new construction. Obvious because some of the impacted property is part of our town walking trail system that is utilized every day. Obvious because some of the impacted property is clearly visible from busy town roads. Obvious because some of the impacted property is in our side yards. For an “outside” entity relying on maps, nothing is obvious.
>
> 2). I was surprised at the the DES response to my concerns that the maps provided with the SPN did not reflect what was actually built. It appears that the documentation requirements specified in the SPN regulations are more “form” rather than “substance”. I did not see anything in the SPN rules that indicated that the required maps and documentation could be “drafts” of plans. Nor was I able to find language that allowed Eversource to change their mind after a Wetlands permit had been approved without communicating those changes to the DES or to municipalities. Of course the changes that were made were to the routing of the new access roads and it is unclear if Eversource initially disclosed to the Wetlands team that new roads were being built.
>
> For the record, the submitted SPN maps were inaccurate for multiple properties in New London, not just 605 Wilmot Center Road. The maps changed significantly. I suspect DES knows this at this point.
>
> You categorized the access roads that were built as “temporary” access. That contradicts Eversource’s assertion that they were intended to be permanent. I am going to share with the utility the DES position that these roads were supposed to be temporary. We want the road on our property removed, and you appear to agree that the SPN permit did not authorize permanent roads/assets. Can you verify this before we reach out to Eversource quoting DES and demanding that the road be fully removed?
>
> 3). Your answer to the AOT question is concerning. Rather than enforce the codified rules that every other entity must follow, you have implied that Eversource does not need to comply with the “larger plan of development” and “ total project” AOT compliance requirements.
>
> Early on in this process, I reached out to the PUC asking the direct question—are there any rules in place that would allow Eversource to be exempt from statutes/regulations/ordinances either at the state or municipal level? Their answer was unambiguous—Eversource is required to follow all codes applicable to any other business entity/individual.
>
> I am troubled that your AOT team adjusted the standard rules to accommodate Eversource. I am copying Karen Ebel, our State Legislature Representative, on this email so that she is aware of my continuing frustration that Eversource seems to operate under protocols that are unspecified in statutory codes, are unique to Eversource, and more importantly, are sometimes detrimental to property owner rights.
>
> For some New London property owners, not all of the new road/construction pad development on their property was included in the AOT. A property owner reviewing that package would have no knowledge that what was depicted was a partial representation of what was going to occur in their back yards. Additionally, how could any municipal Planning Board adequately review a submitted AOT and understand the full scope/impacts of a project within their borders if the DES allows the developer to break the project into pieces and only include a subset of those pieces for municipal AOT review? Who is informing individual property owners and town planning boards that some of the puzzle pieces are missing. I now fully understand why the total project rule is in place. None of this works unless all of the puzzle pieces are in the box.

For the record, when I asked our Town Planner to provide me with the Municipal permitting and approval documentation associated with the terrain alteration/steep slope/excavation work done on our property, he referred me to the DES AOT as the permitting authorization for that work. He was unaware and surprised that the AOT omitted several puzzle pieces, including our property. Eversource never applied for a municipal permit to close the holes that appeared when the DES approved a partial M-127 plan. We and other property owners impacted by the missing permitting would appreciate understanding who dropped the ball. I had originally assumed it was Eversource. Today it is clear those process deficiencies intersect Eversource, DES, and the Town of New London. Had Eversource/DES adhered to the “total project” statutory rule, the permitting gaps would still exist (our municipal ordinance is stricter relative to bringing in fill to alter land terrain), but there would be partial

permitting.
>
> If DES believes that Eversource should be exempt from adhering to existing regulations, you have the ability to propose an administrative rule change, conduct public meetings, and ask the state legislature, if required, to approve proposed amendments. If you want to introduce "linear utility project" as a new or distinct concept in the regulations with new or distinct administrative codes, you can certainly do so. Public scrutiny would surface any unintended consequences associated with proposed rule changes. Until then, Eversource is required to follow the existing rules sanctioned by the Legislature.
>
> I have suspected for many months, that the root cause of the mess that happened with the partial re-build of the M-127 power line is that both the DES and the Town of New London treated this project differently because it was an Eversource project, and because Eversource intentionally communicated this project as routine pole replacement rather than a rebuilding of a a large part of the power corridor. Eversource completed the construction in New London without permits and without Planning Board approval. Our town administrative team assumed that because it was Eversource and because the DES had approved permits that they did not need to scrutinize the work. For over a year, our town struggled with the notion that Eversource needed to follow all of the same ordinances and approval procedures as anyone else who wanted to embark on a major excavation/construction project. The town's outside counsel stepped in and advised our administrative staff that Eversource had no exemption from local permitting requirements/exceptions, and that property owner signatures would have been required had the utility correctly applied for all mandated permits. Eversource is not the property owner and cannot assume that role if not statutorily prescribed.
>
> I believe that the DES is in a similar, precarious position. You have not provided any codified premise allowing for Eversource to opt out of rules that apply to other developers/entities. What I hear you saying is "We've always done it this way." That does not mean that your department's decision to treat Eversource differently—"linear utility project" vs "commercial development project"— and ignore the total project rule is legally correct. I have not found any reference to linear utility project in any administrative rule. Doing the wrong thing consistently does not make it right. And as we know from this project, an AOT that includes only a subset of the proposed work makes it impossible for municipalities and property owners to get a complete understanding of total project impacts, determine required municipal permitting, obtain required Planning Board exceptions, etc.
>
> 4). I will follow up directly with the NH DOJ on your assertion that the appeals case you cited is applicable to the permitting done for the M-127 project. As you can suspect, I strongly disagree and believe that the lawyers needed a solution to an uncomfortable problem. But my intuition could be wrong on this. In order to avoid wasting DOJ time, can you provide me with the contact information for the person who rendered that legal opinion?
>
> 5). I appreciate your agreeing to re-look at the previous DES response to this question. Our town administrative team does not appear to have that documentation in their files. More importantly, incomplete files (and inaccurate file documentation) can become bigger problems down the road. While I understand that the Eversource construction was essentially completed before they advised the DES that they were amending their approved AOT permit, it does seem rather odd that the GZA permitting team submitted detailed site plans for DES approval prior to the construction sub-contractor determining where they wanted to build the new roads. The changes depicted in the Amendment were significant, and provide additional proof that new roads were built. It is another example of getting permits approved before completing the planning and decision making—form over substance.
>
> I had requested a meeting to address property owner concerns that have been festering for a long time. I have publicly stated to the PUC, SEC, Town of New London, and DES that our objectives are to 1). Get New London properties returned to their original state, if desired by impacted property owners and 2). Prevent future NH residents from experiencing the trauma associated with strangers arriving at their homes, unannounced, and building super highways through their back yards without any plans being shared. An additional and more recent goal is to get all levels of NH "government" to stop treating Eversource differently than the rest of us. As a member of our Board of Selectman recently said—"Eversource may be the only game in town but that doesn't mean they should be allowed to do what they want without following the rules and without oversight."
>
> Things went wrong within Eversource, within the Town of New London, and in my opinion, within the DES. Eversource has accepted some but not all of their process improvement opportunities. The Town of New

