



STATE OF MAINE  
COMMISSION ON GOVERNMENTAL ETHICS  
AND ELECTION PRACTICES  
135 STATE HOUSE STATION  
AUGUSTA, MAINE  
04333-0135

Commission Meeting 06/22/2022  
Agenda Item #4

To: Commissioners  
From: Emma Burke, Political Committee & Lobbyist Registrar  
Date: June 13, 2022  
Re: Request by Brookfield White Pine Hydro LLC for Independent Expenditure  
Determinations

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On June 3, 2022, the Brookfield White Pine Hydro LLC (BWPH) began disseminating a video communication urging Governor Janet Mills to support an application before the Maine Department of Environmental Protection relating to the Shawmut Dam. On June 6, 2022, BWPH began disseminating a similar radio advertisement naming Governor Janet Mills. On June 1, 2022 and June 3, 2022 BWPH filed requests seeking the determination of the Commission that these communications are not independent expenditures.

## **LEGAL REQUIREMENTS**

Independent expenditure reports generally. Independent expenditures (IEs) are payments for communications to voters (e.g., mailings, advertisements, and digital or telephone messages) advocating for or against candidates made by political parties, political action committees (PACs), and other organizations or individuals. Any person making a single IE over \$250 per candidate must file an IE report disclosing the amounts spent on the communications, which specific candidate(s) were supported or opposed, and an affidavit confirming the expenditure was made independently of any candidate. In the last 60 days before an election, IE reports must be filed within one or two calendar days of making the expenditure. The law requiring independent expenditure reports is set out in 21-A M.R.S. § 1019-B and Chapter 1, § 10 of the Commission Rules (attached). 94-270 CMR Ch. 1, § 10.

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Definition of an IE. During most parts of an election year, an IE is a payment made to design, produce, or disseminate a communication that “expressly advocates” the election or defeat of a candidate. 21-A M.R.S. § 1019-B(1)(A). As described below, the definition of express advocacy is narrow and must include explicit phrases such as “Vote for Smith!” or “Re-Elect Jill Scott.”

Under paragraph (1)(B) of the IE statute, the IE definition is much broader during the 28 days prior to a primary election, and between Labor Day and the general election. During those two time periods, if a communication merely names or depicts a clearly identified candidate, an IE report must be filed unless the spender demonstrates to the Commission that the communication was not intended to influence the nomination, election, or defeat of a candidate. 21-A M.R.S. § 1019-B(1)(B). In 2003, the Legislature expanded the IE definition by inserting a version of paragraph (1)(B), recognizing that is easy for political organizations to design positive or negative communications about a candidate that will influence voters but do not contain express advocacy phrases such as “Vote for Smith!” P.L. 2003, ch. 448.<sup>1</sup>

Requesting a Commission Determination. A person disseminating a communication naming or depicting a candidate during these time periods may request a determination by the Commission that the payment for the communication is not an IE by submitting a signed statement that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate, supported by any additional evidence the person chooses to submit. 21-A M.R.S. § 1019-B(2). The statement must be submitted within seven days of disseminating the communication. The Commission may gather any additional evidence it determines relevant and “shall determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate.” 21-A M.R.S. § 1019-B(2).

Deadline to File IE Report. The deadlines for filing IE reports are set out in the Commission’s Rules. 21-A M.R.S. § 1019-B(4), 94-270 CMR Ch. 1, § 10(3). This year, any person that made

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<sup>1</sup> From 2003-2021, paragraph 1(B) imposed a “presumption” of an IE, but the presumption terminology was removed from the paragraph in a rewrite of the IE statute in P.L. 2021, ch. 132. The procedure is essentially the same, but there is no longer a presumption in the law. The Commission staff is in the process of updating its forms, guidance and rules to reflect this 2021 law change.

an IE in excess of \$250 per candidate between April 15 and May 31, 2022 was required to file an IE report within two calendar days.

Definition of Clearly Identified. “Clearly Identified” means the candidate’s name, or a photograph or drawing of a candidate, appears in a communication or the identity of the candidate is apparent by unambiguous reference. 21-A M.R.S. § 1012(1).

Definition of Express Advocacy. “Express Advocacy” means any communication that uses phrases such as: “vote for the Governor,” “reelect your Representative,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for Senate District 1,” “Jones for House of Representatives,” “Jean Smith in 2002;” or communications that are susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate. The full definition in the Commission’s rules is attached. 94-270 CMR Ch. 1 § 10(2)(B).

## **DISCUSSION AND STAFF RECOMMENDATION**

On June 3, 2022, BWPH began disseminating a video communication asking Governor Mills to support BWPH’s pending application for Water Quality Certification for the Shawmut Hydroelectric Project. This application is being considered by Maine’s Department of Environmental Protection. Three days later, BWPH began disseminating a similar communication via radio. On June 1, 2022 BWPH filed a Statement to Rebut Presumption of Independent Expenditure for the video communication, and on June 3, 2022 filed another Statement for the radio communication. These requests are attached for your reference.<sup>2</sup>

The communications disseminated by BWPH are presumed to be IEs because they include the name of and refer to Governor Janet Mills, who is running for reelection, though she is unopposed in the primary election, and were disseminated within the 28 days before the June

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<sup>2</sup> In support of its request, BWPH included a submission it made to the DEP that included technical documents related to the dam issue (three expert memos, a PhD dissertation, and a settlement accord). To keep the size of the written materials for this item manageable, we have not included these lengthy documents in the meeting packet, but will provide them upon request.

14<sup>th</sup> primary. Accordingly, the issue before the Commission is to determine whether BWPH has, by a preponderance of evidence, shown the costs of the communications were *not incurred with the intent to influence the election of any of the candidates* named previously. 21-A M.R.S. § 1019-B(4)

It is the opinion of the Commission staff BWPH's request should be successful, and the Commission should determine BWPH has *not* made any IEs. The candidate named and depicted on these communications is the current Governor of Maine, a public figure and chief executive of the State, and she is not opposed in Maine's June 14<sup>th</sup> primary election. The communications do not mention Governor Mills is running for reelection or that she is a candidate. The content of the communications is solely focused on the issue of the dam, for which Governor Mills' support would be beneficial to BWPH. BWPH does not believe it should have to file an IE report on these expenditures because they are neither to support or oppose a candidate, but instead support their Water Quality Certification application at the DEP. Dan Walker, attorney for BWPH, argues "there is no way our client to accurately complete this IE form, and thus the form is intended for a purpose different than that of our client's communication."

