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June 28, 2019

James R. Beyer
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106 Hogan Road, Suite 6
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Bill Hinkel
Land Use Planning Commission
22 State House Station
Augusta, ME 04333-0022

RE: NECEC – Post-Hearing Reply Brief of Central Maine Power Company

Dear Jim and Bill:

Enclosed is the Post-Hearing Reply Brief of Central Maine Power Company. Pursuant to Procedural Orders, we are sending, via overnight delivery, the following:

- Original and 4 copies of CMP's Pre-Filed Direct Testimony for the DEP;
- Original and 9 copies of CMP's Pre-Filed Direct Testimony for LUPC.

Thank you.

Sincerely,

Matthew D. Manahan

Enclosure
cc: Service Lists (via email)

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, Merrill Strip Twp, Lowelltown Twp,	)
Skinner Twp, Appleton Twp, T5 R7 BKP WKR,	)
Hobbstown Twp, Bradstreet Twp,	)
Parlin Pond Twp, Johnson Mountain Twp,	)
West Forks Plt, Moxie Gore,	)
The Forks Plt, Bald Mountain Twp, Concord Twp	)

POST-HEARING REPLY BRIEF
OF CENTRAL MAINE POWER COMPANY

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POST-HEARING REPLY BRIEF
OF CENTRAL MAINE POWER COMPANY

Pursuant to the Maine Department of Environmental Protection (DEP or Department) rules governing licensing hearings,[1] as well as the procedural orders of the DEP and the Maine Land Use Planning Commission (LUPC),[2] Central Maine Power Company (CMP) hereby files this post-hearing reply brief, which responds to those intervenor groups that filed on June 14, 2019 initial briefs[3] regarding CMP's applications for a Site Location of Development Act (Site Law) permit, a Natural Resources Protection Act (NRPA) permit, and a Federal Water Pollution Control Act Section 401 Water Quality Certification (collectively, Applications) for the New England Clean Energy Connect (NECEC) Project (NECEC Project or the Project).

I. TITLE, RIGHT, OR INTEREST (Relevant to DEP and LUPC Review)

Group 4 opens its brief with the already rejected argument that CMP has failed to demonstrate title, right, or interest (TRI) in two public reserved land parcels in Johnson Mountain Township and West Forks Plantation.[4] As explained in detail below, this argument ignores the clear language of the Maine Constitution upon which it is based, as well as the statutory authority that the Maine Legislature granted to the Bureau of Parks and Lands (BPL) to enter into its lease agreements with CMP for these two parcels.

[1] DEP Reg. Ch. 3 § 23.

[2] *See, e.g.*, Joint Seventh Procedural Order ¶ I.6.c.

[3] Certain intervenor groups also filed proposed findings of fact. CMP notes that while this is permissible under the DEP's and LUPC's rules, Groups 2 and 10 also include conclusions of law, which are neither provided for in the rules nor ordered by the Presiding Officers. *See* Joint Eleventh Procedural Order ¶ 3.d.; Joint Seventh Procedural Order ¶ I.6.c.; Joint Fourth Procedural Order ¶ 3. For that reason, Groups 2 and 10's proposed conclusions of law should be disregarded. Furthermore, in its proposed findings of fact, Groups 2 and 10 inappropriately cite the "testimony" of Group 4 counsel at pp. 1, 3, 4, 7, and 9. Because legal counsel's statements are not "testimony," Groups 2 and 10's Draft Proposed Findings of Fact should be disregarded.

[4] Group 4 Initial Brief at 4-6.

At the outset, CMP notes that this very same argument already was raised in this proceeding and dismissed by the DEP Presiding Officer. In its November 13, 2018 letter to the Department, Group 8's NextEra stated that it is "unclear whether the Transmission Line Lease between Department of Agriculture, Conservation and Forestry Bureau of Parks and Lands and Central Maine Power Company dated December 2014 is statutorily permissible." The Presiding Officer responded on November 16, 2018, stating as follows:

> Further, Nextera questions whether the Transmission Line Lease between CMP and the Department of Agriculture, Conservation, and Forestry, Bureau of Public Lands (the Bureau), dated December 15, 2014, is "statutorily permissible." The Bureau entered into that lease with CMP pursuant to 12 M.R.S. § 1852(4), which authorizes the Bureau to "lease the right, for a term not exceeding 25 years, to," among other things, "[s]et and maintain or use poles, electric power transmission and telecommunications facilities." CMP's lease with the Bureau, a copy of which CMP provided to the Department, demonstrates to the Department's satisfaction sufficient title, right, or interest to the lands subject to that lease. 096 C.M.R. ch. 2, § 11(D)(2) (2018). Legal challenges to the Bureau's authority to enter a transmission line lease pursuant to 12 M.R.S. § 1852(4) would be for the courts—not the Department—to adjudicate.

Despite this unequivocal directive from the Presiding Officer, Group 4 nevertheless alleges that the leases in question do not demonstrate TRI because they were not approved by a two-thirds vote of the Legislature. But the constitutional provision at the heart of Group 4's argument, and its implementing statutory provisions, clearly is inapplicable.

The Maine Constitution, Article IX Section 23, provides:

> State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House [emphasis added].

For this provision to apply, therefore, the public lots must (1) be held by the State for conservation or recreation purposes *and* (2) be designated by legislation implementing this provision. The lots at issue in Johnson Mountain Township and West Forks Plantation do not meet either parameter, rendering this constitutional provision inapplicable. Even assuming

arguendo that parameters (1) and (2) are met, which they are not, the action also must (3) reduce or substantially alter the uses of the public lot in order for it to run afoul of the constitution. The NECEC leases do not.

First, neither the Johnson Mountain Township lot nor the West Forks Plantation is "held by the State for conservation or recreation purposes." Instead, these are original public lots held for the respective townships and not for conservation or recreation purposes.[5] Thus, Maine Constitution Article IX Section 23 does not apply.

Second, the legislation implementing Article IX Section 23 was superseded by later-enacted legislation that allows precisely what occurred here – the lease of these public reserved lands for utility purposes. Group 4 cites Title 12 Section 598-A, which Group 4 correctly notes was enacted in 1993, and which implements Article IX Section 23 by providing that "[d]esignated lands under this section may not be reduced or substantially altered, except by a 2/3 vote of the Legislature." That statute provides that "designated lands" include "public reserved lands." 12 M.R.S. § 598-A(2-A)(D). But Group 4 ignores the later-enacted Title 12 Section 1852, which was enacted in 1997 and which explicitly allows the BPL to "transfer or lease" "public reserved lands." Specifically, the BPL may lease the right to "set and maintain or use poles, electric power transmission and telecommunication transmission facilities," and to "establish and maintain or use other rights-of-way." 12 M.R.S. § 1852(4). Thus, the lands identified in Section 598-A are not subject to the 2/3 vote of the Legislature where the BPL is

[5] Response of Central Maine Power Company (CMP) to James Palmer's November 23, 2018 Review of the New England Clean Energy Connect October 2018 Supplemental Application Materials at 17-18 (Dec. 9, 2018) (quoting Maine Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands, Draft Upper Kennebec Region Management Plan (Management Plan) at 82, available at: https://www.maine.gov/dacf/parks/get_involved/planning_and_acquisition/management_plans/upper_kennebec_region.html); *see also* Final Draft Management Plan at 4).

acting under its Section 1852 authority, because the Legislature has, by means of Section 1852, withdrawn those lands from the scope of Section 598-A (i.e., the Legislature has determined that they are not "held for conservation or recreation purposes" and that the uses authorized by Section 1852 do not "reduce" or substantially alter" the uses of those lands). An interpretation to the contrary would render the later-enacted Title 12 Section 1852 meaningless. Thus, Maine Constitution Article IX Section 23 does not apply to these lands.

Third, even if Article IX Section 23 as implemented by Title 12 Section 598-A were applicable here, a careful reading of the implementing statutes demonstrates that leases of public reserved lots for the proposed utility use allowed by Section 1852 do not "reduce or substantially alter" designated lands, as Group 4 alleges.

"Reduced" is defined to mean "a reduction in the acreage of an individual parcel or lot of designated land under section 598-A." 12 M.R.S. § 598(4). The lease for the two parcels in Johnson Mountain Township and West Forks Plantation results in no reduction in acreage of those lots.