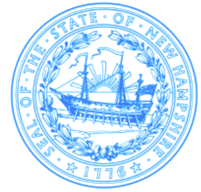
London, after involving outside counsel, has accepted its process failures and has committed to improvements. Hopefully, the DES will objectively look at their end-to-end process and address any deficiencies.
>
> I look forward to our meeting, if for no other reason than ensuring accurate communication is occurring. I do not expect that we will reach consensus on all of our concerns. After working on similar issues with the Town of New London for over a year, I have become more cognizant of the difficulty of solving complex and sensitive problems easily or quickly, and the need at times for an objective third party to sit at the table as critical thinking/analysis occurs. Please trust us when we say we are not interested in participating in any shame/blame exercise. We are only interested in getting problems fixed.
>
> Hopefully DES staff will have access to the relevant Administrative Rules as well as all of the permitting/compliance documentation at our meeting. I have that information in my files.
>
> Please provide a couple of proposed meeting dates to me and I will work with the non-DES folks to choose the best time slot for participating New London stakeholders.
>
> Thank you for agreeing to a formal meeting to address our concerns. It is necessary and a critical next step.
>
> Marguerite Francis
> INV OF PRIVACY
> New London, NH. 03257
> INV OF PRIVACY
>
> Sent from my iPad
>
>> On Oct 26, 2021, at 3:39 PM, Trowbridge, Philip <Philip.R.Trowbridge@des.nh.gov> wrote:
>> Dear Ms. Francis,
>> Thank you for your email on October 18, 2021 regarding the subject topic. Below are responses to the questions you posed.
>> 1). Why was the SPN used when new roads/permanent assets were constructed?
>> We feel that we have answered this question clearly. Please see our response in the letter issued by the department October 13, 2021. The response was reviewed by the NHDES legal unit and the NHDOJ. It was determined that the project met the requirements for a Statutory Permit by Notification (SPN).
>> 2). Why does what was depicted in the SPN documentation differ from what was actually constructed? Your DES compliance photos show this discrepancy.
>> In response to your original complaint, NHDES conducted a field investigation to determine if the work was done in compliance with Wetlands SPN permits #2020-00242 and #2020-03207. To be in compliance with the SPN the work needed to follow the Best Management Practices Manual for Utility Maintenance. Our conclusion was that it was.
>> The discrepancy you mention seems to be that some temporary access ways are in different locations from where they were before or where they were shown on the SPN application. We are going to focus this answer on the section of the ROW off Wilmot Center Road. Work in this area was done under the Wetlands SPN alone. The AoT permit did not apply to this area. The Best Management Practices Manual encourages the use of established access ways to cross wetlands as much as possible, and most of the project appears to have done this. None of the wetland crossings observed by NHDES were in different locations. However, the access way in the upland area leading to Pole #176 took a different path than was shown on the plan in the application. There are situations where moving an access way is appropriate, such as to avoid steep slopes. We do not know why this section of the access way was relocated. However, since this part of the access way was in uplands, it is out of the jurisdiction of the Wetlands SPN. The location of an access way in upland areas is outside the scope of the Wetlands SPN approval.
>> 3). Why does the AOT omit some properties included in this project?
>> For linear projects, AoT has not required that permit coverage be obtained for areas of disturbances of less than 100,000 sq. feet, where such areas are discontinuous with other project disturbances. Therefore, the issued AoT permit may not have included all of the areas of disturbance associated with the overall scope of work performed by Eversource for this project. One such area is the ROW off Wilmot Center Road. NHDES considers the concept of a larger plan of development, defined in Env-Wq 1502.39, to be applicable to land development of commercial or residential projects, not linear utility projects such as the Eversource project.

