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March 28, 2019

Bureau of Land Resources  
c/o James Beyer, Regional Licensing and Compliance Manager  
Maine Department of Environmental Protection  
106 Hogan Road Suite 6  
Bangor, Maine 04401

Maine Land Use Planning Commission  
c/o Bill Hinkel, Regional Supervisor  
22 State House Station,  
Augusta, Maine 04333-0022

**Re: New England Clean Energy Connect – WM&RC Response to Motions to Strike of Groups 2, 4 and 10**

Dear Messrs. Beyer and Hinkel,

Enclosed on behalf of Western Mountains & Rivers Corporation (“WM&RC”), please find WM&RC’s Response to the Motions to Strike by Groups 2, 4, and 10.

Please let me know if you should need additional information.

Sincerely,



Benjamin J. Smith, Esq.

BJS/car  
Service List (email LUPC/DEP)  
Enclosures

STATE OF MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION

and

STATE OF MAINE LAND USE PLANNING COMMISSION

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY )  
NEW ENGLAND CLEAN ENERGY CONNECT )  
#L-27625-26-A-N/#L-27625-TG-B-N/ )  
#L-27625-2C-C-N/#L-27625-VP-D-N/ )  
#L-27625-IW-E-N )

CENTRAL MAINE POWER COMPANY )  
NEW ENGLAND CLEAN ENERGY CONNECT )  
SITE LAW CERTIFICATION SLC-9 )  
Beattie Twp, Lowelltown Twp, Skinner Twp, )  
Appleton Twp, T5 R7 BKP WKR, )  
Hobbs town Twp, Bradstreet Twp, )  
Parlin Pond Twp, West Forks Plt, Moxie Gore, )  
The Forks Plt, Bald Mountain Twp, Concord Twp )

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**RESPONSE OF WESTERN MOUNTAINS & RIVERS CORPORATION  
TO OBJECTIONS AND MOTIONS TO STRIKE OF GROUPS 2, 4 AND 10**

Groups 2, 4 and 10 have objected to and moved to strike the pre-filed testimony of Joseph Christopher and Larry Warren. These motions are addressed separately below:

*Group 4 Objection to Portions of Christopher and Warren  
Testimony and Warren Exhibits*

Group 4 requests that references in Mr. Warren's and Mr. Christopher's pre-filed rebuttal testimony that refer to the Memorandum of Understanding ("MOU") between WM&RC be stricken along with related exhibits in Mr. Warren's testimony

that include the MOU and a map showing mitigation and other donated lands offered by CMP.

The very same arguments raised now by Group 4 to these testimonies and exhibits have already been ruled upon by the Presiding Officers. See Joint Fifth Procedural Order at 3-6 (Mar. 13, 2019). As part of this ruling, the Presiding Officers denied the Motions to Strike of Groups 2, 4, and 10 and rejected identical arguments that the MOU and potential benefits under the MOU were not relevant to this proceeding. These rulings were never appealed.<sup>1</sup> Rehashing these arguments is a dilatory attempt to take a second bite at the apple. The Presiding Officers should summarily deny Group 4's Motion.

*Group 2, 4 & 10 Objection to Christopher Testimony*

Groups 2 and 10 have moved to strike the entirety of Mr. Christopher's testimony along with eleven photographs that he has offered that depict electricity facilities located adjacent to the Kennebec Gorge, McKay Station, and along the upper Penobscot and upper Kennebec Rivers. Without citing any authority, they assert that Mr. Christopher's testimony does not rebut the testimony of Ms. Caruso but rather depicts other areas that have been spoiled by industrial infrastructure. They also assert that the photos are of unidentified areas and not relevant to the scenic character of the Project route.

Group 4 also objects to Mr. Christopher's references to electricity infrastructure on the Penobscot River and also seeks to exclude all photographs because it is unclear who took the photos and when they were taken.

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<sup>1</sup> The deadline to appeal or object to this ruling was March 15, 2019 at 5:00 p.m..



