

**STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION
IN THE MATTER OF**

Central Maine Power Company)	APPLICATION FOR NATURAL RESOURCES PROTECTION ACT PERMIT AND SITE LOCATION OF DEVELOPMENT ACT PERMITS
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; and)	
#L-27625-IW-E-N)	
_____)	

**INTERVENOR GROUP 3 OPPOSITION TO INTERVENOR
GROUP 2 AND 10’s OBJECTIONS AND MOTION TO STRIKE AND GROUP 4’S
OBJECTIONS TO PRE-FILED TESTIMONY AND MOTIONS TO STRIKE**

Intervenor Group 3¹ (Group 3) opposes Intervenor Group 2 and Intervenor Group 10’s (Group 2/10) “Objections and Motion to Strike Witnesses,” filed on March 7, 2019 (Group 2/10 Motion) to the extent such filing concerns Group 3’s witnesses. Group 3 also opposes Intervenor Group 4’s (Group 4) “Objections to Pre-Filed Testimony and Motions to Strike” filed on March 7, 2019 (Group 4 Motion) to the extent such filing concerns Group 3’s witnesses. The Group 2/10 Motion and Group 4 Motion should each be denied as they relate to striking Group 3 witnesses for the reasons articulated in this opposition. Each of Group 3’s witnesses should be allowed to testify at the Department’s hearing based on their pre-filed direct testimony, as their testimony contains information relevant to the Department’s reasonableness inquires under the subtopics set forth in the Department’s Second Procedural Order.

General Argument

¹ For purposes of the Department’s hearing, Intervenor Group 3 consists of: (1) Industrial Energy Consumer Group; (2) City of Lewiston; (3) International Brotherhood of Electrical Workers, Local 104; and (4) Maine Chamber of Commerce.

In its Second Procedural Order, the Department stated it “[has] decided upon the following four (4) major topic areas along with several subtopics as subject matters for the hearing.”² The Department then described four major categories, followed by specific statutory and rule references. Under each major category, the Department enumerated several specific subtopics.

Group 3 agrees with Central Maine Power Company’s interpretation of the Department’s hearing topics. The words “along with” confine the major topic areas to the subtopic areas enumerated. If this were not the case, each specifically delineated subtopic would be rendered mere surplusage, as the major topics areas would subsume the subtopic areas. We ascribe meaning to each of the Department’s words.³ Moreover, it is common sense that if “along with” is interpreted as meaning “in addition to” the hearing would become inefficient, unwieldy, and a waste of administrative resources. The Department’s goals of “narrowing of [sic] scope of hearing to the statutory criteria and topics which are the most significant and contentious” and devoting limited hearing time to “an in-depth examination of the issues most likely to elicit conflicting evidence of technical testimony that warrants a closer examination that could be had on documents alone” would certainly not be met.⁴

Despite this plausibly narrow interpretation, Group 3’s witnesses that seek to testify on non-environmental benefits of the NECEC (i.e., energy and economic benefits) should be allowed to do so because such benefits are within the scope of the Department’s subtopics, are likely to be contentious, and clearly warrant a closer examination. Non-environmental benefits relate to one side of any reasonableness balancing standard. Group 3 incorporates by reference

² Department’s Second Procedural Order, at ¶ 7.

³ *State v. Dubois Livestock, Inc.*, 2017 ME 223, ¶ 6, 174 A.3d 308, 311 (2017) (“We reject interpretations that render some language mere surplusage” (internal citations and quotations removed)).

⁴ Department’s First Procedural Order, at ¶ 18 and 19.

its Opposition to Intervenor Group 2 and 10's Motion to Strike Witnesses, filed on February 21, 2019, for an explanation of why the law requires consideration of non-environmental benefits.

In this case, a reasonableness standard fundamentally permeates most of the Department's subtopics. For example, under the major topic "Scenic Character and Existing Uses," the subtopics include "Scenic/Aesthetic Uses" and "Recreational and Navigational Uses." These subtopics, combined, simply re-state the elements of 38 M.R.S. §480-D (1) ("The activity will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses"), which is at its core a reasonableness balancing standard applicable to each individual element. Under Rule Chapter 315 "[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."⁵ Reasonableness colors adverse visual impacts, interference, and impairment.