>> 4). Why were property owner signatures excluded given the specificity of definitions included in the AOT regulations?
>> We feel that this question was addressed clearly in the October 13, 2021 response from NHDES. Our response on this matter was reviewed by the NHDES legal unit and the NHDOJ.
>> 5). Why were municipalities left out of the loop when Eversource notified DES of AOT changes, specifically the re-routing of the new roads they were building?
>> We have reviewed our October 13, 2021 response to the question "Was the AoT amendment waiver approved by DES communicated to municipalities?" It is apparent that our response was incomplete. A waiver decision was included in the original permit for this project (AoT-1769), issued March 20, 2020, and was provided to the municipalities. Later, Eversource's agent, GZA GeoEnvironmental, Inc. (GZA), submitted a permit amendment and waiver request by email dated August 11, 2020. The request sought a NHDES waiver of Env-Wq1503.21(d)(4) and (6).] The email was not seen by AoT staff until it was discovered during a project file review in June 2021. NHDES followed up with GZA regarding the August 11, 2020 request and was informed that the scope of work for the project was already complete. NHDES is currently investigating whether Eversource provided notification to the appropriate municipalities, and whether any further compliance efforts are warranted. We will keep you informed on this matter as we learn more.
>> In response to your complaint, the Department has reviewed both the Wetlands and AoT files, performed a field inspection, and provided answers to your questions several times. With the exception of #5 above, which we are working on, we feel that we have thoroughly addressed your questions. It is a complicated situation so I would be happy to have a phone call or meeting with you if you would like to go over these responses.
>> ______________________________
>> Philip Trowbridge, P.E., Manager
>> Land Resources Management Program
>> Water Division, NH Department of Environmental Services
>> P.O. Box 95
>> Concord, NH 03302-0095
>> phone (603) 271-4898
>> email: Philip.R.Trowbridge@des.nh.gov
>> -----Original Message-----
>> From: Marguerite INV OF PRIVACY
>> Sent: Monday, October 18, 2021 2:17 PM
>> To: Trowbridge, Philip <philip.r.trowbridge@des.nh.gov>
>> Cc: Anne Norris INV OF PRIVACY; Michael McDonald INV OF PRIVACY>; Blecharczyk, Jeffrey <JEFFREY.D.BLECHARCZYK@des.nh.gov>
>> Subject: NHDES Response to M-127 Compliance Review
>> EXTERNAL: Do not open attachments or click on links unless you recognize and trust the sender.
>> ___________________________________
>>
>> Thank you for your response to our request for a full Wetlands/AOT file review of the Eversource rebuild of the M-127 power line in New London. Unfortunately, your answers do not fully align with the construction that occurred on our properties. We have the following questions/concerns that require additional discussion. We had suggested an in-person meeting on this to avoid the inevitable back and forth that occurs when only relying on written statements.
>> We will re-ask our questions using your letter as our outline.
>> 1). You stated that the SPN permit was applicable because this project did not include construction of new access roads or new permanent assets. New roads were built throughout New London. In fact, the DES field site photos/commentary depicts "old road" and "new road". Additionally, Eversource left behind huge, new construction pads throughout our town. Those pads are permanent assets.
>> In terms of additional "proof" that new roads were built, I would refer you to the documentation Eversource provided to the DES. The SPN maps showing "access" do not match with the roads that were built for this project. One example would be my property—605 Wilmot Center Road. If you compare the SPN to the photographs that the compliance officer took, you will notice that what Eversource depicted on the SPN maps and what was actually constructed are different.
>> If you review the August AOT amendment and waiver request you will notice that Eversource notified the DES that their initial access road plans needed to change—road construction plans moved from one side of the Easement to the other. Roads that already exist cannot magically move 125 feet.

>> Please advise us as to how the SPN can be utilized when new roads/assets were obviously built.
>> 2). The properties included in the AOT does not include all of the properties included on the SPN. The SPN reflects the full Eversource project while the AOT includes only some of the properties where poles/associated equipment were replaced. Eversource invoked the 100,000 sq.ft. of contiguous land disturbance rule, ignoring the additional criteria—part of a larger plan of development. Our reading of the administrative code suggests that all properties part of the total project should be represented. To be specific, if the DES compares the SPN maps with the AOT maps, it will be clear that there are discrepancies in terms of missing properties. Given that this work was part of one large project, we believe that our properties should have been fully represented in the AOT.
>> 3). The AOT amendment waiver that the DES approved happened in August, months after the original permit was transmitted to municipalities. So…it would not have been possible for the amendment waiver to have been included in the initial permit application.
>> Again, our question is basic. In August, when Eversource advised the DES that it was re-routing the new access roads that needed to be constructed, and requested a waiver from filing a formal amendment, did the DES ask Eversource for proof that it had notified municipalities of these changes?
>> 4). The DES "interpretation" of "owner" and the appeals case that is cited is flawed in a very specific manner. In the Robert C. Michele case, it was determined that a specific statutory definition of "owner" was missing, therefore allowing for an interpretation that an Easement holder could be construed as the owner. In the case of the AOT rules, these terms are defined.
>> The Administrative Rule definition does say that Eversource is the "Applicant". It also states that contact information and signature from the owner, if different than the applicant, is required on the application (ENV-Wq 1503.07).
>> "(C). The name and mailing address's of each property owner of the property on which the project will occur, if other than the applicant, and if the property owner does not have an agent, the following:
>> 1). For a property owner who is an individual, not an entity, the property owner's daytime telephone number and e-mail address"
>> Additionally, Env.-Wq 1502.45 states:
>> " "Owner" means the person who holds record title to the property on which the work for which RSA 485-A:17 requires a permit has occurred or is proposed to occur."
>> The AOT permit requires signature from the "Applicant" which is Eversource, the Applicant's "Agent" if applicable which is GZA, the "Owner" which are the McDonalds and myself, and the Owner's "Agent" if applicable which in this case it is not.
>> Eversource is not the record title holder, which I suspect you already understand.
>> ———
>> Given the number of months that this compliance review has been underway, I am disappointed in the completeness of your response. Our questions remain the same:
>> 1). Why was the SPN used when new roads/permanent assets were constructed?
>> 2). Why does what was depicted in the SPN documentation differ from what was actually constructed? Your DES compliance photos shoe this discrepancy.
>> 3). Why does the AOT omit some properties included in this project?
>> 4). Why were property owner signatures excluded given the specificity of definitions included in the AOT regulations?
>> 5). Why were municipalities left out of the loop when Eversource notified DES of AOT changes, specifically the re-routing of the new roads they were building?
>> It has been a very long and arduous journey trying to get to the bottom of what happened with the M-127 partial rebuild project. Our goals from the beginning were to ensure that 1) our properties were fully restored and 2) this would never happen again to other NewHampshire property owners. We have yet to achieve either of those goals.
>> We look forward to more specific responses to our concerns. If you are unable to decipher our questions, please give me a call. If I do not hear from you in 30 days, I will file a formal complaint with the NH DOJ. In my opinion, given that this mess has been repeated with the A-111, D-142, etc. rebuilds, time is of the essence.
>> Marguerite Francis
>> INV OF PRIVACY
>> New London, NH. 03257
>> INV OF PRIVACY
>> Sent from my iPad

The State of New Hampshire
Department of Environmental Services

Robert R. Scott, Commissioner



October 13, 2021

MARGUERITE FRANCIS
INV OF PRIVACY
ELKINS NH 03233

Re: Land Resources Management File Number: 2021-02744
Subject Property: Eversource Transmission Line M127

Dear Ms. Francis:

Thank you for contacting the New Hampshire Department of Environmental Services (NHDES) regarding the subject complaint. We apologize for the delay in responding, which was due to staff vacations and the need to thoroughly research answers to your questions.