As explained more fully below, these arguments are all without merit, because they fail to consider the criteria before the DEP and LUPC. They also seek to remove relevant evidence by applying an evidentiary standard that does not exist before the LUPC and DEP. Based on cross-examination at hearing, counsel for the intervenors may seek to elicit testimony that would enable them to make arguments relating to the weight that should be given by the LUPC and DEP to Mr. Christopher's testimony and exhibits.

Based on the reasonableness standard found in the Natural Resources Protection Act ("NRPA"), the DEP is to consider, based on a "multiplicity of factors" and a "balancing analysis," whether an activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses. *Uliano v. Board of Environmental Protection et al.*, 876 A.2d. 16, 19-20 (Me. 2005); see also 38 M.R.S. §480-D (1) ("The activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses"). Furthermore, Chapter 315 of the DEP's rules provides that "[u]nreasonable adverse visual impacts are those that are expected to *unreasonably interfere* with the general public's visual enjoyment and appreciation of a scenic resource, or those that otherwise *unreasonably impair* the character or quality of such a place." DEP Rule Chapter 315 (4) (emphasis added).

Mr. Christopher's testimony and exhibits are also relevant to the LUPC's evaluation and consideration of a special exception for the utility facilities, which are an allowed use provided that (a) there is no alternative site which is both suitable to the proposed use and reasonably available to the applicant; (b) the use can be buffered from those other uses and resources within the subdistrict with which it is incompatible; LUPC Reg. § 10.23, I.3.f.

Mr. Christopher has identified the pictures as being taken along the upper Kennebec and Penobscot Rivers. It is unnecessary for Mr. Christopher to state when the photos were taken or who took the photos. If such an objection were a basis to exclude such evidence, many intervenors' photos would have already been stricken from the record. Although it is obvious, the pictures of Harris Dam and adjacent areas along the Kennebec River (which are similar to other photos already in the record), are in close proximity to the proposed Project facilities and are relevant to the DEP's and LUPC criteria. The photos of McKay Station and adjacent areas along the upper Penobscot are also relevant to the DEP's criteria, because they depict activities such as rafting that occur without *unreasonable* interference with existing scenic, aesthetic, recreational or navigational uses. This evidence also demonstrates that the Project facilities are not incompatible with other similar uses resources within the subdistrict.

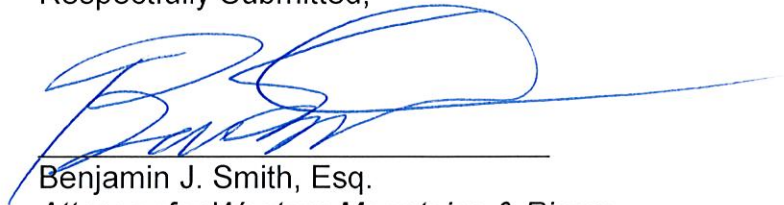
Taken as a whole, Mr. Christopher's testimony and these photos demonstrate that electricity infrastructure, including utility poles, transmission lines, large concrete dams (e.g., Harris Dam, McKay Station), large concrete/brick power houses and other buildings are already part and parcel to the natural environment and landscape of the upper Kennebec and Penobscot rivers and in the vicinity of the Project facilities. As described by Mr. Christopher, these electricity and industrial facilities, which are similar in nature to the facilities proposed as part of the Project, do not deter people from using natural resources in the vicinity of these structures for rafting, boating, and fishing and other uses. Mr. Christopher's testimony and exhibits are therefore directly relevant to the "multiplicity of factors" and "balancing analysis" considered by the DEP and show that the Project will not *unreasonably interfere* with the general public's

visual enjoyment and appreciation of scenic resources and will not *unreasonably impair* the character or quality of such resources. See DEP Rule Chapter 315 (4).

For the foregoing reasons, the Presiding Officer should deny the Motions to Strike of Groups 2, 4 and 10 and their earliest opportunity.

Dated: March 28, 2019

Respectfully Submitted,



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Benjamin J. Smith, Esq.  
*Attorney for Western Mountains & Rivers Corporation*

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