The Commission staff finds it plausible the communications are not intended to influence the election or defeat of a candidate, because:

- the communications are in response to a very specific ongoing administrative issue;
- Governor Mills' support of the dam as chief executive of the State would be beneficial to BWPH;
- Governor Mills may be more likely to support the dam if she hears from Mainers who endorse it; and
- the communications name Governor Mills in her role as Governor and lead policy maker in Maine.

The Commission staff recommends determining the costs of BWPH's communications *did not* incur with the intent to influence the election of Governor Mills.

Thank you for your consideration of this matter.



JUN 02 2022

COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES  
Mail: 135 State House Station, Augusta, Maine 04333  
Office: 45 Memorial Circle, Augusta, Maine

Website: www.maine.gov/ethics  
Phone: 207-287-4179  
Fax: 207-287-6775

### Statement to Rebut Presumption of Independent Expenditure

Under 21-A M.R.S. § 1019-B, an expenditure to design, produce, or disseminate a communication that names or depicts a clearly identified candidate and that is disseminated during the 28 days, including election day, before a primary election; during the 35 days, including election day, before a special election, or from Labor Day to a general election day is presumed to be an independent expenditure. The individual or organization making the expenditure may attempt to rebut the presumption by filing this form. Any documents, statements, or other evidence (e.g., a copy of a printed communication or a script of a recorded communication) supporting the rebuttal may be attached to this form. To rebut the presumption, this form must be filed with the Ethics Commission within 7 days of disseminating the communication. The form may be filed by faxing it to (207) 287-6775 or by sending a scanned copy to ethics@maine.gov, provided that the Commission receives the original within 5 days.

Individual/Organization making the expenditure: Brookfield White Pine Hydro LLC

Contact person: Daniel W. Walker

Contact's mailing address: 45 Memorial Circle  
Augusta, ME 04332

Contact's telephone number(s): 207-623-5300

Candidates named or depicted: Governor Janet Mills  
(use additional pages if necessary)

Payee or creditor (including address): Meta Platforms, Inc., 1601 Willow Road, Menlo Park, CA 94025-1452  
Google, 1600 Amphitheatre Parkway, Mountain View, CA 94043

Type of communication: Digital Advertisement

Date of dissemination: Expected to publish on 6/3/2022

The above expenditure was not incurred with the intent to influence the nomination, election, or defeat of a candidate.

Signature of authorized individual

6/2/22  
Date

June 1, 2022

*Via Hand Delivery*

Mr. Jonathan Wayne, Executive Director  
Maine Commission on Governmental Ethics and Election Practices  
135 State House Station  
Augusta, Maine 04333

**RE: Independent expenditure rebuttal statement**

Members of the Maine Commission on Governmental Ethics and Election Practices,

We are writing pursuant to 21-A M.R.S. §1019-B(2) to request a determination that a communication that will be made by our client, Brookfield White Pine Hydro LLC (BWPH), is not an independent expenditure (IE) within the meaning of Maine election law. We have enclosed a copy of the relevant communication with this letter.

BWPH will disseminate the attached communication as a digital advertisement, and it is not intended to “expressly advocate the election or defeat of a clearly identified candidate” (*i.d.* §1019-B(1)(A) – definition of IE) nor even to “influence[] a campaign” of a candidate (*i.d.* §1052(4)(A) – definition of expenditure). It does nevertheless depict and name Governor Janet Mills, who is currently a gubernatorial candidate, within the 28 days before the Primary Election. As confirmed with Ethics Commission staff in a conversation last week, we are filing this rebuttal statement asking the Commission to determine that the communication is not an IE with attendant reporting requirements.

The purpose of BWPH’s attached communication is to influence the Maine Department of Environmental Protection’s consideration of BWPH’s pending application for Water Quality Certification for the Shawmut Hydroelectric Project,<sup>1</sup> which is in the process of federal relicensing. The Maine DEP reports to, and is ultimately directed by, Governor Mills. Irrespective of her status as a candidate, Governor Mills also remains the chief executive of the State of Maine. The attached communication is directed at the Governor in this, her official, capacity. This is clear from the fact that the communication does not mention the election and explicitly mentions the relicensing of the Shawmut Hydroelectric Project.

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<sup>1</sup> The application number is DEP #L-197751-33-I-N. The DEP has posted the materials related to this administrative proceeding online at <https://www1.maine.gov/dep/land/projects/shawmut/index.html>

June 1, 2022

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In case some brief background is helpful to the Commission's review, the DEP proposed to deny water quality certification for the Shawmut Hydroelectric Project last summer.<sup>2</sup> Before the DEP's order denying water quality certification became final, BWPH withdrew its application and filed a new, substantially different application for water quality certification. It is that application now pending before the DEP. If the DEP denies water quality certification and that denial stands on appeal, the Shawmut Hydroelectric Project would need to be decommissioned. *See* Clean Water Act, Sec. 401. If the DEP imposes unduly burdensome conditions on an order granting water quality certification, the likely result would also be decommissioning of the Shawmut Hydroelectric Project. The result would not only be the loss of a valuable asset for BWPH and its investors, but also would result in the likely shuttering of the Sappi Somerset Mill and the subsequent loss of nearly a thousand union jobs at that mill. This point is made in detail in a BWPH filing with the DEP dated June 1, 2022. We have attached this filing to this letter as Exhibit "A" in case the additional detail and context is helpful to the Commission.