We have reviewed all of the correspondence on this issue and compiled the key questions. Our responses to these questions are listed below.

Was Eversource forthright on their permit application submissions?

> We interpret this question to have two components: (1) Whether Eversource misrepresented whether it has the legal right to undertake the project on the property, and (2) Whether Eversource exceeded the work authorized under the permit.
>
> For the first component, NHDES' authority regarding property rights is limited to determining whether an applicant has sufficient ownership interest to proceed and whether it has met the applicable statutory and regulatory criteria. If Eversource exceeded its rights under the existing easement, then any dispute should be resolved by the parties to the easement. Therefore, if you believe that Eversource took actions in the Right-of-Way (ROW) that were not allowed under the easement agreement, you should take this issue up with Eversource.
>
> For the second component, if an applicant violates the conditions of their permit, NHDES has the authority to bring the applicant into compliance. On July 23/2021, NHDES staff conducted a site inspection of the ROW. No violations of permit conditions were observed.

Was the correct Wetland permitting processes (SPN vs Standard Wetland) utilized?

We have reviewed the Wetlands permit application requirements for Statutory Permit by Notification (SPN) and Standard Dredge and Fill permits and find that the SPN was, in fact, the correct type of Wetlands permit for this work.

> The use of the SPN was applicable for the work proposed and conducted along Transmission Line M127 in accordance with RSA 482-A:3, XV and Administrative Rule Env-Wt 521. Env-Wt 521.06(a)(2) outlines the relevant requirements for utility projects to be considered minimum impact and, therefore, eligible for the SPN:
>
> > *521.06(a)(2): The project does not include establishing new access roads, installing permanent stream or wetland crossings, constructing new utility corridors or rights-of-way, or establishing new utility assets within existing corridors or rights-of-way;*
>
> Transmission Line M127 is an existing utility ROW, for which the applicant requested temporary access across wetlands to conduct maintenance in the utility ROW. The project was not for the construction of a new transmission corridor; it was for maintenance of an existing utility corridor. The wetland impacts were temporary to conduct upgrades to access travel ways in uplands, pole replacement and maintenance of vegetation in the ROW. No new access roads, utility assets, or permanent stream or wetland crossings were established for the project. Therefore, the project met the criteria for minimum impact from Env-Wt 521.06(a)(2).
>
> If the applicant had proposed construction of a substation, parking lot, storage facility, or other utility assets in the ROW then a standard wetlands application would have been required in accordance with Env-Wt 521.01 (b).

Was the Alteration of Terrain (AoT) application complete?

> We have no information to indicate the AoT application was incomplete.

Was the AOT amendment waiver approved by DES communicated to municipalities?

> Waiver decisions for AoT applications are included in the permit, which was provided to the municipalities.

Why were Property Owner signatures absent from the approved permit application?

> For the purposes of a permit to do work in a ROW, the easement owner holds record title to do any work they are authorized to do in the ROW by the easement. Therefore, the easement holder is legally the "owner" per Env-Wq 1502.45. Please see the attached *Appeal of Robert C. Michele &a.*, (Slip Opinion 2014-159, August 11, 2015) for support of this interpretation.

Were proper permitting procedures followed regarding abutter notifications?

> NHDES has followed all requirements in the statutes and rules for notifications for these permits. Neither the Wetlands SPN nor the AoT application require abutter notification. Waiver decisions for the AoT permit were included in the permit, which was provided to the municipalities. We certainly understand your frustration at not being notified of the work by Eversource. However, proper permitting procedures were followed by NHDES in this case.

We have endeavored to answer all of your questions in this letter. If you have any other questions, please contact me at (603)271-4898 or Philip.R.Trowbridge@des.nh.gov and I will direct them to the appropriate staff.

Sincerely,

Philip Trowbridge, P.E., Manager
Land Resources Management Program
Water Division, NH Department of Environmental Services

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

ATTY CLIENT Priv

From: Anne Norris INV OF PRIVACY>
Sent: Monday, July 26, 2021 12:18 AM
To: Bishop, Robert <ROBERT.B.BISHOP@des.nh.gov>; Blecharczyk, Jeffrey <JEFFREY.D.BLECHARCZYK@des.nh.gov>
Cc: macofisle INV OF PRIVACY
Subject: NHDES Compliance

EXTERNAL: Do not open attachments or click on links unless you recognize and trust the sender.

Good morning. We, Anne Norris and Michael McDonald, INV OF PRIVACY New London are one of many property owners in New London that were impacted by the partial re-build of the M127 power corridor last year. I am aware that the NHDES is conducting a Compliance review of this work—both the SPN (File # 2022-00242) and the associated Alteration of Terrain permitting (AOT-1769). A DES truck was at the Whitney Brook power line intersection and I am assuming that means that the compliance review is well underway. I have two specific questions relating to my property that I would appreciate receiving answers to as part of your review.

1). The Alteration of Terrain statute and associated permitting applications requires that property owners or their agents sign the application. The statute defines owner as:

Env-Wq 1502.45 "Owner" means the person who holds record title to the property on which the work for which RSA 485-A:17 requires a permit has occurred or is proposed to occur.

Neither Michael McDonald nor myself signed that permit application. Can you refer us to the statute or administrative rule that allows this statutory requirement to be waived? If we had been included as part of the AOT submission we would not have been surprised when the bulldozers and dump trucks of gravel rolled into our property, and we would have had the opportunity to specify to Eversource property restoration expectations up front as opposed to dealing with this mess on the back end.

2). The original map submissions were subsequently changed to reflect new paths for the access roads that needed to be built to accommodate the power corridor rebuild. The roads on our property moved significantly—from one side of the easement to the other. This change was clearly greater than what would be allowed under the rules requiring either a formal amendment to the AOT or the submission of a new permit. We are aware that the DES waived both of these requirements. Was the Town of New London and/or property owners notified of this waiver and provided with the new maps? If not, why not?