Further, under major topic "Wildlife and Habitat and Fisheries," the subtopics include "Endangered Species – Roaring Brook Mayfly, Spring Salamanders" and "Brook Trout Habitat." These subtopics relate to 38 M.R.S. §480-D (3) ("The activity will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat, aquatic or adjacent upland habitat, travel corridor, freshwater, estuarine or marine fisheries or other aquatic life"), which is also at its core a reasonableness balancing standard. That the Department did not specifically re-state each element of §480-D (3) is of no consequence. Instead, the Department chose to name specific endangered species and habitat, but the analysis is the same: e.g., is the harm to brook trout habitat unreasonable? To answer the question, the Department must consider benefits. Benefits cannot be limited to only brook trout

⁵ DEP Rule Chapter 315 (4) (emphasis added).

habitat benefits because almost no projects have the purpose or effect of creating brook trout habitat benefits, yet many projects adversely impact brook trout habitat in some major or de minimis way. The test is whether the harm is reasonable in light of project purpose and benefits, proposed brook trout habitat mitigation, and practicable alternatives.

Response to Group 2/10 Motion

The Group 2/10 Motion begins by mischaracterizing Mr. Poole’s testimony as “[a]rguing ... that the NECEC project may provide an environmental benefit.”⁶ It then asserts that considering “virtually any factors” in determining reasonableness “completely undermines the whole purpose of the Natural Resources Protection Act[.]”⁷ The apparent argument is that because certain resources are of state significance, they cannot be “balanced against a *potential* economic benefit or unproven *potential* environmental benefit”⁸ To reach this conclusion, Group 2/10 relies on cherry-picked language from the Natural Resource Protection Act’s (NRPA) “findings and purpose” section, 38 M.R.S. §480-A. Finally, Group 2/10 argues that in *Uliano II*⁹ “the Law Court’s position on the reasonableness analysis is made clear.”¹⁰ Group 2/10 claims a reasonableness balancing “measure[s] the nature and extent of the proposed use against the environment’s capacity to tolerate the use”¹¹ and energy and economic benefits created by a project are both outside of the scope of the hearing and “irrelevant even if submitted as public comment.”¹²

Group 2/10’s arguments each fail with respect to Group 3’s witnesses. First, Mr. Poole unequivocally states: “My purpose is to urge the Department to consider and weigh appropriately

⁶ Group 2/10 Motion at 3.

⁷ Group 2/10 Motion at 3.

⁸ Again, Mr. Poole testifies to energy-related benefits, not “environmental” benefits.

⁹ *Uliano v. Board of Environmental Protection*, 977 A.2d 400 (Me. 2009).

¹⁰ Group 2/10 Motion at footnote 5.

¹¹ Group 2/10 Motion at 4 (citing *Uliano II*).

¹² Group 2/10 Motion at footnote 6.

the substantial energy benefits that will be delivered by the NECEC when determining whether its environmental costs are reasonable.”¹³ Group 2/10 repeatedly refers to “environmental” benefits, but Group 3’s witnesses offer testimony on energy and economic benefits.

Second, Group 2/10’s hashing of the NRPA §480-A removes critical language that ties environmental protection to the economy and broader societal goals, which language defeats Group 2/10’s argument. Section §480-A, in full, states:

The Legislature finds and declares that the State's rivers and streams, great ponds, fragile mountain areas, freshwater wetlands, significant wildlife habitat, coastal wetlands and coastal sand dunes systems are resources of state significance. These resources have great scenic beauty and unique characteristics, unsurpassed recreational, cultural, historical and environmental value of present and future benefit to the citizens of the State and that uses are causing the rapid degradation and, in some cases, the destruction of these critical resources, **producing significant adverse economic and environmental impacts and threatening the health, safety and general welfare of the citizens of the State.**

