

**STATE OF MAINE
DEPARTMENT OF ENVIRONMENTAL PROTECTION**

Central Maine Power Company Application for a Site
Location of Development Act Permit and Natural
Resources Protection Act Permit for the Construction
of 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

**POST-HEARING BRIEF AND PROPOSED FINDINGS OF FACT
OF INTERVENOR GROUP 6:
CONSERVATION LAW FOUNDATION AND THE NATURE CONSERVANCY**

June 14, 2019

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INTRODUCTION

In order to protect, steward and conserve Maine's natural resources, infrastructure projects like the New England Clean Energy Connect (NECEC) are subject to laws administered by the Department of Environmental Protection (Department) that ensure the projects will not unreasonably harm those resources. Under these laws, the Department can only issue permits for a project if the facts establish that the project will not have unreasonable impacts or adverse effects on Maine's natural resources. In this case, Central Maine Power Company (CMP) seeks permits from the Department under the Natural Resources Protection Act and the Site Location of Development Act for the construction of the NECEC, a 145-mile electric transmission line that would deliver 1,200 megawatts of energy from the Maine-Quebec border in Beattie Township to Lewiston, for ultimate delivery to the New England power grid.

The evidence presented to date indicates that, as currently proposed, the NECEC would have unreasonable impacts and adverse effects on Maine's natural resources by fragmentation of wildlife habitat. But evidence presented during the Department's hearings on those permit applications establishes that the project could be substantially modified in order to avoid, minimize and/or compensate for these impacts, in particular within the 53.5 miles of line that would be built in an undeveloped corridor that constitutes Segment 1 of the proposed line. Those additional measures include: co-location of the corridor with existing roads, including undergrounding alongside or under existing roads; increasing pole heights to allow mature forest to be retained under the wires; creation of adequately sized wildlife travel corridors in conjunction with vegetative tapering; and/or conservation of land in the affected region. The Department should approve the NECEC's permit applications only if it imposes specific conditions such that the project's unreasonable impacts and adverse effects in Segment 1 of the

proposed corridor are adequately avoided and minimized, and that the project adequately compensates for any impacts that are not avoided and minimized.

BACKGROUND

I. CMP's Permit Applications to the Department.

On September 27, 2017, CMP submitted applications to the Department for permits under the Natural Resources Protection Act (NRPA) and the Site Location of Development Act (SLDA) for the construction of the NECEC. The Department determined that these applications were acceptable for processing on October 13, 2017. CMP subsequently submitted supplemental materials in support of its permit applications on October 19, 2018 and on December 7, 2018.

In its NRPA permit application, CMP represented to the Department that, in designing the NECEC, CMP first sought to avoid impacts and “where impacts cannot be avoided, a number of mitigation measures will be employed prior to and during construction to minimize impacts.” *See* NRPA Application at 13-1. CMP also represented it would compensate for impacts that could not be avoided or mitigated. *Id.* at 13-1–13-2.

In its SLDA permit application, CMP represented to the Department that it would be taking actions to minimize and mitigate impacts of the NECEC on natural resources, acknowledging that within Segment 1 of the line impacts could include fragmentation and creation of new linear edges. *See* SLDA Application at 7-23–7-46. CMP claimed, however, that because Segment 1 will be located in an area managed for timber production, it is “not likely to significantly alter” existing habitat fragmentation or existing edge effect. *Id.* at 7-25–7-26.

II. Pre-Filed Testimony on Habitat Fragmentation.

On February 26, 2019, The Nature Conservancy (TNC) and Dr. Malcolm Hunter, Jr. submitted pre-filed direct testimony on behalf of Intervenor Group 6 (Group 6), which is

comprised of TNC and the Conservation Law Foundation (CLF).¹ Dr. Hunter testified that the NECEC would be a permanent habitat-fragmenting feature, and that Segment 1 would be a direct loss of nearly 1,000 acres of habitat and would indirectly impact another roughly 4,000 acres through the creation of more than 100 linear miles of permanent new habitat edge and associated edge effects. *See* Pre-Filed Direct Testimony of Hunter at 3-6. Dr. Hunter concluded that CMP has not made adequate provisions for the protection of wildlife and fisheries, and that CMP's proposed mitigation package must be substantially increased. *Id.* at 7-8.