As a side note, not all of the work on our property was included in the AOT. While we know that the statute stipulates 100,000 square feet of "contiguous" land disturbance as the trigger for permitting, the SPN dealt with the M127 rebuild as a project, and having the AOT leave out portions of this work just creates confusion.

If you are not the correct person to address my property-specific questions as part of your Compliance review, I would appreciate your forwarding this email to the correct individual.

Thank you,
Anne Norris
Michael McDonald

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by E-mail at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: http://www.courts.state.nh.us/supreme.

THE SUPREME COURT OF NEW HAMPSHIRE

Wetlands Council
No. 2014-509

APPEAL OF ROBERT C. MICHELE & a.
(New Hampshire Wetlands Council)

Argued: April 22, 2015
Opinion Issued: August 11, 2015

Cleveland, Waters and Bass, P.A., of Concord (David W. Rayment and Mark S. Derby on the brief, and Mr. Rayment orally), for the petitioners.

Johnson & Borenstein, LLC, of Andover, Massachusetts (Mark B. Johnson on the brief and orally), for the respondents.

LYNN, J. The petitioners, Robert C. and Katherine L. Michele, trustees of the Robert C. Michele Revocable Trust (Micheles), appeal a ruling of the Wetlands Council (Council) upholding a decision of the New Hampshire Department of Environmental Services (DES) to issue a permit allowing the respondents, Joseph and Linda Bremner (Bremners), to install a seasonal dock in water adjacent to the Micheles' pond-front property over which the Bremners have an easement. We affirm.

I

The following facts are derived from the record. The Micheles own property in Jaffrey with approximately 750 feet of shoreline on Gilmore Pond.

The Bremners own nearby property that does not directly adjoin the pond. At one time, the Bremners' and Micheles' properties were a single parcel, owned by George and Karen Rickley (Rickleys). When the Rickleys conveyed what is now the Bremners' property, they sought approval to subdivide a section of their 750 feet of shoreline to accompany the plot. The town planning board denied the request, and the Rickleys instead conveyed the plot with an easement over a 118-foot segment of their shoreline.[1] The relevant language of the deed states that the owner of the partitioned lot (now the Bremners) "shall have the right under this easement to the exclusive use of said parcel of shore frontage for whatever purposes they may desire." The Micheles bought their property with full knowledge of the easement.

In 2007, the Bremners applied to DES for a permit to install a seasonal dock in the pond, adjacent to their easement. See RSA 482-A:3 (Supp. 2007) (subsequently amended). The Micheles objected to the application, arguing that the Bremners had no legal right to apply for a dock permit on the Micheles' land without their consent. In 2009, DES granted the permit, and the Bremners installed a dock. The Micheles promptly filed both a motion for reconsideration and an action in superior court seeking to invalidate the easement. DES took no further action pending the outcome of the lawsuit. The superior court determined that the easement was valid, and in a 2011 unpublished order, we affirmed the court's ruling. See Michele v. Bremner, No. 2010-0844 (N.H. Aug. 24, 2011). Thereafter, DES affirmed its grant of the permit. It found that the Bremners' dock qualified as a minimal impact project, see N.H. Admin. Rules, Env-Wt 303.04(a), and concluded that, because under its regulations only major shoreline structures require that the fee owner be the applicant, see id. 402.18(a), the Bremners could apply for a dock permit. DES also found that the Micheles failed to demonstrate that the seasonal dock unreasonably affected the value or their use and enjoyment of their property. The Micheles appealed to the Council, which affirmed the DES decision. This appeal followed.

II

The Micheles first argue that DES erred in granting the Bremners, as mere easement holders, a permit to install a seasonal dock over the fee owners' objection. Rather than argue that the Bremners lack a sufficient property interest to install a dock in the water adjacent to the easement, they contend that, under the relevant statutes, DES lacks the authority to issue dock permits to easement holders. In support of this argument, the Micheles advance several theories: (1) the plain meaning of the terms "ownership" and "landowner-applicant" as used in the statutory scheme compel the conclusion

[1] There is some discrepancy as to how much of the shoreline is encompassed in the easement. The exact size is immaterial to the current appeal, and we adopt the 118-foot figure used by DES and the Council.

that only fee owners can apply for a dock permit, see RSA 482-A:11, II (2013); (2) DES, in interpreting the statute, impermissibly went beyond its plain meaning by examining DES regulations; and (3) the instructions and forms that DES uses to administer the statute demonstrate that only fee owners can apply for permits. Alternatively, the Micheles argue that even if the Bremners could apply for a permit under the statute, DES erred in granting a permit because it adversely affected the value and enjoyment of their land.

The Bremners counter that a plain reading of the statute shows that it does not prohibit easement holders from applying for dock permits. They also maintain that this reading is consistent with the statute's purpose, DES's regulations, and DES's forms and procedures. Additionally, the Bremners contend that the issuance of the permit in this case was reasonable, and that many of the Micheles' arguments are based upon unpreserved or irrelevant considerations.

To resolve these issues, we must engage in statutory and regulatory interpretation. Although we give some deference to an agency's interpretation of its own regulations or of a statute it administers, "our deference is not total." Appeal of Old Dutch Mustard Co., 166 N.H. 501, 506 (2014) (quotation omitted). Concerning statutes, "[w]e are still the final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole." Appeal of Town of Seabrook, 163 N.H. 635, 644 (2012). As to regulations, "[w]e examine the agency's interpretation to determine if it is consistent with the language of the regulation and with the purpose which the regulation is intended to serve." Old Dutch Mustard, 166 N.H. at 506 (quotation omitted). "We use the same principles of construction when interpreting both statutes and regulations." Id.

"We first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning." Appeal of Local Gov't Ctr., 165 N.H. 790, 804 (2014). "We interpret legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. "We construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." Id. "Moreover, we do not consider words and phrases in isolation, but rather within the context of the statute as a whole." Id. "This enables us to better discern the legislature's intent and to interpret statutory language in light of the policy or purpose sought to be advanced by the statutory scheme." Id. Additionally, "[w]hen the language of a statute is plain and unambiguous, we need not look beyond the statute itself for further indications of legislative intent." Petition of Malisos, 166 N.H. 726, 729 (2014).