Furthermore, if this communication were an IE, then our client would be required to complete and submit an IE report with the Commission. As part of this report, our client would be required to indicate the candidate that is the subject of the IE and "whether the expenditure was made in support of or in opposition to the candidate." *See* Exhibit "B". As indicated above, the communication neither supports nor opposes Governor Mills' re-election bid, and in fact is clearly intended to influence a completely separate administrative process – the DEP relicensing of a hydroelectric dam. Therefore, there is no way for our client to accurately complete this IE form, and thus the form is intended for a purpose different than that of our client's communication.

This background is intended to illustrate for the Commission why BWPH is funding the attached communication, and to illustrate that it has nothing to do with the upcoming primary elections or general election for governor.

Thank you for considering this request.

Sincerely,

Daniel W. Walker

DWW:

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<sup>2</sup> The draft order denying water quality certification is available online at [https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewibr8mH7f\\_3AhXEUjABHbn\\_CK8QFnoECAwQAQ&url=https%3A%2F%2Fwww.maine.gov%2Fdep%2Fftp%2FHYDRO%2FWaterQualityCertifications%2FShawmut-closed%2Fdraft%2FShawmut\\_WQC\\_L19751-33-H-N\\_DRAFT.pdf&usg=AOvVaw28BDT3e7qoj4hw\\_yudm39P](https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=&ved=2ahUKewibr8mH7f_3AhXEUjABHbn_CK8QFnoECAwQAQ&url=https%3A%2F%2Fwww.maine.gov%2Fdep%2Fftp%2FHYDRO%2FWaterQualityCertifications%2FShawmut-closed%2Fdraft%2FShawmut_WQC_L19751-33-H-N_DRAFT.pdf&usg=AOvVaw28BDT3e7qoj4hw_yudm39P)



## Statement to Rebut Presumption of Independent Expenditure

Under 21-A M.R.S. § 1019-B, an expenditure to design, produce, or disseminate a communication that names or depicts a clearly identified candidate and that is disseminated during the 28 days, including election day, before a primary election; during the 35 days, including election day, before a special election, or from Labor Day to a general election day is presumed to be an independent expenditure. The individual or organization making the expenditure may attempt to rebut the presumption by filing this form. Any documents, statements, or other evidence (e.g., a copy of a printed communication or a script of a recorded communication) supporting the rebuttal may be attached to this form. To rebut the presumption, this form must be filed with the Ethics Commission within 7 days of disseminating the communication. The form may be filed by faxing it to (207) 287-6775 or by sending a scanned copy to ethics@maine.gov, provided that the Commission receives the original within 5 days.

Individual/Organization making the expenditure: Brookfield White Pine Hydro LLC

Contact person: Daniel W. Walker

Contact's mailing address: 45 Memorial Circle

Augusta, ME 04332

Contact's telephone number(s): 207-623-5300

Candidates named or depicted: Governor Janet Mills  
(use additional pages if necessary)

Payee or creditor (including address): Blueberry Broadcasting, LLC, 184 Target Industrial Circle,

Bangor, ME 04401

Type of communication: Radio advertisement

Date of dissemination: 6/6/2022

The above expenditure was not incurred with the intent to influence the nomination, election, or defeat of a candidate.

Signature of authorized individual

6/3/22

Date



Daniel W. Walker  
dwalker@preti.com

June 3, 2022

*Via Hand Delivery*

Mr. Jonathan Wayne, Executive Director  
Maine Commission on Governmental Ethics and Election Practices  
135 State House Station  
Augusta, Maine 04333

**RE: Independent expenditure rebuttal statement**

Members of the Maine Commission on Governmental Ethics and Election Practices,

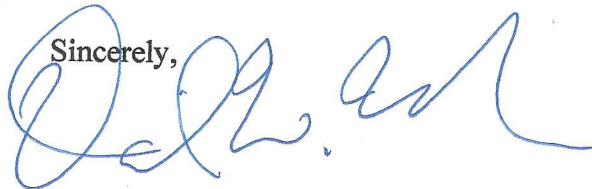
On June 1, I wrote on behalf of Brookfield White Pine Hydro LLC (BWPH) to request a determination that a communication to be made by BWPH is not an independent expenditure (IE) within the meaning of Maine election law. I am now writing to request a determination that a second, very similar, communication that will be made by BWPH is also not an independent expenditure. I have enclosed a copy of this second communication, a radio advertisement, with this letter.

The attached radio advertisement is almost identical in substance to the digital advertisement provided to the commission on June 1. The radio advertisement is also focused on the re-licensing of the Shawmut Hydroelectric Project by the Maine Department of Environmental Protection and mentions Governor Mills in her official capacity as the chief executive of the State of Maine, not in her role as a candidate. Neither the digital advertisement nor the radio advertisement are intended to influence the outcome of the election. Rather than continue to recite all of the factual background and points made in my June 1 letter, I will simply request that the commission consider the radio advertisement and digital advertisement together, and decide that neither is an IE within the meaning of Maine election law.

Of course if you require more information with respect to either communication I will be happy to provide whatever is needed.

Thank you for considering this request.

Sincerely,



Daniel W. Walker

DWW:

Preti Flaherty  
Beliveau & Pachios LLP  
Attorneys at Law

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**MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION**  
**Water quality certification application –**  
**Shawmut Hydroelectric Project**  
**DEP Application #L-19751-33-I-N**

**COMMENTS BY BROOKFIELD WHITE PINE HYDRO LLC (“BWPH”)**  
**IN REPLY TO COMMENTS OF THE MAINE DEPARTMENT OF MARINE**  
**RESOURCES**

This filing responds to comments submitted by the Department of Marine Resources on January 3, 2022 regarding BWPH’s application for water quality certification of the Shawmut Hydroelectric Project.<sup>1</sup> These comments include the DMR’s demand for a nature-like fishway at Shawmut, and this demand should be rejected for four reasons:

1. There is no evidence that the nature-like fishway only recently proposed by the DMR would be effective in helping Atlantic salmon or other co-evolved species swim past the dam. To the contrary, there is evidence that a nature-like fishway will be counterproductive to fish passage at Shawmut compared with BWPH’s proposal for a fish lift, and will prevent compliance with fish passage requirements.
2. The DMR’s proposal will harm the Sappi Somerset mill, and risks shutting down the mill altogether.
3. The DMR and DEP can only require BWPH to install a nature-like fishway (or any other type of fishway) at Shawmut through the adjudicatory proceeding required by 12 M.R.S. §§ 6121 and 12760.
4. The DMR is a party to the 1998 Kennebec Hydro Developers Group Agreement and is contractually prohibited from efforts to impose fish passage requirements on BWPH through the water quality certification process.