TNC testified on behalf of Group 6 that the forest block through which the NECEC would traverse is one of the largest unfragmented forest blocks in the region, and that the project would create a new fragmenting feature that will have unpredictable implications for the health and viability of wildlife and plant species over time—and that such implications could be significant. *See* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 3-4. TNC also testified that the western Maine region through which the NECEC would traverse supports exceptional biodiversity. *Id.* at 3. Further, TNC testified that CMP has not proposed adequate measures to avoid, minimize or compensate for habitat fragmentation impacts, and recommended that the Department consider a number of approaches to avoiding, minimizing and compensating for habitat fragmentation, including undergrounding, vegetation tapering, travel corridors and land conservation. *Id.* at 4-6.

In its February 26, 2019 testimony, TNC also testified that, in addition to the alternatives analysis set forth in CMP's NRPA application, it would be reasonable for the Department to request an alternative analysis that includes additional line burial in Segment 1 of the proposed

¹ The Nature Conservancy and Conservation Law Foundation were granted status as intervenors in the Department's First Procedural Order, issued August 13, 2018, at ¶ 7, and were subsequently consolidated into Intervenor Group 6 in the Department's Second Procedural Order, issued October 5, 2018, at ¶ 4.

corridor, particularly if that burial was administered in conjunction with alignment of the corridor more closely with the Spencer Road. *Id.* at 7. TNC testified that, in assessing the proposed NECEC, it would be useful to understand more generally the practicability of underground transmission of Segment 1 of the proposed corridor. *Id.*

On February 28, 2019, CMP submitted pre-filed direct testimony in support of its permit applications. In its testimony, CMP claimed that the corridor “will not generally impede the movement or migration of wildlife or plant species” and “will not unreasonably harm any significant wildlife habitat, or travel corridor, through habitat fragmentation.” *See Pre-Filed Direct Testimony of Mirabile at 11-14; Pre-Filed Direct Testimony of Goodwin at 15-19.*

In response to pre-filed direct testimony submitted by other parties, CMP submitted pre-filed rebuttal testimony on March 25, 2019. In response to the pre-filed testimony submitted by Group 6 concerning the natural resource impacts of the NECEC through habitat fragmentation, CMP again claimed that it has “adequately avoided, minimized, and proposed appropriate and adequate compensation for impacts associated with habitat fragmentation.” *See Pre-Filed Rebuttal Testimony of Goodwin at 14-19.*

On May 1, 2019, Group 6 submitted Pre-Filed Supplemental Testimony responding to the questions and data requests in the Department’s Tenth Procedural Order. TNC testified on behalf of Group 6 that to avoid and minimize habitat fragmentation, the best mitigation options (in priority order) are co-location with Route 201, including undergrounding; co-location with Spencer Road, including undergrounding; using taller pole structures in the existing right-of-way, with residual impacts compensated for through new land conservation in the affected region; and tapering vegetation and creating wildlife travel corridors in the right-of-way, combined with new land conservation in the affected region. *See Pre-Filed Supplemental*

Testimony of Wood at 1. TNC also testified that it strongly supports mitigation measures for all of Segment 1, and that while an underground route co-located Route 201 would be a preferable mitigation option, TNC does not have the expertise to determine the economic and technical feasibility of this approach, which should have been answered in a full alternatives analysis. *Id.* at 2-3. Further, TNC testified that using taller pole structures—taking into consideration visual impacts—is preferred to vegetative tapering as a mitigation method because taller pole structures would allow mature forest to be retained across most of the right-of-way. *Id.*

Group 6 witness Dr. Erin Simons-Legaard testified that pine marten are considered an “umbrella species” in the affected region—i.e., planning for pine marten habitat often serves the purpose of planning for a wide range of other wildlife—and that optimal habitat for pine marten consists of mature forest greater than 370 acres in area, with a minimum basal area of 80 ft²/acre, trees at least 30 feet tall (preferably >40 feet tall), and at least 30% canopy closure in all seasons. *See* Pre-Filed Supplemental Testimony of Simons-Legaard at 1. Dr. Simons-Legaard testified further that taller poles that would allow mature forest under the wires would be preferable to tapering in almost all locations, and that tapering could potentially result in an “ecological trap” for pine marten, attracting them into suboptimal habitat. *Id.* at 2-3. She also testified that pine marten avoid using narrow strips of forest, and that the most relevant research suggests pine marten would avoid wildlife travel corridors less than about 400 feet wide. *Id.* at 2.

CMP also submitted Pre-Filed Supplemental Testimony responding to the questions and data requests in the Department’s Tenth Procedural Order. CMP testified that undergrounding, tapering and taller pole structures in areas not already proposed for them by CMP may be technically feasible and economically viable minimization or mitigation measures, but only if limited to certain areas and, even if limited to certain areas are only “marginally valuable.” *Id.* at

2. CMP also testified that neither tapering nor taller structures are necessary or appropriate. *See* Pre-Filed Supplemental Testimony of Goodwin at 2-5.