RSA 482-A:3, I, requires that "any person" who wishes to construct a dock must apply to DES for a permit, unless an exemption applies.[2] The statute further specifies other requirements that an "applicant" must fulfill. See RSA 482-A:3, I(d)(1) (notifying abutters). RSA 482-A:11, II then provides, in relevant part, that "[b]efore granting a permit under this chapter, the department may require reasonable proof of ownership by a private landowner-applicant." (Emphasis added.) The Micheles rely primarily upon the legislature's use of the terms "ownership" and "landowner-applicant" in RSA 482-A:11, II to support their position that only fee owners can apply for dock permits. The legislature did not define the terms "owner," "ownership," "landowner," "landowner-applicant" or "applicant." See RSA 482-A:2 (Supp. 2011) (amended 2012).

"When a term is not defined in the statute, we look to its common usage, using the dictionary for guidance." K.L.N. Construction Co. v. Town of Pelham, 167 N.H. 180, 185 (2014). Webster's Third New International Dictionary defines "ownership" as "the state, relation, or fact of being an owner: lawful claim or title"; and "owner" as "one that has the legal or rightful title whether the possessor or not." Webster's Third New International Dictionary 1612 (unabridged ed. 2002) (emphasis added). We acknowledge that these are broad definitions. We see no reason, however, to limit the meaning of the terms when the legislature did not see fit to do so. Based upon the common meaning of the term, we conclude that "ownership," as used in the statute, neither is limited to fee ownership nor requires possession. We further conclude that parties who hold title to a shoreline easement, such as the Bremners, are "owners" under the statute. Because the term "owner" encompasses property interests other than fee ownership, the Micheles' citation to the repeated use of the terms "owner," "property owner," and "landowner" throughout the statutory scheme does not advance their argument.

Contrary to the Micheles' argument that the legislature could not have intended easement holders to be able to apply for a permit under the statute, we see no evidence that the purpose of the statute was to change the balance of property rights between fee owners and easement holders from what it was under the common law. As the Micheles point out, we have previously noted that an "easement is a nonpossessory right to the use of another's land." Arcidi v. Town of Rye, 150 N.H. 694, 698 (2004). As explained above, however, possession is not a requirement of an "ownership" interest in land. Further, in Arcidi, we said that when there is an express grant of an easement, "a grantee takes by implication whatever rights are reasonably necessary to enable it to enjoy the easement beneficially. This includes the right to make improvements

---

[2] We observe that, although RSA 482-A:3, IV-a would normally exempt a low impact seasonal dock, such as the one at issue, from the permit requirements, the proposed dock must be the only dock on the frontage to qualify for the exemption. The Bremners' dock does not qualify for such an exemption because the Micheles already have a dock on the frontage.

that are reasonably necessary to enjoy the easement." Id. at 701 (citation omitted). Arcidi concerned an easement over the plaintiff's land for "ingress and egress by motor vehicle." Id. at 697 (quotation omitted). We held that it was reasonable for the easement holder to cut down trees, fill in wetlands and build a gravel road across the easement. Id. at 697, 702. We conclude that, under the common law, installing a dock — arguably a less impactful project — can be a reasonable use of an easement in at least some circumstances.[3]

Instead of altering the state of property rights under the common law, the purpose of the statute is "to protect and preserve [the state's] submerged lands under tidal and fresh waters and its wetlands . . . from despoliation and unregulated alteration." RSA 482-A:1 (2013). It follows, therefore, that anyone who could build a dock under the common law can apply for a dock permit under RSA chapter 482-A. Given the broad grant of the Bremners' easement, they have a sufficient ownership interest to obtain a dock permit under RSA chapter 482-A.

The Micheles contend that this interpretation of the statute will impermissibly force DES to decide the relative property rights of parties with competing interests. We have previously stated that DES's authority to regulate docks "does not include the power to determine the relative rights of property owners." Gray v. Seidel, 143 N.H. 327, 330 (1999). Gray, however, involved an appeal of a superior court order which determined that, because DES and other local authorities regulate docks, the court lacked jurisdiction to decide whether building a dock was a reasonable use of the plaintiffs' easement. Id. at 329-30. We reversed, holding that the court did have jurisdiction to rule on the question of whether the plaintiffs' proposed dock constituted a reasonable use of the easement. Id. at 330. Gray stands merely for the proposition that DES's authority to regulate docks does not divest the courts of jurisdiction to decide underlying property rights. Nothing in that case alters the fact that, in issuing any dock permit, DES must necessarily decide whether the applicant has met the statutory and regulatory criteria. Thus, DES retains the authority to determine whether an applicant has a sufficient property interest to apply for a dock permit.

Although we need not look beyond the plain and unambiguous terms of the statute to ascertain the legislative intent in this case, see Petition of Malisos, 166 N.H. at 729, we note that DES's regulations are consistent with our ruling. The commissioner of DES is empowered to adopt regulations to implement RSA chapter 482-A. RSA 482-A:11, I (2013). DES regulations

---

[3] Indeed, the issue of whether the Bremners' dock is an unreasonable use of the easement under the common law has already been litigated. In 2014, a superior court found that the Bremners' dock was a reasonable use of the easement but ordered the Bremners to remove their personal property from the easement. The Micheles have not appealed this ruling. The Bremners appealed the decision to the extent that it bars them from leaving certain personal property on the easement, but that issue is not before us today.

define "applicant" as someone "who has applied for a permit" and has "an interest in the land on which a project is to be located that is sufficient for the person to legally proceed with the project." N.H. Admin. Rules, Env-Wt 101.06. The regulations also state that "[a]n applicant for a shoreline structure defined as major shall be the owner in fee." Id. at 402.18. DES read these regulations to mean that only applicants for major projects need be the fee owner; applicants for minor projects, like the Bremners' dock,[4] may have a lesser ownership interest. We agree with DES's interpretation of these regulations.