Each of these points is explained in greater detail here, with supporting expert reports as appropriate.

- 1. The only available evidence shows that a nature-like fishway at Shawmut will be ineffective, and even counterproductive, to fish passage compared with BWPH’s fish lift proposal.**

The DMR’s only comments in this proceeding, to date, are a duplicate of the comments the agency provided to the Federal Energy Regulatory Commission (“FERC”) in December 2021. These comments call for a nature-like fishway at Shawmut.

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<sup>1</sup> These comments were submitted to the DEP Hydropower Coordinator, then Ms. Kathy Howatt, via a January 3, 2022 e-mail from Mr. Sean Ledwin that attached the DMR’s comments to the Federal Energy Regulatory Commission dated December 22, 2021.

Although different than DMR’s previous proposals—one demanding fish passage at Shawmut that allows 99 percent of Atlantic salmon past the dam (a standard that would be unprecedented and impossible to satisfy) and another demanding two fishways at the dam (which would be uneconomic and lead to decommissioning of the hydroelectric facility and likely removal of the dam)—the DMR’s current proposal for a nature-like fishway in place of a fish lift is still problematic and should be rejected. There is no evidence that a nature-like fishway would be effective at Shawmut, and there is substantial evidence to the contrary.

The first problem with DMR’s proposal is that there is no evidence that a nature-like fishway will be as effective as the state-of-the art fish lift proposed by BWPH. Reports prepared by Kleinschmidt Associates (Exhibits A and B) and Alden Research Laboratory, Inc. (Exhibit C), two firms with expertise in fish passage design and effectiveness, both assess the DMR’s proposal for a nature-like fishway at Shawmut.<sup>2</sup> They independently explain that nature-like fishways are a relatively new technology, there are few studies measuring their effectiveness, and the data that does exist is inconclusive because the performance of nature-like fishways is highly variable depending on site-specific factors.<sup>3</sup>

In addition to being unsupported by any evidence, the DMR’s proposal is flawed because it is premised on the supposed success of the nature-like fishway at the Howland dam. *See* DMR comments to FERC on the EIS at 5 (Dec. 22, 2021) (“this type of fish passage approach was used at the Howland site on the Piscataquis River successfully”). The DMR’s consultant, for example, says that it has modeled the proposal for Shawmut on the Howland nature-like fishway due to “indications of effectiveness” of the Howland fishway. *See* Ex. A at 6.<sup>4</sup>

DMR’s position on its proposed nature-like fishway does not square with the available data for Howland, data that the DMR has had in its possession but elected not to share with the DEP, other resource agencies, or the public. The data was obtained from the DMR in April 2022 through a request under Maine’s Freedom of Access Act. The paper containing this data is attached as Exhibit D. It shows an average passage rate for Atlantic salmon of less than 60 percent, well below the 96 percent of Atlantic salmon

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<sup>2</sup> These reports address the DMR’s proposal last summer for a nature-like fishway *and* a fish lift. Although the DMR’s current proposal in this proceeding mentions only a nature-like fishway, the details concerning that particular fishway remain the same.

<sup>3</sup> Such factors include design parameters, hydraulic conditions, light/shadow, noise, and the magnitude and location of competing flows.

<sup>4</sup> *See also* MDMR comments on the EIS for Lockwood, Shawmut, Hydro-Kennebec and Weston, Appendix B at 6 (filed in this proceeding on January 3, 2022) (“the Howland NLF project was noted for relevance to the Shawmut site, primarily for application of the general channel design philosophy as an analog for the schematic layouts”).

BWPH expects to move upstream under its proposed fish lift for Shawmut. *See* Ex. C at 9 & Ex. D at 81.

The lackluster performance of the Howland fishway is obviously highly relevant to the DMR's proposal for a nature-like fishway at Shawmut, and DMR should have promptly disclosed this data to the DEP and BWPH. The shared goal of all parties should be effective fish passage using the best information available. Regardless, contrary to the DMR's claims to the DEP and FERC, "early indications of the effectiveness of the Howland bypass channel" have not been "positive" and there is no basis for using the "general design philosophy" of Howland "as an analog for the Shawmut site," as recommended by DMR. *See* Ex. A at 5. Quite the opposite, the data from Howland undermines the DMR's proposal for a nature-like fishway at Shawmut and lends support to BWPH's proposed fish lift.

Moreover, there are several reasons to expect that a nature-like fishway at Shawmut would be even less-effective than the one at Howland. Nature-like fishways are site specific, and the Shawmut site is not well suited for a nature-like fishway. With the surrounding terrain and property lines, there are limited options for locating a nature-like fishway at the dam and, according to numerous siting and modeling studies, none of these options are good. *See* Ex. A at 8-16 & Ex. C at 11-12. This is because, no matter the location, the competing attraction flows of the dam's largest powerhouse will divert a meaningful proportion of fish away from the entrance to the nature-like fishway. Ex. A at 18 & Ex. C at 11.<sup>5</sup> Further, the DMR's proposed fishway at Shawmut will be unprecedented in length because of the height of the dam and surrounding terrain, and will suffer from excessive water velocities and a lack of resting pools, meaning many fish that do manage to find the fishway will be unable to make it up and past the dam. *See* Ex. A at 17.

The fish passage proposed by BWPH, consisting of the fish lift and a fish bypass that will help channel fish to the lift, can also be adjusted over time to improve and optimize its performance. The DMR's nature-like fishway, in contrast, cannot be realistically adjusted after installation. If fewer than 60 percent of Atlantic salmon were able to make it up and past the nature-like fishway, consistent with the performance of the Howland nature-like fishway, for example, there would be very little BWPH could do about this after the fact. This is another obvious downside of the DMR's proposal.