III. The Department's Hearings on the NECEC.

The Department held the first five days of hearings in this case on April 1-5, 2019. During the hearings, the Department heard oral testimony on, and posed its own questions about, among other things, the impacts of the NECEC on Maine's natural resources, including through habitat fragmentation, and measures designed to avoid, minimize, mitigate and/or compensate for those impacts.

During the hearings, CMP reasserted its claims that the NECEC will not unreasonably harm wildlife habitat or travel corridors through habitat fragmentation. *See* April 1, 2019 Hearing Transcript at 63:24-64:2, 69:3-13, 72:13-73:14, 76:17-19. Further, CMP claimed that it did not address mitigating fragmentation of habitat for species other than deer because "habitat fragmentation was not identified as a concern by [Inland Fisheries & Wildlife]. It was never suggested that we consider those." *Id.* at 236:24-237:4. CMP also testified that there is neither a decommissioning plan nor a restoration plan. *Id.* at 135:2-8.

During Group 6's testimony, its witnesses testified about the potential for Segment 1 of the NECEC to contribute to a new and unprecedented habitat fragmentation of the regionally important, well-connected and resilient landscape through which it is proposed to traverse, and testified that habitat fragmentation had not been adequately addressed in CMP's compensation and mitigation plan. *See* April 5, 2019 Hearing Transcript at 54:19-55:4. In particular, Dr. Hunter testified that the proposed compensation and mitigation plan does not adequately address the cumulative impact to the full array of Maine wildlife. *Id.* at 64:23-65:1.

CMP's witnesses argued that because Segment 1 would be located in commercial working forest, habitat in the region is already fragmented by forestry operations and logging roads. *See* April 1, 2019 Hearing Transcript at 72:19-24. However, TNC witnesses testified that the NECEC transmission corridor would be substantially (3-4 times) wider than existing logging roads in the region, and that commercial forestry results in a patchwork of temporary forest impacts, whereas NECEC would be a permanent, linear fragmenting feature impacting western Maine at a regional scale. *See* April 5, 2019 Hearing Transcript at 61:1-9. Indeed, the NECEC would be the widest linear fragmenting feature in the region between Route 27 and Route 201. *See* April 4, 2019 Hearing Transcript at 64:5-9 and 65:16-21.

On April 19, 2019, the Department issued its Tenth Procedural Order, which requested supplemental information and evidence from the parties on whether undergrounding, tapering or taller pole structures are technically feasible and economically viable mitigation or minimization measures. *See* Tenth Procedural Order at ¶ 2. The Department also requested that the parties be prepared at the May 9, 2019 hearing to discuss 26 specific topics, which included environmental, construction, cost and routing questions concerning undergrounding, travel corridors, taller poles and tapering. *Id.* at ¶ 3 and Appendix A.

The Department held the sixth day of its hearing in this case on May 9, 2019. During the hearing, the Department heard testimony on, and asked questions itself about, the topics outlined in the Department's Tenth Procedural Order. CMP reiterated the testimony from its May 1, 2019 supplemental testimony, including its testimony that the benefits of tapering and taller structures would be marginal. *See* May 9, 2019 Hearing Transcript at 241:17-25.

Group 6's testimony on May 9, 2019 supported mitigating habitat fragmentation for all of Segment 1, including (in order of priority) the following measures: co-location with Route 201,

including burial; co-location with the Spencer Road, including burial; utilization of taller pole structures to retain mature forest canopy, in conjunction with land conservation in the affected region to address residual fragmentation impacts; and tapering in conjunction with wildlife travel corridors and significant land conservation in the affected region. *See* May 9, 2019 Hearing Transcript at 114:3-11; 136:17-137:18. They also testified in support of obtaining additional information from CMP about these measures, including the impacts of taller poles and the possible use of concrete foundations. *Id.* at 115:19-116:7, 140:13-23.