The Legislature further finds and declares that there is a need to facilitate research, develop management programs and establish sound environmental standards that will prevent the degradation of and encourage the enhancement of these resources. It is the intention of the Legislature that existing programs related to Maine's rivers and streams, great ponds, fragile mountain areas, freshwater wetlands, significant wildlife habitat, coastal wetlands and sand dunes systems continue and that the Department of Environmental Protection provide coordination and vigorous leadership to develop programs to achieve the purposes of this article. **The well-being of the citizens of this State** requires the development and maintenance of an efficient system of administering this article to minimize delays and difficulties in evaluating alterations of these resource areas.

The Legislature further finds and declares that the cumulative effect of frequent minor alterations and occasional major alterations of these resources poses a substantial threat to the environment and **economy of the State and its quality of life.**¹⁴

Thus, one purpose of protecting “resources of state significance” is to avoid the production of “significant adverse economic impacts.” Another purpose is to reduce the threat to the health, safety and general welfare of Maine’s citizens. Given these purposes, a project’s broad effects on the economy and energy-related welfare of Maine’s citizens are within the statute’s scope, whether they are positive or negative. The Law Court, in *Uliano II*, found that the NRPA is not unconstitutionally vague, explaining that the NRPA is a valid exercise of the State of Maine’s

¹³ Pre-Filed Direct Testimony of Glenn S. Poole, Exhibit IG3-1, at 9 (emphasis added).

¹⁴ 38 M.R.S. §480-A (emphasis added).

police power that “rests on the Legislature's finding that ‘the cumulative effect of frequent minor alterations and occasional major alterations of [protected natural resources] poses a substantial threat to the environment and economy of the State and its quality of life.’ 38 M.R.S. § 480-A.”¹⁵

Thus, benefits that relate to the economy and would improve quality of life in Maine, such as reducing energy costs and increasing energy reliability, must be weighed and balanced when determining whether environmental impacts are reasonable.

Uliano II further reinforces the fact that the NRPA requires consideration of non-environmental benefits. The Law Court recounted:

Having determined that the impact of the proposed pier on existing scenic and aesthetic uses would be adverse, the Board considered whether the impact would be unreasonable in light of the factors designated by section 5(D) of the Wetland Protection Rules. Applying these factors, the Board concluded that the impact would be unreasonable because: (1) the proposed pier would not benefit the wetland and the harm to the aesthetic value of the wetland would be long-term; (2) the coastal wetland was not extensively developed and residents had refrained from building piers; (3) the pier would provide no public benefit; (4) the Ulianos would only benefit from the pier for a few months each summer; and (5) the Ulianos could already use their property for boating and swimming at most tide levels. In addition, the Board found the impact of the proposed pier would be unreasonable as the Ulianos had at least one practicable alternative.¹⁶

Under the NRPA, the Board of Environmental Protection lawfully considered several factors under Rule Chapter 310, including public and private benefits unrelated to protecting wetlands.

The NRPA does not specifically emphasize wetlands or treat them differently than other resources. Nonetheless, the Department has promulgated wetlands rules that state, for example:

“When considering whether a single activity is reasonable in relation to the direct and cumulative impacts on the resource, the department considers factors such as ... the type and degree of benefit from the activity (public, commercial or personal).” If the type and degree of benefit caused by an activity, whether public, commercial, or personal, is a factor to balance under the NRPA when protecting wetlands, it cannot possibly be argued that economic and energy-related

¹⁵ *Uliano II*, at 413 (emphasis added).

¹⁶ *Uliano II*, at 406-07 (emphasis added).

benefits, accruing to the public at large and individual consumers of energy “clearly fall outside” the hearing topics and “cannot be shoe-horned into them” as Group 2/10 disparagingly argues.¹⁷ Group 3 needs no shoehorn; the Legislature, the Department, and the Law Court have all agreed that environmental protection requires a balancing of environmental harms against benefits that include non-environmental benefits, especially economic benefits and those that increase the quality of life in Maine.