Unlike DMR's late and unvetted recommendation, BWPH's proposal for a fish lift was developed through a years-long multi-agency process that included DMR and is designed to allow 96 percent of Atlantic salmon upstream past Shawmut. BWPH expects to spend at least \$15 million on this state-of-the art technology.<sup>6</sup> Scrapping the Shawmut proposed fish lift in favor of DMR's nature-like fishway is likely to result in

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<sup>5</sup> Unlike the DMR's proposed nature-like fishway, BWPH's contemplated fish lift will be located to take advantage of all powerhouse attractions, using them to draw fish to the lift. *See* Ex. C at 2.

<sup>6</sup> This cost estimate is based on bids received from qualified contractors in 2020.

fewer fish swimming past Shawmut, a result that is unacceptable to BWPH and federal regulators and should be unacceptable to the State of Maine.

## **2. The DMR's proposal is still likely to result in the closure of the Sappi Somerset Mill.**

The DMR's previous demand for two fishways at Shawmut would render the project uneconomic, leading to the decommissioning of the hydroelectric plant and probable dam removal. A nature-like fishway *and* a fish lift at Shawmut would cost an estimated \$35 million<sup>7</sup> to install. This dramatic up-front cost is compounded by the fact a nature-like fishway (in tandem with a lift or, as discussed below, standing alone) would also divert more than 50 percent of the water away from the dam's generating stations, cutting revenues by more than half, and costing an additional \$40 million to \$60 million (depending on water levels and electricity prices) over the 40-year term of the project license. A total price tag of up to \$95 million could not be reasonably recouped over the span of a 40-year license. The highly likely result would be the decommissioning of the hydroelectric facility, followed by likely dam removal.<sup>8</sup> Removal or decommissioning of Shawmut would have catastrophic results for the Sappi Somerset Mill and the local economy.

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<sup>7</sup> The Kleinschmidt report estimates a cost of \$14 to \$16.2 million for the nature-like fishway, not including additional costs associated with design, permitting, owners administration, effectiveness testing, contaminated site remediation, or site access. See Ex. B at 2. However, many necessary infrastructure modifications are not known, or their costs estimable, at this time, given that DMR's nature-like fishway design is only conceptual and presents significant siting challenges for which no easy solutions are readily available. Some of these problems may be unsolvable given the extreme site constraints. For example, DMR's proposed layout for the nature-like fishway would cut off necessary vehicular and equipment access to portions of the project site containing important infrastructure, including the gatehouse and portions of the dam itself. These structures must be accessed for safe project operation and critical dam maintenance. Assuming feasible solutions to these challenges could be identified, costs for these items are not included in Kleinschmidt's estimate but could easily reach \$5 million or more, bringing the total cost for the nature-like fishway to \$19 to \$21 million or even higher. Add to this the expected \$15 million cost of the fish lift, and the total combined cost equals at least \$34 to \$36 million.

<sup>8</sup> If the project were decommissioned because it is uneconomic to operate, FERC would still need to decide the Shawmut dam's future. The most likely outcome, for a host of reasons including public safety and fish passage obligations, would be FERC ordering the removal of Shawmut. But FERC could also require a nature-like fishway be installed at Shawmut even as the project is decommissioned. This would still prove fatal for Sappi because, as explained in this filing, a nature-like fishway alone at Shawmut would rob Sappi of the water it needs to continue operations *and*, if decommissioned, the water levels in the impoundment above Shawmut would further recede, further frustrating Sappi's operations.

The DMR seems to have abandoned its proposal for a nature-like fishway *and* a fish lift,<sup>9</sup> but its current proposal for a standalone nature-like fishway is also likely to result in decommissioning, dam removal, and the closure of the Sappi Somerset Mill. There are several reasons for this.

First, a standalone nature-like fishway will still be unreasonably expensive. Its ultimate cost remains unclear because the DMR's proposal (in the words of the agency's consultant) has not yet "advanced" to "final design."<sup>10</sup> What is clear, however, based on the incomplete information provided by the DMR to date, is that a nature-like fishway at Shawmut would likely cost at least \$19 to \$21 million up front (including the fishway itself and the bridges that would be needed to cross the fishway (*see* Ex. B at 1-2 & note 7 above)) and, even without the second fishway, would still divert more than 50 percent of the water away from the dam's generating stations. The result would be an additional \$1.1 million to \$1.5 million annually in lost revenues, or up to \$60 million over the term of the project license. Put simply, even as the lone fishway on site, a nature-like fishway would be exceedingly expensive and cut project revenues by at least half. And if, consistent with the evidence from Howland, the nature-like fishway underperforms and does not meet the passage standards proposed by BWPH and outlined in the federal agencies' mandatory fish passage prescriptions, it will undermine BWPH's ability to meet its fish passage requirements, increasing the likelihood of decommissioning and dam removal.

There is a second reason, identified by Sappi, that a nature-like fishway is likely to harm the Sappi Somerset Mill. As explained by Sappi's engineer, TRC Environmental Corporation, "[a]s river flow drops below the [nature-like fishway] capacity...the head pond level would drop and risk falling below acceptable water levels for reliable operation of the Somerset mill intake."<sup>11</sup> In other words, the nature-like fishway would rob Sappi of the water it needs for its operations even if the dam stays in place and the project continues operating.

If, as it says, the DMR is truly "committed to developing fish passage recommendations that ensure that the Sappi Somerset Mill is not negatively

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<sup>9</sup> An order requiring a fish lift and a nature-like fishway at Shawmut would not only create insurmountable financial barriers, but also significant operational issues that would decrease the overall effectiveness of fish passage at the site. With two fishways, the attraction flows created by the nature-like fishway would compete with the attraction flows drawing fish to the lift. The fish drawn to the nature-like fishway (and away from the lift) would then have difficulty scaling the nature-like fishway due to the inherent problems with such a fishway at Shawmut (as discussed above and in the attached expert reports), reducing overall fish passage performance.