During CMP's testimony on May 9, 2019, witnesses Terrance Dewan and Amy Segal acknowledged that the visual impact of taller pole structures would vary depending on the location. *See* May 9, 2019 Hearing Transcript at 166:17-25. In some cases, visual impacts would be exacerbated, and in other cases visual impacts could be minimized due to the additional vegetation allowed in the right-of-way. *Id.*

Witnesses from CMP's engineering panel testified about several aspects of taller pole structures. First, all else equal, raising two adjacent pole structures by a set number of feet would allow the same number of feet of additional vegetation to be retained under the wires in the right-of-way (e.g., raising poles 25 feet would allow an additional 25 feet of vegetation), although cleared access roads in the right-of-way would still be necessary. *See* May 9, 2019 Hearing Transcript at 374:8-16. Second, many taller pole structures can still be directly embedded into the ground without concrete foundations, especially if they are shorter than approximately 130 feet (although a site-specific determination would be made for each pole based on soil composition). *Id.* at 377:16-24. Third, most of the estimated incremental cost of taller pole structures is associated with the assumed need for concrete foundations, so if concrete foundations are not needed, there should not be a significant incremental cost associated with

taller pole structures. *Id.* at 380:2-14. Fourth, taller vegetation could be retained in certain areas without using taller pole structures, if natural variations in topography are taken advantage of. *Id.* at 454:20-455:3.

At the hearing and in the 12th Procedural Order, the Department also requested pine marten habitat maps from Dr. Simons-Legaard. These maps establish that significant areas of mature forest and connected habitat exist within and adjacent to the proposed right-of-way.

PROPOSED FINDINGS OF FACT

In accordance with the Presiding Officer's ruling of May 10, 2019² and the Department's Thirteenth Procedural Order issued on June 9, 2019³, Group 6 submits the following proposed findings of fact⁴:

1. Segment 1 of the NECEC corridor would create a significant new fragmenting feature affecting wildlife habitat in western Maine. *See* Pre-Filed Direct Testimony of Hunter at 3-7.
2. Segment 1 of the NECEC corridor would cause a direct loss of nearly 1,000 acres of wildlife habitat. *See* Pre-Filed Direct Testimony of Hunter at 4.
3. Segment 1 of the NECEC corridor would create more than 100 linear miles of new habitat edge, leading to approximately 4,000 acres of indirect habitat impacts through edge effects. *See* Pre-Filed Direct Testimony of Hunter at 4-6.

² *See* May 10, 2019 email from Presiding Officer re: "NECEC post hearing deadlines."

³ *See* June 6, 2019 Tenth Procedural Order at 3, ¶ 11.

⁴ Group 6 respectfully urges the Department to adopt each of these proposed findings of fact, and respectfully requests that they be treated as independent findings, such that the Department may adopt some of these findings, if it determines that it cannot adopt all of these findings. Group 6 hereby reserves its right to respond to any findings of fact proposed by CMP and the other parties in connection with their post-hearing briefs.

4. Segment 1 of the NECEC corridor would traverse one of the largest unfragmented forest blocks in Maine. *See* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 3.
5. Segment 1 of the NECEC corridor would traverse the largest concentration of well-connected and climate-resilient habitat in the eastern United States. *See* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 3.
6. Segment 1 of the NECEC corridor would traverse an area of significant biodiversity, including habitat for many species listed by the State of Maine as Species of Greatest Conservation Need. *See* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 3-5.
7. Forest habitat of high and moderate suitability for pine marten is prevalent within and adjacent to the proposed NECEC corridor. *See* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 1.
8. Habitat that is suitable for pine marten is also suitable for many other species in western Maine. *See* Pre-Filed Direct Testimony of Hunter at 7; *see also* Pre-Filed Supplemental Testimony of Simons-Legaard at 1.
9. Segment 1 of the NECEC corridor would be the widest fragmenting feature between Route 27 and Route 201. *See* April 4, 2019 Hearing Transcript at 64:5-9, 65:16-21.
10. As presently proposed, development of Segment 1 for the NECEC corridor would have unreasonable impacts and adverse effects on Maine's natural resources by fragmenting mature forest that is important for many species in western Maine, including the pine marten. *See* Pre-Filed Direct Testimony of Hunter at 3-8; *see also* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 4-6.

11. As presently proposed, development of Segment 1 of the NECEC corridor would have unreasonable impacts and adverse effects on Maine's natural resources by creating new habitat edge and associated edge effects. *See* Pre-Filed Direct Testimony of Hunter at 3-8; *see also* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 4-5.
12. As presently proposed, development of Segment 1 of the NECEC corridor would have unreasonable impacts and adverse effects on wildlife and fisheries lifecycles. *See* Pre-Filed Direct Testimony of Hunter at 3-8; *see also* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 4-6.
13. CMP has not proposed any decommissioning plan for the NECEC. *See* April 1, 2019 Hearing Transcript at 135:2-8.
14. CMP has not proposed any restoration plan for the NECEC corridor if and when the line is decommissioned. *See* April 1, 2019 Hearing Transcript at 135:2-8.
15. In the absence of any decommissioning plan for the NECEC or restoration plan for the NECEC corridor, the unreasonable impacts and adverse effects of the NECEC on Maine's natural resources would be permanent. *See* April 1, 2019 Hearing Transcript at 135:2-8 *see also* Pre-Filed Direct Testimony of Hunter at 3-4.
16. Segment 1 of the NECEC corridor is located on privately owned land that has been and will continue to be subject to commercial forest practices. *See* April 1, 2019 Hearing Transcript at 59:9-14.
17. Harvesting timber in the NECEC region results in localized, impermanent habitat impacts. *See* Pre-Filed Direct Testimony of Hunter at 3.