"Substantially altered," in the use of designated lands, means "changed so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which that land is held by the State." 12 M.R.S. § 598(5). The statute defines the "essential purposes" of public reserved lands as "the protection, management and improvement of these properties for the multiple use objectives established in section 1847." 12 M.R.S. § 598(5) (emphasis added). Following the statutory trail, Section 1847 makes clear that the essential purpose of public reserved lands is to "be managed under the principles of multiple use to produce a sustained yield of products and services by the use of prudent business practices and the principles of sound planning." 12 M.R.S. § 1847(1). To achieve that purpose, the

Legislature mandated that the BPL prepare management plans for public reserved lands that "provide for a flexible and practical approach to the coordinated management of the public reserved lands" and that "provide for the demonstration of appropriate management practices that will enhance the timber, wildlife, recreation, economic and other values of the lands. 12 M.R.S. § 1847(2) (emphasis added).

The BPL has drafted a 15-year Management Plan for approximately 43,300 acres of lands known as the Upper Kennebec Region, which includes the two parcels in Johnson Mountain Township and West Forks Plantation. This Management Plan,[6] which is in final draft form, clearly contemplates transmission line use of the parcels, and explicitly references the leases with which Group 4 takes issue. It notes that 36 acres of the West Forks lot is in a utility corridor, and that "[a] 100-foot wide CMP transmission line right-of-way (established in 1963) follows the town line across the West Forks Plt. Lot. A new 300-foot wide by mile-long transmission line lease crossing both lots from north to south was executed with CMP in December 2014; the line has not yet been built."[7]

Because the Project does not "frustrate the essential purposes for which that land is held by the State," it does not rise to a substantial alteration of the public reserved lands that it crosses, and Maine Constitution Article IX Section 23 does not apply.

In any event, Group 4's TRI argument is a red herring. As CMP stated in its January 25, 2019 letter to the DEP Presiding Officer, Maine courts are clear that an applicant need only make a *prima facie* showing of TRI.[8] Nothing requires or authorizes DEP to act as an adjudicatory

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[6] *Supra*, n. 5.

[7] *Id.* at 17-18 (Management Plan at 82).

[8] *See Murray v. Inhabitants of the Town of Lincolnville*, 462 A.2d 40, 43 (Me. 1983) (finding that an applicant need only have a "legally cognizable expectation of having the power to use the site in the ways that would be authorized by the permit or license he seeks.").

body to determine ownership rights or resolve property disputes.[9] Presiding Officer Miller acknowledged this in her November 16, 2019 letter to NextEra.[10] Rather, the standard set forth in Chapter 2.11(D) establishes merely the threshold showing an applicant must make before the application is sufficient for review. To have a "legally cognizable expectation" an applicant need only present *prima facie* evidence of title, right, or interest, which CMP has done here.

II. FINANCIAL CAPACITY (Relevant to DEP Review)

Group 4 suggests that the Department should require a performance bond as a term and condition of approval of CMP's Applications.[11] Nowhere in the DEP's regulations implementing the Site Law is the Department required to do so. Rather, to obtain a Site Law permit, an applicant must have "financial capacity to design, construct, operate, and maintain the development in a manner consistent with state environmental standards and the provisions of the Site Law."[12] In compliance with DEP's Chapter 373, CMP submitted to the Department in its Site Law Application evidence that affirmatively demonstrates that it has the financial capacity to design, construct, operate, and maintain the proposed development.[13]

No party has questioned CMP's financial capacity to date, and Group 4 does not do so in its brief. Instead, it claims that two questionable and unsubstantiated "risks" support a bond requirement: a "small but significant risk" of fire damage and a "risk" that the Project "may become obsolete" in 20 years. The issue of fire damage was raised at the hearing by Group 2's

[9] *See Southridge Corp. v. Bd. of Envt'l Prot.*, 655 A.2d 345 (Me. 1995) (holding that a landowner whose property interest was based entirely on an adverse possession claim, on which he may or may not prevail, had sufficient TRI in the disputed land to apply to the DEP for a permit).

[10] "Legal challenges to the Bureau's authority to enter a transmission line lease pursuant to 12 M.R.S. § 1852(4) would be for the courts—not the Department—to adjudicate."

[11] Group 4 Initial Brief at 69-70.

[12] DEP Reg. Ch. 373 § 2(A).

[13] Site Law Application Ch. 3.

non-engineer witnesses Elizabeth Caruso and Garnett Robinson,[14] and by four public comment witnesses,[15] none of whom held themselves out to be an engineer or described any experience with overhead transmission lines and any purported fire hazard. This "risk" is unfounded, and there is no substantial evidence to support it.[16] So too is Group 4's alleged "risk" of the Project becoming obsolete – which Group 4 invented out of whole cloth and without any citation to the record – an entirely new allegation unsupported (and indeed, not found) in the record. The Department should disregard these tenuous and unfounded "risks."

Not only are these contrived risks unsupported by evidence in the record, but in no way do they necessitate a performance bond to ensure that the Project will meet its permit requirements and "state environmental standards," which is the test Group 4 cites. To the contrary, DEP's authority to require financial assurance extends only to the ability to operate and

[14] Hearing Day 2 Transcript 204:3-9 (Caruso); Hearing Day 3 Transcript 55:3-9, 139:12-19 (Robinson); Hearing Day 6 Transcript 57:22-58:2 (Robinson).

[15] Hearing Day 2 PM Transcript 23:23-24 (Nicholas); Hearing Day 2 PM Transcript 37:6-9 (discussing "fire and hazards" from "security risks from arson, explosives and firearms"), 37:14-25 (Kelly); Hearing Day 2 PM Transcript 88:7-22 (discussing fire risks because "every one of these towers has between 150 and 300 gallons of flammable oil located between 350 and 600 feet up in the air" and referencing turbine fires) (MacDonald); Hearing Day 2 PM Transcript 106:11-20, 107:3-10 (asking, "If terrorists cover their evidence by setting northern Maine woods on fire, could corporations claim this was an act of war and release themselves from liability for reimbursing families, communities and businesses for fire damage?") (Rains).

[16] Potential fire hazards related to the construction and operation of the Project were considered by the Maine Public Utilities Commission (MPUC or Commission) in its review of the Project. MPUC Docket No. 2017-00232. In the Order approving the Certificate of Public Convenience and Necessity, the MPUC noted "that ensuring public safety with respect to public utility operations is a central purpose of the Commission outlined in Section 101 of Title 35-A. The above ground HVDC line is designed by professional engineers who by the nature of their training and licensure requirements attest to safety when final stamping of the design occurs. . . . The Commission finds that, with respect to the safety concerns raised by Caratunk, Ms. Kelly, and several public witnesses relating to the availability of fire protection and other emergency response services in the proposed transmission corridor, the record reflects that CMP has adequately addressed such safety concerns throughout other remote areas of its existing transmission system. The Commission, therefore, finds that the NECEC does not pose a threat to public health and safety." MPUC, Docket # 2017-00232, Order at 50 (May 3, 2019).

maintain a project consistent with state environmental standards and the Site Law – not public safety. Because CMP has shown adequate financial capacity to meet such standards, Group 4's request should be denied.

III. SCENIC CHARACTER AND EXISTING USES (Relevant to DEP and LUPC Review)

The scenic character and existing uses arguments of intervenor groups in opposition to the Project suffer from an erroneous understanding of the relevant review standards.[17] Contrary to the regulations relevant to this issue, opposition intervenors would remove entirely the reasonableness standard from agency review and would hold CMP to additional standards not set forth in statute or regulation.

Groups 2 and 10 cite purported examples of "how this project will interfere with existing uses," arguing that *any* interference with existing uses is incapable of buffering or other mitigation.[18] Moreover, Groups 2 and 10 make no mention of whether or not the Project is incompatible with existing uses, which is an important element of the LUPC standard. Instead, those groups take the staunch position that "[o]nce done it cannot be undone and the harm cannot be buffered."[19] In other words, Groups 2 and 10 argue that any adverse impact is determinative. This is a recipe for regulatory paralysis[20] and is not what the rules call for.

Rather, DEP's Chapter 375 regulations require that the DEP consider whether the impact is unreasonable, and require that the DEP must grant the requested permits where (as relevant

[17] In addition to its misunderstanding and misapplication of the relevant review standards, Groups 2 and 10's Post-Hearing Brief is riddled with additional errors, including citing to the "testimony" of counsel for Group 4 numerous times; comments of counsel are not testimony. *See* Groups 2 and 10 Post-Hearing Brief at 7, 21 and Appendix A 1, 3, 4, 7, 9.

[18] Groups 2 and 10 Post-Hearing Brief at 7-10, 20-23.

[19] Groups 2 and 10 Post-Hearing Brief at 9, 23.