<sup>10</sup> "MDMR comments on the EIS for Lockwood, Shawmut, Hydro-Kennebec and Weston, Appendix B at 2 (filed in this proceeding on January 3, 2022).

<sup>11</sup> This report was included in Sappi's recent comments to the National Marine Fisheries Services on April 27, 2022. Sappi copied DEP on these comments and thus they are part of the record in this proceeding. The report is also appended here as Exhibit E.

impacted”,<sup>12</sup> then the DMR should abandon its proposal for a nature-like fishway at Shawmut.

**3. The Departments of Marine Resources and Environmental Protection cannot design or require a nature-like fishway at Shawmut without an adjudicatory proceeding.**

The DMR has presented DEP with a half-finished and unvetted design of a nature-like fishway. The DMR, and its consultants, prepared this design without any public process or input, apparently in response to the public outcry over the agency’s prior proposal for a 99 percent fish passage standard for Shawmut, a standard that would have been impossible to meet. DMR’s late effort to unilaterally design a fishway at Shawmut is contrary to state law. 12 M.R.S. §§ 6121 and 12760 provide that only DMR and the Department of Inland Fisheries and Wildlife are authorized to design fishways and these agencies cannot independently design a fishway without a public adjudicatory proceeding. The participation of the dam owner and members of the public, the introduction of evidence, expert testimony, and the opportunity for cross-examination are all part of the process that must be used for state agencies to independently design or require installation of a fishway. *Id.* & 5 M.R.S. §§ 9051 – 9064.

In the absence of agreement between the agencies and the dam owner, a public adjudicatory process involving expert analysis and cross-examination makes sense when designing or requiring a fishway. This is especially true for the relatively new technology of a nature-like fishway that can have significant impacts on other stakeholders. Consider, for example, the comments from Sappi detailing the reasons that the DMR’s proposal would have potentially devastating impacts to mill operations, workers, and surrounding communities. Consider also the attached reports indicating that the nature-like fishway is not likely to improve fish passage at Shawmut. All of these factors should be considered when the state designs or requires a fishway.

Fishways are complicated and, to be effective, their design must be tailored to the dam and the surrounding terrain and hydraulics. This is particularly true for nature-like fishways, which are only effective if the water velocities resulting from the slope and length are just right, resting pools are sufficiently spaced, and the fishway is in just the right spot relative to the water spilling over and through the dam. If the downstream entrance to the nature-like fishway is too far downstream, as is the case with DMR’s proposal for Shawmut, for example, fish will be attracted past the fishway toward the water passing over the dam or through the powerhouses, diminishing the effectiveness of the passage.

Ultimately, it will be BWPH, not the DMR or DEP, that must deal with the consequences of a poorly designed fishway. If DMR scrambles to propose a preliminary

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<sup>12</sup> E-mail from Ledwin to Howatt, “Shawmut Hydroelectric WQC – Agency Review Request” (Jan. 3, 2022).

concept for a nature-like fishway at the last minute, as it has done here, and this fishway cannot meet the passage requirements likely to be incorporated into Shawmut's FERC license, it will fall on BWPH to remedy the problem. This is one reason BWPH has spent four years carefully designing a fish lift for Shawmut in consultation with multiple state and federal agencies and fish passage engineering experts through a process that, it's worth noting, the DMR actively participated in. This process considered many options, and even considered and rejected a nature-like fishway, before settling on the fish lift that BWPH has proposed to FERC and described in its application to the DEP. The DMR was closely involved in the design of BWPH's proposed fish lift and never, right up until late 2019 when BWPH filed the fish lift design plans with FERC, objected to the technology and proposed location. If the DMR wants to design an altogether different fishway now, it must at least follow the process required by state law, something it cannot do unilaterally.

**4. The DMR is contractually prohibited from proposing fishway designs for Shawmut to the DEP for inclusion in water quality certification.**

The DMR, along with BWPH (as a successor-in-interest), has long been a party to the Kennebec Hydro Developers Group (KHDG) Agreement, a contract that spells out the process for fish passage design at the four dams on the lower Kennebec River, including Shawmut. The contract is attached as Exhibit F. The KHDG Agreement establishes the process and timing for design and installation of fish passage at these dams. It specifically requires DMR, along with the other "resource agencies", and BWPH to "attempt to reach consensus on the need, timing and design of permanent upstream fish passage facilities" at each of these dams. Ex. F, § IV(A). If there is no consensus (which is obviously the case here between DMR and BWPH) then the dispute "will be handled through the FERC process." *Id.*

Put simply, the KHDG Agreement makes FERC the arbiter of any disputes over fish passage between DMR and BWPH. FERC is already in the process of deciding "the need, timing and design" of fish passage at Shawmut, a process that includes participation by BWPH, the federal resources agencies, and DMR, along with many others. Ultimately FERC will incorporate the fish passage design that emerges from this process into the Shawmut license.

DMR has actively participated in the FERC process, consistent with the KHDG Agreement, but based on its prior statements, it appears unlikely that FERC will adopt DMR's extreme (and still-evolving) proposals for fish passage at Shawmut. In its draft Environmental Assessment released last year, for example, FERC staff rejected the DMR's proposal that BWPH be required to pass 99 percent of Atlantic salmon past Shawmut,<sup>13</sup> a performance standard that is quite likely impossible to achieve. Unable to get what it wants at FERC per the KHDG Agreement, the DMR is now turning to DEP to impose its proposals outside the FERC process through the water quality certification.

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<sup>13</sup> See Draft Environmental Assessment for Hydropower License, Shawmut Hydroelectric Project, P-2322-069 at 131 (July 2021).



This is a clear breach of its obligations under the KHDG Agreement and would be grounds to invalidate any DEP order that incorporated DMR's fish passage proposals.

### **Conclusion**

The Department of Marine Resources' incomplete proposal for a nature-like fishway at Shawmut has no role in water quality certification and should be disregarded by the DEP.

June 1, 2022

Randy Dorman

A handwritten signature in blue ink, appearing to read "Randy Dorman", with a horizontal line extending from the end of the name.