18. CMP's proposal for the NECEC does not adequately avoid the unreasonable impacts and adverse effects of Segment 1 of the NECEC on Maine's natural resources. *See* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 4-6.
19. CMP's proposal for the NECEC does not adequately minimize the unreasonable impacts and adverse effects of Segment 1 of the NECEC on Maine's natural resources. *See* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 4-6; *see also* Pre-Filed Direct Testimony of Hunter at 3-8; *see also* April 5, 2019 Hearing Transcript at 54:19-55:4, 64:23-65:1.
20. CMP's proposal for the NECEC does not adequately compensate for the unreasonable impacts and adverse effects of Segment 1 of the NECEC on Maine's natural resources. *See* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 4-6; *see also* Pre-Filed Direct Testimony of Hunter at 3-8; *see also* April 5, 2019 Hearing Transcript at 54:19-55:4, 64:23-65:1.
21. Rerouting Segment 1 to be co-located with Route 201, including undergrounding the line, would contribute to avoiding or significantly minimizing habitat fragmentation impacts. *See* Pre-Filed Supplemental Testimony of Wood at 1.
22. Rerouting Segment 1 to be co-located with Spencer Road, including undergrounding the line, would minimize habitat fragmentation impacts. *See* Pre-Filed Supplemental Testimony of Wood at 1-3; *see also* Pre-Filed Supplemental Testimony of Simons-Legaard at 3.
23. Undergrounding Segment 1 within the currently proposed right-of-way using trenching would have an unreasonable adverse impact on the environment. *See* Pre-Filed Supplemental Testimony of Wood at 3-4.

24. The utilization of taller pole structures in Segment 1 of the NECEC corridor would significantly minimize habitat fragmentation by allowing mature forest canopy to be retained under the wires, at a ratio of 1 to 1, such that raising two adjacent poles structures by 25 feet would allow an additional 25 feet of vegetation under the wires. *See Pre-Filed Supplemental Testimony of Wood at 1; see also Pre-Filed Supplemental Testimony of Simons-Legaard at 1; see also See May 9, 2019 Hearing Transcript at 374:8-16.*
25. The utilization of taller pole structures in Segment 1 of the NECEC corridor could reduce visibility of the NECEC from some viewpoints and increase visibility of the NECEC from other viewpoints. *See May 9, 2019 Hearing Transcript at 166:17-25.*
26. Taller pole structures can be directly embedded into the ground without concrete foundations, especially if they are shorter than approximately 130 feet (although a site-specific determination would be made for each pole based on soil composition). *See May 9, 2019 Hearing Transcript at 377:16-24.*
27. If concrete foundations are required, the utilization of taller pole structures would add an incremental cost to the project of approximately \$115,000 to \$243,000 per structure. *See May 9, 2019 Hearing Transcript at 378:2-379:17.*
28. If concrete foundations are not required, the utilization of taller pole structures would add “very minor” incremental cost to the project, and that cost would be less than \$115,000 per structure. *See May 9, 2019 Hearing Transcript at 379:18-380:10, 381:12-19.*
29. Tapering vegetation and creating wildlife travel corridors at least 400 feet wide could minimize some habitat fragmentation impacts of the proposed corridor, although less

- effectively than co-locating the proposed corridor within existing roads or using taller pole structures. *See* Pre-Filed Supplemental Testimony of Simons-Legaard at 2; *see also* Pre-Filed Supplemental Testimony of Wood at 1.
30. Regardless of minimization measures employed, if Segment 1 of the NECEC corridor were constructed within the proposed right-of-way, fragmentation impacts would occur due to clearing around pole structures and for access roads to or between pole structures for construction and maintenance. *See* Pre-Filed Supplemental Testimony of Wood at 1; *see also* May 9, 2019 Hearing Transcript at 382:19-383:13.
31. Significant land conservation in areas adjacent to Segment 1 of the NECEC corridor could compensate for habitat fragmentation in Segment 1 of the corridor that is not avoided or minimized, and compensation for direct and indirect habitat fragmentation impacts at the Department ratio of 8:1 or the United States Army Corps of Engineers ratio of 20:1 would translate to approximately 40,000 to 100,000 acres of conservation, as the project is currently proposed. *See* Pre-Filed Direct Testimony of Wood, Cutko and Emerson at 6, 9; *see also* Pre-Filed Direct Testimony of Hunter at 8; *see also* Pre-Filed Supplemental Testimony of Wood at 1-2; *see also* May 9, 2019 Hearing Transcript at 143:18-145:9.

