STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION

IN THE MATTER OF

CENTRAL MAINE POWER COMPANY Application for Site Location of Development Act permit and Natural Resources Protection Act permit for the New England Clean Energy Connect ("NECEC") L-27625-26- A-N/ L-27625-TB- B-N/ L-27625-2C- C-N/ L-27625-VP- D-N/ L-27625-IW- E-N/ L-27625-26- K-T	**NRCM'S RESPONSE TO CMP AND NECEC'S SECOND OBJECTION TO SUPPLEMENTAL EVIDENCE**

The Natural Resources Council of Maine ("NRCM") responds to the Licensees' improper filing dated April 29, 2021 that is styled as an objection to supplemental evidence, but is in actually, an attempt to ask the Chair to selectively re-write the merits briefs of various parties in support of the various appeals. There is no authority in the Department's rules for this filing or for the Chair to take this action, and the Licensees' objection should be summarily dismissed. If the Chair does attempt to take some action to re-write the merits briefs of the parties, NRCCM requests that the Board be provided with original briefs, the Licensees' objection, any responses thereto and the Chairs action.

First, there is a certain absurdity in arguing over whether the number of parties who submitted comments is in the record, as the Licensees do (at 4). The Board can count the number of submissions it received, and it is not improper for NRCM to make reference to that number. This is a procedural fact of the proceedings, not an adjudicatory fact that need be established at the hearing. If the Licensees would like to explain their concern over this uncontroversial fact to the Board, they may do so during oral argument, but they may not ask the Chair to selectively revise NRCM's filing.

Second, there is a similar absurdity in the Licensees objecting to a reference to the amendments that they themselves have filed to this project. Reference to the procedural posture of various interrelated permit applications, and requested revisions thereto, is entirely proper. That is particularly true here, where the Licensee attempts to skirt the requirements to present all of its natural resource information in the original proceeding, and instead attempts to correct substantive deficiencies through late-filed amendments that constitute a wholesale replacement of that information. NRCM has repeatedly explained its position that it is improper for the Licensees to continue to substantively revise their application even while the Board considers an outdated project concept. That is particularly true here, where they have submitted a "full set of revised natural resource maps" which the Licensees had the burden to provide to the Department in the first instance. The idea that the very existence of Licensees' proposed revisions—which by definition are filed after the record has closed—constitute factual information that could somehow have been made part of the record before such filings even existed is patently ridiculous. Regardless, as NRCM explained in its filing the Board may take administrative notice of administrative filings within the Department. 5 M.R.S. § 9058 (Agencies may "take official notice of any facts of which judicial notice could be taken, and in addition may take official notice of general, technical or scientific matters within their specialized knowledge and of statutes, regulations and nonconfidential agency records."). *See also Friedman v. Pub. Utilities Comm'n*, 2016 ME 19, ¶ 11, 132 A.3d 183, 187 (PUC "took administrative notice of several documents and exposure regulations in the United States and beyond"); *Middlesex Mut. Assur. Co. v. Maine Superintendent of Ins.*, No. CIV.A. AP-02-80, 2003 WL 22309109, at *1 (Me. Super. Sept. 26, 2003); *Manguriu v. Lynch*, 794 F.3d 119, 121 (1st Cir. 2015) ("We note, moreover, that courts

normally can take judicial notice of agency determinations"); *accord Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408, 412 n.1 (1st Cir. 2000).

Third, it is not improper for NRCM to refer to legislative proceedings and related administrative action of the Department's sister-agency, the Bureau of Parks and Lands, regarding the unauthorized lease over the public lots on which CMP based its administrative standing, and which is the subject of several interrelated proceedings on this permit. That is particularly true where, as here, the Department abdicated its own responsibility to determine whether the 2014 Lease complied with 06-96 CMR ch. 2 § 11(D)(2), and instead entirely deferred to its sister agency in the very permit on appeal *See* Permit Order at 8. The Departments wholesale deference to its sister agency did not arise until issuance of the permit, and it is entirely proper for NRCM to point out why that deference was improper under the Department's own rules, with reference to the actual actions and legislative testimony of the sister agency to which the department improperly abdicated analysis of 06-96 CMR ch. 2 § 11(D)(2). As NRCM explained in its filings, the legislative proceedings and further sister-agency action regarding this lease are the proper subject of administrative notice. And a Maine Court has recently ruled on this very issue, with regard to these identical legislative audio files and these same parties saying as follows:

> As all parties seem to agree, legislative materials can be cited for permissible purposes as part of the merits briefing. CMP objects to Plaintiffs' use of Director Cutko's recent testimony before the Legislature, particularly Plaintiffs' unofficial transcript. However, Plaintiffs also linked to the video of that testimony, which would be the best evidence of it in any event. Therefore, because the parties can cite to the relevant legislative information as part of the merits briefing as it is and because it is clearly relevant to what is looming in the merits briefing, the Court permits the record to be supplemented with the legislative material proposed by Plaintiffs in the April 2 letter

Order in Black v. Cutko, BCDWB-CV-2020-29 (April 21, 2021). Because those audio recordings are the form in which the legislative records are maintained, as the Court explains, they would be

the best evidence of the legislative statements. The Board can give them the appropriate consideration as legislative material for which it can take administrative notice. Likewise, the Board can take administrative notice of the actions of its sister agencies, including the fact that BPL has since terminated the 2014 Lease.

Fourth, the Licensees' objections to West Forks' references to the procedural irregularities in the various interrelated proceedings is unfounded. The Licensees assert that this is extra-record factual material, but as explained above, procedural history of a proceeding, and of interrelated proceedings, including which counsel advised which decision-maker is a procedural fact, not an adjudicatory fact that must be put in the record.

Finally, Licensees object to the statements by FBM about the inadequacy of tapering as a mitigation measure, and the biodiversity of Maine's North Woods. There is ample record evidence to support these statements. *See*, *e.g.*, Group 4 Comments on Draft Order (April 13, 2020), at page 3, pages 8-9, and page 10-15. https://www.maine.gov/dep/ftp/projects/necec/draft-order-comments/party/2020-04-13 Final Group 4 Comments on DEP Draft Order.pdf. The Draft Permit was the first time that tapering was included in the proposal, and so comments thereon were the first time that any party could respond to that proposal.

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Although Licensees purport to raise these issues as an objection to supplemental evidence, they are in actuality asking the Chair to selectively edit the rhetorical presentations of the parties of their arguments. The Chair has no such authority, and should reject the Licensees invitation to engagement in such selective editing of the briefs of the various parties. The Licensees will have the opportunity to make their presentation to the Board, and may raise their concerns directly. The Board can understand the difference between an adjudicative fact and a procedural fact, and the

Board can make its own decision on use of common sense and taking administrative notice of these various issues. NRCM objects to any attempt by the Licensee to have the Chair revise NRCM's filings, and asks that if the Chair take any action to revise NRCM's briefs that its original briefs, together with the Licensees' objections and this response be provided to the full Board.

Dated at Portland, Maine
this 30th day of April 2021

/s/ David M. Kallin

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