[20] *See* Group 3 Post-Hearing Brief at 7-11.

here) the applicant has shown no unreasonable adverse impact on scenic character.[21] The Maine Law Court agrees, finding that while most developments seeking Site Law permits "may be expected to 'affect' the environment adversely to the extent that they add to the demands already made upon it, it is the unreasonable effect upon existing uses, scenic character and natural resources which the Legislature seeks to avoid by empowering the [Department] to measure the nature and extent of the proposed use against the environment's capacity to tolerate the use."[22] So too does NRPA require consideration of whether the development will "unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses."[23] Groups 2 and 10's stubborn anti-development conclusion that "interference with the existing uses is incapable of mitigation,"[24] after citing a litany of ways in which buffering allegedly is impossible, takes no account of the DEP's rules in Chapters 315 and 375 that set forth the parameters for reasonable interference.

Similarly, the LUPC's rules call for an analysis of whether "the use can be <u>buffered</u> from those other uses and resources within the subdistrict <u>with which it is incompatible</u>."[25] This word choice is conscious and unambiguous, but the opposition intervenors instead appear to interpret buffering as screening and wholly ignore that buffering is required only where there is an incompatible use. The verb "buffer" means to lessen or moderate the impact of something. That

[21] DEP Reg. Ch. 375 § 14.

[22] *In re Spring Valley Development*, 300 A.2d 736, 751 (Me. 1973).

[23] 38 M.R.S. § 480-D(1). The DEP's NRPA review of impact to scenic and aesthetic uses is limited to "scenic resources," which are the typical points from which an activity in, on, over, or adjacent to a protected natural resource is viewed by the public. DEP Ch. 315 §§ 3, 4, 10.

[24] Groups 2 and 10 Post-Hearing Brief at 7-10.

[25] LUPC Reg. Ch. 10.23(I)(3)(d)(8) (emphasis added).

does not mean no visibility.[26] The verb "screen," on the other hand, means to conceal, protect, or shelter someone or something with a screen or something forming a screen. Groups 2 and 10 fail to consider or analyze these words, or the incompatibility standard, in their brief, and instead take a dogged anti-development position that buffering a transmission line is impossible, with scant reference to the P-RR subdistrict.

Group 4 also similarly fails to consider the entirety of the LUPC's buffering standard, when it takes issue with the planting plans intended to buffer Appalachian Trail (AT) hikers from the Project at Troutdale Road. Group 4 makes no reference to, nor does it consider, the actual standard governing the buffering of a proposed use,[27] perhaps because the AT at that location crosses an existing transmission line corridor, and is within Troutdale Road, such that the Project is not "incompatible" with the AT's use at that location.[28] Nor is the use of the AT at any of the locations at which it crosses the Project incompatible with transmission lines,[29] as evidenced by both (1) the existing use of the transmission line corridor by AT hikers and (2) the easement from CMP allowing the AT use and by which the National Park Service (NPS) agreed to CMP's construction of additional above ground electric transmission lines on CMP's land.[30]

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[26] Hearing Day 1 Transcript at 355:16-18 (Segal).

[27] Group 4 Initial Brief at 10. Instead, Group 4 suggests three alternatives to the AT crossings – routing the Project along existing roads, relocating the AT, or burying the Project at the AT crossing – which it alleges "have not been adequately explored." Group 4 Initial Brief at 8. Not only have these three alternatives been explored, but they are neither practicable nor reasonably available to CMP. *See* CMP Post-Hearing Brief at 25-27, 43, 50-51, 53.

[28] LUPC Reg. Ch. 10.23(I)(3)(d)(8).

[29] Goodwin Rebuttal at 2; Freye Rebuttal at 2-3; Segal Rebuttal at 7-9.

[30] Exhibit CMP-9-B.

Several intervenors further urge the DEP and LUPC to hold CMP to standards not set forth in statute or regulation, demanding "greater consideration" or a more "serious analysis"[31] of a range of views and resources[32] where the rules simply do not so require. These declarations are no more than a perpetuation of the entirely subjective visual claims made by the intervenors that oppose the Project,[33] and should be disregarded. As the Department is well aware, Chapters 315 and 375 of its regulations set forth an explicit, standardized, and objective methodology for evaluating impacts to existing scenic and aesthetic uses, as well as the scenic character of the surrounding area. Terrence J. DeWan & Associates (TJD&A) followed this methodology in preparing the Visual Impact Assessment for the Project.[34] As CMP witness Terrence J. DeWan explained,[35]

> We prepared the VIA for the New England Clean Energy Connect using standard Visual Impact Assessment methodologies that we have used over the years and we've refined our methodology as we've gone along following the standards described in the Natural Resources Protection Act, Chapter 315 regulations as well as those in the Site Law Chapter 375, the regulations for scenic character.
>
> Under NRPA, the DEP is to consider whether or not an activity will not unreasonably interfere with existing scenic aesthetic recreational or navigational uses. So what is unreasonable adverse visual impact? That seems to be the crux of the issue here before us today. Every time we make a change to the landscape no matter what we do there is an impact. Every time it can be seen, well, that can be considered to be seen as a visual impact because you can see it. It's visually apparent. But if the change is perceived to have an objectionable level of contrast, and by contrast we mean contrast in color, form, line, character, scale and so forth and may be considered to be adverse, but then the real question is where is the line that makes it unreasonable? So Chapter 315 supplies us an answer. . . . Chapter 315 requires that an applicant demonstrate that the proposed design

[31] *See, e.g.*, Group 4 Initial Brief at 14.

[32] Groups 2 and 10 Post-Hearing Brief at 4-5.

[33] Hearing Day 3 Transcript at 91:18-92:25 (Merchant).

[34] Site Law Application § 6.0; Hearing Day 1 Transcript at 296:13-297:1 (Segal); Hearing Day 1 Transcript at 297:4-304:18 (DeWan); Segal Direct; Segal Rebuttal; DeWan Supplemental; Exhibit CMP-5-B; Exhibit CMP-5-C; Exhibit CMP-5.1-A; Exhibit CMP-6.2-A.

[35] Hearing Day 1 Transcript at 297:15-299:6 (DeWan).

> does not unreasonably interfere with the existing scenic and aesthetic uses and thereby diminishes the public enjoyment and appreciation of the qualities of scenic resources and that any potential impacts have been minimized. More broadly under 375 the applicant must demonstrate that the project will not have an unreasonable adverse effect on the scenic character of the surrounding area.

Opposition intervenor witnesses, however, disregarded the explicit, standardized, and objective methodology for evaluating impacts in favor of subjective and very personal impressions. As Group 2 witness Roger Merchant explained:

> MR. MANAHAN: Isn't the point of Chapter 315, Visual Impact Assessment, to take that subjectivity out of the assessment and make it more objective?
>
> ROGER MERCHANT: Probably that's where we depart respectfully because as a photographer it's as much instinct, it's much more instinct and impression. I mean, when I'm traveling along, I'm not expecting to see anything and it shows up, I respond, I react, I says wow, let's capture that. So it doesn't quite fit the constraints of the VIA assessment. I understand what you're getting at. Well, there are formalized ways of developing that and VIA does reflect that, I would agree. But from the field perspective, boots on the ground, I haven't got any VIA assessment score card in my back pocket to make a decision, well, this is high, medium or low. For me it's this is it, period.[36]

Despite lying entirely outside of the regulations, opposition witnesses continue to cite these subjective impressions in an effort to contradict the VIA.[37]

So too do opposition witnesses rely in their briefs on the already-resolved criticisms of the Department's VIA peer reviewer, Dr. James Palmer.[38] As Mr. DeWan explained at the hearing, TJD&A worked closely with DEP's Jim Beyer and Dr. Palmer to resolve the issues Dr. Palmer raised in this review, including his initial statement that the VIA fails to provide a complete inventory of scenic resources potentially impacted by the Project.[39]

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[36] Hearing Day 3 Transcript at 92:12-93:4 (Merchant).

[37] Group 1 Post-Hearing Brief at 1; Groups 2 and 10 Post-Hearing Brief at 7-10; Group 4 Initial Brief at 11-12.

[38] Groups 2 and 10 Post-Hearing Brief at 4-5.

[39] Response of Central Maine Power Company (CMP) to James Palmer's November 23, 2018 Review of the New England Clean Energy Connect October 2018 Supplemental Application Materials at 8-20 (Dec. 9, 2018); Hearing Day 1 Transcript 346:20-347:6 (DeWan).