STANDARD OF REVIEW

In order to issue permits for the construction of the NECEC, the Department must find that CMP has satisfied the criteria set forth in the Natural Resources Protection Act (38 M.R.S. §§ 480-A – 480-JJ), the Site Location of Development Law (38 M.R.S. §§ 481 – 490) and the Department’s associated regulations (C.M.R. Chapters 310, 315, 335, 375).⁵ From among the

⁵ A complete list of the relevant statutory and regulatory criteria was set forth in the Department’s First Procedural Order, issued August 13, 2018, at Appendix B.

relevant review criteria in these statutes and regulations, the Department has identified four major topic areas and several subtopics as the subject matters for the hearing and written submittals, including post-hearing briefs.⁶ The four major topics are: (1) Scenic Character and Existing Uses; (2) Wildlife Habitat and Fisheries; (3) Alternatives Analysis; and (4) Compensation and Mitigation.⁷

First, CMP must demonstrate that the NECEC will not unreasonably interfere with the scenic character, existing scenic, aesthetic, recreational or navigational uses and that the development fits harmoniously into the natural environment. *See* 38 M.R.S. § 480-D(1), 38 M.R.S. § 484(3), Department Rules Chapters 315 and 375, § 14; *see also* Second Procedural Order at ¶ 7(a).

Second, CMP must demonstrate that the NECEC will not unreasonably harm any significant wildlife habitat, freshwater wetland plant habitat, threatened or endangered plant habitat. *See* 38 M.R.S. § 480-D(3), 38 M.R.S. § 484(3), Department Rules Chapters 335 and 375, § 15; *see also* Second Procedural Order at ¶ 7(b). More specifically, CMP must satisfy the review criteria in 38 M.R.S. § 480-D(3), which provides, in part, that:

3. Harm to habitats; fisheries. 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.

Under this category, CMP must also comply with 38 M.R.S. § 484(3), which provides, in part, that:

3. No adverse effect on the natural environment. The developer has made adequate provision for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect existing uses, scenic

⁶ The Department ruled that post-hearing closing briefs shall only relate to the criteria established for the hearing. *See* April 5, 2019 Hearing Transcript, 125: 8-19.

⁷ The Department provided a complete description of these four major hearing topics in its Second Procedural Order, issued October 5, 2018, at ¶ 7.

character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities.

CMP must also comply with the review criteria under Department Rules Chapter 335, which provides the standards by which the Department will determine whether the project has unreasonable impacts to significant wildlife habitat and whether the applicant has avoided, minimized or compensated for impacts. CMP is also required to comply with the requirements of Department Rules Chapter 375, § 15, which establishes the scope for the Department’s review of permit applications under the Site Location of Development Act, and the standards by which the Department will determine whether to issue a permit, including Chapter 375, § 15, paragraph B, which provides:

- B) Scope of Review. In determining whether the developer has made adequate provision for the protection of wildlife and fisheries, the Department shall consider all relevant evidence to that effect, such as evidence that: ... (2) Proposed alterations and activities will not adversely affect wildlife and fisheries lifecycles.

Third, CMP must demonstrate that the NECEC will not unreasonably impact “protected natural resources,” as defined by the Natural Resources Protection Act, in light of practicable alternatives to the proposal that would be less damaging to the environment. *See* 38 M.R.S. §§ 480-D (1) & (3), 38 M.R.S. § 484(3), DEP Rules Chapters 310, 315 and 335; *see also* Second Procedural Order at ¶ 7(c). The Department noted that topics for the hearing will also include evidence addressing 38 M.R.S. § 480-D (8) (the applicant must demonstrate that, with regard to the crossing of the outstanding river segment, no reasonable alternative exists which would have less adverse impact upon the recreational and natural features of the river segment).

Fourth, CMP must demonstrate compensation for unavoidable impacts to certain resources. *See* 38 M.R.S. § 480-D, 38 M.R.S. § 484(3), DEP Rules Chapters 310 and 375, § 15; *see also* Second Procedural Order at ¶ 7(d).