The Micheles also assert that because the DES application forms and instructions ask for the "owner's" information and because the forms have no place on them to identify the applicant as an easement holder, it must follow that only fee owners can apply for a permit. This argument is based upon the same misunderstanding of the meaning of the term "owner" as was discussed above. Because a person who holds an easement interest in property is an "owner" thereof, the absence of additional language in the forms and instructions specifically referencing easement holders provides no support for the Micheles' position.

III

Alternatively, the Micheles argue that even if an easement holder can apply for a permit under the statute, DES and the Council erred in upholding the permit in this case because the Bremners' dock adversely affects the value and enjoyment of the Micheles' property. DES cannot grant a dock permit if doing so will "infringe on the property rights or unreasonably affect the value or enjoyment of property of abutting owners." RSA 482-A:11, II. Whether a permit infringes upon property rights or unreasonably affects the value or enjoyment of another's land is a determination of fact. Cf. Webb v. Rye, 108 N.H. 147, 150 (1967) (stating that whether, under the circumstances, a land use was unreasonable and constituted a nuisance is a question of fact). RSA chapter 541 governs our review of Council decisions. See Appeal of Dean Foods, 158 N.H. 467, 471 (2009). Under RSA 541:13 (2007), we will not set aside the Council's order except for errors of law, unless we are satisfied, by a clear preponderance of the evidence, that it is unjust or unreasonable. The Council's findings of fact are presumed prima facie lawful and reasonable. RSA 541:13. In reviewing the Council's findings, our task is not to determine whether we would have found differently or to reweigh the evidence, but, rather, to determine whether the findings are supported by competent evidence in the record. See Dean Foods, 158 N.H. at 474. We review the Council's rulings on issues of law de novo. Appeal of Portsmouth Regional Hosp., 148 N.H. 55, 57 (2002).

---

[4] The Micheles do not contend that the Bremners' dock constitutes a major shoreline structure.

The Micheles advance several reasons why, in their view, the issuance of the dock permit was unreasonable. They first argue that they are entitled to greater protection than that which RSA 482-A:11, II generally provides because, as fee owners, they have a greater interest than abutting property owners. The statute, however, provides no extra protection for fee owners whose properties are encumbered by water access easements, and we will not add language to the statute that the legislature did not see fit to include. Local Gov't Ctr., 165 N.H. at 804. In any event, a property owner who has granted an easement to a third party logically has a lessened — not a heightened — expectation of unencumbered use and enjoyment of his property as compared to a property owner who has not surrendered any interest in his property and is instead seeking protection against interference from an abutter. Consequently, even if we were to assume that DES or the Council erred by treating the Micheles as "abutting owners" under RSA 482-A:11, II, any such error was not prejudicial because it afforded the Micheles more protection than that to which they were entitled under the statute.

The Micheles next contend that the installation of the dock reduces their privacy and seclusion.[5] After a hearing, at which Mrs. Michele was the sole witness for the petitioners, the Council determined that the Micheles failed to show that the permit unreasonably infringed upon their property rights. It also found that the Micheles were aware of the easement when they purchased their property and that a single witness's subjective testimony failed to show that a small, seasonal dock unreasonably affected the use and enjoyment of the Micheles' land. We cannot say that these findings lack evidentiary support in the record or are unjust or unreasonable.[6]

The Micheles next assert that installation of the dock increased their shorefront liability while eliminating any control they have over the easement area. Their risk is compounded, they argue, by increased incidences of vandalism and trespassing on the easement. Mrs. Michele testified that, as a result of the Bremners' dock, the Micheles' insurance agent advised them to increase their liability coverage. Although agreeing that the dock will likely subject the Micheles to suit if an injury occurs on or around the easement area, the Council found this was inadequate to make installation of the dock

---

[5] The Micheles point to testimony that the Bremners cut down trees from the easement area. This, according to the Micheles, removed a natural screen and caused a community uproar for which the Micheles were blamed. The dock permit, however, did not allow the Bremners to cut down trees. In fact, the Bremners removed the trees before applying for the dock permit. Thus, the tree removal is irrelevant to the issue of whether the permit affected the Micheles' use and enjoyment of their land.

[6] The Micheles also argue that the installation of the dock represented a departure from the intensity of use of the easement established by the Bremners' predecessors in title. That argument concerns the parties' relative property rights and not whether the permit violates RSA 482-A:11, II. Therefore, it is outside the scope of the Council's decision, see Gray, 143 N.H. at 330, and we need not address it.

unreasonable. The Micheles, when they bought the property, knew that they were responsible for insuring the easement area. Further, the Micheles are incorrect in claiming that they have lost all control of the easement area. The Bremners enjoy only the right to make reasonable use of their easement, which includes using it to access the pond and their dock; the Micheles retain the right to seek relief in court should the Bremners make unreasonable use of the easement.

Finally, the Micheles maintain that the placement of the dock thirteen feet from the easement boundary was unreasonable. RSA 482-A:3, XIII(a) states that "[a]ll boat docking facilities shall be at least 20 feet from an abutting property line in non-tidal waters . . . ." (Emphasis added.) We understand their argument to be that, because DES treated them as abutting owners under RSA 482-A:11, II, it also should have treated them as abutting owners under RSA 482-A:3, XIII(a). We disagree. As noted above, to the extent DES may have treated the Micheles as abutting property owners for purposes of RSA 482-A:11, II, it afforded them more protection than that to which they were entitled. We are aware of no legal principle that would require DES to compound any such error by treating the Micheles as abutting property owners under RSA 482-A:3, XIII(a) as well. On the contrary, DES and the Council correctly determined that the 20-foot setback requirement did not apply in the easement context because the owners of the dominant and servient estates hold overlapping rather than abutting property interests. Therefore, RSA 482-A:3 XIII(a) is not applicable.[7] The record reflects that the Bremners chose the location of the dock so as to create the least impact to the shoreline. We hold that the Council did not err in upholding DES's approval of the location of the dock.

IV

For the foregoing reasons, we conclude that the Council did not err in upholding DES's decision to grant a dock permit to the Bremners.

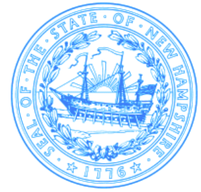
Affirmed.