Nevertheless, and based largely on the retracted comments of Dr. Palmer,[40] opposition intervenor groups demand additional user intercept surveys that the rules do not require.[41] Furthermore, user intercept surveys beyond the survey of rafters on the upper Kennebec River were not requested by either the DEP or Dr. Palmer,[42] and would mark a departure from transmission line permitting standard practices both in Maine and across the nation.[43] Indeed, Dr. Palmer is unaware of any intercept study done on transmission lines anywhere in the country, but was "quite impressed" by the work that TJD&A did on the survey of rafters on the upper Kennebec River.[44] Furthermore, such surveys are unnecessary, as the evidence shows that views of transmission infrastructure create visual impacts comparable to other types of human activity or development and do not dissuade scenic, aesthetic, recreational, or navigational uses.[45] As Mr. DeWan explained at the hearing,

> As you know, the previous governor established a commission to establish -- to look at the effect of wind energy on the way people use recreation resources and in December of last year a survey was conducted by a well-known survey firm between December 5 and 12 looking at 536 panelists most of these people were from out of state, sort of people who come to this area for recreation asking -- they were asking a number of questions and just to quote from the report, 3 percent of the travelers surveyed considered the views of alternative energy resource infrastructure to be very important when selecting a vacation destination, 3 percent. Among 12 items that travelers might consider when selecting a vacation destination views of alternative energy source infrastructure was a consideration that rated the least important. Now, granted, this doesn't address the

[40] Hearing Day 1 Transcript at 343:8-16 (Segal); Hearing Day 1 Transcript at 346:12-347:6 (DeWan).

[41] Groups 2 and 10 Post-Hearing Brief at 6; Group 4 Initial Brief at 13.

[42] Hearing Day 1 Transcript at 343:8-16 (Segal); Hearing Day 1 Transcript at 346:12-347:6 (DeWan).

[43] Hearing Day 2 Transcript at 71:18-72:3 (DeWan); Hearing Day 3 Transcript 93:21-24 (Merchant).

[44] Hearing Day 2 Transcript at 71:18-72:3, 73:8-13 (DeWan).

[45] Response of Central Maine Power Company (CMP) to James Palmer's November 23, 2018 Review of the New England Clean Energy Connect October 2018 Supplemental Application Materials at 2-4 (Dec. 9, 2018); Hearing Day 1 Transcript at 343:17-346:11 (DeWan).

> specific question about the fact that the same transmission lines would have, but it does give an indication of how the general public takes into consideration views of infrastructure such as transmission lines and making decisions about whether or not to go to a place and enjoy the scenic resources.[46]

The remaining criticisms of CMP's VIA also ring hollow, and have already been addressed in this proceeding. For example, Groups 2, 4, and 10 cite Dr. Palmer's comment that CMP's land cover data were outdated.[47] However, TJD&A cross-checked its viewshed mapping and verified potential visibility using Google Earth aerial imagery from 2016, which is the most recent aerial imagery available; used MELCD data, an accepted standard professional practice for preparing VIAs in Maine, to provide consistency across its analysis; and conducted field visits to the vast majority of the scenic resources, even those where the landcover viewshed maps did not indicate potential visibility.[48]

The evidence shows that CMP has made adequate provision for fitting the Project harmoniously into the existing natural environment and that the development will not adversely affect scenic character in the municipality or in neighboring municipalities, the activity will not unreasonably interfere with existing scenic and aesthetic uses, and CMP has made adequate provision for buffering, including for buffering from other uses and resources, and meets the LUPC's special exception criteria for the P-RR subdistrict. As demonstrated in the record, the Project design takes into account the scenic character of the surrounding area, the Project has been located, designed, and landscaped to minimize its visual impact to the fullest extent possible, the Project has been designed and landscaped to minimize its visual impact on the

[46] Hearing Day 1 Transcript at 345:12-346:11 (DeWan).

[47] Groups 2 and 10 Post-Hearing Brief at 4; Group 4 Initial Brief at 15-16.

[48] Response of Central Maine Power Company (CMP) to James Palmer's November 23, 2018 Review of the New England Clean Energy Connect October 2018 Supplemental Application Materials at 4-8 (Dec. 9, 2018); Hearing Day 1 Transcript at 352:20-353:13 (Segal/DeWan).

surrounding area, and the Project provides for the preservation of existing elements of the development site which contribute to the maintenance of scenic character.

IV. WILDLIFE HABITAT AND FISHERIES (Relevant to DEP Review)

Given their failure to address the review standards applicable to scenic character and existing uses, it is not surprising that the briefs of opposition intervenors include numerous misstatements and misapplications of the review criteria relevant to the DEP's review of wildlife habitat and fisheries.

As stated above, DEP's Chapter 375 regulations dictate that the Department may find "adverse effect" only where such adverse effect is "unreasonable."[49] Similarly, NRPA and DEP's regulations implementing NRPA also require DEP to grant a permit where the activity's impact will not be unreasonable.[50] Nevertheless, Groups 2 and 10 would have the Department consider the Project's impact to Segment 1 in isolation and outside of any reasonableness context.[51]

Group 4 goes so far as to construe hearing testimony as germane to non-hearing topics, asserting that CMP's witness Gary Emond provides no evidence that CMP's proposal "would not severely damage individual vernal pools" and no evidence "to support CMP's claims that its mitigation proposal for pool damage is adequate."[52] Given the extensive striking of the

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[49] *See, e.g.,* Ch. 375 §§ 14, 15(B)(2), 15(D). *See also In re Spring Valley Development*, 300 A.2d 736, 751 (Me. 1973) (interpreting the Site Law and finding that "[w]hile most such developments may be expected to 'affect' the environment adversely to the extent that they add to the demands already made upon it, it is the unreasonable effect upon existing uses, scenic character and natural resources which the Legislature seeks to avoid by empowering the Commission to measure the nature and extent of the proposed use against the environment's capacity to tolerate the use.").

[50] 38 M.R.S. § 480-D(3); DEP Ch. 335 §§ 3(A), (C).

[51] Groups 2 and 10 Post-Hearing Brief at 10.

[52] Group 4 Initial Brief at 23-24.

testimony of its vernal pool witness Dr. Aram Calhoun, Group 4 should be well aware that vernal pools were not a hearing topic, and that Mr. Emond's comments were made in the context of habitat fragmentation. He was not providing evidence relating to other potential impacts to vernal pools.

Group 4 further makes assertions relative to CMP's vegetation management plans that are contrary to the evidence.[53] Indeed, the studies with which Group 4 takes issue[54] found – contrary to Group 4's assertions – that despite the open canopy condition, water temperatures were slightly lower than in off-ROW areas and that none of the water quality parameters was significantly different between the on-ROW and off-ROW study areas, and that the increase in incident sunshine due to open canopy conditions resulted in a denser root mass, which further stabilized stream banks and resulted in less stream bank erosion, deeper channels, and higher populations of trout.[55] Nor does Group 4 acknowledge that CMP has consulted and coordinated with the Maine Department of Inland Fisheries and Wildlife (MDIFW) on wildlife habitat and fisheries to the satisfaction of that agency.[56] Instead Group 4 continues to make much ado about the email correspondence between MDIFW's Bob Stratton and DEP's Jim Beyer, in which Mr.

[53] Group 4 Initial Brief at 24-28.

[54] Group 4 Initial Brief at 24-29; *see also* Goodwin Direct at 14-15 and Johnston Rebuttal at 3.

[55] Johnston Rebuttal at 3.

[56] Johnston Rebuttal at 7-9; Exhibit CMP-4.1-A. This comprehensive consultation process has allowed MDIFW to provide final comments on the NECEC Project Compensation Plan, in response to a March 11, 2019 email and attachments from CMP requesting "that MDIFW confirm that the attached clarification materials address all of MDIFW's remaining concerns, and that MDIFW is satisfied that the latest (January 30, 2019) NECEC Project Compensation Plan, as supplemented by these attached clarifications, provides satisfactory mitigation of the NECEC Project's impacts." In its March 18, 2019 response, DIFW thanked CMP "for the March 11 email as a follow-up to address the Department remaining resource impact concerns for the NECEC project," and noted DIFW's appreciation for CMP's "willingness to work with us to finalize the complex fish and wildlife resource issues." DIFW said that CMP's response and explanations were "sufficient to allow DEP to apply applicable natural resource law to the permitting process." Exhibit CMP-4.1-A.

Stratton discussed the classification of certain streams in the Waterbody Crossing Table in CMP's Site Law Application Exhibit 7-7.[57] This is yet another misleading distraction put forward by opposition intervenors, as it does not affect CMP's commitment to apply 100-foot riparian buffers to all brook trout streams.[58]

So too is Group 4's assertion that CMP has failed to protect brook trout at specific sites patently false.[59] CMP, upon consultation with MDIFW, revised its proposal to incorporate taller structures and avoid clearing by allowing full height canopy within the 250-foot riparian management zone for Mountain Brook and Gold Brook[60] and, at the request of the DEP, identified three additional streams (Moxie Stream, South Branch Moose River, and Tomhegan Stream) that require no structure height increases to accommodate 35-foot-tall vegetation along the entire span.[61] The record is replete with evidence that the Project will not unreasonably affect brook trout habitat, and adequate provision has been provided for buffer strips around cold water fisheries.