Manager, Licensing  
Brookfield Renewable

**§1019-B. Reports of independent expenditures**

**1. Independent expenditures; definition.** For the purposes of this section, an "independent expenditure" means any expenditure made by a person, party committee or political action committee that is not made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized political committee or an agent of either and that:

A. Is made to design, produce or disseminate any communication that expressly advocates the election or defeat of a clearly identified candidate; or [PL 2021, c. 132, §7 (AMD).]

B. Unless the person, party committee or political action committee making the expenditure demonstrates under subsection 2 that the expenditure was not intended to influence the nomination, election or defeat of the candidate, is made to design, produce or disseminate a communication that names or depicts a clearly identified candidate and is disseminated during the 28 days, including election day, before a primary election; during the 35 days, including election day, before a special election; or from Labor Day to a general election day. [PL 2021, c. 132, §7 (AMD).]

[PL 2021, c. 132, §7 (AMD).]

**2. Commission determination.** A person, party committee or political action committee may request a determination that an expenditure that otherwise meets the definition of an independent expenditure under subsection 1, paragraph B is not an independent expenditure by filing a signed written statement with the commission within 7 days of disseminating the communication stating that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate, supported by any additional evidence the person, party committee or political action committee chooses to submit. The commission may gather any additional evidence it determines relevant and material and shall determine by a preponderance of the evidence whether the cost was incurred with intent to influence the nomination, election or defeat of a candidate.

[PL 2021, c. 132, §8 (AMD).]

**3. Report required; content; rules.**

[PL 2009, c. 524, §6 (RPR); MRSA T. 21-A §1019-B, sub-§3 (RP).]

**4. Report required; content; rules.** A person, party committee or political action committee that makes any independent expenditure in excess of \$250 during any one candidate's election shall file a report with the commission. In the case of a municipal election, the report must be filed with the municipal clerk.

A. A report required by this subsection must be filed with the commission according to a reporting schedule that the commission shall establish by rule that takes into consideration existing campaign finance reporting requirements. Rules adopted pursuant to this paragraph are routine technical rules as defined in Title 5, chapter 375, subchapter 2-A. [PL 2011, c. 558, §2 (AMD).]

B. A report required by this subsection must contain an itemized account of each expenditure in excess of \$250 in any one candidate's election, the date and purpose of each expenditure and the name of each payee or creditor. The report must state whether the expenditure is in support of or in opposition to the candidate and must include, under penalty of perjury, as provided in Title 17-A, section 451, a statement under oath or affirmation whether the expenditure is made in cooperation, consultation or concert with, or at the request or suggestion of, the candidate or an authorized committee or agent of the candidate. [PL 2015, c. 350, §6 (AMD).]

C. A report required by this subsection must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form. The commission may adopt procedures requiring the electronic filing of an independent expenditure report, as long as the commission receives the statement made under oath or affirmation set out in paragraph B by the filing deadline and the commission adopts an exception for persons who lack access to the required technology or the

technological ability to file reports electronically. The commission may adopt procedures allowing for the signed statement to be provisionally filed by facsimile or electronic mail, as long as the report is not considered complete without the filing of the original signed statement. [PL 2013, c. 334, §16 (AMD).]

[PL 2019, c. 323, §17 (AMD).]

**5. Exclusions.** An independent expenditure does not include:

A. [PL 2021, c. 132, §9 (RP).]

B. A telephone survey that meets generally accepted standards for polling research and that is not conducted for the purpose of changing the voting position of the call recipients or discouraging them from voting; [PL 2011, c. 389, §21 (NEW).]

C. A telephone call naming a clearly identified candidate that identifies an individual's position on a candidate, ballot question or political party for the purpose of encouraging the individual to vote, as long as the call contains no advocacy for or against any candidate; and [PL 2011, c. 389, §21 (NEW).]

D. A voter guide that consists primarily of candidates' responses to surveys and questionnaires and that contains no advocacy for or against any candidate. [PL 2011, c. 389, §21 (NEW).]

[PL 2021, c. 132, §9 (AMD).]

#### SECTION HISTORY

PL 2003, c. 448, §3 (NEW). PL 2007, c. 443, Pt. A, §20 (AMD). PL 2009, c. 366, §5 (AMD). PL 2009, c. 366, §12 (AFF). PL 2009, c. 524, §§6, 7 (AMD). PL 2011, c. 389, §§20, 21 (AMD). PL 2011, c. 389, §62 (AFF). PL 2011, c. 558, §2 (AMD). PL 2013, c. 334, §§15, 16 (AMD). IB 2015, c. 1, §§5, 6 (AMD). PL 2015, c. 350, §6 (AMD). PL 2019, c. 323, §§15-17 (AMD). PL 2021, c. 132, §§7-9 (AMD).

Chapter 1: PROCEDURES

SECTION 10. REPORTS OF INDEPENDENT EXPENDITURES

1. **General.** Any person, party committee, political committee or political action committee that makes any independent expenditure in excess of \$250 per candidate in an election must file a report with the Commission according to this section.
2. **Definitions.** For purposes of this section, the following phrases are defined as follows:
  - A. "Clearly identified," with respect to a candidate, has the same meaning as in Title 21-A, chapter 13, subchapter II.
  - B. "Expressly advocate" means any communication that
    - (1) uses phrases such as "vote for the Governor," "reelect your Representative," "support the Democratic nominee," "cast your ballot for the Republican challenger for Senate District 1," "Jones for House of Representatives," "Jean Smith in 2002," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Woody," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Pick Berry," "Harris in 2000," "Murphy/Stevens" or "Canavan!"; or
    - (2) is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate.
  - C. "Independent expenditure" has the same meaning as in Title 21-A §1019-B. Any expenditure made by any person in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's political committee or their agents is considered to be a contribution to that candidate and is not an independent expenditure.
3. **Reporting Schedules.** Independent expenditures in excess of \$250 per candidate per election made by any person, party committee, political committee or political action committee must be reported to the Commission in accordance with the following schedule:
  - A. *[Repealed]*
  - B. *[Repealed]*
    - (1) **60-Day Pre-Election Report.** A report must be filed by 11:59 p.m. on the 60th day before the election is held and be complete as of the 61st day before the election.