ARGUMENT

The Maine Legislature has enunciated “a strong public policy in favor of the protection and conservation of the natural resources and scenic beauty of Maine.” *Francis Small Heritage Tr., Inc. v. Town of Limington*, 2014 ME 102, ¶ 20, citing 38 M.R.S. § 480-A. To implement this public policy, the Legislature has enacted a set of laws establishing how the Department must determine whether to issue permits for projects, like the NECEC, that will alter Maine’s natural environment. Under these laws—in particular, the Natural Resources Protection Act and the Site Location of Development Act—the Department can only issue permits for a project if it will not “unreasonably harm” or “adversely affect” Maine’s protected natural resources. See 38 M.R.S. § 480-D(3), 38 M.R.S. § 484. The Department may, as conditions of approval, establish any reasonable requirements to ensure that a project will satisfy the requirements of these laws. See, e.g., Department Rules Chapter 310, § 8, Chapter 335, § 6, Chapter 375, § 15(D).

In this case, the weight of the evidence presented to the Department to date indicates that, as currently proposed, the NECEC will unreasonably harm and adversely affect Maine’s natural resources through habitat fragmentation. The Department should therefore only issue permits for the NECEC with conditions of approval that adequately protect those resources by avoiding, minimizing and compensating for the infrastructure project’s impacts.

I. The NECEC Would Have Unreasonable Impacts and Adverse Effects on Maine’s Natural Resources Through the Fragmentation of Wildlife Habitat.

Before being granted a permit under the Natural Resources Protection Act, CMP “must show that the [NECEC] ‘will not unreasonably harm any significant wildlife habitat ... [or] travel corridor.’” *Friends of Lincoln Lakes v. Bd. of Env’tl. Prot.*, 2010 ME 18, ¶ 21, citing 38 M.R.S. § 480-D(3). Similarly, before it can obtain a permit under the Site Location of Development Act, CMP must demonstrate that it has “made adequate provision for fitting the

[NECEC] harmoniously into the existing natural environment and that the [NECEC] will not adversely affect existing uses.” *Concerned Citizens to Save Roxbury v. Bd. of Env’tl. Prot.*, 2011 ME 39, ¶ 26, *citing* 38 M.R.S. § 484(3); *see also Valente v. Bd. of Env’tl. Prot.*, 461 A.2d 716, 718 (Me. 1983) (“the intent and entire thrust of the Site Law is not primarily directed at the development site itself but rather at the effects the development of that site will have upon the natural environment of the locality surrounding the site.”)

The weight of the evidence presented to the Department clearly indicates that the NECEC, as currently proposed, would unreasonably harm and adversely affect Maine’s natural resources through habitat fragmentation. Contrary to CMP’s claims and representations to the Department, the evidence clearly establishes that Segment 1 of the NECEC corridor would create a significant new fragmenting feature affecting wildlife habitat in western Maine by fragmenting mature forest that is important for many species in western Maine. Indeed, Segment 1 of the NECEC corridor would fragment wildlife habitat by traversing: one of the largest unfragmented forest blocks in Maine; the largest concentration of well-connected and climate-resilient habitat in the eastern United States; and an area of significant biodiversity, including habitat for many species listed by the State of Maine as Species of Greatest Conservation Need. The evidence also establishes that the NECEC would cause a direct loss of nearly 1,000 acres of wildlife habitat and would create more than 100 linear miles of new edge habitat, leading to an additional 4,000 acres of indirect habitat impacts through edge effects.

NECEC’s fragmenting of wildlife habitat would thus have unreasonable impacts and adverse effects on Maine’s natural resources. And because CMP has not proposed any decommissioning plan for the NECEC and has not proposed any restoration plan for the NECEC

corridor, the unreasonable impacts and adverse effects of the NECEC on Maine's natural resources would be permanent.

II. The Unreasonable Impacts and Adverse Effects of the NECEC on Maine's Natural Resources Could be Avoided, Minimized and Compensated for by Rerouting the Line Including Undergrounding, the Utilization of Taller Pole Structures, the Tapering of Vegetation Under the Line in Conjunction with Wildlife Travel Corridors and/or Significant Land Conservation.