With regard to habitat fragmentation, Groups 4 and 6 continue to mischaracterize the area through which the Project's Segment 1 will cross as "mature" forest habitat.[62] The evidence

[57] Group 4 Initial Brief at 31-34, 36. *See also* Hearing Day 6 Transcript at 273:10-280:1 (Reardon, Goodwin, Johnston).

[58] Hearing Day 6 Transcript at 308:18-310:3, 324:19-325:14 (Goodwin); Johnston Rebuttal at 7-8. As Group 4 admits, the Water Body Crossing Table that Mr. Reardon attached to his testimony as Group 4 Exhibit 23-JR was not forwarded to the service list (nor was it posted to DEP's website) until February 4, 2019 – i.e., after CMP had submitted its updated Compensation Plan on January 30, 2019. Group 4 Initial Brief at 34.

[59] Group 4 Initial Brief at 35-37.

[60] Mirabile Direct at 9; Goodwin Direct at 13; Exhibit CMP-2-G; Exhibit CMP-3-F.

[61] CMP Response to DEP May 9, 2019 Additional Information Request Attachment B.

[62] Group 4 Initial Brief at 39-41; Group 6 Post-Hearing Brief at 18.

proffered by a wide swath of witnesses demonstrates otherwise.[63] As Group 4's witness testified, the area "contains a fairly limited amount of mature forest."[64] It is for that reason that travel corridors are potential bridges from nowhere to nowhere, as taller structure heights and travel corridors cannot provide links between habitat patches that are not directly proximal to the corridor.[65] Nevertheless, Group 4 criticizes CMP for failing to demonstrate that habitat connectivity will be maintained.[66] Group 4 misses the point – CMP is able to minimize and avoid habitat fragmentation through co-location and its vegetation management practices. Where taller vegetation actually would address habitat fragmentation concerns, CMP worked with MDIFW to propose travel corridors, such as in the upper Kennebec Deer Wintering Area and in Rusty Blackbird habitat in Johnson Mountain Township and Parlin Pond Township.[67] CMP also provided the DEP with pole and tree height information in response to DEP Project Manager Jim Beyer's May 9, 2019 request, which demonstrates that the five crossing locations that Mr. Beyer suggested can accommodate 35-foot-tall vegetation with limited modifications to

[63] Giumarro Supplemental at 2-13; Publicover Supplemental at 4; Hearing Day 4 Transcript at 66:14-67:5 (Publicover); Hearing Day 6 Transcript at 62:12-22, 78:20 (Publicover); Hearing Day 6 Transcript 102:12-103:8 (Publicover); Hearing Day 6 Transcript at 128:17-129:17, 133:22-134:6 (Simons-Legaard); Hearing Day 6 Transcript at 146:2-25 (Wood); Hearing Day 6 Transcript at 237:21-240:11 (Giumarro); Hearing Day 6 Transcript at 241:17-242:1, 295:6-25 (Mirabile).

[64] Hearing Day 4 Transcript at 79:10-16 (Publicover).

[65] Giumarro Supplemental at 2-13; Hearing Day 6 Transcript at 237:21-240:11 (Giumarro); Hearing Day 6 Transcript at 128:17-129:17 (Simons-Legaard); Hearing Day 6 Transcript at 146:2-25 (Wood); Hearing Day 6 Transcript at 102:12-103:8 (Publicover).

[66] Group 4 Initial Brief at 43-45.

[67] Goodwin Direct at 19; Goodwin Rebuttal at 14-15; Exhibit CMP-3-G; Exhibit CMP-3-H.

currently proposed structure heights.[68] CMP clearly is committed to maximizing habitat connectivity where it is practicable and achievable.

The evidence thus shows that CMP coordinated with MDIFW to avoid and minimize, and develop proposed compensation and mitigation to address, impacts to endangered species and brook trout habitat, avoided, minimized, and compensated for habitat fragmentation, and proposed adequate buffer strips around cold water fisheries.[69] Contrary to Group 4's statements on edge effect,[70] CMP's vegetation management practices will avoid the hard edge impact generally associated with habitat fragmentation and negative impacts on species resiliency by creating a soft edge that maintains landscape permeability and establishes areas of dense shrubby vegetation and taller vegetation where topographic conditions allow (e.g., steep ravines), thereby providing a vegetation bridge for wildlife movement across the NECEC corridor.[71] The Project will not unreasonably harm the Roaring Brook Mayfly, Northern Spring Salamander, or brook trout habitat, and adequate provision has been made for buffer strips around cold water fisheries. Similarly, CMP's vegetation management practices make practical and appropriate provision for the maintenance of wildlife travel lanes and connectivity of adjacent habitats and will not result in unreasonable disturbance or harm resulting from habitat fragmentation.

V. ALTERNATIVES ANALYSIS (Relevant to DEP and LUPC Review)

The opposition intervenors focus their alternatives argument almost exclusively on the undergrounding alternative, arguing that CMP's failure to include an undergrounding

[68] *See* CMP Response to MDEP May 9, 2019 Additional Information Request Attachment B, Cross Section Typical Wildlife Travel Corridor; Hearing Day 6 Transcript 325:15-326:15 (Mirabile).

[69] Mirabile Direct at 9; Goodwin Direct at 11.

[70] Group 4 Initial Brief at 41-43.

[71] Mirabile Direct at 12; Goodwin Direct at 17; Goodwin Rebuttal at 18; Emond Rebuttal at 8-9. See also CMP Post-Hearing Brief at 16-18.

alternatives analysis in its Applications is fatal.[72] Such arguments reveal not only a patent misunderstanding of the applicable review criteria, but also a flagrant disregard of the evidence in this case and a misplaced reliance on Group 8's expert witness who revealed himself to have limited, if any, knowledge relevant to this proceeding.

CMP is under no obligation to analyze alternatives that are too remote, speculative, or impractical to pass the threshold test of reasonableness. To the contrary, an applicant must determine the least environmentally damaging practicable alternative only among those alternatives that are reasonable. DEP Rule Chapters 310, 315, and 335 require CMP to demonstrate that there is no "practicable alternative to the activity" that "would be less damaging to the environment" or "will have less visual impact."[73] "Practicable" is defined as "[a]vailable and feasible considering cost, existing technology and logistics based on the overall purpose of the project."[74] It was and remains so obvious that undergrounding would not be practicable that CMP did not initially include it as an alternative in its Applications.[75]

Despite the unavailability of undergrounding, as the cost of doing so would push CMP past a tipping point such that the Project would not have moved forward,[76] CMP conducted a thorough underground alternatives analysis in response to the testimony of witnesses in Intervenor Groups 2, 6, and 8.[77] This analysis confirmed CMP's initial determination that undergrounding the Project, or even portions of the Project beyond the proposed undergrounding

[72] Group 4 Initial Brief at 8-9, 56-58; Groups 2 and 10's Post-Hearing Brief at 17-20, 24-26; Group 8 Post-Hearing Brief at 1-13.

[73] DEP Reg. Ch. 310 §§ 5(A), 5(D), 9; DEP Reg. Ch. 315 § 9; DEP Reg. Ch. 335 § 3(A).

[74] DEP Reg. Ch. 310 § 3(R); DEP Reg. Ch. 315 § 5(D); DEP Reg. Ch. 335 § 2(D).

[75] Bardwell Rebuttal at 3; Hearing Day 6 Transcript at 347:20-348:23 (Tribbet).

[76] Hearing Day 1 Transcript at 248:12-15 (Dickinson); Hearing Day 2 Transcript 146:8-150:7 (Dickinson); Hearing Day 6 Transcript at 441:15-442:5 (Dickinson).

[77] *See* Bardwell Rebuttal; Tribbet Rebuttal; Bardwell Supplemental.

at the upper Kennebec River, is not reasonable, and therefore also could not be "practicable," because the costs of doing so would defeat the purpose of the Project.[78] For the same reason, undergrounding in the two other P-RR subdistricts that the Project will cross is not suitable or reasonably available to CMP.[79]

Nor is undergrounding available and feasible considering existing technology and logistics, contrary to the assertions of Group 8.[80] Group 8 disagrees, based on the proposed, but neither developed nor in-state, examples of other projects that would bury a portion of a transmission line, as well as the fact that CMP has proposed undergrounding at the upper Kennebec River.[81] However, the testimony of Group 8's own witness Christopher Russo belies these simplistic conclusions,[82] and acknowledges that the feasibility of burial depends on "the unique circumstances in geography. Many of them are under water connecting different islands or bodies of water. The design of transmission lines that interconnect systems is very, very site dependent."[83] Furthermore, on questioning at the hearing, Mr. Russo could provide no details on the feasibility of undergrounding as it relates to existing technology and logistics that are specific

[78] Dickinson Rebuttal at 2-3, 9-10, 13; Tribbet Rebuttal at 5; Tribbet Supplemental at 4-6; Hearing Day 1 Transcript at 248:12-15, 285:13-287:3 (Dickinson); Hearing Day 2 Transcript 146:8-150:7 (Dickinson); Hearing Day 6 Transcript at 441:15-442:5 (Dickinson).