- (2) **Two-Day Report.** From the 60<sup>th</sup> day through the 14<sup>th</sup> day before an election, a report must be filed within two calendar days of the expenditure.
- (3) **One-Day Report.** After the 14<sup>th</sup> day before an election, a report must be filed within one calendar day of the expenditure.

For purposes of the filing deadlines in this paragraph, if the expenditure relates to a legislative or gubernatorial election and the filing deadline occurs on a weekend, holiday, or state government shutdown day, the report must be filed on the deadline. If the expenditure relates to a county or municipal election, the report may be filed on the next regular business day.

- C. Reports must contain information as required by Title 21-A, chapter 13, subchapter II (§§ 1016-1017-A), and must clearly identify the candidate and indicate whether the expenditure was made in support of or in opposition to the candidate.
  - D. A separate 24-Hour Report is not required for expenditures reported in an independent expenditure report.
  - E. An independent expenditure report may be provisionally filed by facsimile or by electronic mail to an address designated by the Commission, as long as the facsimile or electronic copy is filed by the applicable deadline and an original of the same report is received by the Commission within five calendar days thereafter.
4. **Multi-Candidate Expenditures.** When a person or organization is required to report an independent expenditure for a communication that supports multiple candidates, the cost should be allocated among the candidates in rough proportion to the benefit received by each candidate.
- A. The allocation should be in rough proportion to the number of voters who will receive the communication and who are in electoral districts of candidates named or depicted in the communication. If the approximate number of voters in each district who will receive the communication cannot be determined, the cost may be divided evenly among the districts in which voters are likely to receive the communication.

[NOTE: FOR EXAMPLE, IF CAMPAIGN LITERATURE NAMING SENATE CANDIDATE X AND HOUSE CANDIDATES Y AND Z ARE MAILED TO 10,000 VOTERS IN X'S DISTRICT AND 4,000 OF THOSE VOTERS RESIDE IN Y'S DISTRICT AND 6,000 OF THOSE VOTERS LIVE IN Z'S DISTRICT, THE ALLOCATION OF THE EXPENDITURE SHOULD BE REPORTED AS: 50% FOR X, 20% FOR Y, and 30% FOR Z.]

- B. If multiple county or legislative candidates are named or depicted in a communication, but voters in some of the candidates' electoral districts will not receive the communication, those candidates should not be included in the allocation.

[NOTE: FOR EXAMPLE, IF AN EXPENDITURE ON A LEGISLATIVE SCORECARD THAT NAMES 150 LEGISLATORS IS DISTRIBUTED TO VOTERS WITHIN A TOWN IN WHICH ONLY ONE LEGISLATOR IS SEEKING RE-ELECTION, 100% OF THE COST SHOULD BE ALLOCATED TO THAT LEGISLATOR'S RACE.]

5. **Rebuttable Presumption.** Under Title 21-A M.R.S.A. §1019-B(1)(B), an expenditure made to design, produce or disseminate a communication that names or depicts a clearly identified candidate and that is disseminated during the 28 days before a primary election, the 35 days before a special election or from Labor Day to the general election will be presumed to be an independent expenditure, unless the person making the expenditure submits a written statement to the Commission within 48 hours of the expenditure stating that the cost was not incurred with the intent to influence the nomination, election or defeat of a candidate.

A. The following types of communications may be covered by the presumption if the specific communication satisfies the requirements of Title 21-A M.R.S.A. §1019-B(1)(B):

- (1) Printed advertisements in newspapers and other media;
- (2) Television and radio advertisements;
- (3) Printed literature;
- (4) Recorded telephone messages;
- (5) Scripted telephone messages by live callers; and
- (6) Electronic communications.

This list is not exhaustive, and other types of communications may be covered by the presumption.

B. The following types of communications and activities are not covered by the presumption, and will not be presumed to be independent expenditures under Title 21-A M.R.S.A. §1019-B(1)(B):

- (1) news stories and editorials, unless the facilities distributing the communication are owned or controlled by the candidate, the candidate's immediate family, or a political committee;
- (2) activity or communication designed to encourage individuals to register to vote or to vote if that activity or communication does not name or depict a clearly identified candidate;
- (3) any communication from a membership organization to its members or from a corporation to its stockholders if the organization or corporation is not organized primarily for the purpose of influencing the nomination or election of any person for state or county office;

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- (4) the use of offices, telephones, computers, or similar equipment when that use does not result in additional cost to the provider; and
  - (5) other communications and activities that are excluded from the legal definition of “expenditure” in the Election Law.
- C. If an expenditure is covered by the presumption and is greater than \$250 per candidate per election, the person making the expenditure must file an independent expenditure report or a signed written statement that the expenditure was not made with the intent to influence the nomination, election or defeat of a candidate. The filing of independent expenditure reports should be made in accordance with the filing schedule in subsections 3(A) and 3(B) of this rule. Any independent expenditure of \$250 or less per candidate per election does not require the filing of an independent expenditure report or a rebuttal statement.
- D. If a committee or association distributes copies of printed literature to its affiliates or members, and the affiliates or members distribute the literature directly to voters, the applicable presumption period applies to the date on which the communication is disseminated directly to voters, rather than the date on which the committee or association distributes the literature to its affiliates or members.
- E. For the purposes of determining whether a communication is covered by the presumption, the date of dissemination is the date of the postmark, hand-delivery, or broadcast of the communication.
- F. An organization that has been supplied printed communications covered by the presumption and that distributes them to voters must report both its own distribution costs and the value of the materials it has distributed, unless the organization supplying the communications has already reported the costs of the materials to the Commission. If the actual costs of the communications cannot be determined, the organization distributing the communication to voters must report the estimated fair market value.
- G. If a person wishes to distribute a specific communication that appears to be covered by the presumption and the person believes that the communication is not intended to influence the nomination, election or defeat of a candidate, the person may submit the rebuttal statement to the Commission in advance of disseminating the communication for an early determination. The request must include the complete communication and be specific as to when and to whom the communication will be disseminated.