DALIANIS, C.J., and HICKS, CONBOY, and BASSETT, JJ., concurred.

[7] For the same reason, we also reject the Micheles' argument that DES's inconsistent treatment of them under the statutory scheme is indicative of a legislative intent that only fee owners can apply for permits.

The State of New Hampshire
Department of Environmental Services

Robert R. Scott, Commissioner



October 13, 2021

MARGUERITE FRANCIS
INV OF PRIVACY
ELKINS NH 03233

Re: Land Resources Management File Number: 2021-02744
Subject Property: Eversource Transmission Line M127

Dear Ms. Francis:

Thank you for contacting the New Hampshire Department of Environmental Services (NHDES) regarding the subject complaint. We apologize for the delay in responding, which was due to staff vacations and the need to thoroughly research answers to your questions.

We have reviewed all of the correspondence on this issue and compiled the key questions. Our responses to these questions are listed below.

Was Eversource forthright on their permit application submissions?

> We interpret this question to have two components: (1) Whether Eversource misrepresented whether it has the legal right to undertake the project on the property, and (2) Whether Eversource exceeded the work authorized under the permit.
>
> For the first component, NHDES' authority regarding property rights is limited to determining whether an applicant has sufficient ownership interest to proceed and whether it has met the applicable statutory and regulatory criteria. If Eversource exceeded its rights under the existing easement, then any dispute should be resolved by the parties to the easement. Therefore, if you believe that Eversource took actions in the Right-of-Way (ROW) that were not allowed under the easement agreement, you should take this issue up with Eversource.
>
> For the second component, if an applicant violates the conditions of their permit, NHDES has the authority to bring the applicant into compliance. On July 23/2021, NHDES staff conducted a site inspection of the ROW. No violations of permit conditions were observed.

Was the correct Wetland permitting processes (SPN vs Standard Wetland) utilized?

We have reviewed the Wetlands permit application requirements for Statutory Permit by Notification (SPN) and Standard Dredge and Fill permits and find that the SPN was, in fact, the correct type of Wetlands permit for this work.

> The use of the SPN was applicable for the work proposed and conducted along Transmission Line M127 in accordance with RSA 482-A:3, XV and Administrative Rule Env-Wt 521. Env-Wt 521.06(a)(2) outlines the relevant requirements for utility projects to be considered minimum impact and, therefore, eligible for the SPN:
>
> > *521.06(a)(2): The project does not include establishing new access roads, installing permanent stream or wetland crossings, constructing new utility corridors or rights-of-way, or establishing new utility assets within existing corridors or rights-of-way;*
>
> Transmission Line M127 is an existing utility ROW, for which the applicant requested temporary access across wetlands to conduct maintenance in the utility ROW. The project was not for the construction of a new transmission corridor; it was for maintenance of an existing utility corridor. The wetland impacts were temporary to conduct upgrades to access travel ways in uplands, pole replacement and maintenance of vegetation in the ROW. No new access roads, utility assets, or permanent stream or wetland crossings were established for the project. Therefore, the project met the criteria for minimum impact from Env-Wt 521.06(a)(2).
>
> If the applicant had proposed construction of a substation, parking lot, storage facility, or other utility assets in the ROW then a standard wetlands application would have been required in accordance with Env-Wt 521.01 (b).

Was the Alteration of Terrain (AoT) application complete?

> We have no information to indicate the AoT application was incomplete.

Was the AOT amendment waiver approved by DES communicated to municipalities?

> Waiver decisions for AoT applications are included in the permit, which was provided to the municipalities.

Why were Property Owner signatures absent from the approved permit application?

> For the purposes of a permit to do work in a ROW, the easement owner holds record title to do any work they are authorized to do in the ROW by the easement. Therefore, the easement holder is legally the "owner" per Env-Wq 1502.45. Please see the attached *Appeal of Robert C. Michele &a.*, (Slip Opinion 2014-159, August 11, 2015) for support of this interpretation.

Were proper permitting procedures followed regarding abutter notifications?

> NHDES has followed all requirements in the statutes and rules for notifications for these permits. Neither the Wetlands SPN nor the AoT application require abutter notification. Waiver decisions for the AoT permit were included in the permit, which was provided to the municipalities. We certainly understand your frustration at not being notified of the work by Eversource. However, proper permitting procedures were followed by NHDES in this case.

We have endeavored to answer all of your questions in this letter. If you have any other questions, please contact me at (603)271-4898 or Philip.R.Trowbridge@des.nh.gov and I will direct them to the appropriate staff.

Sincerely,

Philip Trowbridge, P.E., Manager
Land Resources Management Program
Water Division, NH Department of Environmental Services

Redaction Date: 8/5/2024 3:25:07 PM

Redaction Log

Total Number of Redactions in Document: 42

Redaction Reasons by Page

Page	Reason	Description	Occurrences
12	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	1
15	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	1
18	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	2
19	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	3
20	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	2
21	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
22	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
23	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
24	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
25	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
26	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
27	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
27	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	3
29	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	1
32	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	1

Redaction Date: 8/5/2024 3:25:07 PM

Redaction Log

Page	Reason	Description	Occurrences
35	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	2
36	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	3
37	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	2
38	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	1
41	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
42	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
43	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
44	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
45	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
46	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
47	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
48	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
49	ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	1
49	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	3
59	INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	1

Redaction Date: 8/5/2024 3:25:07 PM

Redaction Log

Redaction Reasons by Exemption

Reason	Description	Pages (Count)
ATTY CLIENT Priv	RSA 91-A:5, XII, Records Protected under attorney-client privilege or attorney work product doctrine	21(1) 22(1) 23(1) 24(1) 25(1) 26(1) 27(1) 41(1) 42(1) 43(1) 44(1) 45(1) 46(1) 47(1) 48(1) 49(1)
INV OF PRIVACY	NH RSA 91-A:5 IV Confidential information which would constitute an invasion of privacy if disclosed	15(1) 18(2) 19(3) 20(2) 27(3) 29(1) 32(1) 35(2) 36(3) 37(2) 38(1) 49(3) 59(1) 12(1)