[79] Bardwell Rebuttal at 3-16, 23-27; Tribbet Rebuttal at 5; Freye Rebuttal at 5-6; Bardwell Supplemental at 2-8; Hearing Day 1 Transcript at 265:16-266:12, 266:13-23, 289:20-290:9 (Mirabile); Hearing Day 2 Transcript 146:8-150:7 (Dickinson); Hearing Day 3 Transcript at 192: 12-14 (Warren); Hearing Day 6 Transcript at 341:5-344:22, 431:7-432:4 (Bardwell); Hearing Day 6 Transcript at 346:23-347:1 (Tribbet); Hearing Day 6 Transcript at 432:5-12 (Achorn); Hearing Day 6 Transcript at 445:7-447:12 (Paquette); Exhibits CMP-11-A through CMP-11.1-G.

[80] Group 8 Post-Hearing Brief at 8-12.

[81] Group 8 Post-Hearing Brief at 2-4, 8-9.

[82] *See* Group 3 Post-Hearing Brief at 14-19.

[83] Hearing Day 4 Transcript at 179:24-180:4 (Russo).

to this Project.[84] Nevertheless, Groups 2, 8, and 10 continue to rely on Mr. Russo's self-discredited analysis of the "viability" of an underground route.[85] CMP's evidence, on the other hand, clearly shows that undergrounding is neither available nor feasible considering existing technology and logistics,[86] and Group 3's rebuttal evidence further confirmed CMP's obvious conclusion that undergrounding is a "fruitless option."[87]

The evidence further demonstrates that undergrounding will not lessen environmental impacts, as Group 8 alleges.[88] To the contrary, underground transmission installations cause a continuous surface disruption (rather than intermittent and widely spaced at each overhead structure installation location), require additional control measures for soil erosion, sedimentation, and dust generation during construction, require permanent access roads to every jointing location along the route, and can only avoid wetlands and waterways by using higher cost and higher risk trenchless methods.[89]

Nor is undergrounding available along the alternate routes suggested by intervenors.[90] The evidence shows that Spencer Road is not a public road, and its private owners specifically did not want a transmission line located along that road.[91] While Route 201 is a public road, "the Maine Department of Transportation [MDOT] will not allow the line to be built in the travel

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[84] *See* Group 3 Post-Hearing Brief at 15-17.

[85] Groups 2 and 10 Post-Hearing Brief at 19-20, 26; Group 8 Post-Hearing Brief at 2-3, 8.

[86] Bardwell Rebuttal at 9-16; Hearing Day 6 Transcript 341:22-342:1; 355:2-5 (Paquette); 356:11-14; 418:7-15, 431:20-432:4; 443:16-444:20.

[87] Paquette Surrebuttal at 3-4, 7, 16-17.

[88] Group 8 Post-Hearing Brief at 10.

[89] Bardwell Rebuttal at 12-13; Paquette Surrebuttal at 7-17.

[90] Group 4 Initial Brief at 58-59; Group 6 Post-Hearing Brief at 19, 20-21.

[91] Freye Rebuttal at 5; Freye Supplemental at 5-6; Hearing Day 6 Transcript at 338:10-15 (Freye).

lanes and there is insufficient room alongside the travel lanes to actually install the line."[92] In other words, Route 201 is unavailable due to lack of sufficient space within the highway limits,[93] the restrictions MDOT places on such burial and the installation of splicing vaults,[94] safety constraints with co-locating with the existing overhead distribution line,[95] and other cost, safety, and environmental issues of doing so.[96] The presence of the existing overhead distribution line in Route 201, "rather than indicating a potential pathway actually means much of the available space is currently occupied."[97] Intervenor suggestions to the contrary should be disregarded.

The evidence set forth in its Applications, pre-filed testimony, and live testimony at the hearing shows that CMP conducted a thorough analysis of alternatives to the Project, and that a less environmentally damaging practicable alternative to the Project, which meets the Project's purpose, does not exist. No proposed alternatives to the proposed location and character of the transmission line would lessen its impact on the environment or the risks it would engender to the public health or safety, without unreasonably increasing its cost. Where the Project crosses an outstanding river segment as identified in title 38, section 480-P, the evidence demonstrates that no reasonable alternative exists which would have less adverse effect upon the natural and recreational features of those river segments. Nor is there any alternative site to the Project's

[92] Hearing Day 6 Transcript at 487:14-19 (Bardwell).

[93] Freye Supplemental at 4; Hearing Day 6 Transcript at 337:22-338:10 (Freye); Hearing Day 6 Transcript at 342:5-343:3, 487:1-19 (Bardwell).

[94] Bardwell Rebuttal at 10; Bardwell Supplemental at 12; Hearing Day 6 Transcript at 487:1-19 (Bardwell).

[95] Freye Supplemental at 5, 7-8.

[96] Freye Rebuttal at 7-8; Freye Supplemental at 5; Hearing Day 6 Transcript at 342:5-343:3 (Bardwell); Hearing Day 6 Transcript at 464:3-23 (Dickinson).

[97] Hearing Day 6 Transcript at 337:25-338:4 (Freye).

three P-RR subdistrict crossings that is both suitable to the proposed use and reasonably available to CMP.

VI. COMPENSATION AND MITIGATION (Relevant to DEP Review)

In criticizing CMP's proposed compensation and mitigation, the opposition intervenor groups fail to acknowledge the careful and considered siting and design of the Project that occurred in the years prior to its proposal.[98] The siting of the Project prior to initiating the permitting process took about three years,[99] and, as CMP witness Peggy Dwyer explained,

> Every angle point you see on that project map represents a thoughtful, proactive effort to minimize an impact at the planning stage to move away from a waterbody, road or viewshed here or tuck the line behind screening topography there. Those efforts minimized impacts in significant ways.[100]

Group 4's allegation that CMP did not pursue any avoidance, minimization, and mitigation techniques until pressed to do so at the hearing is patently false.[101] Groups 2 and 10 make a similar allegation,[102] as does Group 1, stating incorrectly that CMP relied on intervenors to suggest "remedies" to address Project impacts.[103] The evidence shows that CMP carefully considered modifications to the route and to the size and location of structures as CMP sited the

[98] Hearing Day 1 Transcript at 62:22-65:1, 66:24-67:7 (Mirabile); Hearing Day 1 Transcript at 85:11-19 (Johnston); Hearing Day 1 Transcript at 291:16-292:9 (Goodwin); Hearing Day 1 Transcript at 332:18-333:9 (Dwyer); Hearing Day 2 Transcript at 28:18-29:6 (Segal); Hearing Day 3 Transcript at 191:1-12 (Christopher); Hearing Day 4 PM Transcript at 92:16-25 (Robinson).

[99] Hearing Day 6 Transcript at 337:16-19, 459:19-460:1 (Freye).

[100] Hearing Day 1 Transcript at 333:1-9 (Dwyer).

[101] Group 4 Initial Brief at 59-60, 61, 64.

[102] Groups 2 and 10 Post-Hearing Brief at 16.

[103] Group 1 Post-Hearing Brief at 2.

Project.[104]

In any event, many of the avoidance, minimization, and mitigation proposals made by the opposition intervenors simply are not possible. Group 6 proposes that the Project be re-routed to be co-located with Route 201 or Spencer Road, and proposes that such re-routing should include undergrounding of the line. As CMP has explained numerous times, this option is not available to CMP.

Co-location along Route 201, either overhead or underground, is not available to CMP. Not only is there insufficient space within the highway limits,[105] but there are numerous safety constraints associated with co-locating with the existing overhead distribution line that runs along Route 201,[106] in addition to the visual and environmental issues associated with doing so.[107] Indeed, "[t]he presence of this [existing overhead distribution] line rather than indicating a potential pathway actually means much of the available space is currently occupied."[108] Moreover, CMP specifically designed the Project to minimize visibility along and from this scenic byway – co-location, on the other hand, would have a significant visual impact.[109]

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[104] Hearing Day 1 Transcript at 62:22-65:1, 66:24-67:7 (Mirabile); Hearing Day 1 Transcript at 85:11-19 (Johnston); Hearing Day 1 Transcript at 291:16-292:9 (Goodwin); Hearing Day 1 Transcript at 332:18-333:9 (Dwyer); Hearing Day 2 Transcript at 28:18-29:6 (Segal); Hearing Day 3 Transcript at 191:1-12 (Christopher); Hearing Day 4 PM Transcript at 92:16-25 (Robinson).