Further, it is unclear how *Uliano II* clarifies the NRPA’s reasonableness standard, as suggested by Group 2/10. The quotation relied upon by Group 2/10 is the Law Court’s interpretation of the Site Location of Development Law, not the NRPA. More importantly, the quotation occurs as part of a general discussion of the legal concept of reasonableness in the context of an unconstitutional vagueness analysis. Even assuming this dicta about the Site Location of Development Law applies, we are left with balancing “the nature and extent of the proposed use against the environment’s capacity to tolerate the use.”¹⁸ Group 2/10 fails to explain how this balancing would work. Under the NRPA, the nature and extent of an “activity” would be relevant, but what is the nature and extent of an activity? Rule Chapter 315, for example, states:

4. Scope of Review. The potential impacts of a proposed activity will be determined by the Department considering the presence of a scenic resource listed in Section 10, the significance of the scenic resource, the existing character of the surrounding area, the expectations of the typical viewer, the extent and intransience of the activity, the project purpose, and the context of the proposed activity. Unreasonable 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.¹⁹

A project’s “purpose” and “the context of the proposed activity” are within the scope of the rule and the NRPA. Further, “practicable” is defined as “[a]vailable and feasible considering cost,

¹⁷ Group 2/10 Motion at 4.

¹⁸ Group 2/10 Motion at 4 (citing *Uliano II*).

¹⁹ DEP Rule Chapter 315 (4) (emphasis added).

existing technology and logistics based on the overall purpose of the activity.”²⁰ If a project like the NECEC has a purpose that includes the creation of non-environmental benefits, then those benefits directly relate to the “nature and extent” of the activity and must be weighed by reasonableness against “the environment’s capacity to tolerate the [activity].”

Response to Group 4 Motion

Group 4 argues that Mr. Poole’s testimony should be stricken as irrelevant because energy-related benefits are not a topic for this hearing. It makes similar arguments for the testimony of Mr. Barrett and Mr. Connors. These arguments should be denied because the NRPA’s environmental protection purpose is expressly connected to broader societal goals related to Maine’s economy and the general welfare of its citizens. To exclude non-environmental benefits from a reasonableness analysis would make a mockery of the NRPA, as nearly no development in Maine would ever occur, at a clear cost to Maine’s economy and the welfare of its citizens.

It appears that Group 4 interprets the NRPA’s reasonableness standard as requiring solely an examination of the magnitude of environmental harm. Cutting down one tree to build a house might be acceptable because harm is de minimis. But for a large project, with many more environmental impacts, what is reasonable? Factors other than magnitude must be considered, including non-environmental benefits.

Assume two large projects would create equivalent environmental footprints, say, removal of 10,000 trees and destruction of a wetland. One project is a maximum-security prison for prisoners from overcrowded Massachusetts prisons and would employ 15 Mainers. The other project is an energy research facility that is developing ultra-efficient energy storage batteries for

²⁰ DEP Rule Chapter 315 (5)(G).

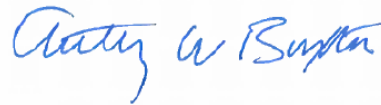
wind farms and would employ 200 Mainers. Is the Department required to analyze each project in a vacuum based solely on the magnitude of their environmental impacts? The answer is “no.” The NRPA requires consideration of non-environmental benefits that would accrue to Maine, including benefits to Maine’s economy and the quality of life of its citizens. One project’s environmental impacts are clearly more reasonable than the other’s in this example despite the fact that both would create the same environmental harms.

For the foregoing reasons, Group 3 urges the Department to deny the Group 2/10 Motion and Group 4 Motion, each as they relate to Group 3 witnesses.

DATED: March 8, 2019

Respectfully submitted,

Spokesperson for Intervenor Group 3



Anthony W. Buxton
R. Benjamin Borowski
Counsel to the Industrial Energy Consumer Group
Preti Flaherty Beliveau & Pachios LLP
P.O. Box 1058, 45 Memorial Circle
Augusta, ME 04332
Telephone: 207-623-5300
Fax: 207-623-2914