As presently proposed, the NECEC does not adequately avoid, minimize and compensate for these unreasonable impacts and adverse effects on Maine's natural resources. However, evidence presented throughout this proceeding clearly indicates that the project could be substantially modified in order to avoid, minimize and/or compensate for these impacts, in particular within the 53.5 miles of line that would be built in an undeveloped corridor that constitutes Segment 1 of the proposed line. Those additional measures include: co-location of the corridor with existing roads, including undergrounding alongside or under existing roads; increasing pole heights to allow mature forest to be retained under the wires; creation of adequately sized wildlife travel corridors in conjunction with vegetative tapering; and/or conservation of land in the affected region.

The evidence presented to the Department establishes that taller pole structures can be directly embedded into the ground without concrete foundations, especially if they are shorter than approximately 130 feet (although a site-specific determination would be made for each pole based on soil composition). If concrete foundations are not required, the utilization of taller pole structures would add very minor incremental cost to the project, and less than \$115,000 per structure. If concrete foundations are required, the utilization of taller pole structures would add an incremental cost to the project of approximately \$115,000 to \$243,000 per structure.

The evidence also establishes that tapering vegetation and creating wildlife travel corridors at least 400 feet wide could minimize some habitat fragmentation impacts of the proposed corridor, although less effectively than co-locating the proposed corridor with existing roads or using taller pole structures. Further, the evidence establishes that significant land conservation in areas adjacent to Segment 1 of the NECEC corridor could compensate for habitat fragmentation in Segment 1 of the corridor that is not avoided or minimized, and that as the project is proposed, compensation for direct and indirect habitat fragmentation impacts at the Department ratio of 8:1 or the Army Corps ratio of 20:1 would translate to approximately 40,000 to 100,000 acres of conservation.

III. The Department Should Only Issue Permits for the NECEC if the Project is Substantially Modified to include Conditions of Approval that Require Measures that Adequately Avoid, Minimize and Compensate for the Project's Unreasonable Impacts and Adverse Effects on Maine's Natural Resources.

In light of the NECEC's unreasonable impacts and adverse effects on Maine's natural resources as the project is proposed, the Department should only issue permits for the NECEC if the project is significantly modified to include a combination of measures that adequately avoids and minimizes the project's habitat fragmentation impacts in Segment 1 of the proposed corridor, and that adequately compensates for any habitat fragmentation that cannot be avoided or minimized.

The Department should prioritize maintaining existing forest canopy throughout the 53.5-mile proposed Segment 1, which would avoid habitat fragmentation and could be achieved by one or a combination of the following:

- Rerouting the right-of-way to be co-located with existing roads, such as Route 201 or the Spencer Road, including undergrounding. If additional conversations between CMP and the primary landowners or right-of-way owners are necessary

to fully understand the availability of these alternatives to the Applicant, we encourage the Department to require those conversations take place to ensure these alternatives have been adequately analyzed.

- Using taller pole structures in the proposed right-of-way, such that mature forest (trees at least 30-feet high) are, and can be, retained under the wires, taking into consideration visual impacts.

If the Department finds that some habitat fragmentation cannot be avoided, it should seek to minimize fragmentation through conditions that require tapering of vegetation in conjunction with the creation of wildlife travel corridors at least 400 feet wide. Further, the Department should require compensation for any habitat fragmentation that is not avoided—including as a result of tapered vegetation and/or pole structure access roads—in the form of significant land preservation in the affected region, at a compensation ratio of 8:1 or 20:1.

CONCLUSION

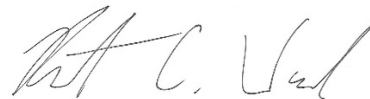
As currently proposed, the NECEC would have unreasonable impacts and adverse effects on Maine's natural resources, in particular by fragmenting wildlife habitat. The project could be substantially modified in order to avoid, minimize and compensate for these impacts. The most effective measure to avoid and minimize habitat fragmentation would be rerouting Segment 1 of the right-of-way to be co-located with existing roads, such as Route 201 or the Spencer Road, including undergrounding—which should be fully explored, even if further conversations with relevant landowners or right-of-way owners are necessary. Using taller pole structures in the proposed Segment 1 right-of-way such that mature forest (trees at least 30-feet high) is retained under the wires would also significantly minimize habitat fragmentation impacts. Tapering vegetation and creating wildlife travel corridors at least 400 feet wide could also minimize

habitat fragmentation, although less effectively than co-location or taller pole structures. If the Department finds that there are impacts that cannot be avoided or minimized, land preservation in the affected region could compensate for these impacts at a ratio of 8:1 or 20:1. The Department should only issue permits for the NECEC if the project is substantially modified such that it adequately avoids, minimizes and compensates for the project's unreasonable impacts and adverse effects on Maine's natural resources.

Respectfully submitted,



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