[105] Freye Supplemental at 4; Hearing Day 6 Transcript at 337:22-338:10 (Freye); Hearing Day 6 Transcript at 342:5-343:3, 487:1-19 (Bardwell).

[106] Freye Supplemental at 5, 7-8.

[107] Freye Rebuttal at 7-8; Hearing Day 6 Transcript at 342:5-343:3 (Bardwell); Hearing Day 6 Transcript at 464:3-23 (Dickinson).

[108] Hearing Day 6 Transcript at 337:25-338:4 (Freye).

[109] Hearing Day 1 Transcript at 107:18-22, 108:2-4 (Mirabile); Hearing Day 1 Transcript at 332:1-327:19 (Segal); Hearing Day 2 Transcript at 34:9-16 (Segal); Hearing Day 6 Transcript at 201:3-8 (Segal); Hearing Day 6 Transcript at 464:11-17 (Dickinson).

Undergrounding further is not an available option along Route 201 due to topography,[110] the winding nature of the road,[111] and the restrictions placed on burial and the installation of splicing vaults by MDOT.[112] Simply put, "the Maine Department of Transportation will not allow the line to be built in the travel lanes and there is insufficient room alongside the travel lanes to actually install the line."[113] The same is true of the Spencer Road, whose owners specifically did not want a transmission line located along that private road.[114]

Even if co-location along Route 201 or Spencer Road were available, such co-location would require new corridor in any case, as there is no corridor that connects the upper Kennebec River area to Québec other than the proposed route of the Project. As CMP witness Kenneth Freye explained in his pre-filed testimony,

> There is a distribution line from Harris Dam to the village of Jackman (the Jackman Tie Line or JTL). The JTL extends west from Harris Dam to a point on Route 201 in West Forks Plantation south of the Johnson Mountain town line. From that point to the Town of Jackman, about 18 miles, the JTL is a standard roadside distribution line located within the highway limits of Route 201. The JTL originally diverged from Route 201 about 1.5 miles south of the intersection of Routes 201 and 6/15 in the village of Jackman, and was located on a 100-foot wide easement for about 1.75 miles to the termination on Coburn Avenue in Jackman. That cross-country section was abandoned, however, and the JTL is now entirely roadside, terminating on Route 6/15.
>
> This could be the corridor that Ms. Caruso mistakenly believes connects to Quebec. It does not; the JTL terminates in Jackman about 16 miles from the Canadian border. Not only would new corridor need to be acquired through the towns of Jackman and Moose River, but corridor would need to be acquired along Route 201, a designated scenic highway, for the entire distance from Jackman to West Forks Plantation. In addition, the

[110] Hearing Day 6 Transcript at 405:15-23, 409:10-23 (Freye).

[111] Hearing Day 6 Transcript at 407:18-408:8 (Freye).

[112] Bardwell Rebuttal at 10; Bardwell Supplemental at 12; Hearing Day 6 Transcript at 487:1-19 (Bardwell).

[113] Hearing Day 6 Transcript at 487:14-19 (Bardwell).

[114] Freye Rebuttal at 5; Freye Supplemental at 5-6; Hearing Day 6 Transcript at 338:10-15 (Freye).

> JTL corridor between Harris Dam and Route 201 would need to be expanded through two conservation easements and across the State-owned Cold Stream Forest.[115]

Any change in the border crossing now would require the acquisition of a new corridor by both CMP and Hydro-Québec, as well as new natural and cultural resource and cadastral surveys, and there are no existing transmission line crossings on the Québec/Maine border that could allow co-location of a new transmission line border crossing.[116]

Group 6 next proposes that avoidance, minimization, and mitigation could be achieved with taller pole structures to allow for trees at least 30-feet high to grow within the ROW, "taking into consideration visual impacts."[117] Groups 1 and 4 echo this and further claim that evidence allowing such techniques is missing from CMP's proposal.[118] This is not the case.

CMP's Applications contain an allowance for mature forest canopy.[119] CMP's vegetation management plans, filed with its Site Law Application as Exhibit 10-1 and 10-2, allow for avoidance and minimization to protect sensitive natural resources, and specify that only capable vegetation (woody vegetation capable of growing tall enough to violate the required clearance between the conductors and vegetation established by the North American Electric Reliability Corporation) will be removed:

> When and if terrain conditions permit (e.g., certain ravines and narrow valleys) capable vegetation will be permitted to grow within and adjacent to protected natural resources or

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[115] Freye Rebuttal at 6-7; *see also* Hearing Day 6 Transcript at 364:13-367:8 (Freye).

[116] Freye Supplemental at 2-3; Hearing Day 6 Transcript at 338:16-339:5, 366:17-367:8 (Freye).

[117] Group 6 Post-Hearing Brief at 19-21.

[118] Group 1 Post-Hearing Brief at 2; Group 4 Initial Brief at 59-60, 61, 64.

[119] CMP's Applications also allow for mechanical methods of vegetation management, which CMP will use exclusively within Segment 1. Site Law Application Exhibit 10-1 at 4-5, Exhibit 10-2 at 3; Mirabile Supplemental at 5; Hearing Day 6 Transcript at 246:8-17, 289:22-25, 290:16-292:3, 310:4-11, 313:21-314:1, 328:8-17 (Mirabile). Group 1's call for an amendment to or modification of CMP's proposal to allow for no herbicide use in Segment 1 is unnecessary. Group 1 Post-Hearing Brief at 4.

> critical habitats where maximum growing height can be expected to remain well below the conductor safety zone. Narrow valleys are those that are spanned by a single section of transmission line, structure-to-structure.[120]

CMP confirmed this language in response to questioning by Mr. Beyer at the hearing.[121]

Nevertheless, the evidence shows that taller structures that would allow full-height vegetation have minimal, if any, benefit. Not only do taller pole structures have greater visual impact,[122] as Group 6 acknowledges,[123] but they have additional cost, safety, reliability, and environmental impacts.[124] Crucially, as Group 4's witness testified, the Segment 1 area "contains a fairly limited amount of mature forest."[125] It is for that reason that travel corridors achieved by taller pole structures may be bridges from areas of marginal or no habitat to other areas of marginal or no habitat, allowing for mature forest adjacent to a shifting mosaic of forest that is anything but mature.[126] In other words, where habitat patches are not directly and permanently proximal to the corridor, taller pole structures provide no benefit.[127]

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[120] Site Law Application Exhibit 10-1 at 2.

[121] Hearing Day 6 Transcript at 312:20-313:18 (Mirabile).

[122] DeWan Supplemental at 2-6; Goodwin Supplemental at 2; Exhibit CMP-6.2-A.

[123] Group 6 Post-Hearing Brief at 21.

[124] Goodwin Supplemental at 2; Hearing Day 6 Transcript at 232:11-14 (Johnston).

[125] Hearing Day 4 Transcript at 79:10-16 (Publicover). *See also* Giumarro Supplemental at 2-13; Hearing Day 6 Transcript at 237:21-240:11 (Giumarro); Hearing Day 6 Transcript at 128:17-129:17 (Simons-Legaard); Hearing Day 6 Transcript at 146:2-25 (Wood); Hearing Day 6 Transcript at 102:12-103:8 (Publicover).

[126] Giumarro Supplemental at 2-13; Hearing Day 6 Transcript at 241:17-242:1, 295:6-25 (Mirabile); Hearing Day 6 Transcript 102:12-103:8 (Publicover); Hearing Day 6 Transcript at 133:22-134:6 (Simons-Legaard).

[127] Giumarro Supplemental at 12-13; Goodwin Supplemental at 5; Hearing Day 6 Transcript at 237:21-240:11 (Giumarro); Hearing Day 6 Transcript at 128:17-129:17 (Simons-Legaard); Hearing Day 6 Transcript at 146:2-25 (Wood); Hearing Day 6 Transcript at 102:12-103:8 (Publicover).

So too are Group 4's complaints about the adequacy of CMP's Compensation Plan to mitigate for impacts to brook trout habitat and to offset significant habitat function losses contrary to the evidence.[128] CMP worked collaboratively and extensively with MDIFW to develop a robust compensation package, to the satisfaction of that agency.[129] This comprehensive consultation process allowed MDIFW to provide final comments on the Compensation Plan, in response to a March 11, 2019 email and attachments from CMP requesting "that MDIFW confirm that the attached clarification materials address all of MDIFW's remaining concerns, and that MDIFW is satisfied that the latest (January 30, 2019) NECEC Project Compensation Plan, as supplemented by these attached clarifications, provides satisfactory mitigation of the NECEC Project's impacts."[130] In its March 18, 2019 response, DIFW thanked CMP "for the March 11 email as a follow-up to address the Department remaining resource impact concerns for the NECEC project," and noted DIFW's appreciation for CMP's "willingness to work with us to finalize the complex fish and wildlife resource issues."[131] DIFW said that CMP's response and explanations were "sufficient to allow DEP to apply applicable natural resource law to the permitting process."[132]

Specifically, MDIFW voiced no concerns over the compensation parcels and monetary contribution amounts[133] of which Group 4 complains.[134] CMP further has committed to work

[128] Group 4 Initial Brief at 69.

[129] Johnston Rebuttal at 7-9; Hearing transcript Day 1 at 291:16-292:25 (Goodwin/Johnston); Johnston Rebuttal Exhibit CMP-4.1-A.

[130] Exhibit CMP-4.1-A.

[131] *Id.*

[132] *Id.*

[133] Johnston Rebuttal at 11-12, 14-15; Goodwin Direct at 23.

[134] Group 4 Initial Brief at 61-65.

with MDIFW and cooperating nongovernmental organizations to conduct a qualitative assessment to determine the most beneficial use of the proposed funding.[135] Yet Group 4 stubbornly maintains that the proposed funds are not sufficient, and that the MDIFW simply was wrong in agreeing to such amounts.[136] Distrust of the expertise of DEP and LUPC's sister agency, and blunt allegations that MDIFW "dropped the ball," is not convincing evidence of any faults or deficiencies in CMP's proposed compensation and mitigation.

The evidence shows that CMP carefully and thoughtfully designed and sited the Project in a manner that avoids and minimizes impacts to the greatest extent possible and, where impacts are unavoidable, CMP proposed mitigation measures and provided a robust and comprehensive Compensation Plan that significantly exceeds the requirements of NRPA.

VII. GREENHOUSE GAS IMPACTS (Purportedly Relevant to DEP Review)

In yet another attempt to put this irrelevant issue before the Department, Group 4 continues to misapply the Chapter 375 regulations in an effort to vest in the DEP a broad authority to review the greenhouse gas benefits the Project will provide.[137] In so doing, Group 4 relies exclusively on Chapter 375, Section 2(B), which provides that the DEP shall consider all relevant evidence "in determining whether the proposed development will cause an unreasonable alteration of climate," and which is very limited in scope.

Chapter 375, Section 2, addresses "alteration of climate" and considers "large-scale, heavy industrial facilities, such as power generating plants" and those facilities' potential "to affect the climate in the vicinity of their location by causing changes in climatic characteristics

[135] Johnston Rebuttal at 11, 14-15.

[136] Hearing Day 4 Transcript at 34:14-35:2, 44:24-46:4 (Reardon); Hearing Day 4 Transcript at 53:21-54:14 (Joseph), 58:4-14 (Publicover).

[137] Group 4 Initial Brief at 49-53.

such as rainfall, fog, and relative humidity patterns." At the September 7, 2018 prehearing conference, Assistant Attorney General Bensinger noted that these provisions are limited to consideration of impacts from the specific development being proposed, and whether it would have climate impacts "in the vicinity of" the development's location. In other words, the rule limits consideration of climate impacts to any such impacts that result from the development itself, in its location – not from distant benefits or impacts attributable to a product that will pass through the development (such as electricity or goods sold at a store).

Group 4 attempts to maneuver around this plain limitation by stating that the Project "will have a dramatic impact on numerous power generating plants throughout the region with the potential for dramatic shifts in where and how much greenhouse gas is emitted."[138] This does not expand the DEP's review of the Project's impacts beyond its localized effects, nor does the argument that a Clean Energy Generation project will cause "unreasonable alteration of climate" pass the straight-face test.

Yet, and despite firm evidence in this and the Maine Public Utilities Commission proceeding,[139] Group 4 questions whether the Project will result in greenhouse gas emissions reductions. As CMP stated in its May 24, 2019 Response to Group 4's May 9, 2019 Comments Regarding Greenhouse Gas Emissions Reductions, three different experts, including CMP's expert Daymark Energy Advisors, the Generator Intervenors'[140] expert Energyzt Advisors, LLC (Energyzt), and the MPUC's independent expert London Economics International (LEI),

[138] Group 4 Initial Brief at 49.

[139] MPUC Docket No. 2017-00232.

[140] The Generator Intervenors are Calpine Corporation, Vistra Energy Corporation, and Bucksport Energy LLC.

presented reports that modeled the Project's regional GHG emissions impacts.[141] Additionally, NRCM, along with the Maine Renewable Energy Association (MREA), and the Sierra Club, retained the Generator Intervenors' expert, Energyzt, to produce an additional study of the NECEC's GHG impacts.[142] This study came to the same conclusions as the report conducted for the Generator Intervenors, but NRCM never directly submitted the study to the MPUC and has not offered the study to the DEP.[143]

In any event, CMP has never taken the position that "this project is necessary because it will result in specific greenhouse gas emissions reductions," as Group 4 alleges.[144] To the contrary, the Project is intended to "fulfill the purpose and need of delivering renewable energy from Canada to New England, which has a continuing need for such power."[145] As CMP stated in its Site Law Application, "[t]he NECEC is designed to provide a cost-effective and environmentally friendly transmission path to deliver the Clean Energy Generation sought by the Massachusetts RFP from Quebec-based sources and will be capable of delivering the entire annual quantity of clean energy sought."[146] Greenhouse gas emissions reductions are a benefit

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[141] Response of Central Maine Power Company to the Group 4 May 9, 2019 Comments Regarding Greenhouse Gas Emissions at 4-5 (May 24, 2019) (citing MPUC Order at 70).

[142] *Id.* at 5 (citing MPUC Docket No. 2017-00232 January 8, 2019 Hearing Transcript at 6:11-7:2 (Hearing Testimony of Generator Intervenor Witnesses Tanya Bodell and James Speyer acknowledging that they also worked on and produced the October 2018 GHG Report for NRCM, MREA and the Sierra Club). See the October 2018 Energyzt Report, "Greenwashing and Carbon Emissions: Understanding the True Impacts of New England Clean Energy Connect," produced for NRCM, MREA and the Sierra Club, available in the MPUC case management system (CMS) under Docket No. 2017-00232 at CMS entry 429).

[143] *Id.* (citing MPUC Docket No. 2017-00232, CMS entry 429, by which Carol Howard, a non-party to the MPUC proceeding who provided public witness testimony, submitted the Energyzt Report as Exhibit F to her testimony).

[144] Group 4 Initial Brief at 50.

[145] NRPA Application at 2-1 – 2-2.

[146] Site Law Application at 1.4.

of the Project, but are not the Project need.[147] And those benefits are actual, as stated in the May 24 Comments of CMP and of Group 3, which are incorporated herein by reference.

VIII. CONCLUSION (Relevant to DEP and LUPC Review)

The voluminous evidence in this matter demonstrates that CMP has made adequate provision for fitting the Project harmoniously into the existing natural environment and that the Project will not adversely affect existing uses, scenic character, air quality, water quality or other natural resources in the municipality or in neighboring municipalities. The evidence further shows that the Project will not unreasonably interfere with existing scenic, aesthetic, recreational or navigational uses.

Nor is there any practicable alternative to the Project that would have less visual impact and would be less damaging to the environment, and no alternative to the proposed location and character of the Project that would lessen its impact on the environment or the risks it would engender to the public health or safety, without unreasonably increasing its cost. Where the Project is proposed to cross outstanding river segments, the evidence shows that no reasonable alternative exists which would have less adverse effect upon the natural and recreational features of the river segment. The evidence further demonstrates that there is no alternative site which is both suitable to the proposed use and reasonably available to CMP, and that the use can be buffered from those other uses and resources within the P-RR subdistricts with which it is or may be incompatible.

For all these reasons, the LUPC should certify to the DEP that the NECEC Project is an allowed use in the P-RR subdistrict, and the DEP should grant CMP's applications for Site Law and NRPA permits and Water Quality Certification for the NECEC Project. The agencies should

[147] *Id.*

further adopt CMP's proposed findings of fact, attached to its June 14, 2019 Post-Hearing Brief as Attachment A and Attachment B.

Dated this 28th day of June, 2019.

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